

## **Norton Intec Rubbers (P) Ltd., Madras Vs The Collector of Central Excise, Madras and Union of India (UOI)**

**Court:** Madras High Court

**Date of Decision:** July 31, 2002

**Acts Referred:** Constitution of India, 1950 " Article 226

**Citation:** (2003) 111 ECR 23 : (2004) 164 ELT 5

**Hon'ble Judges:** P. Sathasivam, J

**Bench:** Single Bench

**Advocate:** P. Aravind Dattar, for Mr. Muthappan, for the Appellant; N. Kannadasan, Senior Central Govt. Standing Counsel, for the Respondent

**Final Decision:** Allowed

### **Judgement**

@JUDGMENTTAG-ORDER

P. Sathasivam, J.

The petitioner has approached this Court to issue a Writ of Prohibition forbearing the respondents from proceeding with the show cause notice of the first respondent-Collector of Central Excise, Madras dated 30-8-1993 on various grounds.

2. The case of the petitioner is briefly stated hereunder:

The petitioner company, registered as a private limited company under the Indian Companies Act are manufacturers of Butyl Rubber Tubes

(BRT), Flaps, Curing Bags, etc., which are excisable products attracting tariff classification under Chapter 40 of Central Excise Tariff Act, 1985

(in short "CETA 1985") in their factory situate in SIPCOT complex, Gummidipoondi. It has its administrative Office at Madras. The factory

premises is licensed under the Rules of Central Excise. The physical control of Excise authorities over the removal of goods under Chapter V of

Central Excise Rules became operative. According to the rules for physical control of licensed manufacturer of excisable goods, the manufacturer

is required to give notice of manufacture before intending to manufacture; prior declaration of factory premises and equipment has to be filed

before the Collector; the alteration or movement of factory equipment in the licensed area will have to be marked and approved; the manufacturer

shall have to provide an approval store room or other place of storage in his premises for depositing the manufacturer's goods in their non-duty

paid state and for which a bond has to be executed by the manufacturer to the Excise Department in terms of the Rule 47 of the said Rules; the

Excise duty would be chargeable only on removal of goods from the factory premises or place of storage. The proper officer of the Excise

Department has to visit for every clearance of goods intended for removal by the petitioner company. The goods are cleared under a statutory

Gate Pass prescribed under the Rule 52-A of the said rules, copies of which are to be submitted to the Department and for accompanying the

goods and for being retained by the manufacturer assessee for his record. The petitioner company has observed all the rules and there has not

been any serious irregularity pointed out or noticed. The petitioner company functioning under the physical control has been so functioning under

the direct control of the Excise Department. In spite of the said statutory provision and strict compliance due to mala fide on the part of the excise

authorities, the customs notice was issued on 5-8-93 followed by the impugned show cause notice of the excise authorities dated 30-8-93. The

entire show cause notice has proceeded merely on speculations, presumptions and assuming certain figures to be representing results of illegitimate

activities which is even ex facie unacceptable in law. The notice has been issued in an arbitrary fashion which cannot per se be the basis for

demanding duty alleging any evasion of payment of duty. Since the Apex Tribunal has taken a view that the Central Excise authorities required the

manufacturer/assessee to prove the negative, it would be futile for the petitioner to pursue the departmental remedies at this stage. Since all the

forums including the Apex Tribunal would be following the same ruling of the Tribunal and the petitioner's pursuit of remedy in the departmental

forums would therefore be illusory and ineffective; hence the present writ petition before this Court.

3. Assistant Collector of Central Excise (Legal) in the Office of the Collector of Central Excise, Madras-34 has filed a counter affidavit disputing

various averments made by the petitioner and highlighting the statutory provisions and the steps being taken by the authorities. Though the counter

refers to elaborate details, in the light of the decision to be taken in the writ petition, I am not inclined to refer all those details except the averment

in para 15. In this paragraph, the respondents have fairly admitted the removal from the manufacturing premises of the petitioner was with the

consent and knowledge of the department and strict procedure has been followed. They also admitted that the question of allowing excess

clearance of goods does not arise.

4. Heard Mr. P. Aravind Dattar, learned Senior counsel for the petitioner and Mr. N. Kannadasan, learned Senior Central Government Standing

counsel.

5. The writ petition is filed against a show cause notice. Normally the High Court will not interfere at this stage, particularly when the petitioner has

effective remedy by way of appeal or revision. However, Mr. Aravind Dattar, by drawing my attention to Section 11-A of Central Excise Act,

1944 (in short "the Act"), Rule 9 (2) of Central Excise Rules, 1944 (in short "the Rules") and other details such as observance of all the relevant

rules by the petitioner company, contended that there has not been any serious irregularity pointed out or noticed either in the maintenance of the

bonded store room, manufacturing premises or in the formalities to be observed for clearance of goods or in the maintenance of statutory records

or in the submission of the returns and other formalities, and that the petitioner company is functioning under the control of Excise Department, the

impugned show cause notice cannot be sustained. In the earlier part of my order, I have already referred to the relevant provisions/procedure to be

followed and the definite case of the petitioner company that they are observing all the rules and there has not been any serious irregularity at any

point of time. In such a circumstance, Mr. Aravind Dattar, learned senior counsel for the petitioner has contended that if the show cause notice

itself is not in accordance with the statutory provisions, even at this stage, this Court can restrain the respondents by issuance of writ of prohibition.

Though both the counsel have referred to number of decisions in support of their stand, in view of the stand taken by the respondents in the

counter affidavit, I am of the view that it is unnecessary to refer and consider the same. Among those averments, the statement referred to in

paragraph 15 is relevant which reads as under:

15. As regards averments made in para 16 by the petitioner that the provisions of Rule 9 under which the demand has been raised cannot be

invoked in cases where the removal was with the consent and knowledge of the department, it is submitted that the demand has been issued on the

strength of the evidences collected by the Department at the time of investigation and for the clearances of goods made by the petitioner

clandestinely without the knowledge of the Departmental officers and without following any Central Excise procedure. Further, the department

completely deny the charges and state that all the clandestine removals were done without the knowledge of the Departmental Officers. The

petitioner avers that the tubes and flaps manufactured and cleared by them, came within the scope of the physical control of the Excise authorities

and that there is total lack of jurisdiction to demand any differential duty from the petitioner. In this connection, it is submitted that as and when the

petitioner files the AR 1 applications with the proper officer, the proper Officer allows the clearances of excisable goods to that extent and in this

case, the same procedure has been followed as applied for by the petitioner in the AR 1s and hence, the question of allowing excess clearances of

goods does not arise. It is further submitted that there is no dispute in the clearances of goods allowed by the department and no differential duty

has been demanded from the petitioner on those goods....

It is clear that as and when the petitioner company files AR 1 applications with the proper Officer, the proper Officer allows the clearances of

excisable goods to that extent and the same procedure has been followed in the case of the petitioner. In the light of the admitted factual position,

as rightly argued by Mr. P. Aravind Dattar, learned senior counsel for the petitioner, Rule 9 (2) does not apply to the petitioner's case. Here again,

though Mr. P. Aravind Dattar has cited several decisions of the Supreme Court in support of his contention regarding applicability of proof u/s 9(2)

and scope of Section 11A(1) of the Act, I am of the view that it is unnecessary to refer all the decisions except a decision in N.B. Sanjana v.

Elphinistone Spinning and Weaving Mills, reported in 1978 E.L.T. 399. The following conclusion of Their Lordships is relevant:

para 26.....Then the question is whether the demands could be justified under Rule 9 (2). Even here we find considerable difficulty in sustaining

the notice under this rule. Sub-rule (1) of Rule 9 provides for the time and manner of payment of duty. In this case there is no controversy that

whenever goods were cleared by the respondents, necessary applications had been made to the officer concerned and the latter had passed

orders of assessment to nil duty. To attract sub-rule (2) to Rule 9, the goods should have been removed in contravention of sub-rule (1). It is not

the case of the appellants that the respondents have not complied with the provisions of sub-rule (1). We are of the opinion that in order to attract

sub-rule (2), the goods should have been removed clandestinely and without assessment....

In our case, in the light of the categorical assertion/ details in the affidavit and in view of the admission of the respondents in para 15 of the counter

affidavit, there is no clandestine removal without assessment. On the other hand, it is clear that goods had been removed with the express

permission of the Excise authorities. Further, the argument against the impugned demand on grounds of limitation has a lot of force because when

the unit was also under physical control of the Excise Department, the show cause notice issued on 30-8-93 for the period 1989-90 to 1992-93

being beyond six months" period u/s 11A of the Act is squarely time barred because the charge of clandestine removal is incongruous in a unit

under physical control of the Excise Department. By applying the principle laid down in the above decision and in the light of the admitted factual

position, the impugned show cause notice is liable to be quashed. Mr. N. Kannadasan, learned Senior Central Government Standing counsel by

referring various decisions of this Court as well as the Apex Court, contended that this cannot be cited as a precedent for other cases for by-

passing the effective alternative remedies. I have already referred to the admitted factual position that clearance of goods were allowed only in the

presence of their departmental staff. If that is so, the provisions of Rule 9 under which the demand has raised cannot be invoked. In other words, in

cases where the removal was with the consent and knowledge of the department, Rule 9 cannot be invoked. Only in the light of the admitted

factual position coupled with the interpretation of the Supreme Court with reference to Rule 9 (2), this Court is constrained to quash the impugned

show cause notice and this order cannot be cited as a precedent for by-passing alternative remedies.

5. In the light of what is stated above, I sustain the objection raised by the learned senior counsel for the petitioner and the petitioner is entitled to

succeed. Net result, Writ Petition is allowed.