INDIAN METALS AND FERRO ALLOYS LTD. CUTTACK

v.

COLLECTOR OF CENTRAL EXCISE, BHUBANESHWAR

NOVEMBER 22, 1990

[S. RANGANATHAN AND K. RAMASWAMY, JJ.]

Central Excises and Salt Act, 1944—Section 3 and First Schedule Item Nos. 26AA and 68—Assessee—Manufacturer of pipes, tubes and poles of iron and steel—assessability to excise duty—Whether under Item 26AA or 68.

The appellant is a manufacturer of pipes, tubes and poles made of iron and steel. Tariff Item No. 26AA was introduced w.e.f. 24.4.1962 in the First Schedule to the Central Excises and Salt Act, according to which, the appellant paid the excise duty. Thereafter the Government issued a notification dated 1.3.1963, whereby 'telegraph, telephone and electric lighting and transmission poles falling under Item 26AA" were exempted from payment of duty subject to certain conditions. The appellant having paid the duty earlier, applied for the refund on 10.5.1963 and sought permission to clear the goods without payment of duty. The Assistant Collector rejected the said request on the ground that conditions prescribed in the notification had not been complied with. The appellant thereupon preferred an appeal before the Collector of Central Excise who held that the goods in question were eligible for the exemption contained in the notification. As a consequence thereof, the appellant paid no duty on the goods and cleared the goods from 1962 till 1975. On 1.3.1975, the Legislature introduced Tariff Item No. 68 in the First Schedule to the Act covering goods not elsewhere prescribed. Even thereafter the appellant filed classification lists showing the poles as falling under Item 26AA and those lists were duly approved and the appellant cleared its goods without paying duty till August 1982. Earlier on 8.12.1977, the Superintendent of Central Excise had taken a view that the transmission and lighting poles were classifiable not under Item 26AA but under Item 68. The appellant was accordingly asked to furnish a statement of the goods manufactured and sold earlier and to file a classified list. The appellant objected contending that the poles were covered by Tariff 26AA and it was entitled to exemption. The Revenue did not accept that contention whereupon the appellant filed a writ petition before the High Court challenging the communication dated 26.12.1977. The appellant received a further letter on 6.11.1981 whereby it was required to pay duty under Item No. 68 in regard to

A "swaged poles" also. The appellant challenged this letter also by means of a writ petition before the High Court. The High Court declined to interfere with the adjudication proceedings and dismissed the writ petitions by directing that the adudication be made within three months. On 31.3.83 the Assistant Collector passed an order holding the goods classifiable under Item 68. The Appellate Collector affirmed the order B of the Assistant Collector. Both parties preferred appeals before the Central Excise and Gold (Control) Appellate Tribunal. The Tribunal did not agree with the contention of the Appellant that the goods were dutiable under Tariff Item No. 26AA. It however gave certain directions restricting the levy of excise duty periodwise. Hence these appeals by the appellant under Section 35L of the Act.

C Allowing the appeals, this Court,

HELD: There is some difference in the description of the goods. While item 26AA covers only pipes and tubes, the goods manufactured by the assessee are called poles. It is also true that the poles have to be D manufactured by applying certain processes of heating and forging to pipes or tubes. But all this does not so change the commercial character of the goods as to take them away from the scope of item No. 26AA. [336C-D]

The language of tariff item No. 26AA is very wide. It covers iron and steel products of the description set out therein. [337D]

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Unless the department can establish that the goods in question can, by no conceivable process of reasoning, be brought under any of the specific items mentioned in the tariff, resort cannot be had to the residuary item. [339E]

F The appellant's contention that the goods in question fall under Item 26AA is well founded and the Revenue was not justified in attempting to levy duty on the basis that the goods fall under Tariff Item No. 68. [334G-H]

Indian Aluminium Cables Ltd. v. *Union,* [1985] 3 SCC 284; G *Bharat Forge and Press Industries* v. *C.C.E.,* [1990] 1 SCC 532; *Varghese* v. *I.T.O.,* [1982] 1 SCR 629; *State of Tamil Nadu* v. *Mahi Traders,* [1989] 1 SCR 445; *C.C.E.* v. *Andhra Sugar Ltd.,* [1989] (Supp.) 1, SCC 144 and *Collector of Central Excise* v. *Parle Exports P. Ltd.,* [1989] 1 SCC 345, referred to.

H CIVIL APPELLATE JURISDICTION: Civil Appeal Nos. 2743-48 and 2920 of 1986.

From the Order dated 16.4.1985 and 12.5.1986 of the Customs Excise and Gold (Control Appellate Tribunal), New Delhi in Appeal Nos. ED/SB/2870/83 to 2874/83-B and 166 of 1984(B) (Order No. 297-302/85-B and 40/86-B-I.

C.S. Vaidyanathan, S.R. Setia, Rajen Mahapatra and Ms. Indu Malini Ananthachari for the Appellant.

N.S. Hegde, Additional Solicitor General (N.P.), Dalip Tandon, P. Parmeshwaran and Ms. Sushma Suri (N.P.) for the Respondent.

The Judgment of the Court was delivered by

RANGANATHAN, J. These three appeals can be disposed of by a common order. The appellant is a manufacturer of pipes, tubes and poles made of iron and steel. These products are generally used by the telephone and telegraph departments of the Government of India but can also be used for purposes of transmission and lighting. The question is whether these goods are liable to excise duty under item 26AA or under item 68, in the First Schedule to the Central Excises & Salt Act, 1944 (hereinafter referred to as 'the Act').

Tariff Item No. 26AA was introduced w.e.f. 24.4.1962 in the First Schedule to the Act. Item 26AA reads thus:

Description of goods	Rate of duty
26AA. Iron or Steel Products, The Following Namely:	
(i) Semi-finished steel inluding blooms, billets, slabs, sheet bars, tin-bars and hoe bars.	Three hundred and fifty rupees per metric tonne.
(i-a) Bars, rods, coils, wires, joists, girders, angles other than slotted angles, channels other than slotted channels, tees, flats, beams, zeds, trough, piling and all other rolled, forged or extruded shapes and sections not otherwise specified.	Three hundred and fifty rupees per metric tonne.
(ii) Plates and sheets (including uncoated plates and sheets intended for tinning, and forms such as ridges, channels,	One thousand three hundred and fifty rupees per metric tonne.

rain water pipes and their fittings made from plates or sheets but not including plates and sheets after tinning, and hoops all sorts other than skelp and strips.	
(iii) Flats skelp and stips.	One thousand three hundred and fifty rupees per metric tonne.
(iv) *Pipes and tubes (including blanks thereof) all sorts, whether rolled, forged, spun, cast, drawn, annealed, welded or extruded.*	One thousand rupees per metric tonne plus the excise duty for the time being leviable on pig iron or steel ingots, as the case may be.
(v) All other steel castings, not otherwise specified.	Seven hundred and fifty rupees per metric tonne.

Explanation—"Skelp" means hot rolled narrow strip of width not exceeding six hundred milimetres with rolled (square, slightly round or bevelled) edge."

However, soon afterwards, the Government of India issued a notification dated 1.3.1963 under Rule 8 of the Central Excise Rules (hereinafter referred to as 'the Rules') by which "telegraph, telephone and electric lighting and transmission poles falling under Item 26AA of the First Schedule of the Act" were declared completely exempt from duty subject to certain conditions and limitations prescribed in the notification with which we are not concerned. (It may be here mentioned that this some similar notification was in force at various points of time but it is unnecessary to set out the full particulars thereof).

The appellant, having paid the duty in respect of the above goods under item 26AA, applied to the Assistant Collector, Central Excise on 10.5.1963 for the refund of the duty already paid in view of the notification above-mentioned. Permission was also sought for clearance of poles without payment of duty from the factory with immediate effect. The Assistant Collector, by an order dated 25.5.1963, rejected these requests on the ground that the conditions prescribed in the notification for exemption were not satisfied and not on the ground that the goods manufactured did not fall under item 26AA. The appellant thereupon preferred an appeal before the Collector of Central

Excise who held that the goods manufactured were eligible for the exemption contained in the notification. This order of the Collector was passed on 29.1.1964. The result was that the appellant paid no duty on the goods in question and the goods were cleared without either payment of duty or collection of duty from the purchasers right from 1962 till 1975.

On 1.3.1975, the legislature introduced Tariff Item No. 68 in the First Schedule to the Act covering "goods not elsewhere prescribed". Even thereafter, the appellant filed classification lists showing the poles as falling under Item 26AA and eligible for exemption under the relevant notification (which had taken the place of the notification of 1.3.63). These classification lists were approved and the appellant continued to clear its goods without paying duty till August, 1982.

Ealier, on 8.12.1977, the Superintendent of Central Excise had taken a view that the transmission and lighting poles manufactured by the appellant were classifiable not under item 26AA but under item 68 of the Central Excise Tariff and that, therefore, the appellant was liable to pay duty on all goods manufactured by it from 1.3.1975 till the date of the notice. The appellant was asked to furnish a statement of the goods manufactured and sold earlier and also to file a classified list for the above goods in respect of the future. The appellant objected to this, referred to the earlier exemptions granted and contended that the poles were covered by Tariff Item No. 26AA and that it continued to be entitled to the exemption under notification No. 69 of 1973 dated 1.3.1973 as amended by a notification No. 16 of 1976. Apparently, this contention was not acceptable to the Revenue. So, the appellant filed Writ Petition No. OJC 1072 of 1977 in the Orissa High Court challenging the letter dated 8.12.1977 and obtained, on 26.12.77, an order restraining the Revenue from enforcing the letter of 8.12.77. It received a further letter from the Superintendent on 6.11.1981 to the effect that the assessee-appellant will have to pay duty under Tariff Item No. 68 in regard to "swaged poles" and calling upon it file a classification list well in advance on the above footing. The appellant challenged this letter by filing a Writ Petition No. 329 of 1982 and obtained a stay order. These two writ petitions were eventually disposed of by the Orissa High Court by its order dated 6.10.1982. The High Court declined to interfere with the adjudication proceedings under the Act in the writ petition and dismissed the writ petitions with the direction that an adjudication be made within three months from the date of the communication of the order after giving full opportunity to the appellant to establish its stand and by a reasoned deci-

sion. Subsequently, on 31.3.83, the Assistant Collector passed an order holding the goods of the value of Rs. 16,04,753 classifiable under Tariff Item 68 and confirmed the demand for the period 1.3.1975 to 21.1.1983 (excluding the period from 26.12.1977 to 6.10.1982, the period of the stay granted in the writ petiton). The Appellate Collector, by his order dated 30.9.83, dismissed the appeals preferred and confirmed the order of the Assistant Collector in respect of the goods to the tune of Rs. 13,53,653 being the goods cleared during the period from 22.3.79 to 21.1.83.

Further appeals were preferred before the Central Excise & Gold (Control) Appellate Tribunal (CEGAT) by both parties. There were five appeals by the assessee before the Tribunal in respect of five demand notices and proceedings in respect thereof. The department had preferred the appeal in respect of the demand for the period 1.3.75 to 21.3.79 which had been set aside by the Appellate Collector. The Tribunal disposed of the appeals on 16.4.85. It did not agree with the appellant's contention that the goods were dutiable under Tariff item No. 68. It was, however, of the opinion that the back duty demand should be restricted to a period of six months prior to the issue of the show cause notice dated 8.12.77 (excluding the period from 26.12.1977 to 16.3.1978). It upheld a demand of Rs. 15,45,217. The appellant filed a rectification application pointing out that the stay had been vacated by the High Court only on 6.10.82 and this was disposed of by the Tribunal on 12.5.1986. The Tribunal directed the exclusion, from the levy of back duty, of the larger period from 26.12.77 to 6.10.1982. There was, we are told, another rectification application and an order thereon which is the subject matter of another Special Leave Petition which is not before us today. We shall leave that out of account.

These appeals, under Section 35L of the Act, have been preferred against the orders dated 16.4.1985 and 12.5.1986 passed by the Tribunal.

We have heard the learned counsel for both parties. We are of the opinion that the appeals have to be allowed on the principle contention on classification raised on behalf of the appellant and that, in this view, it is unnecessary to consider the other point regarding limitation raised on behalf of the appellant. We are of the opinion that the appellant's contention that the goods in question fall under Item 26AA is well founded and that the Revenue was not justified in attempting to levy duty on the basis that the goods fall under Tariff Item No. 68. Before we state our reasons for coming to this conclusion, it would be

only appropriate to indicate the approach of the Revenue authorities and the Tribunal. A

The Assistant Collector of Central Excise pointed out that the poles sold by the assessee were manufactured by it, no doubt from pipes and tubes, out after an elaborate process. He described this process at great length in his order dated 31.3.1983. Such poles are of B two types: (1) Stepped poles (2) Swaged poles. Stepped poles are made "from one length of the tube, seamless or welded, the diameter being reduced in parallel steps by passing the tubes through series of dies." Swaged poles are made "of seamless or welded tubes of suitable lengths swaged together when hot and the upper edge of each joint is chamfered off at an angle of about 45 degrees". The process of C manufacture is briefly this: for stepped poles, a pre-determined length of tube, called a pole blank, is heated at the end to about 1100°C and subsequently forged giving a hook shape to the end to facilitate holding of the tube. The hooked end is held firmly and by a series of draw dies the out side diameter is reduced to give steps to the poles at desired step lengths. The forged end is subsequently sawn off and the D finished poles, after cooling, are conveyed to a bituminizing plant. Different varieties of step drawn poles, as per ISI specifications, are drawn depending on the needs of the consumers. For the manufacture of swaged poles, the bottom pipe passes through roughing and the top portion of this pipe is slightly squeezed so that the middle pipe can be put into the bottom pipe and can fit in. Under heavy hydraulic pres- E sure both the pipes are pressed mechanically and swaged. Finally the top tube is put inside the middle tube and the process is repeated so as to produce a complete piece of swaged pole. The Assistant Collector was of the view that the process of manufacture, as indicated above, alters the identity of the mother tubes and that the stepped poles or swaged poles, as the case may be, constitute a distinct commercial F commodity. In view of this process of manufacture which the tubes undergo, the end product, i.e. poles, no longer falls under the purview of the description of Tariff Item 26AA and hence falls under item 68 introduced in 1975.

The Appellate Collector and Tribunal have endorsed this line of G reasoning. The Tribunal observed that the process of manufacture of poles produced by the appellant showed that the goods in question were obtained by heating the steel pipes to a substantial temperature and giving shapes and forms by a series of processes to produce, what were known as, stepped poles and swaged poles. It was, therefore, manifest that the poles have a distinct name, character and use, diffe- H

A rent from pipes and tubes. In trade parlance also, the Tribunal pointed out, the expressions 'pipes' and 'tubes' were generally understood as something intended for conveying fluids. It could not be said that the products manufactured by the appellant are pipes or tubes. The products conform to ISI specification of "poles". The Tribunal agreed with the Appellate Collector that the poles made of steel tubes and B steel pipes are distinct from 'pipes and tubes', the expression used in sub-item (iv) of item 26AA. The duty was, therefore, rightly levied under Tariff item 68.

On behalf of the appellant, it had been submitted before the Tribunal that, on all earlier occasions, the classification lists filed by the appellant were repeatedly approved on the basis that the goods fall C under Tariff item No. 26AA and that it was not open to the department to reopen these approved classification lists. The Tribunal observed:

> "We do not wholly accept this contention. It is well settled D that if facts are different, further and fresh facts are brought on record, process of manufacture is changed, relevant entries in the Tariff have undergone a modification or if there had been pronouncement of a High Court or Supreme Court, the classification approved may be reconsidered and reopened. *(M/s. Nucham Plastics Ltd. Faridabad* v. *The Collector of Central Excise, Delhi,* [1983] ECR E 1888-D following *M/s. J.K. Synthetics Ltd. and Another* v. *Union of India and Others,* [1981] ELT 328 (Delhi). In the instant case, after the approval by earlier classification lists, Tariff item 68 had come on the Tariff. Due to this change in law, Excise authorities could enquire what would F be the more appropriate classification of the goods in question. It was thus open to the authorities to modify the classification subject, however, to the demand being restricted to the time limit, as may be applicable, and stipulated in section 11A of the Central Excises and Salt Act, 1944. We, therefore, hold that the classification sought under Tariff G item 68 is valid."

We may point out that the reasoning in this part of the order of the Tribunal, extracted above, is patently erroneous. It seems to say that, even if the goods manufactured by the appellant had been rightly classified under item 26AA before 1.3.1975, the introduction of item H 68 makes a difference to the interpretation of item 26AA. This is not

correct. Item 68 was only intended as a residuary item. It covers goods not expressly mentioned in any of the earlier items. If, as assumed by the Tribunal, the poles manufactured were rightly classified under item 26AA, the question of revising the classification cannot arise merely because item 68 is introduced to bring into the tax net items not covered by the various items set out in the schedule. It does not and cannot affect the interpretation of the items enumerated in the schedule. This logic of the Tribunal is, therefore, clearly wrong.

The real question, therefore, is whether the goods manufactured by the appellant can be rightly classified under item 26AA. We think that the answer to this question should be in the affirmative. It is true that there is some difference in the description of the goods. While item 26AA covers only pipes and tubes, the goods manufactured by the assessee are called poles. It is also true that the poles have to be manufactured by applying certain processes of heating and forging to pipes or tubes. But does all this so change the commercial character of the goods marketed by the assessee as to take them away from the scope of item 26AA?

We think not. The language of tariff item no. 26AA is very wide. It covers iron and steel products of the descriptions set out therein. The sum and substance of the description given by the Assistant Collector in the assessment order is only (a) that the poles produced by the appellant are not ordinary pipes and tubes which convey a fluid from one place to another and (b) that they are manufactured by a very elaborate and sophisticated process. So far as the first point is concerned, it will be appreciated that, just as pipes and tubes are generally intended to carry a fluid from one place to another, the poles with which we are concerned enable wires to be passed through them for the transmission of electric energy, a function not very very different in nature from that of other ordinary pipes and tubes. That apart, even tubes and pipes are not always necessarily used for such purpose. They can be used as flag-masts or for purposes of scaffolding or other purposes where they do not serve as a medium for the transmission of a fluid. This is not, therefore, a sound objection. In regard to the second point, it is perhaps sufficient to point out that sub-item (iv) of item 26AA refers to pipes and tubes (includings blanks thereof) all sorts, whether rolled, forged, spun, cast, drawn, annealed, welded or extruded. It is comprehensive enough to taken in all sorts of pipes and tubes and even those obtained by the processes of forging, drawing and so on. The ultimate product in the present case is merely a set of pipes or tubes of different diameters attached to one another by diffe-

A rent methods. The so-called manufacture is nothing but the putting together of a number of pipes or tubes by one or other of the processes mentioned in the tariff item. The goods produced, therefore, do not cease to be iron and steel products or pipes and tubes of the description mentioned in item 26AA(iv). It may not be also correct to characterise them as a different commercial commodity. Some of them B are called poles, an expression which means "a long slender piece of metal or wood commonly tapering and more or less rounded". Electric poles, being hollow ones, are not much different from pipes or tubes. The statement that they are commercially distinct commodities is merely based on their being called 'poles'. They are also available in the same market in which normally pipes and tubes are otherwise available. Neither the circumstance that certain processes are applied C to the "mother" pipes or tubes nor the fact that, in order to identify the particular type of tube or pipe one needs, one may use different names is sufficient to treat the article as a commercially different commodity: See *Indian Aluminium Cables Ltd.* v. *Union,* [1985] 3 S.C.C. 284 followed and applied in *Bharat Forge & Press Industries* v. *C.C.E.*, D [1990] 1 S.C.C. 532.

However, even assuming that there could have been some doubt as to the intention of the legislation in this regard, the matter is placed beyond all doubt by the Revenue's own consistent interpretation of the item over the years. It has been pointed out that prior to 1.3.1975, E residuary item no. 68 was not in the schedule. If the Revenue's contention that these poles are not pipes and tubes is correct then they could not have been brought to duty at all before 1.3.1975. But the facts is that transmission poles have been brought to duty between 1962 to 1975, and that could only have been under item 26AA (for there was no residuary item then). This is indeed proved by the fact that this very F assessee was thus assessed initially and also by the issue of notifications of exemption from time to time which proceed on the footing that these poles were assessable to duty under item 26AA but were entitled to an exemption if certain conditions were fulfilled. Indeed, the assessee also applied for an obtained relief under one of those exemption notifications since 1964.

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It is contended on behalf of the department that this earlier view of the department may be wrong and that it is open to the department to contend now that the poles really do not fall under item 26AA. In any event, it was submitted since the poles were exempted from duty under one notification or other, it was not very material prior to H 1.3.1975 to specifically clarify whether the poles would fall under item

26AA or not. This argument proceeds on a misapprehension. The Revenue is not being precluded from putting forward the present contention on grounds of estoppel. The practice of the department in assessing the poles to duty (except in cases where they were exempt as the conditions in the exemption notifications were fulfilled) and the issue of notifications from time to time (the first of which was almost contemporaneous with the insertion of item 26AA) are being relied upon on the doctrine of *contemporaneo expositio* to remove any possible ambiguity in the understanding of the language of the relevant statutory instrument: see *Varghese* v. *I.T.O.*, [1982] 1 S.C.R. 629; *State of Tamil Nadu* v. *Mahi Traders,* [1989] 1 S.C.R. 445; *C.C.E.* v. *Andhra Sugar Ltd.*, [1989] (Supp.) 1 S.C.C. 144 and *Collector of Central Excise* v. *Parle Exports P. Ltd.*, [1989] 1 S.C.C. 345. Applying the principle of these decisions, that a contemporaneous exposition by the administrative authorities is a very useful and relevant guide to the interpretation of the expressions used in a statutory instrument, we think the assessee's contention that its products fall within the purview of item 26AA should be upheld.

A B C D

One more aspect of the issue should be adverted to before we conclude. The assessee is relying upon a specific entry in the tariff schedule while the department seeks to bring the goods to charge under the residuary item no. 68. It is a settled principle that unless the department can establish that the goods in question can, by no conceivable process of reasoning, be brought under any of the specific items mentioned in the tariff, resort cannot be had to the residuary item: see the *Bharat Forge* case (supra). This certainly is not the position in this case, particularly in the light of the department's own understanding and interpretation of item 26AA.

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For the reasons above mentioned, we are of the opinion that the appellant's contention that the goods in question are assessable to duty under item 26AA is correct and has to be upheld. The assessments in question will be modified accordingly and the appellant will be entitled to complete exemption or reduced duty in accordance with the provisions of item 26AA read with the relevant notifications, if any, extant at the various points of time with which we are concerned. The appeals are allowed accordingly. In the above view, it is not necessary to go into the other question regarding limitation which had been urged before the Tribunal by the assessee-appellant.

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Y. LAL Appeals allowed.