Shiva Glass Works Co. Ltd vs Assitant Collector Of Central Excise ... on 11 January, 1991

Equivalent citations: 1991 AIR 456, 1991 SCR (1) 43, AIR 1991 SUPREME COURT 456, 1991 (2) SCC 329, 1991 AIR SCW 260, (1991) 52 ELT 637, (1991) 1 JT 73 (SC), (1991) 1 SCR 43 (SC), 1991 (1) UJ (SC) 464, 1991 (1) JT 73, 1991 (51) ELT 637, 1991 (1) SCR 43, 1991 UJ(SC) 1 464, (1991) 32 ECC 85, (1991) 32 ECR 513

Author: N.D. Ojha

Bench: N.D. Ojha, K.N. Saikia

PETITIONER:
SHIVA GLASS WORKS CO. LTD.

Vs.

RESPONDENT:
ASSITANT COLLECTOR OF CENTRAL EXCISE AND OTHERS.

DATE OF JUDGMENT11/01/1991

BENCH:
OJHA, N.D. (J)
BENCH:
OJHA, N.D. (J)
SAIKIA, K.N. (J)

CITATION:
1991 AIR 456 1991 SCR (1) 43
1991 SCC (2) 329 JT 1991 (1) 73
1991 SCALE (1)12

ACT:
Central Excises and Salt Act, 1944 /Central Excise Rules, 1944: Section 3/Rules 10 and 10A--Assessee--Price list of goods furnished--Accepted provisionally--Excise duty paid--Goods cleared--Discrepancy--Detected later--Recovery of excise duty--Whether permissible.

HEADNOTE:
The appellant company a licensee under the central Excises and Salt Act, 1944 and during the relevant period namely 1st September, 1961 to 26th September, 1963 carried

on the business of manufacturing different types of glass wares which were excisable goods under the Act.

The appellant used to present A.R.I. forms accompanied with price lists of the goods and after paying excise duties calculated on the basis of the price lists used to remove the goods. The office of the appellant was searched by the Excise Authorities on 26th September, 1963 and several documents, books and papers were seized, and as a consequence thereof it transpired that the appellants were maintaining two sets of bills. The bills of one set were those on the basis of which the appellant used to pay excise duty before clearance of the goods and those of the other were such which were never issued to the dealers. In these two sets of bills, the rate of discount was differently shown.

A notice dated 26th March, 1968 was served on the appellant by the Assistant Collector stating that it appeared that during the relevant period the appellant had not paid excise duty on the goods at the prices at which they were sold, but duty was paid at lower rates and requiring it to show cause as to why duty on the prices at which the good were actually sold, as found on scrutiny of sale vouchers/sale documents should not be recovered under Rule 10A of the Central Excise Rules, 1944. In reply the appellant asserted that it was the provision of Rule 10 and not Rule 10A which was attracted to the facts and consequently the initiation of proceedings was barred by time. This plea did not find favour with the Excise Authorities, and the appellant was required to pay the additional duty of Rs. 1.41 lakhs.

The aforesaid order was challenged by the appellant before the

44

High Court under Article 226 of the Constitution and a Single Judge accepted the contention of the appellant the Rule 10 and not Rule 10A of the Rules was applicable and on this view quashed the order dated 26th August, 1968

The respondents preferred and appeal to the Division Bench which has reversed the order of the Single Judge, on the finding that it was a case falling Rule 10A and dismissed the writ petition.

In the appeal to this Court it was contended that the single Judge was right in taking the view that the case fell within the purview of Rule 10 of the Rules and that the Division Bench committed an error in reversing the Judgment, while the Revenue contested the appeal urging that on the facts found by the division Bench, and indeed on the case set up by the appellant itself no exception could be taken to the finding of the Division Bench that it was Rule 10A and not Rule 10 which was attracted to the facts of the case.

Dismissing the Appeal, this Court,

HELD: 1. The question as to whether Rule 10 or Rule 10A was applicable has to be determined in the background of the

procedure which was followed. The legal position is that Rule 10A does not apply where the case is covered by Rule 10 of the Rules. [48E]

N.B. Sanjana v. Elphinstone Mills, [1971] 3 S.C.R. 506 relied on.

2. Simply because Rule 9B of the Rules, was conceded not to have been taken recourse to by the respondents so that provisional assessment could be said to have come into existence in its statutory sense as contemplated by the said rule when duty was paid at the time of clearance of the goods, the conclusion was not inescapable, that a final assessment had came into being at that time. [49A-B]

3. In view of the procedure adopted by the appellant it was apparently a case where duty was calculated on the basis of price lists supplied by the appellant to facilitate the clearance of the goods and the correct amount of duty payable was yet to be determined after subsequent verification, and appellant was under an obligation to pay, on the basis of the bond executed by them, the difference of the amount of the duty paid at the time of clearance of the goods and the amount found payable after subsequent varification. [49B-C]

4. The Division Bench of the High Court has found that there was no assessment as is understood in the eye of law, but only a mechanical settlement or adjustment of duties on the basis of the sale prices filed by the appellant had been made and at best, it was a case of incomplete assessment which the Excise Authorities were entitle to complete under Rule 10A.[49D]

Assistant Collector of Central Excise, Calcutta Division v. National Tobacco Co. of India Ltd., [1973] 1 S.C.R. 822, referred to.

5. The instant case therefore falls within the purview of Rule 10A and not Rule 10 of the Rules. [50B]

JUDGMENT:

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 763 of 1977.

From the Judgment and Order dated 30.7.1976 of the Calcutta High Court in Appeal No. 167 of 1972.

Raja Ram Agrawal, K.B. Rana and Praveen Kumar for Khaitan & Co. for the Appellant.

A. Subba Rao, P. Parmeshwaran and A.D.N. Rao for the Respondents.

The Judgment of the Court was delivered by OJHA, J. This appeal by special leave has been preferred against the judgment dated 30th July, 1976 of the Calcutta High Court in Appeal from Original Order No. 167/1972. The facts in nutshell necessary for the decision of this appeal are that

the Appellant-Company, a licensee under the Central Excise and Salt Act, 1944 (hereinafter referred to as the Act) carried on during the relevant time, namely, 1st September, 1961 to 26th September, 1963, business of manufacturing different types of glasswared which were excisable goods under the Act. The appellant used to present A.R.I. forms accompanied with price list of the goods and after paying excise duties calculated on the basis of the price lists used to remove the goods. The appellant's office was searched by the Excise Authorities on 26 September, 1963 and several documents, books and papers were seized. As a consequence of this search and seizure it transpired that the appellant was maintaining two sets of bills. The bills of one set were those on the basis of which the appellant used to pay excise duty before clearance of the goods and those of the other were such which were never issued to the dealers. In these two sets of bills inter alia the rate of discount was differently shown. A notice dated 26th March, 1968 was served on the appellant by the Assistant collector of Central Excise, Calcutta-II Division, Calcutta stating that it appeared that the appellant had, during the relevant period, not paid excise duty on the goods at the prices at which they were sold but duty was paid at lower rates declared by it. The appellant was required to show cause as to why duty amounting to Rs. 1,43,633.84 p. on the prices at which the goods were actually sold, as found on scrutiny of sale vouchers/sale documents should not be recovered under rule 10A of the Central Excise Rule, 1944 (hereinafter referred to as the Rules.) The appellant, in reply to the show cause notice, inter alia asserted that it was the provisions of Rule 10 and not Rule 10A of the Rules which were attracted to the facts of the instant case and that consequently the initiation of proceedings against the appellant was barred by time. This plea did not find favour with the Excise Authorities and the appellant was required, by order dated 26th August, 1968, to pay to the Central Government, an additional duty of Rs. 1,41,829.11 p. This order was challenged by the appellant before the High Court under Article 226 of the Constitution of India. A learned Single Judge of the High Court accepted the contention of the Rule 10 and not Rule 10A of the Rules was applicable and on this view the order dated 26th August, 1968 was quashed. Aggrieved by that order, the respondents preferred an appeal before a Division Bench of the High Court. The judgment of the learned Single Judge was reversed and on the finding that it was a case falling under Rule 10A, the writ petition was dismissed by the judgment under appeal.

The only point which has been urged by learned counsel for the appellant in support of this appeal is that the learned Single Judge was right in taking the view that the case fell within the purview of Rule 10 of the Rules and the Division Bench committed an error in reversing his judgment. For the respondents on the other hand, it has been urged that on the fact found by the division Bench and indeed on the case set up by the appellant itself no exception could be taken to the finding of the Division Bench that it was Rule 10A of the Rules and not Rule 10 which was attracted to the facts of the instant case. In order to appreciate the respective submissions made by learned counsel for the parties it would be useful to extract Rules 10 and 10A. They read as hereunder:

> "10. Recovery of duties or charges short-levied or errones-
>
> ously refunded--When duties or charges have been short-levied through inadvertence, error, collusion or misconstruction on the part of an officer, or through mis-statement 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 owning to

such cause, erroneously refunded, the person chargeable with the duty or charge so short-levies, or to whom such refund has been erroneously made, shall pay the deficiency or the amount paid to him in excess as the case may be, on written demand by the proper officer being made within three months from the date on which the duty or charge was paid or adjusted in the owners' account, current, if any, or from the date of making the refund."

"10A. Residuary powers for recovery of sums due to Government--Where these Rules do not make any specific provision for the collection any duty, or of any deficiency in duty has for any reason been short-levied, or of any other sum of any kind payable to the Central Government under the Act or these Rules, such duty, deficiency in duty or sum shall on a written demand made by the proper officer, be paid to such person and at such time and place as the proper officer may specify. In elaboration of his submission that it was a case covered by Rule 10 of the Rules learned counsel for the appellant pointed out that since the case of the respondents was that on the basis of the documents seized during the search of the appellant's office on 26th September, 1963 it was found that the duty paid by the appellant on the basis of price lists furnished by the appellant at the time of clearance of the goods was deficient, it was a case where duty had been short-levied "through mis-statement as to the quantity, description or value of such goods on the part of the owner" as contemplated by Rule 10. We find it difficult to agree with the submission. The procedure adopted by the appellant/was indicated by the appellant under its letter dated 23rd March, 1961, a portion whereof as extracted by the learned Single Judge reads as hereunder:

"We enclose herewith our three price lists for 1) Bottles and phials 2) Glass-Wares and 3) Fancy Wares for the purposes of provisional assessment. These price are inclusive of Central Excise duty. As regards Trade discounts to be deducted from the said prices as per Section 4 of the Act we declare that 1) 25% should be deducted from the price list for bottles and phials. 2) 35% from the price list for glass-wares and 3) 20% from the price list for fancy wares over and above necessary deduction for Central Excise duty included in the prices."

The learned Single Judge has also pointed out that the appellant used to clear the goods by executing bond and that in the specimen copy of the bond produced in court it was stated that whereas final assessment of excise duty of glass and glasswares made by the appellant from time to time could not be made for want of full particulars as regards value, description, quality or proof thereof or for non- completion of chemical or other tests and whereas the appellant had requested the Excise Authorities as per Rule 9B of the Rules to make provisional assessment of excise duty of the goods pending final assessment, the appellent was giving a guarantee to the extent of the sum mentioned in the bond for payment of the duties. The learned Single Judge has also pointed out that it appeared to be the common case of the parties that in order to facilitate the assessment of the goods by Excise Authorities, the appellant used to file the price list in advance and after acceptance provisionally of the price list, the goods used to be cleared and if subsequently and discrepancy was detected or found, the same used to be paid by the appellant.

The question as to whether Rule 10 or Rule 10A of the Rules was applicable has to be determined in the background of the appellant as indicated above. The legal position that Rule 10A does not apply where the case is covered by Rule 10 of the Rules is well-settle in view of the decision of this Court in N.B. Sanjana v. Elphinstone Mills, [1971] 3 S.C.R. 506, on which reliance has been placed by learned counsel for the appellant. Consequently, Rule 10A could be attracted only if the case does not fall within the purview of Rule 10. It was conceded before the learned Single Judge on behalf of the respondents that the respondents were not proceeding under the provision of Rule 9B. On this basis and on his own finding also that Rule 9B was not attracted, the learned Single Judge held that it was not a case of provisional assessment but a case of regular assessment in pursuance whereof duty was paid by the appelant and that since the case of the respondents was that the appellant had manufactured documents as was revealed as a consequence of the search and seizure referred to above it was a case of short-levy due to mis-statement by the appellant. Consequently, the case clearly fell within the purview of Rule 10 of the Rules. The Division Bench of the High Court in appeal did not, and in our opinion rightly, subscribe to the aforesaid finding. Simply because Rule 9B of the Rules was conceded not to have been taken recourse to by the respondents so that a provisional assessment could be said to have come into existence in its statutory sense as contemplated by the said rule when duty was paid at the time of clearance of the goods, the conclusion was not inescapable, that a final assessment had come into being at that time. In our opinion, in view of the procedure adopted by the appellant referred to above it was apparently a case where duty was calculated on the basis of price lists supplied by the appellant to facilitate the clearance of the goods and the correct amount of duty payable was yet to be determined after subsequent varification and appellant was under an obligation to pay, on the basis of the bond executed by them, the difference of the amount of the duty paid at the time of clearance of the goods and the amount found payable after subsequent verification. In the judgment appealed against the Division Bench of the High Court has found that there was no assessment as is understood in the eye of law but only a mechanical settlement or adjustment of duties on the basis of the sale prices filed by the appellant had been made and at best, it was a case of an incomplete assessment which the Excise Authorities were entitled to complete under Rule 10A. In taking this view the Division Bench of the High Court has relied on a decision of this Court in Assistant Collector of Central Excise, Calcutta Division v. national Tobacco Co. of India Ltd., [1973] 1 S.C.R.. 822. In that case also the Company used to furnish quarterly price lists which used to be accepted for purpose of enabling the Company to clear its goods and according to the Excise Authorities these used to be verified afterwards by obtaining evidence of actual sale in the market before issuing final certificates that the duty had been fully paid up. The prices of the goods to be cleared were furnished by the Company on forms known as A.R.I. forms in that case also. It was held that only a mechanical adjustment for settlement of accounts by making debit entries was gone through and that it could not be said that any such adjustment was assessment which was a quasi-judicial process and involved due application of mind to the fact as well the requirements of law. With regards to the debit entries it was held that the making of such entries was only a mode of collection of tax and even if payment or actual collection of tax could be spoken of as a de facto "levy" it was only provisional and not final. It could only be clothed or invested with the validity after carrying out the obligation to make an assessment to justify it. It was also held that it was the process of adjustment that really determined whether levy was short or complete. It was not a factual or presumed levy which could in a disputed case prove an "assessment." This had to be done by proof of the actual steps taken which constitute

assessment.

We are of the opinion that in view of the procedure adopted by the appellant in the instant case referred to above and the law laid down by this Court in the case of national Tobacco Co. of India Ltd. (supra) it is not possible to take any exception to the finding of the Division Bench in the judgment appealed against that it was a case which fell within the purview of Rule 10A and not Rule 10 of the Rules. In the result, we find no merit in this appeal. It is accordingly dismissed with costs.

N.V.K. Appeal dismissed.