

AFR

COURT NO.37

## CIVIL MISC. WRIT PETITION N.1139 OF 2010

Ganesh Polytex Ltd., Raipur. ....Petitioner  
Vs.  
Union of India and others. ....Respondents

AND

## CIVIL MISC. WRIT PETITION N.1187 OF 2010

M/s Ganesh Polytex Ltd., Raipur. ....Petitioner  
Vs.  
Union of India and others. ....Respondents

**Hon'ble Yatindra Singh, J.****Hon'ble Rajes Kumar, J.**

1. This case has pained us. Even if the stand of the revenue is correct—though there are doubts about it—this is not the way to go about doing it. Here are the facts.

**THE FACTS**

2. The petitioner claims to manufacture Recycled Polyester Staple Fibre since 2000. According to the petitioner it is neither an excisable good nor any excise duty is leviable on the same. The petitioner has also been filing returns showing them as non-excisable goods.

3. A notice under Section 11-A of the Central Excise Act (the Act) was issued to the petitioner for charging excise duty on the same. The petitioner filed its reply, which was decided against the petitioner. An appeal was filed. It was allowed by the Commissioner (Appeals) on 31.05.2004. The department filed an appeal before Customs Excise & Service Tax Appellate Tribunal, New Delhi (the Tribunal). The petitioner also filed his cross objection in support of the order of the Commissioner (Appeals).

4. The appeal of the department was dismissed by the order dated 01.02.2005 upholding the order of the Commissioner (Appeals)

and the objection was disposed of accordingly.

5. The Tribunal upheld the view of the Commissioner (Appeals) holding that the goods manufactured by the petitioner were non-excisable goods in view of note 1 of Chapter 54 of the Schedule of Central Excise Tariff Act (the Tariff Act).

6. The Government of India, Ministry of Finance issued instructions dated 29.06.2010 under Section 37-B of the Act. Under the instructions, certain goods were explained to be excisable goods. In pursuance of these instructions, the Superintendent of Central Excise, Range-IX, Division-II, Kanpur (respondent no.4) issued notices on 14.07.2010, 27.07.201 and 02.08.2010 demanding excise duty from the petitioner before clearance of the goods.

7. The petitioner filed its reply on 02.08.2010. However, the respondent instead of deciding it by speaking order seized the goods of the petitioner along with truck no. HR-56-7049.

8. The petitioner filed Writ Petition No.1139 of 2010 (the first WP) against the same. This writ petition was entertained. However, prayer for challenging the notices were deleted and the petitioner was asked to file its reply before the competent authority. The respondents were also restrained from interfering with the functioning of the petitioner's factory.

9. The petitioner was subsequently given a notice dated 13.08.2010 asking it to execute a bond for the amount of assessable value likely to be cleared during the month. The petitioner did so but filed another Writ Petition No.1187 of 2010 (the second WP) challenging these notices.

10. The second WP was also entertained and interim order was granted on 27.08.2010. However, it was clarified that it would be open to the respondents to decide the question of classification of the goods manufactured by the petitioner.

11. Subsequently, during pendency of the WPs, a notice dated 03.09.2010 was sent to the petitioner asking the petitioner to show cause on the same day as to why the product manufactured by them may not be classified under the heading mentioned in the show cause notice.

12. According to the petitioner;

The aforesaid notice was served late in the evening at about 5:30 pm. The offices of the respondent were also closed;

It was not possible to file any objections on the same day.

13. On the next date, i.e. 04.09.2010 an order was passed by the Assistant Commissioner, Central Excise Division-II Kanpur holding that the goods manufactured by the petitioner are covered under the heading CSH 55032000, 55062000, 55051090, 55033000 and 55034000 respectively and are chargeable to duty;

14. The petitioner filed an application in the second writ petition for listing, annexing these orders and notices.

15. We have heard Sri Navin Sinha and Sri Ashok Kumar counsel for the petitioner and Sri SP Kesarwani and Sri BKS Raghuvanshi for the respondents.

#### **THE DECISION**

16. The counsel for the petitioner made a statement that first WP has become infructuous and he does not wish to press it. It is dismissed as not pressed.

17. The second writ petition has not been formally amended challenging the order dated 04.09.2010 but the counsel for the parties agreed that the writ petitions be decided finally and the validity of the order dated 04.09.2010 may be considered. We accordingly proceed to decide the writ petitions including validity of the order dated

04.09.2010.

18. The counsel for the petitioner submitted that :

- (i) No reasonable opportunity was given before passing the order dated 04.09.2010. The notice dated 03.09.2010 was received late in the evening asking them to appear and show cause on the same day. No objection could also be filed as the case was decided next day;
- (ii) The instructions issued by the Board can neither override the statutory provisions contained in Note 1 Chapter 54, a part of the Tariff Act;
- (iii) The judgement of the Tribunal is in favour of the petitioner. The instruction of the Board can neither override it nor nullify it;
- (iv) The note 1 of Chapter 54 applies to all Chapters and is also applicable to Chapter 55.
- (v) If note 1 of Chapter 54 is taken into account then the goods manufactured by the petitioner are not excisable goods and this was also so held by the Tribunal in its order dated 01.02.2005.

19. The counsel for the respondents did not dispute the first two submissions of the petitioner but submitted that :

The instructions merely explain the statutory provisions and do not contravene them;

The principles of res-judicata are not applicable in taxing statutes.

20. It is not disputed that;

The notice dated 03.09.2010 for classifying the petitioner's goods was served on the same day in the late evening;

No objection was filed by the petitioner.

21. The beginning of the last century witnessed the emergence of a semi-clad Indian, referred to as 'half naked Fakir' by Winston Churchill. His philosophy was,

'Means are more important than the end: it is only with the right means that the desired end will follow'.

To the charge that, 'means are after all means', he would say,

'Means are, after all, everything'.

His name, Mohandas Karamchandra Gandhi—known to the World as Mahatma Gandhi, father of our nation.

22. Mahatma Gandhi's saying is not only in the realm of philosophy. It is part legal jurisprudence too.

23. About three quarter of century ago Justice Gordon Hewart said<sup>1</sup>,

'Not only must Justice be done; it must also be seen to be done.'

24. A quarter of century ago, this is how Lord Denning put it<sup>2</sup>,

'But it is fundamental in our law that the means that are adopted to this end should be lawful means. A good end does not justify bad means. The means should not be such as to offend against the fundamental freedom, the privacy and elemental rights of property.'

25. They did not say anything new but derived it from age old principles of natural justice. This is universal. Here is a case from another part of the World.

26. In TVA Vs Hill (57 L.Ed 2nd 117) the question involved before the US Supreme Court was, should the construction of a dam over Little Tennessee River be stopped? The reason was that it might end the natural habitat of an endangered snail darter, a three-inch tannish coloured fish, found in the river.

27. Traditionally, Attorney General of US appears only once in his

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1 See R v Sussex Justices, ex parte McCarthy 1924 (1) KB 256, 1923 All ER 233.

2 See R Vs IRC Exparte Rossminster Ltd 1979 (3) All ELR 385.

term. There cases are argued in the court by the Solicitor General. At that time, Griffin B Bell was the Attorney General of US. He chose to appear in this case. He showed the fish to the court. According to him dam almost complete and its construction should not be stopped merely for this three-inch fish.

28. The US Supreme court did grant the injunction stopping the construction of the dam. The court quoted the following passage of Bolds (A man for all seasons Act I Page 147) with approval.

'The law Roper the law I know what's legal not what's right And will stick to what's legal- I am not God. The currents and endless of rights and wrong which you find such plain sailing. I cannot navigate I am not a voyager. I am a forester in the thickness of law-what would you do? Cut a great road through the law to get after the Devil. And when the last law was down and Devil turned around on you, where would you hide, Roper the laws all being flat. This country's planned thick with the laws from coast to coast-Man's law not God's and if you cut them down-Do you really think you can stand upright in the winds that would blow then-Yes I would give the Devil benefit of law for my own safety's sake.'

Ultimately, the US congress had to amend the law to get over the judgement. Snail darters, that had previously lived only on the Little Tennessee River, were transplanted to the Hiwassee River. It was only then they could complete the constructions.

29. The notice dt. 3.9.2010 was served the same day in the evening. The order classifying the petitioner's goods was passed on the next date. The petitioner's goods were earlier held to be non-excisable by the Tribunal. The instructions may be issued under section 37-B of the Act but it is doubtful if they can nullify a judgement though principles of res-judicata do not apply in taxing statutes. In our opinion,

It is not such an issue that could be decided in such a shoddy manner without affording reasonable opportunity to the petitioner;

The order is against the principles of natural justice;

It is illegal and is set aside.

### **INTERIM ARRANGEMENT**

30. We have quashed the order classifying the petitioners goods and the matter has to be decided again. Nevertheless, the equities have to be adjusted and safeguard for collecting excise duty is to be provided in the event that the petitioners goods are ultimately classified as excisable goods. To cover such an eventuality the following arrangement is made:

- (i) The petitioner has already given bond to the Excise Department. It would be entitled to remove its goods without payment of any excise duty till it is exhausted;
- (ii) In case, the aforesaid bond is exhausted, the petitioner may be asked to furnish another bond;
- (iii) In case bonds as mentioned in the preceding points (i) and (ii) are filed then the respondents shall not interfere in the functioning of the factory or clearing of the goods by the petitioners unless orders classifying the goods are passed against the petitioner. The aggrieved party will have right to take legal proceeding against the same.

### **CONCLUSIONS**

31. Our conclusions are as follows,

- (a)The order dated 04.09.2010 was passed without reasonable opportunity to the petitioner. It is illegal and is quashed.
- (b)The petitioner may appear before the Assistant Commissioner, Central Excise Division-II, Kanpur on 20.10.2010 and file objections against the notice dated 03.09.2010 along with the relevant supporting material. It would be open to the petitioner to take all objections against the same. Thereafter, the Assistant Commissioner may decide the same in accordance to law after hearing the petitioner;
- (c)The arrangement as detailed by us under heading 'INTERIM ARRANGEMENT' will continue till the question of classification of the petitioner's goods is decided.

32. The Writ Petition No.1139 of 2010 is dismissed as infructuous and Writ Petition No.1187 of 2010 is allowed with cost. We also clarify that in case of violation of the orders, it would be open to the petitioner to take contempt proceedings.

Dt.27.09.2010

R./