

IN THE HIGH COURT OF JUDICATURE AT CALCUTTA
CIVIL APPELLATE JURISDICTION
(MANDAMUS APPEAL)
APPELLATE SIDE

RESERVED ON: 03.01.2023
DELIVERED ON: 09.01.2023

CORAM:

THE HON'BLE MR. JUSTICE T.S. SIVAGNANAM

AND

THE HON'BLE MR. JUSTICE HIRANMAY BHATTACHARYYA

FMA NO. 683 OF 2018

WITH

IA NO. CAN 01 OF 2017 (OLD CAN 3163 OF 2017)

M/S. EPC INTERNATIONAL PVT. LTD. & ANR.

VERSUS

UNION OF INDIA & ANR.

Appearance:-

Mr. N.K. Chowdhury, Advocate.

Mr. Nilotpal Chowdhury, Advocate.

Mr. Prabir Bera

.....For the Appellants

Mr. Bhaskar Prosad Banerjee, Advocate

Mr. Abhradip Maity, Advocate.

.....For the Respondents

JUDGMENT

(Judgment of the Court was delivered by T.S.SIVAGNANAM, J.)

1. This intra-Court appeal filed by writ petitioner is directed against the order dated 9th March, 2017 in WP No. 5757 (W) of 2017. The said writ petition was filed challenging an order-in-original dated 29.11.2016 passed by the Commissioner, Central Excise and Service Tax, Siliguri Commissionerate, the second respondent in this appeal. The facts leading to the filing of the writ petition could be summarized as follows.
2. The second respondent issued show cause-cum-demand notice dated 11th March, 2016 alleging that the appellant has contravened the provisions of Sections 2(f) and 3 of the Central Excise Act, 1944 (the Act) read with Rules 4, 6, 8, 10 and 12 of the Central Excise Rules, 2002 (the Rules) inasmuch as they have clandestinely manufactured and cleared “Special Boiling Point Spirit” classifiable under Central Excise Tariff Sub-heading 2710.1213 commercially known as ‘EPC solvent’ during the period from 2011-12 to 2015-16 (up to October, 2015) without payment of Central Excise Duty as leviable thereon amounting to Rs. 24,87,18,605.00/- including cess. Further, it was stated that the aforementioned goods have been cleared without payment of Central Excise Duty hence liable for confiscation under the provisions of Rule 25 of the Rules. It was further stated that the appellants have suppressed the fact of clandestine manufacture and clearance by way of suppression and willful misstatement in their ER Returns submitted by them to the Central Excise Department every month and by way of manipulation in the sale invoices, the

amount of Central Excise Duty so evaded is recoverable in terms of Section 11A(4) of the Act by invoking the extended period of 5 years. Therefore, the appellants are liable to pay interest in terms of Section 11AA read with Section 11AC of the Act. It was alleged in the notice that intelligence was received with the effect that the appellants were procuring “condensate” and were manufacturing “industrial solvent” from such product but they failed to pay Excise Duty against clearances of such manufactured “Industrial Solvent”. Acting on such intelligence, the officers of Head Quarter Anti-Evasion Unit, Siliguri Central Excise Commissionerate visited the factory premises on 12th June, 2015. After briefly stating about the manufacturing process as culled out during the inspection, during which the officers appear to have examined the documents available in the factory premises and stated that the appellants were submitting their returns showing no production and clearance of finished goods therein. After mentioning about the various registrations, permissions and licenses obtained by the appellants it was stated that the appellants themselves declared their premises as a factory and the activities therein was a manufacturing process but they failed to pay Central Excise Duty by suppressing the fact of production in their monthly returns and thereby, violated Rule 4 of the Rules and also violated Rule 6 as they had mis-classified their finished goods and had not assessed liability of duty on the finished goods correctly, violated Rule 8 as they had not paid duty, violated Rule 10 as they had not shown it in their daily stock account the amount payable and particulars regarding the amount of duty actually paid in respect of the goods

cleared from the factory premises and violated Rule 12 inasmuch as they had not disclosed removal of those goods in their monthly returns. Statement of the authorized signatory of the appellants and their managers and employees were recorded. There was a reference to a chemical test report dated 13th January, 2016 stating that though in the reports no classification of the product has been made but there were certain observations made in the report which ultimately led to a prima facie conclusion that the appellant had violated the various provisions of the Act of the Rules and were called upon to show cause (a) as to why the goods which were manufactured and cleared clandestinely without payment of Central Excise Duty should not be confiscated under Rule 25 of the Rules, (b) as to why the goods which were held under seizure vide seizure memo dated 12.06.2015 should not be confiscated under Rule 25, (c) why Central Excise Duty along with cess should not be demanded and recovered under Section 11A (4) of the Act; (d) why applicable rate of interest should not be charged and recovered as per Section 11AA of the Act; (e) why penalty under Rule 25 of the Rules read with Section AC of the Act should not be imposed; (f) why extended period of 5 years as per provisions of Section 11A(4) should not be applicable in respect of the instant case as duty has been evaded by way of suppression and willful mis-statement in the returns and manipulation in the sale invoices; (g) why penalty should not be imposed on the Director, who was the second notice, as per provisions of Rule 26 of the Rules.

3. The appellants submitted their reply dated 8th July, 2016 to the show cause notice stating that they had purchased the goods namely, “condensate” from M/s. Oil India Limited, Assam under proper Central Excise invoices without payment of duty by virtue of the classification of products under Tariff Sub-heading 2709 0000 at Nil rate. The said product was subjected to distillation process in their factory for refining the condensates by removing impurities without ad-mixture with any other materials and sold the distilled condensates to various customers under the cover of Central Excise invoices appropriately classified the distilled condensate under tariff sub-heading 2709 0000 at Nil rate of duty considering that “condensates” and “distilled condensates” are one and the same and having same composition. Further, it was stated that “distilled condensates” were sold in the name of “condensates (distilled)” or industrial solvent or EPC SOL-100, EPC SOL-200, EPC SOL-500 as per the requirement of the customers. It is further stated that the said “condensates” (distilled) etc. are used as industrial solvent in the paint industry, thinner, adhesives and dry cleaning purpose but it has no use as fuel or as motor spirit. Further, that the “condensates” are supplied by M/s. Oil India Limited under stringent conditions one of which is to furnish end use certificate though the District Magistrate, Jalpaiguri every month. The process of distillation was explained in the following terms :

As to the process of distillation of condensates, we stated and duly verified by the department; that, condensates received from Oil India Limited are kept in the storage Tanks lying in our premises. From there it goes to an

apparatus called “kettle”, where it is heated using hot lubricating oil. At 27 degree Celsius temperature condensates starts distilling. At a temperature between 27 degree Celsius and 45/48 degree Celsius, a portion of condensates vaporizes. The vapour is collected in a chamber, where it is cooled down to form refine condensates, which is sold as EPC-100. Therefore, at a temperature between 49 degree Celsius to 60 degree Celsius, some other portion of the condensates vaporizes which, in the same way is collected and named as refine condensates, EPC-200. In the same way, the rest portions of condensates, is distilled at a temperature between 69 degree Celsius to 100 degree Celsius to name the said refine condensates as EPC-500. The EPC-100, EPC-200 & EPC-500 are fully free of impurities and the impurities got collected at the bottom of the storage tank, which is thrown away, having no commercial importance.

As the process undertaken in our premises, to convert the condensates into refined condition,, after removing impurities, do not tantamount to emerging of a new product, such process may not be treated as “manufacture”. Hence, the refined condensates or condensates (distilled) were/are cleared by us under Tariff sub-heading no. 27090000 @NIL duty, as that of condensates.

4. It was submitted that the present management of the company took over in the year 2012 and they have been submitting Nil monthly returns regularly and the officers of the department have inspected the factory on several occasions, scrutinized the returns but have not raised any question about the dutiability of the product. It was further stated that the officers of the Anti-Evasion Unit visited the factory premises on 12th June, 2015 and examined various records and have taken samples of the condensates and the samples were received by the chemical examiner’s office on 19th June, 2015 and after a period of 7 months, the chemical examiner submitted a report on

13th January, 2016. The appellants further stated that the charge against them for demanding duty, interest and imposing penalty are wholly unjustified and improper as it lacks any proper evidence and the show-cause notice has been issued without proper appreciation of the legal position. At the first instance, the appellant contended that they have not mis-declared or suppressed any facts with intent to evade payment of duty so as to attract the extended period of limitation under Section 11A (4) of the Act as the goods in question are not dutiable have the charge of intention to evade duty is improper. Further, it was stated as to how the goods cleared from 01.04.2011 to 31.10.2015 could be confiscated when the goods were not available for confiscation and not seized by the department. With regard to the allegation that the appellants are engaged in the process of manufacture, it was submitted that the said allegation is wholly baseless as the process of distillation does not bring about a new product for the condensate (distilled) etc. to be termed as a product manufactured from the material purchased from M/s. Oil India Limited. Further, with regard to the allegation of suppression/ mis-statement it was stated that they have declared all the particulars in the returns and the allegation has been made mechanically only to invoke the extended period of limitation and for inflating the amount of duty. Further, the officers of the department have been regularly inspecting the factory premises from time to time and have scrutinized the records and at no earlier point of time have raised any issue in this regard, therefore, the charge of suppression/ mis-declaration is not legally sustainable. In this regard, reference was made to the

circular issued by the CBEC in Circular No. 1024/12/2016-CX dated 11th April, 2016. Further, the appellants stated that there is no dispute to the fact that they purchased the condensate from M/s. Oil India Limited who had classified the products under Tariff sub-heading 27090000 with Nil rate of duty and they have only processed the said condensate in their factory for purification by removing impurities, applying distillation process, to increase efficiency of the condensate without mixing of any other element. With regard to the statements recorded from various persons, it is stated that the question as to whether the process would amount to manufacture, is a legal interpretation and such interpretation cannot be based on statement of certain persons and more particularly when the operator of the company in his statement had only described the processing of condensate (distilled) and nothing more. In the show cause notice the second respondent had referred to the certificate obtained by the appellants under the provisions of the Act with respect of Value Added Tax Act and also referred to the returned filed under the provisions of the Central Sales Tax Act. With regard to this allegation, it was submitted that none of the authorities who had granted those certificates have certified that the process of distillation amounts to manufacture. With regard to the veracity of the chemical test report, it was submitted that the department wanted the chemical examiner to certify the chemical constituents of the sample and classification under the Central Excise Tariff Act, 1985. However, the chemical examiner has not certified the chemical constituent of the sample nor its classification under the Tariff Act but has certified only the

density of the samples' flash point, evaporation etc. Furthermore, there was an inordinate delay of more than 6 months for the chemical examiner to submit his report and the product being a petro-product, it will not retain its original properties for such a long period of time. Therefore, it was requested that the report of the chemical examiner can have any impact on classifying the product under Tariff sub-heading 27101213. Even going by the report of the chemical examiner, it is seen that the condensate (distilled) is the lighter form of condensates and this could be seen from the density of the product as certified by the chemical examiner which will go to show that the difference in the density is very negligible. Thus, it will be clear that the two samples are mostly of identical nature in all respects.

5. Further it was pointed out that the chemical examiner has conspicuously avoided mentioning "chemical constituent" and classification of the two samples of condensate and condensate (distilled) for which purpose only the samples were sent to him. After taking such a stand, the appellants proceeded to discuss the legal issues as to whether the process of distillation, can be treated as a process of manufacture or not. After referring to the various technical details and decisions, it was stated that the goods cannot be classified under tariff sub heading 271012 or 27101213 as the product does not fulfill the criteria of "manufacture". The order of seizure and confiscation was also contested and various submissions were made as to how the said orders are not sustainable. Ultimately it was stated that the product is correctly classifiable under tariff sub heading No. 27090000 as against the

proposal of the department and the appellants prayed for dropping the proceedings. By way of the additional reply dated 08.07.2016, the second respondent contested the proposal to levy penalty against him. The adjudicating authority rejected the contention raised by the appellants and confirmed the proposal in the notice by order dated 29.11.2016.

6. The Order-in-Original dated 29.11.2016 was challenged in the writ petition reiterating the contention which was raised in the reply to the show cause notice and justifying their action that the product is correctly classifiable under tariff sub heading No. 27090000 attracting NIL rate of duty. The learned Single Bench by the impugned order after noting that the appellants have raised the issue of lack of jurisdiction on the part of the authority in issuing the show cause notice, by invoking the extended period of limitation and also after noting the decisions which were relied on by the appellants proceeded to non-suit the appellants on the sole ground that the Order-in-Original is an appealable order and the question whether the product had undergone a change so as to come within a different classification cannot be examined in the writ petition as the Writ Court cannot act as an appellate authority and substitute its findings upon the reappraisal of the facts and evidence unless a finding is demonstrated to be perverse. Challenging the correctness of the order passed in the writ petition, the appellants have filed the present appeal.

7. We have elaborately heard Mr. N.K. Chowdhury assisted by Mr. Nilotpal Chowdhury, Mr. Prabir Bera and Mr. Deepak Sharma, advocates for the

appellants and Mr. Bhaskar Prosad Banerjee assisted by Mr. Abhradip Maity, advocates for the respondents.

8. The Hon'ble Supreme Court in ***Whirlpool Corporation Versus Registrar of Trade Marks, Mumbai***¹ held that the alternate remedy is not to operate as a bar in atleast three contingencies namely where the writ petition has been filed for the enforcement of any fundamental right or where there has been violation of principles of natural justice or where the orders or proceedings are wholly without jurisdiction or vires of an act is challenged. Thus, when an appealable order is put to challenge in a writ petition under Article 226 of the Constitution of India, the Court will proceed to consider as to whether the case would fall under any one of the exceptions carved out by the Hon'ble Supreme Court for exercise of jurisdiction under Article 226 questioning the correctness of an appealable order. Undoubtedly, the primary ground on which the writ petition was filed is questioning the jurisdiction of the authority to issue the show cause notice by invoking the extended period of limitation. That apart, the appellants had raised the contention that when the dispute is a classification dispute of a product, extended period of limitation cannot be invoked. This contention in our view is well founded in the light of the decision of the Hon'ble Supreme Court in ***Nestle India Limited Versus Commissioner of Central Excise, Chandigarh***² wherein the Hon'ble Supreme Court held that in the facts of the said case the extended period of limitation was not invocable for two reasons firstly the assessee therein had

¹ AIR 1999 SC 22

² 2009 (235) ELT 577 (SC)

been clearing the product for 20 years prior to the issuance of the show cause notice and the assessee offered demonstration to the department and the department did not avail of that opportunity to find out whether there is manufacture in the first instance.

9. Secondly after referring to the decision in ***Padmini Products Versus Collector of Central Excise*** ³ and ***Collector of Central Excise, Hyderabad Versus Chemphar Drugs and Liniments, Hyderabad*** ⁴ it was held that extended period of limitation is applicable only when there is some positive act other than mere inaction or failure on the part of the manufacturer. Further there must be conscious or deliberate withholding of the information by the manufacturer to invoke larger period of limitation. In ***Coastal Energy Private Limited Versus Commissioner of Customs and Central Excise and Service Tax, Guntur*** ⁵ one of the questions which arose before the tribunal was whether the extended period of limitation could be invoked in a classification dispute. The tribunal held that the issue of classification is technical in nature and therefore *mens rea* to evade payment of duty cannot be alleged and therefore extended period of limitation cannot be invoked and no penalty could have been levied and can be levied on the appellants therein even in respect of demand for normal period. The said decision was affirmed by the Hon'ble Supreme Court upon the dismissal of the Civil Appeal No. 5461 of 2015 by judgment dated 11.07.2016. In ***Prabhu Steel Industries Limited Versus***

³ 1989 (43) ELT 195 (SC)

⁴ 1989 (40) ELT 276 (SC)

⁵ 2014 (310) ELT 97 (Tribunal- Bang)

Collector of Central Excise, Nagpur ⁶ the Hon'ble Supreme Court held that when the goods are cleared in accordance with the approved classification list and all materials facts were known to the revenue authority mere change of opinion as to the correct classification/description of the product is not sufficient to invoke the extended period of limitation particularly when there was no concealment of true facts and for such reasons the demand was set aside as time barred. **Rainbow Industries Private Limited Versus Collector of Central Excise, Vadodara** ⁷ was a case relating to manufacture of dye stuff, manufacturer filed a price list as required under Rule 173C of the Central Excise Rules which was approved by the Excise authority with effect from 01.04.1975. About a year thereafter, the Assistant Collector issued a notice requiring the appellant therein to show cause as to why the net assessable value should not be revised and difference of duty recovered. The reply given was not accepted and the matter stood affirmed up to the stage of the tribunal. The Hon'ble Supreme Court held that once the department accepted the price list, acted upon it and the goods were cleared within the knowledge of the department then, in the absence of any amendment in law or judicial pronouncement the reclassification should be effective from the date the department issued the show cause notice and the reasons for its clearance with the knowledge of the department and no intention to evade payment of duty. This decision was referred to and quoted with approval in **Collector of Central**

⁶ 1997 (95) ELT 164 (SC)

⁷ 1994 (74) ELT 3 (SC)

Excise, Baroda, Versus Cotspun Limited⁸ and it was held that the levy of the excise duty on the basis of approved classification list is a correct levy at least until such time as to the correctness of the approval of the classification by issuance to the assessee of a show cause notice and levy of excise duty on the basis of a approved classification is not a short levy and difference of duty cannot be recovered on the ground that it is a short levy.

10. Bearing the above legal principles in mind, if we examine the facts of the case on hand, it is evidently clear that the tariff sub heading under which the product was classified was accepted by the department for more than six years and the products were cleared at NIL rate of duty. The monthly returns filed by the appellant was never called in question despite the fact that on several occasions, the officers of the department inspected the factory premises of the appellant. Therefore, by any stretch of imagination the question of invoking extended period of limitation does not arise. The allegations of mis statement, willful suppression are absolutely vague except for using those words is mere usage of the words “willful suppression”, “mis-statement”, “intention to evade payment of duty” is not sufficient to hold an assessee guilty of such mis demeanors. There should be sufficient material available on record to establish these allegations and essentially *mens rea* has to be established before the conclusion is arrived at. On a reading of the show cause notice as well as Order-in-Original we are fully satisfied that there is no material brought on record by the department to establish these allegations. Having held so, the

⁸ 1999 (113) ELT 353 (SC)

only conclusion that can be arrived at is to hold that invoking the extended period of limitation is bad in law. The second issue is with regard to the classification of products which undoubtedly is a disputed question and cannot be appropriately adjudicated in a writ petition. However the endeavor of the appellant before us is not to convert this court into a chemical laboratory but the endeavor is to show that the material based on which the Commissioner came to the conclusion that the process adopted by the appellants amounted to manufacture is without any basis. On a reading of the show cause notice as well as the Order-in-Original it is clear that the adjudicating authority was largely guided by the chemical examiners report. In the preceding paragraph we have set out as to what was the observation made by the chemical examiner in his report. Firstly the report need to be discarded as there was a delay of more than seven months to submit the report from the date of drawl of samples. The product is a petro product and has got certain natural properties and it is not clear as to whether there was any certification as to any change in the characteristics of the product after a long period of time. Secondly, the purpose for which the report was called for from the chemical examiner was to ascertain the chemical constituent of the samples and the classification under the Central Excise Tariff Act 1985. It cannot be disputed by the department that the chemical examiner did not answer both these queries and proceeded to analyze the density of the product and from the values mentioned in the report, it is seen that there is a negligible difference in the density of the condensate and the condensate (distilled) which is dealt with by the appellant.

Therefore this is also one more ground to discard the chemical examiners report. The department does not dispute the fact that for nearly seven years the product has been cleared by the appellant by adopting the classification under Chapter sub heading 27090000. If in the opinion of the department there was a wrong classification adopted by the appellant there are ways and means by which the correct classification could be determined. In the process of determination of classification of the product, the role of the appellant is indispensable rather it is not one sided action as the appellant has to be given adequate opportunity to demonstrate as to how the process adopted by them does not amount to manufacture. Such procedure was not adopted by the department prior to issuance of the show cause notice or at least when the show cause notice was adjudicated. No demonstration was called for from the appellant and the adjudicating authority was solely guided by the chemical examiner report which did not address the queries sought for. The registration under the provisions of the Value Added Tax Act could hardly have any impact on the question of classification of the condensate (distilled). None of the State Government authorities have stated that the process amounts to manufacture. In any event, the adjudicating authority has not stated specifically that the appellant do not deal with any other products where the process of manufacture is undertaken and the excisable goods are produced. Therefore placing reliance on the registration or certificate issued by the State Authorities can have little impact on the facts of the present case.

11. In the earlier paragraph, we have held that invoking the extended period of limitation was bad in law. The Central Board of Excise and Customs had received representations seeking clarification regarding re-refining of waste oil and by circular dated 11.04.2016, it was stated that whether the process undertaken by the assessee amounts to manufacture or not is an interpretational issue and therefore when a demand is raised it should be raised for the normal period of limitation only. This is also one more reasons to hold that invoking the extended period of limitation and demanding duty for the past period is not sustainable. Considering the above position, we can safely hold that the jurisdictional issue arises for consideration in the case on hand and if that be so, the writ petition was maintainable. In ***State of Punjab Versus Bhatinda District Cooperative Milk P. Union Limited***⁹ the Hon'ble Supreme Court held that the question of limitation is a jurisdictional question and writ petition was maintainable.

12. Upon reading of the order of adjudication, we find that the issue has been dealt with in a very cursory manner without taking note of the objection raised by the appellant in their reply to the show cause notice. The adjudicating authority has stated that no doubt has been raised by the appellant with regard to the observations of the chemical examiner. This finding is factually incorrect as this was specifically raised in the reply to the show cause notice in Paragraph 21(c) therein. The learned senior standing counsel had referred to certain paragraphs of the adjudicating order and in

⁹ 2007 (217) ELT 325 (SC)

particular paragraphs 3.2, 6.3, 6.5, 6.8 and 6.9. Paragraph 3.2 is the statement of the case which is partially culled out from the averments in the show cause notice and partially from the reply given by the appellant. Paragraph 6.3 refers to the registration obtained by the appellant from the West Bengal Tax Department which we have already dealt with and held to have no impact on the present proceedings. Paragraph 6.5 deals with the chemical examiners report which we have also considered and held that the chemical examiner report is of little avail as the report does not address the queries which was raised apart from the fact that the report was submitted after seven months after the drawl of the samples. On a cursory reading of the paragraph 6.8 of the adjudicating order, one gets the impression that the adjudicating authority recorded a positive finding that the process done by the appellant is “manufacture”. But on a closer reading, we find it is only a discussion about certain decisions which was referred to by the adjudicating authority and nothing turns out on the facts of the case on hand. Paragraph 6.9 relates to the statements recorded from the Director of the appellant. The issue in the case on hand relates to classification of a product which requires to be done in a scientific manner and such classification cannot be determined and concluded based on statements given by either the Director of the company or their employees.

13. Thus, for all the above reasons, we are of the definite view that the adjudication order is thoroughly flawed more particularly on the ground of limitation.

14. In the result, the appeal is allowed, the order passed in the writ petition is set aside and the writ petition is allowed and consequently the Order-in-Original dated 29.11.2016 is quashed. No costs.

(T.S. SIVAGNANAM, J.)

I agree

(HIRANMAY BHATTACHARYYA, J.)

(P.A – PRAMITA/SACHIN)