

M/S. Pahwa Chemicals Pvt. Ltd vs The Commissioner Of Central Excise, New ... on 24 February, 2005

Equivalent citations: AIR 2005 SUPREME COURT 1532, 2005 AIR SCW 1277, 2005 (2) SCC 720, 2005 (2) SCALE 358, (2005) 29 ALLINDCAS 216 (SC), 205 (3) SLT 374, (2005) 2 SCJ 629, (2005) 2 SUPREME 307, (2005) 2 SCALE 358, (2005) 181 ELT 339, (2005) 121 ECR 268, (2005) 274 ITR 87

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Bench: S. N. Variava, Ar. Lakshmanan, S. H. Kapadia

CASE NO.:

Appeal (civil) 2350 of 2002

PETITIONER:

M/s. Pahwa Chemicals Pvt. Ltd.

RESPONDENT:

The Commissioner of Central Excise, New Delhi

DATE OF JUDGMENT: 24/02/2005

BENCH:

S. N. Variava, Dr. AR. Lakshmanan & S. H. Kapadia

JUDGMENT:

J U D G M E N T WITH CIVIL APPEAL NO. 406 OF 2004 S. N. VARIAVA, J.

Civil Appeal No. 2350 is filed against the Judgment dated 19th July, 2001 passed by the Customs, Excise & Gold (Control) Appellate Tribunal (for short 'CEGAT') and Civil Appeal No. 406 of 2004 is filed against the Judgment dated 25th June, 2003 passed by CEGAT. Both these Appeals can be disposed off by this common Judgment as the parties are the same and the question involved is the same. Briefly stated the facts are as follows:

The Appellants are engaged in manufacture of Textile Printing Adhesives falling under Chapter Heading No. 3402 of the Central Excise Tariff Act, 1985. The Appellants were claiming benefit of Notification No. 1 of 1993 as amended and Notification No. 16 of 1997. Show-cause-notices were issued to them alleging that they were not entitled to the benefit of the Notifications as they were using the logo of "ATR" belonging to one M/s. ATR St. Moritz A.G., Switzerland. Duty and penalty was demanded from them for having suppressed the facts and non-payment of duty. The Appellants replied to the notices. However, the Deputy Commissioner confirmed the demand of Rs.26,74,875.75 and imposed a penalty of Rs. 26,00,000/-. The

Appellants filed an Appeal before the Commissioner of Central Excise (Appeals). They inter alia contended that, as suppression has been alleged, the Superintendent who had issued the show-cause-notices was not competent to issue the show-cause-notices and the Deputy Commissioner was not competent to adjudicate. The Commissioner (Appeals) upheld the contention that the show-cause-notices were wrongly issued and had been wrongly adjudicated by the Deputy Commissioner in excess of powers vested in him by the Central Board of Central Excise (for short 'Board'). The Commissioner (Appeals) remitted the matter back with the following directions:-

"I. If the matter does not really merit invocation of suppression of facts, willful misstatement, etc., the superfluous words may be got deleted from the subject Show Cause Notices by issuing suitable corrigenda and the matter may be re-adjudicated by the competent adjudicating authority. The SSI Notification Nos. may also be duly amended and substituted by Notifications in force during the periods of demand.

II. If the charge of misstatement suppression of facts etc. is to be retained, fresh Show Cause Notices may be issued in supersession of the impugned Show Cause Notices in line with the instructions contained in the two circulars referred to above.

III. While re-adjudicating the matter, the appellants' contention that vide their letter dated 1.4.99, they had sent a specimen of the label to be used by them and that this specimen shows that their own brand name was more prominently displayed than the foreign brand name and that the price should be treated as cum-duty price should be examined in the light of the various CEGAT decisions available on this subject."

Aggrieved by the directions given, the Appellants filed an Appeal. CEGAT by its Order dated 19th July, 2001 held that the Commissioner (Appeals) should not have remitted the matter back with the above directions and directed the Commissioner (Appeals) to decide the matter on merits. CEGAT also held on merits that the Appellants were not entitled to the benefits of the above mentioned Notifications as they used the brand name of another Company on their products. Aggrieved by this Order the Appellants have filed Civil Appeal No. 2350 of 2002.

No stay was granted in this Appeal, therefore, the Commissioner (Appeals) adjudicated and confirmed the demand by an Order dated 17th July, 2002. The Appellants then filed an Appeal before CEGAT wherein the only contention taken was that the Superintendent had no jurisdiction to issue show-cause-notices and the Deputy Commissioner had no jurisdiction to adjudicate. CEGAT has dismissed the Appeal by the Order dated 25th June, 2003. The Appellants have filed Civil Appeal No. 406 of 2004 against this Order.

It must be mentioned that the only point agitated is that the Superintendent had no jurisdiction to issue the show-cause-notices and that the Deputy Commissioner had no jurisdiction to adjudicate. This is because in an earlier round it has already been held by CEGAT, by its order dated 17th October, 2000 that the Appellants are not entitled to the benefit of the Notifications. Against that

Order Civil Appeal No.4050 of 2001 is pending before this Court. In order to consider this point it is necessary to see the relevant provisions.

Section 11A, as it stood, prior to 14th May, 1992 reads as follows:

"SECTION 11A. Recovery of duties not levied or not paid or short-levied or short-paid or erroneously refunded. (1) When any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded, a Central Excise Officer may, within six months from the relevant date, serve notice on the person chargeable with the duty which has not been levied or paid or which has been short-levied or short-paid or to whom the refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice:

Provided that where any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded by reason of fraud, collusion or any willful mis-statement or suppression of facts or contravention of any of the provisions of this Act or of the rules made thereunder with intent to evade payment of duty, by such person or his agent, the provisions of this sub-section shall have effect, as if, for the words "Central Excise Officer", the words "Collector of Central Excise" and for the words "six months" the words "five years" were substituted.

Explanation. Where the service of the notice is stayed by an order of a court, the period of such stay shall be excluded in computing the aforesaid period of six months or five years, as the case may be.

(2) The Assistant Collector of Central Excise or, as the case may be, the Collector of Central Excise shall, after considering the representation, if any, made by the person on whom notice is served under sub-section (1), determine the amount of duty of excise due from such person (not being in excess of the amount specified in the notice) and thereupon such person shall pay the amount so determined.

(3) For the purposes of this section,--

(i) "refund", includes rebate of duty of excise on excisable goods exported out of India or on excisable materials used in the manufacture of goods which are exported out of India;

(ii) "relevant date" means, --

(a) in the case of excisable goods on which duty of excise has not been levied or paid or has been short-levied or short-

paid (A) where under the rules made under this Act a monthly return, showing particulars of the duty paid on the excisable goods removed during the month to which the said return relates, is to be

filed by a manufacturer or producer or a licensee of a warehouse, as the case may be, the date on which such return is so filed;

(B) where no monthly return as aforesaid is filed, the last date on which such return is to be filed under the said rules;

(C) in any other case, the date on which the duty is to be paid under this Act or the rules made thereunder;

(b) in a case where duty of excise is provisionally assessed under this Act or the rules made thereunder, the date of adjustment of duty after the final assessment thereof;

(c) in the case of excisable goods on which duty of excise has been erroneously refunded, the date of such refund.

Thus, under Section 11A, as it then stood, whenever it was alleged that there was fraud, collusion, willful misstatement or suppression of facts, the show-cause-notices could only be issued by the Collector. As the Act itself laid down a requirement, it has been held, in a number of authorities, that a show-cause notice issued and/or adjudication done by an officer below the rank of a Collector would be invalid as such an officer had no jurisdiction. With effect from 14th May, 1992 Section 11A was amended and the word "Collector" was deleted and the words "Central Excise Officer" were incorporated. Thus, the Legislature purposely and knowingly made a change whereby it was no longer required that where allegations of fraud, collusion, willful misstatement or suppression of facts are made, a Collector should issue a show-cause notice or adjudicate the same. Now a Central Excise Officer also has the jurisdiction.

Section 2(b) of the Act defines a "Central Excise Officer" as follows:

"2(b). "Central Excise Officer" means the Chief Commissioner of Central Excise, Commissioner of Central Excise, Commissioner of Central Excise (Appeals), Additional Commissioner of Central Excise, Deputy Commissioner of Central Excise, Assistant Commissioner of Central Excise or any other officer of the Central Excise Department, or any person (including an officer of the State Government) invested by the Central Board of Excise and Customs constituted under the Central Boards of Revenue Act, 1963 (54 of 1963) with any of the powers of a Central Excise Officer under this Act."

Thus, even an Additional Commissioner or an Assistant Collector or a Deputy Commissioner or any other Officer of the Central Excise or any person invested by the Board with the power of the Central Excise Officer would be a Central Excise Officer. Even though the Legislature made this change, the Board issued a Circular dated 27th February 1997 which reads as follows:

"I am directed to say that the Board has decided to review the powers of adjudication with the objective that cases are decided expeditiously, there is even distribution of

workload and various doubts in this regard are clarified.

2. In this connection, the following facts and legal position has been taken into consideration:-

(i) By virtue of Clause (a) of Section 33 of Central Excise Act, 1944, Commissioners can adjudicate the cases of confiscation and penalty without limit. This power has been delegated to Deputy Commissioners by CBR Notification No.12-C.Ex., dated 17th May, 1947, to Assistant Commissioners of Central Excise by CBR Notification No.8-C.E., dated 2nd September, 1944 and to Superintendent of Central Excise by CBR Notification No.93/59, dated 28th November, 1959.

(ii) So far as the confirmation of duty is concerned, it is observed that Section 11A empowers any Central Excise Officer to issue the notice and determine the duty due.

(iii) Likewise, the "proper officer" i.e. Jurisdictional Central Excise Officer can issue notice and adjudicate the demands under Rule 9(2)/Rule 57-I/Rule 57U of Central Excise Rules, 1944.

(iv) In order to bring about uniformity and objectivity the Board issued instructions defining powers of adjudication of specified Central Excise Officers taking 'duty involved' as the criterion.

3. Those show cause notices where adjudication orders are not passed upto 28th February, 1997, will be adjudicated as provided hereinafter :-

(A) All cases involving fraud, collusion, any willful mis-statement, suppression of facts, or contravention of Central Excise Act/Rules made thereunder with intent to evade payment of duty and/or where extended period has been invoked in show cause notices, (including Modvat cases, Rule 9(2) cases of this type) will be adjudicated by :-

(Amt. of duty involved) Commissioners - Without limit Addl. Commissioners - Upto Rs. 10 lakhs (B) In respect of cases which do not fall under the category (A) above, will be adjudicated by :-

(Amt. of duty involved) Commissioners - Without limit Addl. Commissioners/ - Above Rs. 2 lakhs Dy. Commissioners and upto Rs. 10 lakhs Assistant Commissioner - Upto Rs. 2 lakhs Notwithstanding the powers of Assistant Commissioners to adjudicate the cases involving duty amount upto Rs. 2 lakhs only as above, all cases of determination of valuation and/or classification other than those covered under Category (A) above, will be adjudicated by the Assistant Commissioners without any limit as hitherto, as also Modvat disputes, other than those at category (A) above.

(C) Cases related to issues mentioned under first proviso to Section 35B(1) of Central Excise Act, 1944 would be adjudicated by the Addl.

Commissioners/Dy. Commissioners without any monetary limit, as was the position under Board's Circular No. 13/93-CX., dated 15th October, 1993.

4. The value of goods/conveyance, plants, machinery and building etc., liable to confiscation will not alter above powers of adjudication which will solely depend upon the amount of duty/Modvat credit involved on the offending goods.

5.1 In respect of cases covered under Category (A) of Para 3 above, the show cause notices will be issued by the same rank of officers who will adjudicate them. Wherever the posts of Commissioner-I and Commissioner- II (Judicial) are in existence, the show cause notices will be issued by Commissioner-I. 5.2 In respect of cases covered under Category (B) of Para 3 above, show cause notices will be issued by the Range Superintendent where they are to be adjudicated by the Assistant Commissioner and such notices will be issued by Assistant Commissioner when they are adjudicated by Dy. Commissioner/Addl. Commissioner/Commissioner.

5.3 In respect of cases covered under category (C) of Para 3 above, show cause notices will be issued by Assistant Commissioner.

6. The definition of expression "Commissioner" contained in Rule 2(ii) was amended by Notification No. 11/92-C.E. (N.T.), dated 14-5-1992. Accordingly, an Additional Commissioner of Central Excise is not a Commissioner for the purposes of appeal. Therefore, appeal against the Order-in-Original passed by an Addl. Commissioner of Central Excise shall lie to the Commissioner of Central Excise (Appeals) and not to the CEGAT.

7. All Previous Board's Circulars relating to issue of show cause notices and their adjudications except the Circular No. 13/93-C.X., are hereby rescinded.

8. An immediate exercise should be undertaken thereafter to take the stock of the pendencies as on 1st March and transfer of the relevant files and records to respective adjudicating authorities by 15th March, 1997 under proper receipt. This re-cast figures should be reflected suitably in the Monthly Technical Report of March, 1997 to be submitted in April, 1997.

9. Receipt of this Circular may please be acknowledged.

10. The trade and field formations may be suitably informed."

By clauses 3(A) and 5.1 of this Circular, the Board is directing that in cases of fraud, collusion, willful misstatement or suppression of facts the notice must be issued and adjudication must take place by the Commissioner without limit and by the Deputy Commissioner up to a limit of Rs.10,00,000/-. Thereafter the Board by another Circular dated 13th August, 1997 reiterated the above position. The Appellants place strong reliance upon these two Circulars and submit that by virtue of these

Circulars the Superintendent had no jurisdiction to issue the show-cause-notices and that the Deputy Commissioner had no jurisdiction to adjudicate. As noted above, the Legislature has purposely omitted the word "Collector" from the proviso to Section 11A and replaced it with the words "Central Excise Officer". It is the Act which confers jurisdiction on the concerned Officer/s. The Act permits any Central Excise Officer to issue the show-cause notices even in cases where there are allegations of fraud, collusion, willful misstatement and suppression of facts. The question therefore is: Can the Board override the provisions of the Act by issuing directions in the manner in which it is done and if the Board cannot do so then what is the effect of such Circulars? In order to consider the powers of the Board one needs to see certain provisions of the Act. Section 2(b) defines the "Central Excise Officer" and it is mentioned therein that any Officer of the Central Excise Department or any person who has been invested by the Board with any of the powers of the Central Excise Officer would be a Central Excise Officer. Thus, the Board has power to invest any Central Excise Officer or any other Officer with powers of Central Excise Officer. By virtue of Section 37B the Board can issue orders, instructions or directions to the Central Excise Officers and such Officers must follow such orders, instructions or directions of the Board. However, these directions can only be for the purpose of uniformity in the classification of excisable goods or with respect to levy of duties of excise on such goods. It is thus clear that the Board has no power to issue instructions or orders contrary to the provisions of the Act or in derogation of the provisions of the Act. The Board can only issue such direction as is necessary for the purpose of and in furtherance of the provisions of the Act. The instructions issued by the Board have to be within the four corners of the Act. If, therefore, the Act vests in the Central Excise Officers jurisdiction to issue show-cause-notices and to adjudicate, the Board has no power to cut down that jurisdiction. However, for the purposes of better administration of levy and collection of duty and for purpose of classification of goods the Board may issue directions allocating certain types of works to certain Officers or classes of Officers. The Circulars relied upon are, therefore, nothing more than administrative directions allocating various types of works to various classes of Officers. These administrative directions cannot take away jurisdiction vested in a Central Excise Officer under the Act. At the highest all that can be said is Central Excise Officers, as a matter of propriety, must follow the directions and only deal with the work which has been allotted to them by virtue of these Circulars. But if an Officer still issues a notice or adjudicates contrary to the Circulars it would not be a ground for holding that he had no jurisdiction to issue the show cause notice or to set aside the adjudication.

The Tribunal has in its order dated 25th June, 2003, inter alia, held as follows:-

".....Further, at the relevant time as per the provisions of Section 11A(1) proper officer which includes Superintendent is competent to issue the show cause notice. Board's Circular is only the administrative direction which does not cause any prejudice to the Appellants....."

In our view this is absolutely correct. We, therefore, see no infirmity in the Judgment dated 25th June, 2003. We hold that the Superintendent had jurisdiction to issue show-cause-notice and the Deputy Commissioner had jurisdiction to adjudicate. As we have held that the concerned Officers had jurisdiction, we see no infirmity in the Order dated 19th July, 2001 directing the Commissioner (Appeals) to dispose of the Appeal. In view of the above, we see no reason to interfere. The Appeals

stand dismissed. There will be no Order as to costs.