(1992) 03 BOM CK 0052

In the Bombay High Court

Case No : Writ Petition No. 2339 of 1983

Western Indian Texturizers Ltd. APPELLANT

Vs

Union of India RESPONDENT

Date of Decision : 10-03-1992

Acts Referred:

Central Excise Rules, 1944 — Rule 56B, 8(1)
Central Excises and Salt Act, 1944 — Section 11B

Citation : (1992) 60 ELT 200

Hon'ble Judges : M.L. Pendse, J;M.G. Chaudhari, J

Bench : Division Bench

Advocate : Shri M.A. Dalvi, instructed by M/s Matubhai Jamietram and Madan, for the Appellant; Shri R.V. Desai, Shri P.N. Menon and Shri K.C. Sidhwa, for the Respondent

Judgement

Pendse, J.—The petitioners are a Public Limited Company and are engaged in processing, that is draw text rising of, inter alia, partially oriented yarn and other types of nylon yarn. The partially oriented yarn is processed by the petitioners after receiving the same from the factory of Nirlon Synthetic Fibers and Chemicals Limited. The petitioners are engaged in the work of processing in their factory at Thana. The partially oriented yarn is classified under Tariff Item 18-II(i)(a), and after further process of draw texturising is classified under Tariff Item 18-II(i)(a). The Nirlon Synthetic Fibres and Chemicals Limited had availed of provisions of Rule 56B of the Central Excise Rules and were permitted to pay the duty at the subsequent point of time, that is after the same is textures by the petitioners. The finished textures yarn is chargeable to excise duty at the rate applicable to the base yarn, namely partially oriented yarn plus Rs. 5/- per Kilogram, and that is so provided by exemption notification dated March 1, 1978. The Central Government had issued an exemption Notification bearing No. 28/75 whereunder polyester filament yarn is exempted from part of duty of excise leviable thereon under Tariff Item No. 18 of the First Schedule. The quantum of exemption conferred is dependent on the denier count of the yarn. The rate of duty for polyester yarn of 75 deniers and above but below 100 deniers is Rs. 63/-, while in respect of 100 deniers and above but not above 750 deniers is Rs. 49/-.

2. The petitioners claimed that they were not aware of the exemption of duty provided by Exemption Notification No. 28/75. The petitioners claimed that the exemption was available not merely in respect of basic duty but also additional excise duty levied under Additional Duties of Excise (Textiles and Textile Articles) Act, and also special duty of excise changed under the Finance Act.

The petitioners claimed that denier is a weight in grams of 9000 meters of the specified yarn. The weight of 9000 meters of partially oriented yarn manufactured at Nirlon''s factory in terms of the provisions of Rule 56B is 130 grams, and therefore the yarn is said to be of 130 deniers. The yarn after undergoing the process of texturising, gets stretched and becomes thinner and becomes 85 grams or 85 deniers. The petitioners claimed that under mistake of law the duty was wrongly calculated without taking into consideration the exemption provided for. The petitioners therefore claimed that an amount of Rs. 42,76,729.51 was paid in excess by taking into consideration the additional excise duty and special duty of excise, while a sum of Rs. 25,92,485.53 was the amount of difference paid in excess in respect of the basic duty with reference to the denier counts. The petitioners therefore sought refund of amount of Rs. 68,69,215.04. The petitioners also sought declaration that the provisions of the Central Excise Laws (Amendment and Validation) Act, 1982 are unconstitutional.

3. Shri Dalvi, learned counsel appearing on behalf of the petitioners, very fairly stated that the claim of the petitioner for a declaration that provisions of the Central Excise Laws are unconstitutional no longer survives for consideration in view of catena of decisions of this Court and the Supreme Court. The learned counsel also contended that the claim of the petitioners for refund of additional excise duty and special duty of excise to the tune of Rs. 42,76,729.51 cannot be sustained in view of the decision of the Supreme Court reported in Union of India (UOI) and Others Vs. Modi Rubber Ltd., .

Shri Dalvi submitted that the claim for refund of excess duty paid by mistake of law due to ignorance of exemption prescribed under Notification No. 28/75 survives for determination in the petition. The claim of the petitioner on this count is just, because the duty to be paid on the yarn is in respect of 100 deniers and above but not above 750 deniers, that is at the rate of Rs. 49/-, while the petitioners have paid under mistake duty at the rate of Rs. 63/- on the assumption that it is 75 deniers and above but below 100 deniers. Shri Dalvi invited our attention to the exemption Notification No. 66/78 issued by the Central Government in exercise of powers conferred by sub-rule (1) of Rule 8 of the Central Excise Rules. The Table provides that in respect of the textures yarn produced out of base yarn the rate of duty is the duty for the time being leviable on the base yarn if not already paid, plus Rs. 5/- per kilogram. The perusal of Notification 28/75 makes it clear that in respect of polyester yarn the duty payable is at Rs. 63/- if the yarn is of 75 deniers and above but below 100 deniers and at the rate of Rs. 49/- if the yarn is of 100 deniers and above but not above 750 deniers. Shri Dalvi is right in his submission that recovery of excise duty calculated between Rs. 63/- and Rs. 49/- for the period between April 1982 to February 1983 is liable to be refunded by the Department. The respondents though duly served in the year 1983 have not cared to file any return and dispute the claim made by the petitioners. In these circumstances we are unable to find any reason to deprive the petitioners of the claim for refund for Rs. 25,92,485.53 and the details of which are set out at Exhibit ''G'' to the Petition.

4. Shri Desai, learned counsel appearing on behalf of the Department, submitted that in view of enactment of Central Act No. 40/91, which has come into operation from September 20, 1991, even though the application for refund is granted the petitioners are not entitled to seek actual payment of the amount from the Department. Shri Dalvi on the other hand submitted that provisions of the Act are not applicable and in any event the constitutional validity of the provisions is under challenge. In our judgment, it is not necessary to examine the applicability of the enactment in the present proceedings. We propose to restrict the relief only to the declaration that the petitioners are entitled to the refund and we leave it to the Department to determine what is the effect of Act No. 40/91.

5. Accordingly, petition partly succeeds and we hold that the petitioners are entitled to the refund of the excise duty paid and details on which are set out at Exhibit ''G'' to the petition. It is now necessary for the Department to ascertain whether the amount claimed under Exhibit ''G'' is accurate or otherwise. The Department should ascertain the amount payable. It is open for the Department then to determine whether the petitioners are entitled to the actual refund of the amount in view of provisions of Central Act No. 40/91. The Department shall determine that question after giving proper notice to the petitioners. The claim of refund of Rs. 42,76,729.51, and the details of which are set out in Exhibit ''F'' to the petition, stands rejected.

6. There will be no order as to costs.