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Tata Iron and Steel Company Ltd. Vs Union of India (UOI) and Others

Court: Patna High Court

Date of Decision: March 9, 1987

Acts Referred: Central Excise Rules, 1944 â€" Rule 173, 173B, 173G, 9(1)
Central Excises and Salt Act, 1944 â€" Section 11A, 11A(1)
Constitution of India, 1950 â€" Article 226, 227
Medicinal and Toilet Preparations (Excise Duties) Act, 1955 â€" Section 2

Citation: (1987) 32 ELT 676

Hon'ble Judges: Uday Sinha, J; S.C. Mookherji, J

Bench: Division Bench

Advocate: K.D. Chatterji, A.B.S. Sinha, Kalidas Chatterji and Ashok Priyadarshi, for the Appellant; R.B. Mahto, General and Y.V. Giri for Central Government, for the Respondent

Final Decision: Allowed

Judgement

Uday Sinha, J.
The Tata Iron and Steel Company Limited (hereinafter called ""the Tisco""), the petitioner in this application under Articles

226 and 227 of the Constitution has moved this Court for quashing the order of the Collector of Central Excise, Patna, dated 24.9.1982

(Annexure-2) and Annexure-3 dated 29.1.1983. By Annexure-2 the Collector adjudicated that the petitioner was liable to pay excise duty

amounting to Rs. 39,97,718.14 as differential duty under Tariff Item 26AA(ia) and Rs. 1,56,81,092.25 as duty under Tariff Item 68.

2. When the case was called on for hearing, we suggested to the learned counsel for the petitioner, if he would choose to exhaust his internal

remedy under the Central Excises and Salt Act, 1944 rather than press the present application under Article 226 of the Constitution. He chose to

press the present application and not to waste time before the appellate excise authorities. Rule having been issued, we cannot refuse to adjudicate

the matter on the ground of availability of alternative remedy. We have, therefore, heard this matter and now proceed to judgment.

3. The petitioner manufactures wheels, tyres and axles of railways. The buyers of these products are the Indian Railways. Apart from selling

wheels, tyres and axles for Railway wagons, the petitioner also sells and supplies wheels and axles as a composit unit. These are forged products.

Before supplying these items to the Railways, these forged items are machined and polished by the petitioner. That brings about the rub falling for

consideration before us. The stand of the petitioner is that forged steel products fall within the ambit of Tariff Item 26AA(ia) of the Central Excise

Rules (sic). The stand of the revenue is that these products after the stage of forging obviously fall within Tariff Item 26AA(ia) and dutiable as such.

The further stand of the revenue is that after machining and polishing these items, a new product comes into being, and therefore, the new machined

and polished tyres, axles, etc., fall within the ambit of Tariff Item 68 and separately dutiable as such. Thus whereas according to the petitioner,

these products are dutiable only under Tariff Item 26AA(ia), according to the revenue, they are dutiable also under Tariff Item 68.

4. The petitioner was paying duty in terms of Tariff Item 26AA(ia) since 1962. They were being paid after the classification list filed by the

petitioner had been approved by excise authorities. It continued as such till 1981 when the Assistant Collector, Central Excise, Jamshedpur

(respondent No. 3) called "upon the petitioner to show cause why it be not proceeded against for contravention of Rules 173-B, 9(1) read with

Rule 173G(i) and Rule 173(i)(a) which were excisable under Tariff Item 68 on account of these products having been machined (sic). According

to the revenue duty should have been paid on these goods as forged items and not on the basis of weight after machining. It is obvious that the

weight gets reduced after machining. Thus, according to the Revenue, the petitioner was liable to pay differential duty in terms of Tariff Item 26AA

as well as separate item in terms of Tariff Item 68. The demand notices were issued in respect of non-payment of duty during the period March,

1975 to July, 1981 and for subsequent periods also. The petitioner showed cause and contested the assertions and claim of the revenue. The

Collector by his order dated 2.9.1982 contained in Annexure-2 rejected the stand of the petitioner and held that the petitioner was liable to pay

differential duty as well as duty in terms of Tariff Item 68 as alleged in the notice. The order contained in Annexure-2 was followed up by

Annexure-3 whereby the petitioner was called upon to pay the duty.

5. Before setting out the submissions advanced on behalf of the petitioner, it would be apt to note the relevant provisions. Tariff Item 26AA so far

as is relevant reads as follows :

26AA. Iron or steel products, the following, namely :-

** ** ** **

(ia) Bars, rods, coils, wires, joists, girders, angles, other than slotted angles, channels, other than slotted channels, tees, beams, zeds, trough, piling

and all other rolled, forged or extruded shapes and sections, not otherwise specified.

Item 68 was residuary item and read as follows :-

68. All other goods, not elsewhere specified, but excluding -

(a) alcohol, all sorts, including alcoholic liquors for human consumption;

(b) opium, Indian hemp and other narcotic drugs and narcotics; and

(c) dutiable goods as defined in Section 2(c) of the Medicinal and Toilet Preparations (Excise Duties) Act, 1955 (16 of 1955).

Explanation :- For the purposes of this item, goods which are referred to in any preceding item in this Schedule for the purpose of excluding such

goods from the description of goods in that item (whether such exclusion is by means of an Explanation to such item or by words of exclusion in

the description itself or in any other manner) shall be deemed to be goods not specified in that item.

From the above, it will be seen that forged steel products are liable to duty in terms of Tariff Item 26AA. The petitioner admits that after the

wheels, tyres, etc., have been forged, they are put through a process of machining and polishing before they are supplied to the Railways. The

stand of the petitioner is that this machining and polishing in the workshop of the petitioner is of insignificant character and that extensive machining

and polishing is done by the Railways themselves before the items are attached to the rolling stock. It cannot be doubted that machining and

polishing in the workshop of the petitioner will entail shaving or cutting of some superficial materials in the forged items. The process of forging must

be deemed to have come to an end the moment they are forged. That being so and duty being payable by weight at the rate of Rs. 350 per M.T.,

the petitioner would be liable to pay duty on the forged wheels, tyres, etc. before they are put through the process of machining and polishing. Till,

the controversy was raised, the petitioner was paying duty in terms of Tariff Item 26AA on the weight of the goods after they had been machined

and polished. We have not the least doubt that the petitioner would be liable to pay on the forged items.

As such the duty by that process would be higher. The revenue would, therefore, be entitled to extra duty, i.e. the demand for differential duty of

thirty nine lacs. On principle the petitioner has hardly a case in that behalf. The question of limitation is a separate matter and we shall have to

consider how far the petitioner would be liable to pay duty on the whole weight of the forged items and not on the reduced weight after the goods

have been machined and polished.

6. Wheels, tyres, axles as a composite unit. - These are supplied by the petitioner to the Railways as one unit apart from supplying wheels, tyres,

axles separately. Mr. Chatterji for the petitioner conceded that a complete set of wheels, tyres, axles as one unit was an item separate from forged

steel and thus the petitioner would be liable to pay duty in terms of Tariff Item 68 as well. The order of the Collector in this behalf was not

challenged. We, therefore, need not go into the legality of the order of the Collector in that behalf on wheel set. It must be upheld as such.

7. The real controversy in this application is whether wheels and tyres are liable to duty in terms of Tariff Item 68 also. A basic tenet in the matter

of exigibility of the excise duty is that whenever an independent article comes into being, it becomes liable to levy of excise duty. In this behalf the

contention of the petitioner is that by machining and polishing no separate item of article is brought into being. According to the petitioner, the

polishing and machining is insignificant and that the forging of wheels and tyres is not complete until it has been machined and polished in

accordance with the requirements of the Railways. According to the petitioner, the wheels and tyres passed through rough machining process to

remove excess metal/surface defects. According to the petitioner, only some of the articles passed through inspection and got despatched.

According to the revenue, the tyres and wheels have to undergo considerable machining and polishing and, therefore, the machined and polished

articles assume a character different from that of forged articles.

8. The petitioner has placed reliance upon a certificate issued by Additional Director, Railway Stocks (P), Railway Board in which it has been

mentioned that wheels, tyres, axles and blanks manufactured by Tata Iron and Steel Company and supplied to Indian Railways against orders

placed by Railways to Tisco are manufactured according to the specifications, drawings agreed to between the Railways and Tisco. Axles

according to him, are supplied to the Railway in rough machined condition and wheels, tyres are supplied in as rolled/as forged condition. The

Additional Director has also mentioned in his certificate (Annexure-8) that the wheels, tyres, axles and blanks have to be sometimes rough

machined partially to remove excess steel or manufacturing defects. The certificate does not advance the case of the petitioner. In fact, the

statement that ""these wheels, tyres, axles and blanks have to be sometimes rough machined partially"" really goes against the case of the petitioner.

This shows that the process of forging is complete even without machining and polishing. In paragraph 3(iii) of the counter-affidavit on behalf of the

respondents it has been stated that the forged shapes and sections that emerge at the forging stage are not the one and the same as wheels, tyres

and axles or sets thereof obtained by further process of machining and other operations which are a distinct product different from the forged

shapes and sections. According to the revenue, in the manufacture of wheels, tyres, axles, etc., the forged products are punched and delivered to

the machining plant where drilling, machining, polishing etc., are done for the purpose of conforming strictly to specifications. According to the

revenue, the forged items are not the wheels, axles or tyres, but they become so only after substantial machining. The materials brought on record

by the parties really boils down to the petitioner asserting that the rough machining and polishing is insignificant part and the revenue''s assertion that

there is considerable machining and polishing.

9. It may have been difficult to decide the issue merely upon the assertions of the parties. There is, however, one circumstance which clinches the

issue. That is the new classification of the Tariff items. In 1985 the Central Excise Tariff Act, 1985 was enacted. This came into being in April,

1986. The Central Excise Tariff Items have been made comprehensive in accordance with the international trade practice. The Statement of

Objects and Reasons read as follows :

STATEMENT''OF OBJECTS AND REASONS

Central Excise duty is now levied at the rate specified in the First Schedule to the Central Excises and Salt Act, 1944. The Central Excises and

Salt Act, 1944 originally provided for only 11 items. The number of items has since increased to 137. The levy, which was selective in nature to

start with, acquired a comprehensive coverage in 1975, when the residuary Item 68 was introduced. Thus barring a few items like opium, alcohol,

etc., all other manufactured goods now come under the scope of this levy.

2. The Technical Study Group on Central Excise Tariff, which was set up by Government in 1984 to conduct a comprehensive inquiry into the

structure of the Central Excise Tariff has suggested the adoption of a detailed Central Excise Tariff based broadly on the system of classification

derived from the International Convention on the Harmonised Commodity Description and Coding System (Harmonised System) with such

contractions or modifications thereto as are necessary to fall within the scope of the levy of Central Excise duty. The Group has also suggested that

the new Tariff should be provided for by a separate Act to be called the Central Excise Tariff Act.

3. The Tariff suggested by the Study Group is based on an internationally accepted nomenclature, in the formulation of which all considerations,

technical and legal, have been taken into account. It should, therefore, reduce disputes on account of Tariff classification. Besides, since the Tariff

would be on the lines of the Harmonised System, it would bring about considerable alignment between the Customs and Central Excise Tariffs and

thus facilitate charging of additional customs duty on imports equivalent to excise duty. Accordingly, it is proposed to specify the Central Excise

Tariff suggested by the Study Group by a separate Tariff Act instead of the present system of the Tariff being governed by the First Schedule to

the Central Excises and Salt Act, 1944.

4. The main features of the Bill are as follows :

(i) The Tariff included in the Schedule to the Bill has been made more detailed and comprehensive, thus obviating the need for having a residuary

Tariff Item. Goods of the same class have been grouped together to enable parity in treatment.

(ii) In regard to the rates of duty, the Schedule to the Bill seeks to preserve by and large the existing duty structure; to the extent possible, effective

rates of duties fixed under exemption notifications, without any conditions, have also been incorporated. However, the effective rates of duty in

certain cases (as for instance, exemptions granted on fulfilment of certain conditions) would still be provided through exemption notifications issued

under the Central Excise Rules, 1944.

The matter was ambiguous until the new Schedule was brought out. In the new Schedule Item 72.8 is mentioned as pieces roughly shaped by

rolling or forging of iron and steel not elsewhere specified. This item thus relates only to forged items. As against this Chapter 86 contains several

items, the heading of which reads as follows :

RAILWAY OR TRAMWAY LOCOMOTIVES, ROLLING-STOCK AND PARTS THEREOF; RAILWAY OR TRAMWAY TRACK

FIXTURES AND FITTINGS AND PARTS THEREOF, ETC.

Item 86.07 is mentioned as :

Parts of railway or tramway locomotives or rolling-stock"".

Thus this classification makes it absolutely clear that parts of railway or rolling stock are items entirely distinct from steel forged items. The finished

wheels may appear to be a stage subsequent to forging, but the import of classification of goods clearly is that rolling stocks are entirely different

from forged items.

10. It was submitted that the classification [of] items introduced in 1986 can have no relevance to classification [of] items prior to it. The

submission appears to be attractive but only to a very limited extent. The new pattern is on the basis of international trade and practice and has

been done in order to reduce confusion and ambiguity in the international market. Following of the international pattern shows that on the

international canvas, machined and polished steel goods have for long been considered to be items different from forged items. It thus clearly

shows that forged items are different from rolling stock. Wheels become wheels only when they are machined and polished. In my view, therefore,

the machined and polished wheels, axles, tyres, etc., are separate identifiable goods and are liable to payment of excise duty under Tariff Item 68

besides being exigible under Tariff Item 26AA.

11. Learned counsel for the petitioner then submitted that the realisation of excise duty from 1975 was barred in terms of Section 11A of the

Central Excises and Salt Act, 1944. Section 11A lays down that when any duty of excise has not been paid a Central Excise Officer may, within

six months from the relevant date, serve notice on the person chargeable with the duty which had not been levied or paid. In terms of this

provision, the notice to show cause why he should not pay the duty must be issued and served within six months. In this case the period for which

demand has been made is from March, 1975 to July, 1981. The notice was thus obviously beyond six months. Steps for realisation, therefore, will

obviously be barred. Learned Advocate General appearing on behalf of the revenue relied upon the proviso to Section 11A which lays down that

where excise duty has not been levied or paid by reason of fraud, collusion or any wilful mis-statement or suppression of facts, or contravention of

the rules with intent to evade payment of duty, the provisions of Sub-section (1) of Section 11A shall have effect, as if for the words ""six months

the words ""five years"" were substituted. According to learned Advocate General, the petitioner was guilty of fraud or at least of wilful mis-

statement or suppression of facts in regard to machined and polished wheels, axles, tyres etc., and this was obviously " done with the intent to

avoid payment of duty. The period of limitation, therefore, according to the revenue, would be five years and not six months.

12. I regret, the submission urged on behalf of the revenue is fallacious. Even assuming the submission to be correct, the notice having been issued

in July, 1981, the five years period would embrace the period July, 1976 to July, 1981. The period prior thereto would obviously fall beyond the

period of five years. The revenue, therefore, cannot take steps for realisation of duty not paid between the period March, 1975 to July, 1976.

13. That, however, does not conclude matters. Learned counsel for the petitioner submitted and, in my view, rightly that there was no mis-

statement or suppression of facts by the petitioner; much less was there any fraud or collusion. The facts asserted in the petition show explicitly that

the petitioner was supplying forged wheels, tyres, axles, etc., to the Railways since 1962. The petitioner had been filing classification lists in terms

of Tariff Item 26AA. The revenue knew very well what the petitioner was doing and for about 17 years this pattern of payment of duty was carried

on. The petitioner bona fide believed that the polishing and machining of the goods did not bring about a new excisable item. These amply show

that the revenue also was of the same view; otherwise it would not have accepted the classification list or would have called upon the petitioner to

file a different classification list in terms of Tariff Item 68. It is true that the revenue has now woken up and is of the view that machined and

polished wheels, tyres and axles fall within Item No. 68. But if the revenue can be of that view now, how can the petitioner be hauled up for

suppression or mis-statement of facts or fraud being of the same view. In that view of the matter, I am clearly of the view that there was no fraud,

collusion, suppression or wilful mis-statement of facts. These not having been established, the proviso cannot come into play. Secondly, from the

facts brought on record there is nothing to show that there was any intent to avoid payment of duty. It is obvious that the petitioner bona fide

believed that the wheels, tyres, axles, etc. were merely forged items exigible under Item 26AA. I have no reason to doubt its bona fide in this

behalf. In the Cement Marketing Co. of India Ltd. v. The Assistant Commissioner of Sales Tax, Indore, and Ors. [1980] 45 STC 197 it was held

that merely filing [a] wrong return is not necessarily [a] false return. That was case under the Madhya Pradesh General Sales Tax Act where the

assessee had not included the freight in the return of sales tax, as it was generally under the impression that inclusion of freight was not necessary in

showing the gross turnover. In that background, Bhagwati, J. (as he then was) observed as follows :

It is possible that even where the incorrectness of the return is claimed to be due to want of care on the part of the assessee and there is no

reasonable explanation forthcoming from the assessee for such want of care, the Court may, in a given case, infer deliberateness and the return

may be liable to be branded as a false return. But where the assessee does not include a particular item in the taxable turnover under a bona fide

belief that he is not liable so to include it, it would not be right to condemn the return as a "false" return inviting imposition of penalty.

In the present case, the petitioner could not have realised that at some point of time in future the Excise Department would turn up denying the

classification list and form the opinion that machined and polished goods were items different from forged items. In that view of the matter, I am

unable to hold that there was any intention to evade payment of duty on the part of the petitioner. Barring the period for six months, therefore, the

proceeding for realisation of duty and differential duty must be held to be barred. The proceeding will be valid only for a period of six months

preceding the issuance of notice. The order for payment of duty in terms of Item 68 for goods cleared prior to 16.11.1980 must be held to be

invalid. The petitioner is liable to pay duty and differential duty on goods cleared between 16.11.1980 and 16.5.1981, but it would not be liable to

pay duty in terms of Item 68 for the period prior to 16.11.1980.

14. In fine, my conclusions are that the petitioner is liable to pay excise duty on wheels, tyres and axle set for entire period of terms of Tariff Item

68. The petitioner is not liable to pay duty and differential duty on wheels, tyres and axles as separate items for the period March, 1975 to

15.11.1980. The petitioner is, however, liable to pay duty and differential duty for the period 16.11.1980 to 16.5.1981.

15. For the reasons, stated above, the application succeeds in part as indicated above. In the special circumstances of the case, there shall be no

order as to costs.