Metal Forgings & Anr vs Union Of India & Ors on 22 November, 2002

Equivalent citations: AIR 2003 SUPREME COURT 291, 2002 AIR SCW 4764, (2002) 8 SCALE 531.2, 2003 (2) SCC 36, (2002) 9 JT 582 (SC), 2002 (7) SLT 59, 2003 (1) SRJ 96, 2002 (9) JT 582, 2002 (4) LRI 792, (2003) 108 ECR 490, (2002) 146 ELT 241, (2002) 8 SUPREME 316

Bench: N Santosh Hegde, B P Singh

CASE NO.:
Appeal (civil) 2029-31 of 1995

PETITIONER:
Metal Forgings & Anr.

RESPONDENT:
Union of India & Ors.

DATE OF JUDGMENT: 22/11/2002

BENCH:
N Santosh Hegde & B P Singh.

JUDGMENT:

J U D G M E N T SANTOSH HEGDE, J.

The appellants herein are the manufacturers of forged steel products which was assessable to central excise duty under Tariff Item 26AA(ia). On the introduction of Tariff Item 68 in the first Schedule to the Central Excises & Salt Act, 1944 (the Act) w.e.f. 1.3.1985, a question arose whether the said product manufactured by the appellants by forging became liable for further duty under Tariff Item 68 because after the forging, the appellants are said to have subjected this product to certain other manufacturing processes like polishing and trimming to make the product suitable for its ultimate use. This dispute between the appellant and the Revenue had a chequered career going through the process of appeals, revision, writ petition before the Delhi High Court, then a remand, another round of appeal before the authorities and then ultimately another appeal to the Central Excise & Gold (Control) Appellate Tribunal ('the tribunal') which was by then constituted, and from there to this Court by way of this statutory appeal. Thus, this litigation which started by virtue of an order made by the Assistant Collector on 21.1.1976 is now before us in the year 2002.

Before the tribunal, two questions arose for consideration. They are: whether the products manufactured by the appellants are classifiable under Tariff Item 68 ? If so, the demand made by the revenue for collection of duty under that head was within the period of limitation. A Bench of the tribunal which heard the appeal, could not come to a unanimous decision on these questions. The

Judicial Member came to the conclusion that the Department was right in classifying the goods under Tariff Item 68 while the Technical Member was of the opinion that the matter should be remanded to the lower appellate authority for deciding the classification of the products after taking into account the entire material brought on record by the appellants before the appellate authority and not by merely relying on the judgment of Delhi High Court.

In regard to the question of limitation, the Judicial Member held that even though the order of the Assistant Collector dated 22.1.1976 was not provisional but final, even then certain letters and orders issued or made during the course of the proceedings could be treated as required show cause notice, hence, the Department could determine the amount of duty payable by the party at least from 25.1.1985 till the end of 1985 hence partly allowed the claim of the revenue, while the Technical Member came to the conclusion that the clearances made by the appellants for the relevant period should be treated as provisional clearance which does not require issuance of show cause notice and also because of the interim order made by the High Court of Delhi on 19.2.1981, the Department was restrained from issuing the required show cause notice, therefore, the bar of limitation cannot be put against the revenue. On that basis the contention of the appellants of lack of show cause notice and bar of limitation came to be rejected. Thus, upholding the demand made by the revenue in its entirety.

The matter was then referred to a third member of the tribunal who interestingly agreed with the Judicial Member on the question of classification and came to the conclusion that the goods manufactured by the appellants are classifiable under Item 68, while on the question of limitation, he agreed with the Technical Member that the clearance of the goods by the appellant was made on a provisional basis, therefore, the question of limitation does not arise.

Consequently, the case of the appellants both in regard to classification as also limitation failed before the tribunal because of the majority view.

Hence, the appellants are in these appeals before us.

Mr. S Ganesh, learned senior counsel for the appellants, contended that the activities like removal of superfluous extra skin of forging or polishing and trimming the forged products cannot be construed as the processes involved in the manufacture of any new product. He placed strong reliance on the judgment of this Court in Tata Iron & Steel Co. Ltd. v. Union of India & Ors. [1988 (35) ELT 605] which according to the learned counsel, concludes this question of classification in favour of the appellants both on facts and in law. He further contended that since the burden of proof that the forgings manufactured by the appellants do fall under Item 68 being heavily on the revenue and the revenue having not placed any material in support of its case, the conclusion arrived at by the majority members of the tribunal that the products manufactured by the appellants fall under Tariff Item 68 cannot be sustained.

In regard to the question of limitation, learned counsel urged that it is an admitted fact that no show cause notice as required in law was ever issued by the appellants, therefore, in the absence of any show-cause notice, there could not be any demand at all under Section 11A of the Act. He submitted

that the Judicial Member was correct in coming to the conclusion that the order of the Assistant Collector dated 22.1.1976 being a final order, a show cause notice ought to have been issued as required in law within the period of limitation which not having been done, there cannot be a demand. He also contended that the majority members were wrong in coming to the conclusion that the order of the Assistant Collector dated 22.1.1976 was a provisional order or that certain letters and orders issued during the course of the proceedings at different stages could be construed as show cause notices. Learned counsel further submitted that there was no interim order issued by the High Court or any other authority whereby the revenue was ever prevented from issuing a show cause notice, therefore, the finding of the majority members of the tribunal that by virtue of Explanation to Section 11-A, the period of limitation gets extended, is also erroneous. He argued that the reliance placed on the decision of this Court in Samrat International (P) Ltd. v. Collector of Central Excise [1992 (58) ELT 561] was erroneous inasmuch as the said case was decided on the facts of that case which facts are not available in the present appeals to come to the conclusion that there was any provisional assessment. He pointed out that the case of Samrat International (supra) has since been explained by another judgment of this Court in the case of Coastal Gases & Chemicals Pvt. Ltd. v. Asstt. C.C.E., Visakhapatnam [1997 (92) ELT 460] which has held that the decision in Samrat International (supra) was based on the peculiar facts of that case.

Mr. N K Bajpai, learned counsel appearing for the revenue, supported the finding of the majority members of the tribunal both on the question of classification as also on the question of limitation. He submitted that the question of classification being basically a question of fact and the tribunal being a final authority on facts and there being no unreasonableness in such finding of the tribunal, the said finding does not call for any interference in these appeals. In regard to the question of limitation also, he supported the findings of the majority members contending that the order of the Assistant Collector dated 26.1.1976 is only a provisional order. There was no question of limitation being involved until final classification was made. He also contended that there being an interim order of the High Court dated 19.2.1981, the authorities could not have issued any show cause notice during the pendency of the said interim order. He also submitted that the show cause notice being only a notice informing the assessee of his liability to pay the duty, the said information having been made known to the assessee by way of various letters and orders, it should be held that there was substantial compliance of the requirement of the said notice. Learned counsel also argued that in view of the fact that the question of classification was still not finally adjudicated, it was not possible for the Department to issue a show cause notice because of the pendency of the proceedings, therefore, if the requirement of issuance of notice is to be strictly construed in the manner pleaded by the appellants then in many a case where classification dispute is pending, it would become impossible for the revenue to issue a proper notice. Therefore, the requirement of issuance of a notice should be liberally construed.

From the above arguments, the very same two questions that arose for consideration before the tribunal also arise for our consideration. They are (a) Do products manufactured by the appellants fall under Tariff Item 68 ? (b) Whether the demand of the revenue is barred by limitation ?

Though elaborate arguments have been addressed by both the parties in regard to the question of classification, we intend taking up the second question as to the limitation first for our consideration

since a decision on this question would render our examination of the first question redundant.

It is an admitted fact that a show cause notice as required in law has not been issued by the revenue. The first contention of the revenue in this regard is that since the necessary information required to be given in the show cause notice was made available to the appellants in the form of various letters and orders, issuance of such demand notice in a specified manner is not required in law. We do think that we cannot accede to this argument of the learned counsel for the revenue. Herein we may also notice that the learned Technical Member of the tribunal has rightly come to the conclusion that the various documents and orders which were sought to be treated as show cause notices by the appellate authority are inadequate to be treated as show cause notices contemplated under Rule 10 of the Rules or Section 11A of the Act. Even the Judicial Member in his order has taken almost a similar view by holding that letters either in the form of suggestion or advice or deemed notice issued prior to the finalisation of the classification cannot be taken note of as show cause notices for the recovery of demand, and we are in agreement with the said findings of the two Members of the tribunal. This is because of the fact that issuance of a show cause notice in a particular format is a mandatory requirement of law. The law requires the said notice to be issued under a specific provision of law and not as a correspondence or part of an order. The said notice must also indicate the amount demanded and call upon the assessee to show cause if he has any objection for such demand. The said notice also will have to be served on the assessee within the said period which is either 6 months or 5 years as the facts demand. Therefore, it will be futile to contend that each and every communication or order could be construed as a show cause notice. For this reason the above argument of the revenue must fail.

The next question for our consideration is whether the order made by the Assistant Collector on 22.1.1976 could be treated as a provisional classification so as to keep the period of limitation frozen. The Judicial Member in this regard came to a definite conclusion that the said order is a final order against which appeals and revisions were taken recourse to. According to the learned Member merely because there is a continuing dispute in regard to the correctness of the said order of the Assistant Collector by way of appeals and revisions, the same does not make the order of the Assistant Collector anything short of a final order, therefore, he rejected the contention of the revenue on this count. While the Technical Member and the third Member following the judgment of this Court in the case of Samrat International (supra) came to the conclusion that the order of the Assistant Collector could be treated as a provisional order because there was correspondence regarding the excisability and the classification list filed by the appellants. From the above we notice that the majority of the members of the tribunal based their finding that the clearances made by the appellants during the relevant period was provisional in nature mainly because of the finding of this Court in the case of Samrat International (supra). A perusal of this judgment shows that the said judgment was delivered on the peculiar facts of that case and it does lay down a principle in law which enables the revenue to treat every classification made by it or the goods removed by virtue of said classification to be treated as the provisional merely because some appeal or other proceeding is pending, questioning the classification involved therein. As a matter of fact, this Court in the case of Coastal Gases & Chemicals Pvt. Ltd. v. Asstt. C.C.E., Visakhapatnam (supra) while considering the judgment in Samrat International case (supra) held thus :

> "On the facts of that case, however, this Court had held that the payment of duty which was made by the appellants in that case was provisional and the procedure under Rule 9B had been followed. We have not been shown any material on record to indicate whether the appellants in the present case had cleared carbon dioxide manufactured by them by following the procedure laid down in Rule 9B or that the payment of excise duty which the appellants had made during the relevant period was provisional."

From the above, it is clear that to establish that the clearances were made on a provisional basis, there should be first of all an order under Rule 9B of the Rules, and then material to show that the goods were cleared on the basis of said provisional basis, and payment of duty was also made on the basis of said provisional classification. These facts in the instant case are missing, therefore, in our opinion there is no material in the instant case to establish the fact that either there was a provisional classification or there was an order made under Rule 9B empowering the clearance on the basis of such provisional classification. In the absence of the same, we cannot accept the argument of the revenue that in fact the order of the Assistant Collected dated 21.1.1976 is a provisional order based on which clearance was made by the appellants or that they paid duty on that basis. On the contrary, as held by the Judicial Member the said order of classification was a final order, therefore, the Revenue cannot contend the limitation prescribed under Section 11A does not apply.

The next ground urged on behalf of the revenue in regard to the question of limitation is based on an interim order made by the High Court dated 19.12.1981. It is to be noted that the writ petition in which the said interim order was made, was filed against the order made by the Govt. of India dated 2.8.1980 in a revision petition filed before it. In the said writ petition, the High Court ordered :

> " In the meantime, stay the operation of the impugned order of the Central Government dated 2.8.1980."

Based on this interim order, learned counsel for the revenue contended that the revenue could not have issued a show cause notice during the currency of the said interim order, therefore, by virtue of the Explanation to Section 11A, the period of limitation gets frozen during the said stay order. We cannot accept this argument either. It is a settled position in law that unless and until there is a specific injunction/stay granted by a competent court which restrains an authority from issuing the required notice, merely because some interim order is made, the authorities empowered to issue such notice cannot refrain from issuing the required notice within the period of limitation nor can they plead the existence of such interim order as a defence against the plea of limitation. This Court in Gokak Patel Volkart Ltd. v. Collector of Central Excise, Belgaum [1987 (28) ELT 53] has held where by an interim order the High Court merely stays the collection of excise duty which, the benefit of Explanation to section 11A excludes the period of stay order is not available to the revenue. The said judgment also holds that the issuance of notice under Section 11A is a condition precedent to issue a demand notice. In that case, the interim order issued was in the following terms :

> "Pending disposal of the aforesaid writ petition, it is ordered by this Court that collection of custom duty as a fabric be and the same is hereby stayed. ".

The said stay order was made on 4.6.1976 and the writ petition was dismissed on 16.2.1981. During the currency of the said stay order, the revenue did not issue a show cause notice but the same was issued only on 20.5.1982. On the basis of the above stay order, the revenue in that case claimed the benefit of Explanation to Section 11A. Rejecting the said plea, this Court held :

> "In the instant case the order of stay passed by the Karnataka High Court had only stayed the collection of customs duty, which is a stage following levy under the scheme of the Act. Obviously, there was no interim direction of the High Court in the matter of issuance of notice for the purpose of levy of duty. "

The Court in the said case further oberved :

> "No notice seems to have been issued in this case in regard to the period in question. Instead thereof an outright demand had been served. The provisions of Section 11A(1) and (2) make it clear that the statutory scheme is that in the situations covered by the sub-section (1), a notice of show cause has to be issued and sub-section (2) requires that the cause shown by way of representation has to be considered by the prescribed authority and then only the amount has to be determined. The Scheme is in consonance with the rules of natural justice. An opportunity to be heard is intended to be afforded to the person who is likely to be prejudiced when the order is made before making the order thereof. Notice is thus a condition precedent to a demand under sub-section (2). In the instant case, compliance with this statutory requirement has not been made, and, therefore, the demand is in contravention of the statutory provision. Certain other authorities have been cited at the hearing by counsel for both sides. Reference to them, we consider, is not necessary."

In our opinion the above judgment in Gokak Patel Volkart's case (supra) clearly goes against the argument of the revenue with reference to the interim order made by the Delhi High Court in this case. As notice above, what was stayed by the High Court was the operation of the order of the Union of India made in a revision filed by the appellants. That order did not restrain the authorities from issuing a show cause notice as required by law. Therefore, it is not open to the revenue to contend that the period covered by the interim order of the High Court is available to the revenue to avoid limitation. The above view of ours is also supported by another judgment of this Court in J.K. Cotton Mills' case [supra] wherein also this Court has held that the provision for extension of time limit for issuance of notice by excluding the period of stay granted by an order of court is to be construed strictly. In the said view of the matter the above contention of the revenue should also fail.

For the reasons stated above, we are of the opinion that in the absence of a show cause notice it is not open to the revenue to make a demand on the appellants even assuming that the contention of the revenue in regard to classification as held by the tribunal is correct.

In view of our finding on this question of limitation which precludes the revenue from making a demand on the appellants because of the bar of limitation, we think it unnecessary to go to the first question as to the correctness of the classification made by the tribunal in the impugned order.

For the reasons stated above, these appeals succeed and the same are allowed. The impugned orders are set aside.