

A M/S. POULOSE AND MATHEN

v.

COLLECTOR OF CENTRAL EXCISE AND ANR.

FEBRUARY 4, 1997

B [S.P. BHARUCHA AND K.S. PARIPOORNAN, JJ.]

Central Excise

Central Excises and Salt Act, 1944

C *Schedule I Entry 14A—Central Excise Rule 1944—Rule 10—Appellant receiving waste carbon-di-oxide from fertilizer factory—Manufacturing pure carbon-di-oxide—Availing exemption under Tariff Advice 83/81—Wherein impure carbon-di-oxide classifiable as item 68 and not as item 14H—Tribunal relying on a later Trade Notice holding appellant not eligible for exemption—No records to show the later Trade Notice was in pursuance of Tariff Advice by CBEC—Held, the decision of the Tribunal is incorrect in law.*

D *Section 11A—Show Cause Notice—Issued for shorter period—Later demand and levy for a longer period without prior notice and opportunity of hearing to the assessee—Held, invalid and entire proceeding is vitiated.*

E *Trade Notices issued at different times—Department in doubt about applicability—Held, where two opinions are possible the assessee should be given the benefit of doubt and that which is in its favour should be given effect to.*

F **The appellant, a manufacturer of liquid Carbon-di-Oxide conforming to ISI grades, availed the benefit of exemption notification No. 7/65-Ce for removing the raw Carbon-di-Oxide from a fertilizer factory. The appellants had taken L4 licence for manufacturing pure Carbon-di-Oxide and a L6 licence for removing the waste gas generated in the fertilizer factory. By the notification 7/65 Carbon-di-Oxide falling under item 14H CET was exempted from excise duty provided it was used for any "industrial purpose" and as per procedure under Chapter X of the Central Excise Rules. The appellants received show cause notice in 1978 to explain why the licences should not be revoked and why duty should not be imposed from**

G **March 1977 to September 1978. The Revenue contended that the appellant**

was not eligible for exemption since they are not utilising the same for any "industrial purpose". The Assistant Collector held that the appellants are not eligible for the benefit of the Notification No.7/65 and duty was demanded for the period from March 1977 to February 1982.

The Appellate Collector while deciding the appeal relied on a Trade Notice issued in 1981 by 'CBEC whereby it was decided that Carbon-di-Oxide generated in fertilizer factories should be outside the purview of item 14H and it will be classifiable under item 68, and held that the order of Assistant Collector was incorrect.

On appeal by Revenue, the Tribunal relying on a Trade Notice issued in 1985 wherein it was mentioned that impure Carbon-di-Oxide was correctly classifiable under item 14H held that it will be applicable for all transactions in question and reversed the order of the Appellate Collector.

In appeal before this Court, the Appellant contended that the show cause notice was issued for the period from March 1977 to September 1978 and the demand and levy is for a longer period for which there is no notice which is violative of principles of natural justice, and that the Tribunal erred in discarding the Trade Notice issued in 1981 which was communicated to the appellants for information.

Allowing the Appeal, the Court

HELD: 1. The show-cause notice served for a shorter period cannot be relied on for the purpose of levy for a much longer period. The appellant was not served with a proper notice before saddling the liability for a period beyond September 1978. This is unfair and vitiates the proceedings. [897-E]

2. The reasoning and conclusion of the Appellate Tribunal is based on surmises and the Tribunal ignored the earlier Trade Notice of 1981 without proper reasons therefor. There is no material on record to show that Trade Notices of 1985 were issued by the Collectors in pursuance of the Tariff advice of the Central Board of Excise and Customs. The Tribunal also omitted to notice that the earlier Tariff advice was in force at the time when the proceeding was pending before the Assistant Collector and also the Appellate Collector. [898-A-B]

3. The appellate Tribunal casually referred to a later tariff advice No.6/85, without fully and effectively appreciating its contents, its scope

A and the impact of the earlier tariff advice No.83/81. The above aspect is vital and fundamental to the basis of which the Appellate Collector granted relief to the appellant. The Appellate Tribunal failed to consider the matter according to law and the order appealed against is set aside. [898-F]

B 4. There is no record to show that the earlier Tariff advice has been rescinded or departed from, and to what extent. The department itself was having considerable doubt about the matter. The position was not free from doubt. In such a case where two opinions are possible, the assessee should be given the benefit of doubt and that opinion which is in its favour should be given effect to. [898-H, 899-A-B]

C CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2344 of 1986.

From the Judgment and Order dated 18.3.86 of the Customs Excise and Gold (Control) Appellate Tribunal, New Delhi in A. No. ED. (SB) **D** (T) 60/82-C (Order No. 179/86-C).

Joseph Vellapally, Mrs. A.K. Verma for JBD & Co. for the Appellant.

E Dr. R.R. Mishra, P Narsimhan, V.K. Verma and Ms. Sushma Suri for the Respondents.

The following Judgment of the Court was delivered by

F **PARIPOORNAN, J.** The appellant is a small scale industry. It carries on the business of manufacture of liquid Carbon Dioxide (CO₂) conforming to ISI Grades. The factory is situated at Kalamassery in Ernakulam District, Kerala State. The first respondent in this appeal is the Collector of Central Excise, Cochin. The Second respondent is the Fertiliser & Chemicals Travancore Limited (FACT). This appeal is filed under Section 35L(b) of the Central Excise & Salt Act, 1944, against the order dated 18.3.1986 passed by the Central Excise and Gold (Control) Appellate **G** Tribunal, New Delhi substantially modifying the order passed in the appellants' favour by the Appellate Collector of Central Excise, Madras dated 18.6.1982. The Appellate Collector set aside the order of the Assistant Collector rendered on 2.2.1982 holding that the appellant is not entitled to the benefit or exemption notification No. 7/65-Ce dated **H** 30.1.1965.

2. The facts of this case are in a narrow compass, The appellants manufacture carbon dioxide of ISI specification out of raw carbon dioxide gas received through pipe line from M/s. FACT Ltd., Eloor. The raw carbon dioxide is odourous and has a purity of less than 99% and contains moisture above 0.1%. Such raw carbon dioxide is subjected to various processes in order to remove traces of moisture, oxide of sulphur etc. The gas is then dried and fed into Rotary Booster compressor to boost the pressure to a very high point and then passed through activated carbon to remove final traces of oil and also to deodourise. The pure gas obtained after these processes is liquified and filled in cylinders and removed therefrom for making further products or for sale.

3. At the relevant time, Carbonic Acid (carbon dioxide) was specified in Entry No. 14H(iv) of the Ist Schedule to the Central Excise Act, 1944 and was assessable to duty of excise at the rates in force from, time to time. The appellants had taken out L.4 licence for the manufacture of carbon dioxide. They were permitted to remove waste gas generated from M/s. Fertiliser and Chemicals, Travancore Ltd., in view of paragraph 2 of Notification No. 7/65 dated 30.1.1965 after taking out L.6 licence. The licence was granted on 11.3.1977. Under notification No. 7/65, carbon dioxide falling under item 14H of the Central Excise Tariff was exempted from the whole of the duty of excise leviable thereon, provided it was used for any "industrial purpose" and subject to the procedure in Chapter X of the Central Excise Rules and it is common ground that such procedure was followed by the appellant by taking out L.6 licence. The appellants had given an undertaking that they would pay the duty on the carbon dioxide received for processing, (raw carbon dioxide - waste gas) in case it was subsequently decided that they were not entitled to receive the said carbon dioxide free of duty under notification No. 7/65.

4. The appellants were served with a show-cause notice dated 20.11.1978 to explain why L.6 licence granted to them (to receive impure carbon dioxide gas (waste gas) by pipe line from M/s. FACT.) and also. 4 licence for the manufacture of carbon dioxide (or liquid carbonic acid) should not be revoked and why duty of Rs. 8,92,695.60 along with SED Rs. 19,823.10 should not be demanded from them for the period from March 1977 to September, 1978 under Rule 10 of the Central Excise Rules, 1944.

5. The plea of the Revenue was that the appellant was not entitled to

A receive CO₂ gas (raw carbon dioxide) free of duty under Notification No.7/65 as they are not using the same for any "industrial purposes" involving any product other than the self sale of CO₂ which was received by them.

B 6. After hearing the appellant, the Assistant Collector of Central Excise passed an order on 2.2.1982 holding that the appellants' are not eligible for the benefit of the Notification No.7/65 dated 30.1.1965 and in consequence the Superintendent of Central Excise by proceedings dated 4.5.1983 quantified the total duty payable by the appellant in the sum of Rs.25,20,694.76 for the period from *March 1977 to February 1982*. Thus duty was levied on raw carbon dioxide (waste gas,) obtained from M/s. FACT C Ltd. by the appellant.

D 7. In appeal, the Appellate Collector of Central Excise relied on Trade Notice No. 220/81 dated September, 1981 issued by the Collector of Customs and Central Excise, Cochin-31 in consequence of Tariff Advice No. 83/81 dated 24.8.1981 of the Central Board of Excise and Customs and held thus:

E "The question to be decided in this case is whether the appellants are entitled to avail the benefit of notification No.7/65 dt. 30.1.65. The appellants rely on the Trade Notice No.220/81 issued from file C. No. V/68/30/3/81 C6 by the Collector of Central Excise Cochin. In this trade notice, it has been informed that the carbon dioxide gas produced in distilleries and fertiliser factories or in any other factory will fall outside the purview of item 14H. *So long as the gas does not conform to the marketable grade as prescribed in the ISI specifications, such gas will be properly classifiable under item 68.* The appellants were allowed to avail notfn. No. 7/65. But the trade notice referred to above is in favour of the assessee and would be binding on the department (*New Gujarat Paper Industries v. Superintendent of Central Excise, 1977* ELT J. 67 Guj. Div.8). Hence the order of the Asstt. Collector making duty retrospectively is not correct.

G Besides I am of the view that the carbon dioxide gas produced from the fertiliser factory of M/s. FACT will fall outside the purview of Item No. 14H of Central Excise Tariff *so long as the gas does not conform to the marketable grade as prescribed in the ISI specification.* Such gas will be properly classifiable under item H

68 of Central Excise Tariff. Hence, necessary action in this regard has to be taken by the Asstt. Collector. The order of the lower authority is set aside with these directions." A

(emphasis supplied)

8. In further appeal filed by the Revenue, the Appellate Tribunal reversed the aforesaid decision of the Appellate Collector dated 18.6.1982 by its order dated 18.3.1986. The Appellate Tribunal decided the matter on merits on the other aspects as well, though the Appellate Collector rendered his decision substantially on the basis of Trade Notice. (The Appellate Collector also found that the carbon dioxide produced by M/s. FACT will fall outside the purview of item No. 14H of the central Excise Tariff, since the gas did not conform to the "marketable grade" as prescribed in the ISI specification). Regarding the applicability of trade notice dated September, 1981, the Appellate Tribunal observed, in paragraph 51 of its order, thus : B C D

"The Trade Notice on which the respondents seek to rely was issued *nearly 3 years later*. In these circumstances the trade notice has no relevance to what happened earlier. Shri Tripathi had filed before us a copy of the Tariff Advice No. 6/85 dated 6.2.85 of the CBEC along with a *model trade notice*, to the effect that impure carbon dioxide not conforming to I.S.I. specifications produced by distilleries and fertilizer units, was correctly classifiable under item 14H. *It may be presumed* that the Collectorates, or at least some of them duly issued trade notices to this effect in early 1985. If the trade notice of 1981 could be considered as relevant to matters occurring 3 or more years earlier, we see no reason why a trade notice of 1985, to the contrary effect, should not be taken as equally applicable to the transactions in question." E F

(Emphasis supplied)

9. We heard counsel. G

10. Appellants' counsel stressed two points :

(1) The show-cause notice dated 20.11.1978 (Page 79 of the Paper-book) was issued for the period from March 1977 to September 1978 but H

A the levy and demand is for a larger period - *March 1977 to February, 1982*. There was no proper notice and opportunity to explain. This is violative of natural justice and is also unfair;

B (2) The Appellate Tribunal was totally in error in discarding the Trade Notice No. 220/81 based on Tariff Advice No.83/81 dated 24.8.1981 of the Central Board of Excise and Customs *which was communicated to the appellants for information*. (The said Trade Notice is available at page 125 of the Paperbook). The Appellate Tribunal failed to understand and give effect to the terms of the above trade notice, and the reasons to discard the trade notice relied on by the Appellate Collector are unsustainable. A larger contention on the merits to the effect that "waste gas" is not a marketable commodity and is not exigible to duty, was also raised relying on the decision in *Union of India v. Indian Aluminium*, (1995) 77 ELT 268.

D 11. The relevant Trade Notice relied on by the Appellate Collector is available at page 125 of the Paperbook. It is as follows:

"Trade Notice No. 220/81 dt. 9-81.

T.I.68 A.C.C. Nes.No.42/81

E Sub : CASES. Carbon Dioxide gas emanating from Distillery portion of Sugar factories and Fertiliser factories whether classifiable under T.I. 14H or T.I. 68 - question regarding.

F It is considered that carbon dioxide gas produced in distilleries and fertiliser factories or any in other factory will fall outside the purview of item 14H of Central Excise Tariff. So long as the gas does not conform to the marketable grade as prescribed in the ISI specifications such gas will be properly classifiable under item 68 of CET.

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(Issued from file C. No. V/68/30/5/81CX-6)

Sd/-M. Suresh
Asst. Collector (Tech).
For Collector.

H

To,
As per DE No. 1 and II
Space 15.

A

Forwarded to M/s. Poulouse & Mathen, Eloor for information.

Sd/- Superintendent
Central Excise Range
Alwaye."

B

It is based on the Tariff Advice No. 83/81. It reads as follows :

"TARIFF ADVICE No. 83/81
F.No.105/2/81-CX.3

C

GOVERNMENT OF INDIA
CENTRAL BOARD OF EXCISE & CUSTOMS

NEW DELHI, THE 24TH AUGUST, 1981.

D

To,

All collectors of Central Excise
All collector of Customs
All Appellate Collectors of Customs & Central Excise
All Deputy Collectors of Central Excise.

E

Sir,

Sub : GASES - Carbon Dioxide gas emanating from distillery
portion of Sugar factories and factories and Fertiliser
factories - Whether classifiable under T.I. 14H or T.I.68
- Question regarding.

F

.....
I am directed to say that a question has been raised whether
raw carbon dioxide gas emanating from distilleries attached to
sugar factories is classifiable under Item 14H or Item 68 of C.E.T.

G

2. The matter was discussed in the 15th South Zone Tariff-
cum-General Conference held on the 19th and 20th May, 1981 . H

H

A at Bangalore.

B 3. The conference noted that the Certain gases arise in distilleries. These are described as raw carbon dioxide, or waste gases and are similar to kiln gas generated in sugar factories. Such waste gases have carbon dioxide only to the extent of about 50%. However, in so far as fertiliser factories are concerned, it was noted that the purity of Carbon Dioxide gas produced in the factories is more than 70%. In both the types of cases the Co₂ in question does not conform to the marketable standard. Also, in both the cases, it was not possible to quantify the production of Carbon Dioxide.

C 4. After a detailed discussion, the Conference reached the conclusion that the purity of Carbon Dioxide gas produced in distilleries is even below 50%. It should not, therefore, be considered as Carbon Dioxide and, further, as such a mixture of waste gases does not conform to any specifications of Carbon Dioxide as such and it should be outside the purview of Item 14H on the analogy of kiln gas. *Similarly, the carbon dioxide gas generated in the fertiliser factories is also impure and does not conform to the marketable grade and hence it will also fall outside the purview of Item 14H.*

E 5. *The Board has accepted the recommendations of the Conference that Carbon dioxide produced in distilleries as well as in the fertiliser factories will fall outside the purview of Item 14H and will be properly classifiable under Item 68. The Board is also of the view that Carbon dioxide gas generated by any other factory will also fall outside the purview of Item 14H so long as it does not conform to the marketable standard of the carbon dioxide as prescribed in the ISI specifications.*

F 6. The above position may please be brought to the notice of the field formations for their information and guidance. The Trade interests may also be informed as in the Model Trade Notice.

G 7. Receipt of this letter may please be acknowledged.

H Sd/ G.N. BHAGCHANDANI
UNDER SECRETARY

Copy forwarded to : As per list attached.

A

MODEL TRADE NOTICE

SUB : GASES - Carbon Dioxide gas emanating from distillery portion of sugar factories and from fertiliser factories whether classifiable under T.I.14H or T.I.68 - Question regarding.

B

It is considered that Carbon Dioxide gas produced in distilleries and fertiliser factories or in any other factory will fall outside the purview of Item 14H of C.E.T. so long as the gas does not conform to the marketable grade as prescribed in the ISI specifications. Such gas will be properly classifiable under Item 68 C.E.T."

C

(emphasis supplied)

D

12. It is seen that the show-cause notice dated 20.11.1978 was issued for the period from March 1977 to September, 1978. But the order of the Assistant Collector given effect to by the proceedings of the superintendent dated 4.5.1983 has levied the duty for a longer period, from March 1977 to February, 1982. The show-cause notice served for a *shorter period* cannot be relied on for the purpose of levy for a *much longer period*. We should say that the appellant was not served with a proper notice before saddling the liability for a period beyond September, 1978. This is unfair and vitiates the proceedings.

E

13. The Tribunal has stated that the trade notice issued in September, 1981 based on Trade Advice of the Board dated 24.8.1981 was issued three years later than the relevant period. the Tribunal refers to Trade Advice No. 6/85 dated 6.2.1985 of the Central Board of Excise and Customs along with "a model trade notice" wherein it seems to have been stated that carbon dioxide not conforming to I.S.I. specifications produced by distilleries and fertilizer units was correctly classifiable under item 14H. The Appellate Tribunal was of the view "that it *may be presumed*" that the Collectorates, or "at least some of them" duly issued trade notices to this effect in early 1985, and so a later trade notice could also be taken into account.

F

G

14. We hold that the reasoning and conclusion of the Appellate

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A Tribunal is based on surmises and the Tribunal ignored the earlier trade notice of 1981 without proper reasons therefor, Firstly, the tariff advice No. 6/85 dated 6.2.1985 which is said to have been accompanied by a "model" trade notice is not part of the record. Its contents are unknown. There is *no material* on record to show that trade notices were issued by the Collectors in pursuance of the above tariff advice of the Central Board of Excise and Customs. The Tribunal also omitted to notice that the earlier tariff advice No. 83/81 was in force at the time when the proceeding was pending before the Assistant Collector and she passed the order on 2.2.1982 and also when the Appellate Collector set aside the above order and gave relief to the assessee by his order dated 18.6.1982. The concerned department understood the legal position then as reflected in the trade advice and trade notice of the year 1981. It was a plausible view of the matter. It was pointedly stated that the carbon dioxide gas generated in the fertilizer factories is also impure and *does not conform "to the marketable grade" and hence it will also fall outside the purview of Item 14H*. Whether the later tariff advice No. 6/85 adverted to all relevant aspects or deviated from 1981 tariff advice and if so, to what extent, are not detailedly stated in the order of the Tribunal (Paragraph 51). The earlier tariff advice and trade notice categorically stated that in the absence of non-conformity *to the marketable grade (standard)* "impure carbon dioxide not conforming to I.S.I. specifications produced by distilleries and fertilizer units was correctly classifiable under item 14H." Was the requirement, that the goods should be of "*marketable grade*" (*standard*) dispensed with, in the later tariff advice? This is not adverted to by the Tribunal. The Appellate Tribunal casually referred to a later tariff advice No. 6/85, without fully and effectively appreciating its contents, its scope and the impact of the earlier tariff advice No. 83/81. The above aspect is vital and fundamental to the basis of which the Appellate Collector granted relief to the appellant. We are of the view that the Appellate Tribunal has failed to consider the matter according to law and the order appealed against should be set aside and we hereby do so.

G 15. One aspect deserves to be noticed in this context. The earlier tariff advice No.83/81 on the basis - of which trade notice No.220/81 was issued by the Collector of Central Excise and Customs is binding on the department. It should be given effect to. There is no material on record to show that this has been rescinded or departed from, and even "so, to what H extent. Even assuming that the later tariff advice No.6/85 has taken a

different view-about which there is no positive material - the facts point out that the concerned department itself was having considerable doubts about the matter. The position was not free from doubt. It was far from clear. In such a case, where two opinions are possible, the assessee should be given the benefit of doubt and that opinion which is in its favour should be given effect to. In the light of the above, it is unnecessary to adjudicate the other points involved in the appeal on the merits. A B

16. For the reasons stated above, we set aside the order of the Customs Excise and Gold (Control) Appellate Tribunal dated 18.3.1986 and allow this appeal and restore the order of the Appellate Collector of Central Excise, Madras dated 18.6.1982. There shall be no order as to costs. C

V.M.

Appeal allowed.