Shiva Glass Works Co. Ltd.

Vs

The Assistant Collector of Central Excise and others, Respondents

Civil Appeal No.763 of 1977

(N. D. Ojha, K. N. Saikia JJ)

11-01-1991

Judgement

OJHA, J.:-

1.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 Excises 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 glasswares 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 appellant's office was searched by the Excise Authorities on 26th 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-11 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 R. IOA of the Central Excise Rules, 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 R. 10 and not R. 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 orde was challenged by the appellant before the High Court under Art. 226 of the Constitution of India. A learned single Judge of the High Court accepted the contention of the appellant that 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 R. 10A, the writ petition was dismissed by the judgment under appeal.

2. 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 R.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 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 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 the 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 shortlevied or erroneously refunded - When duties or charges have been short-levied through inadvertence, error, collusion or misconstruction on the part of an officer, or through misstatement 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 owing to such cause, erroneously refunded, the person chargeable with the duty or charge so short-levied, 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.
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> "10A. Residuary powers for recovery of sums due to Government - Where these Rules do not make any specific provision for the collection of 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."

3. 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 misstatement as to the quantity, description or value of such goods on the part of the owner" as contemplated by R. 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) Glasswares and 3) Fancy Wares for the purposes of provisional assessment. These prices are inclusive of Central Excise Duty. As regards Trade discounts to be deducted from the said prices as per S. 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."

4. 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 glassweres made by the appellant from time to time could not be made for want of full particulars as regards value, description, quality or proof there of 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 appellant 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 any discrepancy was detected or found, she same used to be paid by the appellant.

5. The question as to whether R. 10 or R. 10A of the Rules was applicable has to be determined in the background of the procedure which was followed even according to the appellant as indicated above. The legal position that Rule 10 A does not apply where the case is covered by Rule 10 of the Rules is well settled in view of the decision of this Court in N. B. Sanjana v. Elphinstone Mills (1971) 3 SCR 506: (AIR 1971 SC 2039), on which reliance has been placed by learned counsel for the appellant. Consequently, Rs 10A could be attracted only if the case does not fall within the purview of R. 10. It was conceded before the learned single Judge on behalf of the respondents that the respondents were not proceeding under the provisions of R. 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 appellant 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 misstatement by the appellant. Consequently, the case clearly fell within the purview of R. 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 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 verification. In the judgment appealed against the Division Bench of the High Court has found that there was no assessment as is understood in 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 SCR 822: (AIR 1972 SC 2563). 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 facts as well as the requirements of law. With regard 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 cornplete. 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. assessrnent.

6. 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. (AIR 1972 SC 2563) (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 R. 10A and not Rule 10 of the Rules. In the result, we rid no merit in this appeal. It is accordingly dismissed with costs.

Appeal dismissed.

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