Padmini Products

Vs

Collector of Central Excise, Bangalore

Civil Appeal No. 4080 of 1988

(Sabyasachi Mukharji, B. C. Ray JJ)

18.08.1989

JUDGMENT

SABYASACHI MUKHARJI J. -

1. This is an appeal by the Revenue under section 35L of the Central Excises and Salt Act, 1944 (hereinafter referred to as "the Act"), against Order No. 195 of 1988-C dated March 8, 1988, passed by the Customs, Excise and Gold (Control) Appellate Tribunal (hereinafter referred to as "the Tribunal").

The appellants, at all relevant times, were manufacturing agarbathies, dhoop sticks, dhoop coil, dhoop powder falling under the Tariff item No. 68 of the erstwhile Central Excise Tariff. The relevant period involved in the present civil appeal is from the year 1979 to 1983-84. The appellants claimed exemption under Notification No. 55 of 1975 dated March 1, 1975. By the said notification, the Central Government had exempted goods of the description in the Schedule annexed to the notification and falling under Tariff item No. 68 of the First Schedule to the Act from the whole of the duty of excise leviable thereon. In serial No. 68 of the Schedule to the said notification, "Handicrafts" were listed. It is, therefore, clear that "handicrafts" were fully exempt from payment of duty of excise, according to the appellants. Under the Notification No. 111 of 1978 dated May 9, 1978, the appellants were exempted from licensing control. That is the case of the appellants. The provision requiring a manufacturer to take out a licence is controlled by rule 174 of the Central Excise Rules, 1944. The relevant provision of rule 174 at the relevant time provided, inter alia, as follows :

> "Rule 174. Persons requiring a licence. - Every manufacturer, trader or person hereinafter mentioned, shall be required to take out a licence and shall not conduct his business in regard to such goods otherwise than by the authority, and subject to the terms and conditions of a licence granted by a duly authorised officer in the proper Form."

It is the case of the appellants that by this notification all goods which were exempt from the whole of the duty of excise leviable thereon unconditionally were exempted from the operation of rule 174. The appellants were manufacturing dhoop sticks, coil and powder which the appellants contended before the Tribunal were handicrafts under Notification No. 55 of 1975 and as such were exempt from licensing control under Notification No. 111 of 1978. It is, therefore, necessary at this stage, in view of the contentions raised in this appeal, to refer to the notifications. By the first notification, i.e., Notification No. 55 of 1975, in exercise of the powers conferred by sub-rule (1) of rule 8 of the Central Excise Rules, 1944, the Central Government had exempted goods of the

description specified in the Schedule annexed thereto and falling under item No. 68 of the First Schedule to the Act from the whole of the duty of excise leviable thereon and, as mentioned hereinbefore, item No. 68 of the Schedule annexed to the notification included among the exempted goods "Handicrafts". By the second notification, i.e., Notification No. 111 of 1978-CE dated May 9, 1978, the Central Government exempted from the operation of rule 174 of the said Rules, inter alia, all goods that are exempt from the whole of the duty of excise leviable thereon unconditionally. The effect of this notification was that manufacture of such goods were exempt from the operation of rule 174 of the said Rules. As a result, it was not necessary to take out a licence as enjoyed by rule 174. The appellants had indicated the process of manufacture of dhoop sticks, coil and powder before the Tribunal and the process was as follows :

> "1. The various ingredients/raw materials like perfumes, essential oils, natural oils and other raw materials are first mixed in specific proportions by manual labour.

2. These raw materials along with jigget and saw dust after seiving by hand are mixed in a barrel with a stirrer with hand and made into a paste.

3. This paste is kneaded in the kneading machine operated by power.

4. This paste is put by hand in the extruder.

5. The extruder extrudes the paste in the form of needles with the aid of power.

6. As the paste is extruded from the extruder, it is collected on a wooden tray which is of particular size. As it is collected on the tray, it is cut on both sides to the accurate size by hand.

7. The thin long incense is then transferred by hand from the individual trays to a long big tray by hand.

8. After transferring, it is properly arranged by hand in a consolidated manner on the long big tray.

9. Another tray which has four slits called the cutting tray is placed on top of the long tray with the incense.

10. After placing the cutting tray, a hand roller cutter is rolled along the slits of the cutting trays to cut the incense to the required sizes.

11. The extra length or width of the incense on the tray is then removed by hand.

12. The cut incense is then transferred to a drying tray by hand.

13. The incense is dried by stocking the trays in the drying yard.

14. The dried incense is broken at the cut ends.

15. Then ten incense sticks are inserted into the packet.

16. The incense packets are first punched with an eyelet.

17. Then twelve packets are wrapped in a cellophane wrapper."

The Revenue had issued trade notices indicating that agarbathies were handicrafts and were eligible to the exemption contained in the Notification No. 55 of 1975 dated March 1, 1975. Our attention was drawn by Shri V Lakshmi Kumaran appearing for the appellant to the trade notice issued on october 10, 1977, which read as follows :

> "Pune Trade Notice No. 258/1977, (No. 3/T.I. 68/1977) Dt. 18-10-1977
>
> Agarbathies are exempt under Notification No. 55 of 1975
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> Attention of the trade is invited to this Collectorate Trade Notice No. 179 of 1975 (No. 4/T.I. 68 of 1975) dated 4-10-1975 on the above subject.
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> 2. The issue has been reconsidered and it has been advised that agarbathies are handicrafts and would be eligible for the exemption contained in the Notification No. 55 of 1975 CE dated the March 1, 1975 (as amended)."

He also drew out attention to the certificate furnished by the Basic Chemicals, Pharmaceuticals and Cosmetics Export Promotion Council, which stated as follows :

> "This is to certify that dhoop sticks, incense cubes and cones, coils, joss sticks are agarbathies in different physical forms. The ingredients as well as end-use for agarbathies, dhoop sticks, incense cubes and cones, coils, joss sticks are one and the same.
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> The Government of India has, therefore, categorised dhoop sticks, incense cubes and cones, coils, joss sticks as agarbathies and thus eligible for the same rate of export incentives."

It was contended before the Tribunal on behalf of the appellants that dhoop sticks had been recognised by the Indian Handicrafts Board as handicrafts and that these were nothing else but agarbathies. As indicated hereinbefore, Basic Chemicals, Pharmaceuticals and Cosmetics Export Promotion Council had also indicated that dhoop sticks, incense cubes and cones, coils and joss sticks are agarbathies in different physical forms and that the end-use of these and the ingredients used therein were one and the same and for that reason these had been made eligible for the benefit of export incentives as agarbathies. Learned counsel for the appellants submitted that, in the report on the Marketing of Handicrafts under the title "Survey of Indian Handicrafts" sponsored by the All-India Handicrafts Board, which was brought out by the Indian Co-operative Union, agarbathies were mentioned which, according to counsel, indicated that these were recognised as handicrafts. A letter was placed before the Tribunal which was issued by the Deputy Director, All India Handicrafts Board, functioning under the Ministry of Commerce, Department of Export Production, which had certified that the agarbathies were the products of the Indian Handicrafts Board, Ministry of Commerce. Certain notifications were also brought to the attention of the Tribunal which indicated that agarbathies were handicrafts eligible for exemption under Notification No. 55 of 1975. It was, therefore, contended that dhoop sticks, coil and powder were agarbathies and agarbathies were accepted as handicrafts by various authorities including the Central Government and mere use of power in the manufacture of these did not bar them from being called handicrafts. It was further contended that, in any event, there was no warrant for invoking a longer time-limit of five years for raising the demand and if at all a demand should be raised, it should be for a period of six months reckoned from the date of six months prior to the issue of the show cause notice. In those

circumstances, it was submitted that the appellants should not be made liable beyond the period of six months from the date of issue of the show cause notice. The Tribunal, however, referred to the definition of the term "handicrafts" given in the Concise Oxford Dictionary, 7th edition, which states as follows :

> "Manual skill; manual art or trade or occupation; man skilled in a handicraft."

Therefore, in order to be handicrafts, the Tribunal proceeded on the basis that it should be the result of manual skill. But the respondent before the Tribunal pleaded that the raw materials for the dhoop are kneaded with the aid of power and after kneading the same, are extruded and the manual work that was done in the process was only in feeding of the raw materials by hand and later in the cutting of the sticks to the desired length. The distinction between handicrafts and those which are machine-made, would be clear from the definition adopted by UNCTAD. The same reads as follows :

> "Some goods may be produced partly by machines and partly by hand : (i.e., a dress made up by hand from machine-made cloth, perhaps with additional hand embroidery or other decorations)... in such cases a product should be regarded as hand-made or handicrafts if the essential character of the product in its finished form is derived from the 'hand-made' aspect of its production."

In the import policy for 1984-85, handicrafts and agarbathies and dhoop figured under a heading apart from handicrafts and it was stated that dhoop and agarbathies had been listed under traditional item in Appendix 17 at serial No. V under group heading "Toiletry and Perfumery" while the handicrafts had been given separately in that policy and this envisaged the handicraft to be manufactured by hand. General Note 1 against the entry "Handicrafts" in the policy book stated as follows :

> "Articles which are classifiable elsewhere in this policy will be deemed to be 'handicrafts' falling in this group only if such articles, besides being made by hand, have some artistic or decorative value; they may or may not possess functional utility value in addition. Artistic or decorative value of the article exported need not necessarily come out of any art work, engraving or decoration done on the article but the very form, shape or design of the article could also be artistic and suggestive of the fact that the article is primarily meant for decorative and not for utility purposes."

After analysing the findings and the trade notices and relying on the decision of this court in M.S. Co. (P.) Ltd., v. Union of India, AIR 1985 SC 76 the Tribunal, in the light of the definition of "handicrafts" in the Encyclopaedia Britannica, came to the conclusion that, in the manufacture of a product, the skill of the worker and the use of hand are two pre-requisites for a product to qualify as a 'handicraft'. In the Encyclopaedia Britannica, "handicraft" has been defined as follows :

> "Occupation of making by hand usable products graced with visual appeal. Handicrafts encompass activities that require a broad range of skills and equipment, including needle work, lace-making, weaving printed textile, decoration, basketry, pottery, ornamental metal working, jewelling, leather working, wood working, glass-blowing, and the making of stained glass".

It was found by the Tribunal that raw materials were mixed by hand and the first essential procedure

in the manufacture of dhoop, etc., is kneading of the raw materials and the next essential stage is the formation of the dhoop into sticks or coils. Both these processes were carried out by the aid of power. Only the cutting of the sticks to the desired length was stated to be by hand. It was not the case of the appellant that in the formation of the dhoop sticks or coils, etc., there had been use of the skill of the human hand to give the dhoop its essential character. But the Tribunal found that it was difficult to accept that these were handicrafts merely because some authorities have chosen to treat agarbathies as handicrafts. Therefore, the Tribunal agreed with the Collector that these were not handicrafts. In that view of the matter, the Tribunal upheld the order of the Collector on this point and held that these were dutiable. In view of the evidence examined by the Tribunal and in the light of the well- settled principle and the background of the definition of "handicrafts", it appears to us that the Tribunal was right in coming to the conclusion that only a very small portion of the required work was done by hand. The main part of the manufacture of agarbathies, etc., was done with the aid of power. It was the machine that produced predominantly the end product. In that view of the matter, we are of the opinion that the Tribunal was right in holding that agarbathies were not handicrafts. In coming to the aforesaid conclusion, the Tribunal had considered all relevant materials and records and applied the correct principles of law. These findings of the Tribunal on this aspect are unassailable. In the premises, when the appeal was filed and came up before this court for hearing on March 2, 1989, on examination of these materials, this court was satisfied that this contention of the appellant cannot be accepted and agarbathies were not handicrafts. It was, however, further held by the Tribunal that the Revenue was entitled to levy tax for a period of five years prior to the issue of show-cause notice and not six months pursuant to rule 9(2) of the Central Excise Rules. The relevant portion of rule 9(2) provides as follows :

> "(2) If any excisable goods are, in contravention of sub-rule (1), deposited in, or removed from, any place specified therein, the producer or manufacturer thereof shall pay the duty leviable on such goods upon written demand made within the period specified in section 11A of the Act by the proper officer, whether such demand is delivered personally to him, or is left at his dwelling house, and shall also be liable to a penalty which may extend to two thousand rupees, and such goods shall be liable to confiscation."

It may be mentioned that rule 9(1) of the said Rules stipulated that no excisable goods shall be removed from any place where they are produced, except in the manner provided in the rules. Therefore, the question that arises in this appeal is whether section 11-A of the Act applies or not. The relevant provisions of section 11-A are as follows :

> "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 :
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> 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 wilful 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.
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> 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."

Shri V. Lakshmi Kumaran, learned councel for the appellant, drew our attention to the observations of this court in Collector of Central Excise v. Chemphar Drugs and Liniments [1990] 184 ITR 224, where at page 229 of the report, this court observed that in order to sustain an order of the Tribunal beyond a period of six months and up to a period of five years, in view of the proviso to sub-section (1) of section 11A of the Act, it had to be established that the duty of excise had not been levied or paid or short-levied or short-paid, or erroneously refunded by reason of either fraud or collusion or wilful mis-statement or suppression of facts or contravention of any provision of the Act or Rules made thereunder, with intent to evade payment of duty. It was observed by this court that something positive other than mere inaction or failure on the part of the manufacturer or producer or conscious or deliberate withholding of information when the manufacturer knew otherwise, is required before it is saddled with any liability, beyond the period of six months had to be established. Whether, in a particular set of facts and circumstances, there was any fraud or collusion or wilful mis-statement or suppression or contravention of any provision of the Act, is a question of fact depending upon the facts and circumstances of a particular case. The Tribunal, however, had held contrary to the contention of the appellants. The Tribunal noted that dhoop sticks are products different from agarbathies even though they belonged to the same category and the Tribunal was of the view that these were to be treated differently. Therefore, the clarification given in the context of the agarbathies could not be applicable to dhoop sticks, etc., and the Tribunal came to the conclusion that inasmuch as the appellant had manufactured the goods without informing the central excise authorities and had been removing these without payment of duty, these would have to be taken to attract the mischief of the provisions of rule 9(2) and the longer period of limitation was available. But the Tribunal reduced the penalty. Counsel for the appellants contended before us that, in view of the trade notices which were referred to by the Tribunal, there is scope for believing that agarbathies were entitled to exemption and if that is so, then there is enough scope for believing that there was no need of taking out a licence under rule 174 of the said Rules and also that there was no need for paying duty at the time of removal of dhoop sticks, etc., Counsel further submitted that, in any event, apart from the fact that no licence had been taken and for which no licence was required because the whole duty was exempt in view of Notification No. 111 of 1973, referred to hereinbefore, and in view of the fact that there was scope for believing that it was exempt under the Schedule annexed to the first notification, i.e., 55 of 1975, being handicrafts, the appellants could not be held to be guilty of the fact that excise duty had not been paid or short-levied or short-paid or erroneously refunded because of either any fraud or collusion or wilful mis-statement or suppression of facts or contravention of any provision of the Act or Rules made thereunder. These ingredients postulate a positive act. Failure to pay duty or take out a licence is not necessarily due to fraud or collusion or wilful mis-statement or suppression of facts or contravention of any provision of the Act. Suppression of facts is not failure to disclose the legal consequences of a certain provision. Shri Ganguly, appearing for the Revenue, contended before us that the appellants should have taken out a licence under rule 174 of the said Rules because all the goods were not handicrafts and as such were not exempted under Notification No. 55 of 1975 and, therefore, the appellants were obliged to take out a licence. The failure to take out the licence and thereafter to take the goods out of the factory gate without payment of duty was itself sufficient, according to Sri Ganguly, to infer that the appellants came within the mischief of section 11-A of the Act. We are unable to accept this position

canvassed on behalf of the Revenue. As mentioned hereinbefore, mere failure or negligence on the part of the producer or manufacturer either not to take out a licence in case where there was scope for doubts as to whether a licence was required to be taken out or where there was scope for doubt whether the goods were dutiable or not, would not attract section 11-A of the Act. In the facts and circumstances of this case, there were materials, as indicated, to suggest that there was scope for confusion and the appellants believed that the goods came within the purview of the concept of handicrafts and as such were exempt. If there was scope for such a belief or opinion, then failure either to take out a licence or to pay duty on that belief, when there was no contrary evidence that the producer or the manufacturer knew that these were excisable or required to be licensed, would not attract the penal provisions of section 11A of the Act. If the facts are otherwise, then the position would be different. It is true that the Tribunal has come to a conclusion that there was failure in terms of section 11A of the Act. Section 35L of the Act, inter alia, provides that an appeal shall lie to this court from any order passed by the Appellate Tribunal relating, among other things, to the determination of any question having a relation to the rate of duty of excise or to the value of goods for purposes of assessment. Therefore, in this appeal, we have to examine the correctness of the decision of the Tribunal. For the reasons indicated above, the Tribunal was in error in applying the provisions of section 11A of the Act. There were no materials from which it could be inferred or established that the duty of excise had not been levied or paid or short-levied or short-paid or erroneously refunded by reason of fraud, collusion or any wilful mis-statement or suppression of facts, or contravention of any of the provisions of the Act or of the rules made thereunder. The Tribunal, in the appellate order, has, however, reduced the penalty to Rs. 5,000 and had also upheld the order of the confiscation of the goods. In view of fact that the claim of the Revenue is not sustainable beyond a period of six months on the ground that these dhoop sticks, etc., were not handicrafts entitled to exemption, we set aside the order of the Tribunal and remand the matter to the Tribunal to modify the demand by confining it to the period of six months prior to the issue of the show-cause notice and pass consequential orders in the appeal on the question of penalty and confiscation. The appeal is allowed to the extent indicated above and the matter is, therefore, remanded to the Tribunal with the aforesaid directions. This appeal is disposed of accordingly.

Appeal allowed in part.

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