

PETITIONER:
COLLECTOR OF CENTRAL EXCISE, HYDERABAD ETC.ETC.

Vs.

RESPONDENT:
M/S.VAZIR SULTAN TOBACCO COMPANY LIMITED, HYDERABAD ETC.ETC.

DATE OF JUDGMENT: 28/02/1996

BENCH:
JEEVAN REDDY, B.P. (J)
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JEEVAN REDDY, B.P. (J)
SEN, S.C. (J)
NANAVATI G.T. (J)

CITATION:
1996 SCC (3) 434 JT 1996 (3) 112
1996 SCALE (2) 603

ACT:

HEADNOTE:

JUDGMENT:

J U D E M E N T

B.P. JEEVAN REDDY, J.

Subsection (1) of Section 37 of the Finance Act, 1978, levied a special duty of excise equal to five percent of the amount of excise duty chargeable on goods. The levy came into effect on and from March 1, 1978 and was to remain in force till March 31, 1979. Sub-section (3) provided that the said levy shall be in addition to the duties of excise chargeable on such goods under the law in force. Sub-section (4) provided that the provisions of the Central Excise Act and the rules made thereunder shall apply, as far as may be, in relation to the levy and collection of the special duties of excise levied under the said section. The question in this batch of appeals is whether the goods manufactured prior to March 1, 1978 but removed on or after March 1, 1978 are liable to pay the special duty of excise. Section 37 reads as follows:

"(1) In the case of goods chargeable with duty of excise under the Central Excise Act as amended from time to time, read with any notification for the time being in force issued by the Central Government in relation to the duty so chargeable there shall be levied and collected a special duty of excise equal to five percent of the amount so chargeable on such goods.

(2) Sub-section (1) shall cease to have effect after the 31st day of March, 1979, except as respects things done or omitted to be done before such case and section 6 of

the General Clauses Act, 1897 (10 of 1897) shall apply upon such case as if the said sub-section had then been repeated by a Central Act.

(3) The special duty of excise referred to in sub-section (1) shall be in addition to any duties of excise chargeable on such goods under the Central Excise Act or any other law for the time being in force.

(4) The provisions of the Central Excise Act and the rules made thereunder, including those relating to refunds and exemptions from duties shall as far as may be apply in relation to the levy and collection of the special duties of excise leviable under this section, in respect of any goods as they apply in relation to the levy and collection of the duties of excise on such goods under that Act or those rules as the case may be."

It is not necessary to refer to the facts to the several appeals before us. It would be enough if we state the facts in Civil Appeal No.3199 of 1986. The respondents M/s. Vazir Sultan Tobacco Company Limited, is engaged in the manufacture of cigarettes. The appeal relates to the levy of special excise duty on cigarettes removed by the respondent between March 1, 1978 and March 12, 1978. The respondent's case was and is that though cleared on or after March 1, 1978, they were manufactured prior to the said date. It contended that inasmuch as the special duty of excise like any other duties of excise is upon the manufacture or production of excisable articles and not upon removal, no duty is leviable upon the said cigarettes. The authorities rejected the contention and levied the duty. Subsequently, the respondent filed an application for refund agitating the very same issue, which too was rejected by the Assistant Collector. An appeal before the Collector (Appeals) proved fruitless. The respondent then carried the matter by way of further appeal to the Tribunal. The matter was heard by the Special Bench of the Tribunal. They allowed the appeal under the impugned order upholding the contention of the respondent.

Sri Joseph Vellapally, learned counsel for the Revenue, assailed the correctness of the view taken by the Tribunal on several grounds. He submitted that Section 37 evolved a simple formula, viz., wherever central excise duty is payable on certain goods, special excise duty shall also be payable at the rate of five percent of the central excise duty. Counsel submitted that the levy and collection of the central excise duties is governed by Section 3 of the Central Excise and Salt Act, 1944 read with Rules 9, 9A and 9B of the Central Excise Rules. According to these Rules, the levy and collection is at the stage of clearance of the goods from the factory or warehouse, as the case may be. Both for the purpose of rate and valuation, one has to look to the date of removal and it is the said date which determined the levy, the rate and the valuation. He submitted that the question at issue in these appeals is concluded by the decision of this Court in *Wallace Flour Mills Company v. Collector of Central Excise* [1989 (44) E.L.T.590]. The fact that duties of excise are levied upon

the production or manufacture of goods, the learned counsel contended, does not detract from the clear position emerging from the provisions of the Act and the Rules.

Sri Soli J. Sorabjee, learned counsel appearing for respondents, supported the reasoning and conclusion of the Tribunal. He submitted that the duties of excise are leviable only upon the manufacture or production of the goods as contemplated by Entry 84 of List-I of the Seventh Schedule to the Constitution. The mere fact that, for the sake of convenience, the duty is collected at the stage of removal cannot and does not change the character of the tax. It is upon the manufacture or production of goods and not on any other basis. The special excise duty is a separate and distinct levy from the Central Excise duties. It is levied for the first time by Section 37 of the Finance Act, 1978 on and with effect from March 1, 1978. Counsel submitted that when the goods in question were manufactured, there was no levy of special excise duty. If there is no levy of special excise duty on the date of their manufacture or production, it cannot attach at the stage of removal. Saying otherwise, the learned counsel contended, would detract from the very concept of duties of excise. Learned counsel also relied upon certain decisions both of this Court and High Courts in support of his submission.

We are inclined to agree with Sri Sorabjee. Entry 84 of List-I of the Seventh Schedule to the Constitution empowers the Parliament to make a law providing for levy of duties of excise on tobacco and other goods manufactured or produced in India [except, of course, certain goods mentioned therein]. Indisputably, the special excise duty is an excise duty and is relatable to Entry 84. If so, the levy must be on the manufacture or production of goods. That is how the words "goods manufactured or produced in India" in Entry 84 have been understood by this Court throughout. Once the levy is not there at the time when the goods are manufactured or produced in India, it cannot be levied at the stage of removal of the said goods. The idea of collection at the stage of removal is devised for the sake of convenience. It is not as if the levy is at the stage of removal; it is only the collection that is done at the stage of removal. Admittedly, the special excise duty is an independent duty of excise separate and distinct from the duties of excise levied by the Central Excise and Salt Act, 1944. This levy came into effect only on and from March 1, 1978 which means that the goods produced prior to that date were not subject to such levy. If that is so, the levy cannot attach nor can it be realized because such goods are removed on or after March 1, 1978. The provisions of the Central Excise Act and the Rules, in our opinion, do not say otherwise.

Section 3(1) of the Central Excise Act says:

- (i) There shall be levied and collected in such manner as may be prescribed duties of excise on all excisable goods other than salt which are produced or manufactured in, or imported by land into, any part of India as, and at the rates, set forth in the First Schedule."

The expression "prescribed" is defined in clause (g) of Section 2 to mean prescribed by Rules made under the Act.

It is evident that the words "in such manner as may be prescribed" qualify the word "collected" and not the word "levied". While the levy is created by Section 3 itself, the collection of the duty is left to be regulated by the Rules made under the Act.

Rules 9 and 9-A are relevant for our purpose. Rule 9(1) provides that:

"No excisable goods shall be removed from any place where they are produced, cured or manufactured or any premises appurtenant thereto, which may be specified by the Collector in this behalf whether for consumption export or manufacture of any other commodity in or outside such places until the excise duty leviable thereon has been paid at such place and in such manner as is prescribed in these Rules or as the Collector may require and except on presentation of an application in the proper form and on obtaining the permission of the proper officer on the form."

Rule 9 says that "no excisable goods" should be removed from the place of their manufacture until excise duty leviable thereon has been paid "at such place and in such manner" as is prescribed in these Rules. It is relevant to notice that the Rule specifically uses the expression "excisable goods" - and not "goods" - and for good reason. The expression "excisable goods" has been defined in clause (d) of Section 2 to mean "goods specified in the First Schedule as being subject to a duty of excise and includes salt." The goods removed must be excisable goods first - which means that the goods were subject to the levy of duty before their removal. Rule 9-A is to the same effect. Sub-rules (1) to (3-A) of Rule 9-A may be set out in their entirety in view of the reliance placed by both the counsel upon them. They read:

"(1) The rate of duty and tariff valuation, if any, applicable to any excisable goods shall be the rate and valuation in force.

(i) in the case of goods removed from the premises of a cure on payment of duties on the date on which the duty is assessed; and

(ii) the case of goods removed from a factory or a warehouse subject to sub-rules (2), (3) and (3)(a), on the date of the actual removal of such goods from such factory or warehouse.

(2) If the goods have previously been removed from a warehouse to be rewarehoused, and the duty is paid on such goods without their being rewarehoused the rate and valuations if any, applicable thereto shall be the rate and valuation, if any, in force on the date on which duty is paid or, if the duty is paid through an account-current maintained with the Collector under rule 9, on the date on which an application in the proper form is delivered to the officer-in-charge of the warehouse from which the goods were removed.

(3) Where any person who has removed excisable goods for export in bond fails to export or to furnish proof of such export to the satisfaction of the Collector or diverts the goods for home consumptions the rate of duty leviable and the tariff valuations if any in respect of such goods shall be the rate and valuation in force on the date on which the duty is paid.

(3A) Where duty becomes chargeable on any material or component parts in respect of which credit of duty had been allowed under rule 56A, the rate of duty leviable and the tariff valuation, if any, in respect of such material or component parts shall be the rate and valuation in force on the date on which the duty is paid."

According to sub-rule (1) of Rule 9-A, the rate of duty [apart from tariff valuation] applicable to any "excisable goods" shall be the rate in force on the date of actual removal of such goods from the factory or the warehouses as the case may be. This is the general rule. Sub-rules (2), (3) and (3A) provide certain exceptional situations which are not relevant for the purpose of these appeals. It is the general rule contained in sub-rule (1) and in particular clause (ii) of sub-rule (1) - that is relevant here. In other words, the rate of duty as well as the valuation of goods shall be the rate and the valuation as on the date of actual "removal". This rule too opens with the expression "excisable goods".

Sri Vellapally contended that if the above interpretation is adopted, it may lead to an enigmatic situation. He explains his apprehension thus: the special excise duty is levied only for the period March 1, 1978 to February 28, 1979; Take a case, where the goods are manufactured on or before February 28, 1979 are removed on or after March 17, 1979, what would be the rate of duty [and which would be relevant date for valuation purposes]; the assessee may say that on the date of removals neither the levy is in force nor are Rules 9 and 9A and, hence he need not pay any special excise duty on such goods. We do not see any valid basis for this apprehension. In the situation contemplated by Sri vellapally, the date of removal has to be taken as February 28, 1979. It cannot be otherwise. If Rules 9 and 9A are held inapplicable, it would logically follow that the moment the goods are manufactured the levy becomes payable and, in the circumstances, the last date of levy can reasonably be taken to be the date of removal. Of course, an absurd consequence would follow if it is held that in the above situation, no special excise duty is payable if the removal is on or after March 1, 1979. Such an absurd consequence could not be presumed to have been intended by the Parliament.

We are of the opinion that Section 3 cannot be read as shifting the levy from the stage of manufacture or production of goods to the stage of removal. The levy is and remains upon the manufacture or production alone. Only the collection part of it is shifted to the stage of removal. Once this is so, the fact that the provisions of the Central Excise Act are applied in the matter of levy and collection

of special excise duty cannot and does not mean that wherever the Central Excise duty is payable, the special excise duty is also payable automatically. That is so as an ordinary rule. But insofar as the goods manufactured or produced prior to March 1, 1978 are concerned, the said rule cannot apply for the reason that there was no levy of special excise duty on such goods at the stage and at the time of their manufacture/production. The removal of goods is not the taxable event. Taxable event is the manufacture or production of goods.

"Excise is a duty on manufacture or production. But the realization of the duty may be postponed for administrative convenience to the date of removal of goods from the factory. Rule 9A of the said rules merely does that. That is the scheme of the Act. It does not in our opinions make removal be the taxable event. The taxable event is the manufacture, But the liability to pay the duty is postponed till the time of removal under Rule 9A of the said Rules. In this connections reference may be made to the decision of the Karnataka High Court in Karnataka Cement Pipe Factory v. Superintendent of Central Excise (1986 (23) E.L.T.313) where it was decided that the words 'as being subject to a duty of excise' appearing in Section 2(d) of the Act are only descriptive of the goods and not to the actual levy. 'Excisable goods' it was held do not become nonexcisable goods merely by the reason of the exemption given under a notification. This view was also taken by the Madras High Court in Tamil Nadu (Madras State) Handloom Weavers Co-operative Society Ltd. v. Assistant Collector of Central Excise (1978 (2) E.L.T. (J.57)). On the basis of Rule 9A of the said rules, the Central Excise authorities were within the competence to apply the rate prevailing on the date of removal. We are of the opinion that even though the taxable event is the manufacture or the production of an excisable article, the duty can be levied and collected at a later date for administrative convenience."

Sri Sorabjee relied strongly upon the decision of this Court in D.R. Kohli & Ors. v. Atul Products Ltd. [1985 (2) S.C.C. 77]. But that was a case which turned on its peculiar facts and the main discussion in that case was with respect to the applicability of Rules 10 and 10-A as in force at the relevant time. The Court found that the Revenue was virtually inveigled into a trap by the respondent suggesting that it was too eager to pay excise duty on certain goods which to the knowledge of the respondent were not liable for

excise duty with the object of getting the benefit of the right to clear its products which were liable for higher excise duty [because of their increased value] without paying any duty at all. In those facts, the question of applicability of Rule 10 and for that matter, Rule 10-A arose. It was held that while Rule 10 was not applicable, Rule 10-A was attracted.

Sri Sorabjee also relied upon the decision of this Court in Union of India & Ors. v. Modi Rubber Limited [1986 (4) S.C.C. 66] to emphasis his submission that the central excise duties leviable under the Central Excise and Salt Act, 1944 are distinct and different from the special duty, additional duty or any other duty of excise levied under any other Parliament enactment. Since the aforesaid proposition is not in dispute, it is not necessary to refer to the facts in the said decision.

Before we conclude, it is necessary to notice a few facts having a bearing upon the relief to be granted in these matters. The special excise duty was being levied from 1963 upto 1971 by various Finance Acts passed from time to time. It was discontinued from 1972 until 1978 when it was revived by the Finance Act, 1978. Thereafter, it was being levied from year to year by annual Finance Acts. The provisions of these Finance Acts, insofar as the levy of special excise duty is concerned, are identical. In the Finance Acts of 1987 and 1988, however, the rate of special excise duty was raised to ten percent but then notifications were issued exempting the duty on all goods in toto. In other words, with effect from March 1, 1986, there was, in effect, no special excise duty until February 28, 1988. With effect from March 1, 1988, the duty was again imposed @ 5% while excepting certain essential commodities and other priority items from the said impost. We have held hereinabove that the goods manufactured/produced before March 1, 1978 but cleared on or after March 1, 1978 are not excisable to special excise duty. At the same time, we have also expressed before February 28, 1979 but cleared thereafter would be liable to pay the said duty at the rate and valuation in force as on February 28, 1979. In the light of the fact that the duty was continued from 1978 to 1986, indeed upto February 28, 1989 and also in view of the principle behind the presumption incorporated in Section 12-b of the Central Excise Act inserted by the Central Excises and Customs Law [Amendment] Act, 1991- which is not a legislative recognition of a widely accepted presumption - we think it appropriate to correct that the assessees shall not be entitled to refund of amount collected from them by way of special excise duty on or after March 1, 1978 in respect of goods manufactured prior to the said date. Looked at from the standpoint of avoidance of multiplicity of proceedings and of unending legal quibbling also, it is desirable to give a quietus to this controversy. To avoid any discriminatory consequences, it is further directed that if any amounts are due and are yet to be recovered in respect of such goods on account of special excise duty, the same can be recovered according to law. for the above reasons, the appeals filed by the appellant-state are dismissed and the appeals filed by the respondents-assessees are allowed subject to the above directions. there shall be no order as to costs.