Bongaigaon Refinery and Petro-Chem. Ltd. Vs Collr. of C. Ex.

Court: Calcutta High Court

Date of Decision: June 11, 1991

Acts Referred: Central Excise Rules, 1944 â€" Rule 49, 9
Central Excises and Salt Act, 1944 â€" Section 2, 35F, 4, 5A(1)

Citation: (1992) 57 ELT 383

Hon'ble Judges: Ruma Pal, J

Bench: Single Bench

Advocate: R.N. Bajoria, J.P. Khaitan and P.K. Jhunjhunwala, for the Appellant;N.C. Roychowdhury and Prantosh Mukherjee, for the Respondent

Judgement

@JUDGMENTTAG-ORDER

Ruma Pal, J.
The petitioner is a Government of India Undertaking. According to the petitioner it has a factory at Dhaligaon in which there

are several units namely, a Refinery Unit, a Xylene Unit and a Polyester Staple Fibre Unit. It is not disputed that these units are situated in an area

measuring 3.926 sq. km. and is encircled by a single boundary wall. All these units are under the management and control of the petitioner. The

said three units have been considered as one factory under the provisions of the Factories Act, 1949 and a licence was granted accordingly. The

Refinery Unit refines/ processes crude petroleum. Various products are obtained from such refining/processing including Low Sulphur Heavy

Stock (hereinafter referred to as LSHS). The LSHS is used as fuel in the Xylene and Polyester Staple Fibre Units. There is no dispute that LSHS

is classifiable under Chapter 27, Heading 2713.30 of the Central Excise Tariff Act, 1985 (hereinafter referred to as the said Act).

2. On 1st March, 1989 a Notification No. 28/89-C.E. was issued (hereinafter referred to the said Notification). The said notification provides as

under :

Exemption to goods other than blended or compounded lubricating oils and greases. In exercise of the powers conferred by Sub-section (1) of

Section 5A of the Central Excises and Salt Act, 1944 (1 of 1944), the Central Government, being satisfied that it is necessary in the public interest

so to do, hereby exempts goods (other than blended or compounded lubricating oils and greases) falling under Chapter 27 of the Schedule to the

Central Excise Tariff Act, 1985 (5 of 1986) produced in a factory and -

(a) utilised in the factory in which the said excisable goods are produced, for the manufacture of any goods falling under the said Schedule or as

fuel for such manufacture (excluding fuel used for any internal combustion engine) or both;

(b) allowed to escape in the atmosphere by flare system or otherwise; from the whole of the duty of excise leviable thereon which is specified in the

said Schedule"".

3. On the basis of the said Notification the petitioner filed a Classification List on 20-4-1989 claiming exemption of LSHS used for fuel in the

manufacture of Xylene and Polyester Staple fibre in the petitioner''s factory. The classification list was approved and the petitioner availed of the

exemption granted by the said Notification.

4. On 13th January, 1990 the petitioner received a show cause notice for modification of the approved classification list and for realisation of a

total amount of Rs. 17,87,789.31. The petitioner showed cause and contended inter alia, that the said three units comprised one factory within the

meaning of Section 2(e) of the Central Excises and Salt Act, 1944. The Assistant Collector of Central Excise rejected the contention of the

petitioner by an order dated 25th October, 1990 and upheld the demand in the show cause notice. The petitioner preferred an appeal from the

said order before the Collector of Central Excise (Appeals), Calcutta and filed an application u/s 35F of the Central Excises and Salt Act, 1944

for waiver of pre-deposit of the amount claimed and for stay of realisation of the same. The petitioner''s application was dismissed by the Collector

by an order dated 30-4-1991. The petitioner has been required to deposit the entire amount within a fortnight of the receipt of the order. The

appeal was fixed for hearing on 6th June, 1991. This order has been impugned in these proceedings. The impugned order was received by the

petitioner on 7th May, 1991 at Assam.

5. In this writ petition the petitioner has contended inter alia, that the Collector had disposed of the petitioner''s application upon a misconstruction

of the word ""factory"" used in the said notification. The impugned order provides as follows :

...Notification No. 28/89 provides full duty exemption for goods (other than blended or compounded lubricating oils and greases) falling under

Chapter 27 of the Central Excise Tariff subject to the condition that the same is utilised in the factory of production for manufacture of any

excisable goods, or as fuel for such manufacture or both, or allowed to escape in the atmosphere by flare system or otherwise. The Appellants

manufactured LSHS falling under Chapter 27 in their refinery. Admittedly the LSHS was used in their Xylene factory and PSF factory situated in

separate premises at a distance of l/4th Km to 3/4th Km. Their claim that all the three units should be treated as a single factory for the purpose of

this Notification does not appear reasonable. Prima facie therefore I do not feel that there is a case in favour of the appellant. I, therefore, reject

the appellants'' request for dispensing with the pre-deposit....

6. It does not appear that the Collector had at all addressed himself to the definition of the word ""Factory"" in the Central Excises and Salt Act,

1944. The Collector appears to have assumed what was required to be decided viz., whether the Xylene Plant and PSF Plant were separate

factories. It appears from the written records of submissions that the petitioner had in fact, relied upon two decisions on the meaning of the word

Factory"" in the Central Excises & Salt Act, 1944 namely, 1991 (52) ELT 116 and 1990 (31) ECR 309 Neither of these two cases have even

been considered by the Collector although in my view the said decisions would be relevant for the purpose of determining whether the petitioner

had a prima facie case or not.

7. Apart from the said two decisions, a Division Bench of the Delhi High Court in the case of The Delhi Cloth and General Mills Co. Ltd. and

Another Vs. The Joint Secretary, Govt. of India and Another, had to consider a situation similar to the petitioners. In that case the assessee

manufactured Calcium Carbide in one plant. The assessee started using Calcium Carbide for the manufacture of Acetylene Gas in the assessee''s

Acetylene Gas Plant. One of the questions which the Delhi High Court was called upon to consider was whether the removal of the Calcium

Carbide from the Calcium Carbide Plant to the assessee''s Acetylene Gas Plant was a removal from the factory justifying levy of excise duty. In

this context the Delhi High Court at page 126 held as follows :

(3) The third question is as to whether assessable value of the product can be determined u/s 4. The crucial requisite of Section 4 is that the value

has to be determined at the time of the removal of the article chargeable with duty from the factory. The petitioner has alleged that the article

manufactured by it is not removed from its factory, but is straightway used to general acetylene gas by the transfer of the article from the plant to

another in the same factory. There is no denial by the respondents of this assertion. All that is said is that removal from one plant to another is

removal within the meaning of Section 4. But both the plants are situated in the same factory. The Calcium Carbide plant takes the first step, while

the acetylene gas plant takes the second step and the two combined produce the acetylene gas. Since there is no traverse by the respondents of

the pleading of the petitioner that this movement taking place within the factory, the point of time at which the value of the product is to be

determined u/s 4 is not reached. Consequently the question of levy and collection of the duty does not arise.

(4) The expression ""factory"" is defined in Section 2(e) to mean any premises including the precincts thereof wherein or in any part of which

excisable goods are manufactured. The definition covers the present case because the calcium carbide is manufactured in one part of the factory

while the acetylene gas is manufactured in another part thereof. The definition of ""factory"" makes it clear that the meaning of factory is not restricted

to only the part in which the excisable goods are manufactured. On the other hand, it includes the whole of the premises in a part of which such

goods are manufactured. At any rate the case of the petitioner is that whole of the premises which comprises both the plants making calcium

carbide and acetylene gas are its factory. It is not contended by the respondents that the calcium carbide plant constitute a separate factory and the

acetylene gas plant constitutes another factory. It cannot be said therefore, that the so-called calcium carbide made by the petitioner is removed

from the factory in which it is made. A perusal of Rules 9 and 49 makes it clear that the question of collection of any excise duty cannot arise

unless and until the goods are removed from the factory.

It is desirable that the Collector should redetermine the issue having regard to the principles of law enunciated inter alia, in the decisions noted

above and to pass a speaking order dealing with the ratios in such decision. I do not think that the interest of the revenue would be served if the

matter was delayed by keeping the writ petition pending nor could the respondents improve upon the impugned order by any affidavit which may

be filed by them in these proceedings. In that view of the matter I dispose of the writ application by setting aside the impugned order and by

directing the Collector of Central Excise (Appeals), Calcutta to re-hear the matter after giving the petitioner an opportunity of being heard and to

dispose of the application for waiver of pre-deposit and stay of the order appealed against in the light of the observations in this judgment. The

Collector will pass a speaking order and give his reasons while dealing with any authority cited. The Collector will also consider any question of

financial hardship that may"be raised. The Collector should dispose of such application expeditiously, preferrably within a period of eight weeks

from date. Until the Collector hears and disposes of the said application of the petitioner for waiver of pre-deposit of the entire amount, the

respondents will not realise this demand raised on the basis of the order of the Assistant Collector dated 25th October, 1990 subject to the

petitioner"s undertaking to this Court not to deal with or dispose of its assets without the leave of this Court and except in the usual course of

business.

8. This writ application is disposed of accordingly. As no affidavit-in-opposition has been used, it is recorded that the allegations contained in the

petition are not admitted.

9. There will be no order as to costs.

10. Let a Xerox copy of this order duly countersigned by the Deputy Registrar (Court) be given to the 1d. Counsel appearing for the parties as

prayed for on usual terms.