
(1984) 03 BOM CK 0066

In the Bombay High Court

Case No : Appeal No. 213 of 1979 (On appeal from 1979 E.L.T. (J 618)
(Bombay))

Zenith Tin Works Private Limited

APPELLANT

Vs

Union of India and others

RESPONDENT

Date of Decision : 22-03-1984

Acts Referred:

Central Excise Rules, 1944 — Rule 10, 56A, 8

Citation : (1986) 23 ELT 357

Hon'ble Judges : S.P. Bharucha, J;D.M. Rege, J

Bench : Division Bench

Judgement

Bharucha, J.—The appellants manufacture aluminium collapsible tubes by the process of extrusion from duty paid aluminium. Their products are covered by Item 27(d) of the First Schedule to the Central Excises and Salt Act, 1944.

2. At the relevant time, clauses (a), (b) and (d) of Item 27 read thus :

"27. Aluminium.

(a) In any crude form including ingots, bars, Rs. 300 per blocks, slabs, billets, shots and pellets, metric tonne (b) Manufactures, the following namely, plates, Rs. 500 per sheets, circles and strips in any form or size metric tonne. not otherwise specified (d) Extruded shapes and sections including 10 per cent extruded pipes and tubes. ad valorem."

3. On 3rd April 1965 an exemption notification was issued under Rule 8 of the Central Excise Rules, 1944. It granted exemption to extruded shapes or sections of aluminium, including extruded pipes and tubes, if manufactured out of duty paid aluminium in any crude form or duty paid aluminium manufactures. The exemption granted was from so much of the excise duty leviable on the extruded shapes or sections under Item 27(d) as was equivalent to the duty already paid on aluminium manufactured under Item 27(b).

4. A trade Notice was issued by the Bombay Central Excise Collectorate on 25th August, 1965 which required manufacturers who desired to avail of the exemption to follow the procedure under Rule 56A of the Central Excise Rules.

5. On 8th September, 1965 the petitioners applied for permission to avail of the "refund of excise duty and special duty paid on raw material, viz., aluminium slugs and sheets used for manufacturing of aluminium collapsible tubes, Tariff Item No. 27(d) under Rule 56A of Proforma Credit from 3rd April, 1965." On 15th September, 1965 the petitioners were granted permission to avail of the procedure under Rule 56A "for the raw material of which has paid duty under sub-item (a) and (b), No. 27". This permission was granted from the date of the application, viz. 8th September, 1965. On 19th September, 1965 the appellants were informed that the permission was granted from 3rd April, 1965.

6. The appellants thereafter followed the procedure under Rule 56A. They maintained an accounts with the excise authorities. When duty paid raw material was received, the appellants gave notice to the excise authorities in writing of their intention to take the raw material into their factory for being used in the manufacture of finished excisable products and asked for credit in their account of the excise duty paid on the raw material. Such credit was given by the excise authorities in the appellants' account. When excisable finished products in the form of aluminium collapsible tubes were cleared by the appellants, assessments to excise duty were made and the excise duty payable was credited to the appellants' account. Where there was an insufficient balance therein, payment was made into the account by the appellants.

7. On 28th January, 1968 the Inspector of Central Excise wrote to the appellants that they had been permitted to avail of the procedure under Rule 56A only for raw material which had paid duty under Item 27(a) and (b). It had come to the notice of the excise authorities that the appellants had also brought within the procedure under Rule 56A aluminium flat bar sections covered by Item 27(d). To regularise the matter, the appellants were told that they could apply for permission to bring in raw material under Item 27(d). On 24th February, 1968 the appellants requested the Assistant Collector of Central Excise to allow them to follow the procedure under Rule 56A for aluminium flat bar sections falling under Item 27(d). On 2nd September, 1968 such permission was granted, but only in respect of aluminium flat bar sections received after that date.

8. The appellants preferred an appeal in this regard to the Collector of Central Excise. This came to be rejected on 11th May, 1970.

9. The appellants then filed a revision application before the Government of India. It was rejected but with this modification that the procedure of proforma credit in respect of aluminium flat bar sections was allowed to be followed by the appellants from the date of their application under Rule 56A i.e. from 24th February, 1968.

10. On 28th August, 1973, the appellants were issued with a notice of demand

for payment of excise duty under Rule 10A. The demand was in the sum of Rs. 85,491.94. It was made in respect of "proforma credit on aluminium flat bar sections during the period May 1966 to 24th February, 1968..."

11. On 21st September, 1973 the appellants filed a writ petition challenging the order of the Government of India in revision and the notice of demand under Rule 10A. At the hearing of the petition it was urged that the exemption in respect of aluminium flat bar sections covered under Item 27(d) ought to have been granted from the date upon which the exemption notification had come in force. It was also urged that the demand notice was bad inasmuch as Rule 10A has no application. The learned Single Judge rejected both the contention and dismissed the petition. As regards the second contention he observed that he was satisfied that this was not a case of short-levy which attracted the provisions of Rule 10; it was a case not of re-opening of assessments but of rectifying an error in collection and that, therefore, Rule 10A applied.

12. Being aggrieved by the judgment and order of the learned Single Judge the appellants have preferred this appeal. Mr. Mody, learned counsel for the appellants, has urged only the second of the two contentions before us. In his submission, there was inadvertence or an error in granting to the appellants the benefit of the exemption in respect of finished products made from aluminium flat bar sections covered by Item 27(d). By reason of such error there had been a short-levy of excise duty thereon. The requirements of Rule 10 were, therefore, satisfied and Rule 10A had no application.

13. It was urged by Mr. Dalal, learned counsel for the respondents, on the other hand that assessments had been made in respect of finished products made from raw material falling under Item 27(d). They had been assessed to the full excise duty leviable thereon. There had been an error only in the collection thereof. The error was that the appellants were given credit under Rule 56A for the excise duty paid on the aluminium flat bar sections. No re-opening of assessment was, therefore, involved. Rule 10 had no application and Rule 10A applied.

14. Rule 10 as it then read provided for recovery of duties or charges short-levied or erroneously refunded. Clause (1) of Rule 10 read thus :

"(1) When duties or charges have been short-levied through inadvertence, error, collusion, or misconstruction on the part of an officer, or through misstatement as to the quantity, description or value of such goods on the part of the owner, or when any such duty or charge, after having been levied, has been owing to any such cause, erroneously refunded, the proper officer may, within three months from the date on which the duty or charge was paid or adjusted in the owner's account-current, if any, or from the date of making the refund, serve a notice on the person from whom such deficiency in duty or charges is or are recoverable requiring him to show cause to the Assistant Collector of Central Excise why he should not pay the amount specified in the notice."

15. Rule 10A provided residuary powers for recovery of sums dues to the

Government and applied where the Rules did not make any specific provision for the collection of any duty or of any deficiency in duty if the duty had for any reason been short-levied, or of any other sum of any kind payable to the Central Government under the Central Excise Act or Rules. No time-limit for the issue of a notice under Rule 10A was provided for.

16. It is an admitted position that assessments in respect of finished products manufactured by the appellants have been completed. The assessments have been made in respect of finished products made from aluminium flat bar sections covered by Item 27(d) in the manner that has been applied to finished products made from raw material covered by Item 27(a) and (b) to which, admittedly, the procedure under Rule 56A had been made applicable. Full duty was made payable on the finished products because the procedure under Rule 56A was applied and, thereunder, credit for the excise duty paid on the raw material had already been given in the appellant's account. Credit was so given because the finished products made from raw material covered by Item 27(a) and (b) and, mistakenly, (d) were given the benefit of the exemption. The assessments were, therefore, made, as they could not but have been made, at the exempted rate for finished products made out of raw material covered by Item 27(a) and (b). The assessments were also so made, though mistakenly, for finished products manufactured out of aluminium flat bar sections covered by Item 27(d).

17. In our view there was, thus, in respect of finished products manufactured from aluminium flat bar sections covered by Item 27(d) under-assessment of excise duty and short-levy. Re-assessment of the excise duty upon those finished products is involved. Consequently Rule 10 would apply and Rule 10A would be excluded.

18. Mr. Dalal submitted that credit was given by reason of the application to finished products made from aluminium flat bar section covered under Item 27(d) of the procedure with Rule 56A de hors the exemption notification. Rule 56A had been made applicable to aluminium from the year 1972. We proceed to consider the position upon this basis.

19. Rule 56A provides for the giving of credit for the excise duty paid upon raw material used in the manufacture of excisable finished products in the account of the manufacturer with the excise authorities. It was Mr. Dalal's submission that the assessment upon the finished products made from aluminium flat bar sections covered by Item 27(d) had been made by levying the full excise duty leviable thereon; that it was only the credit, given in respect of the excise duty paid upon aluminium flat bars covered under Item 27(d) that was sought to be recovered from the appellants; that this involved only a deficiency in collection; and that no short-levy or re-opening of assessments was involved.

20. In our view, Mr. Dalal's submission is not tenable. Where the procedure under Rule 56A has been made applicable, the manufacture is entitled to credit in his account with the excise authorities for the excise duty that has been paid

on raw material used in the manufacture of the finished product. The finished product can, then, be assessed to excise duty only at the full rate leviable thereon less the excise duty paid on the raw material. Where credit for the excise duty that has been paid on the raw material has been inadvertently or erroneously given e.g., because the procedure under Rule 56A has not been made applicable, the finished product is under-assessed to excise duty and there is short-levy.

21. It is a matter of convenience that Rule 56A provides procedure whereunder the manufacturer maintains an account with the excise authorities wherein credit for the amount of the excise duty paid on the raw material used by him to manufacture the excisable finished product is given and a debit is made for the amount of the excise duty upon the finished product. Taken overall, the assessment of excise duty on all the finished products is at the full rate leviable thereon less the amount of the excise duty paid on all the raw material. There is under-assessment where credit is inadvertently or erroneously given in respect of raw material to which the procedure under Rule 56A has not been made applicable, and there is short-levy. The assessment has then to be reopened. Rule 10 applies and Rule 10A is excluded.

22. Mr. Dalal drew our attention to the judgment in *N. B. Sanjana v. The Elphinstone Spinning and Weaving Mills Co. Ltd.* - 1978 E.L.T. (J 399) : AIR 1971 S.C. 2309 and to the observation of the Supreme Court therein that the charging provision stated, "There shall be levied and collected in such a manner as may be prescribed the duty of excise...." We note that the fact that both expressions "levied" and "collected" are used shows that the expression "levy" has not been used in the sense of actual collection. In the matter of *Assistant Collector of Central Excise, Calcutta Division Vs. National Tobacco Co. of India Ltd.*, the Supreme Court observed that Rule 10 should be confined to cases where the demand was being made for a short-levy caused wholly by one of the reasons given in that rule so that an assessment had to be opened. The Supreme Court found on the facts of the case that the assessments had not been completed. In the present case assessments are, admittedly, completed. As we see it, they were erroneous under-assessments resulting in erroneous short-levy. Rule 10, therefore, became applicable.

23. A learned Single Judge of the Madras High Court in *E. I. D. Parry (India) Ltd. v. Government of India* 1979 E.L.T. J. 253, found that there was no obligation on the part of the manufacturer under Rule 56A to correlate the duty paid raw material to the finished product. Since there had been complete utilisation of the raw material imported the provisions of Rule 56A were fully satisfied. Mr. Dalal relied upon this judgment to submit that credit given regarding one lot of raw material upon which excise duty had been paid was not relatable to the excise duty levied upon the finished product manufactured therefrom. As we have observed, taken overall, the effect of following the Rule 56A procedure is that the assessment of excise duty on all the finished products is at the full rate leviable

thereon less the amount of the excise duty paid on all the raw material. The Madras judgment supports our view that the over-all picture must be looked at.

24. Mr. Dalal drew our attention to the judgment of the Gauhati High Court in *Bishnauth Tea Co. v. Superintendent, Customs & Central Excise* 1976 Tax L.R. 1605. This was a case in which there had been an assessment. The officer concerned, placing reliance upon certain treasury challans, came to the conclusion that the sum stated in the challans had been duly deposited and a "nil" demand for excise duty was issued. It transpired upon subsequent inquiry that the challans were forged and that the "deposits" might not have been made. The "nil" demand was, accordingly, found to be incorrect and a demand notice was issued under Rule 10A. The Court held that as the levy was in order and for the correct amount, the question of short-levy did not arise and Rule 10 could not be invoked. To the facts of the case before us this judgment can have no application.

25. Taken either on the basis of the exemption notification or on the basis of Rule 56A, de hors the exemption notification, there was, inadvertently or by error, under-assessment and short-levy of excise duty upon finished products manufactured by the appellants during the relevant period from aluminium flat bar sections covered by Item 27(d). To the recovery of such short-levy the provisions of Rule 10 are attracted. The provisions of Rule 10 being attracted, the provisions of Rule 10A are excluded.

26. Rule 10 provides a time-limit of three months for the issue of a notice thereunder. The period of three months having long since expired, the demand notice dated 28th August, 1973 though it be issued under Rule 10A, cannot be treated as a notice under Rule 10.

27. The impugned Judgment and order are, accordingly, set aside. The appeal is allowed in terms of prayer a (ii) of the petition. The respondent shall pay to the appellants the costs of the appeal.

28. Pursuant to an interim order in the appeal, passed on 1st August, 1979, the appellants have deposited in court the full amount claimed under the demand notice. The appellants shall be entitled to withdraw the same. On Mr. Dalal's application, the appellants are permitted to withdraw the same only after the expiry of 10 weeks from today.

29. Mr. Dalal orally applies for leave to appeal to the Supreme Court. The application is rejected.