

(1992) 01 GUJ CK 0039

In the Gujarat High Court

Case No : Special Civil Application No. 1259 of 1990

Alembic Glass Ind. Ltd.

APPELLANT

Vs

Union of India (UOI)

RESPONDENT

Date of Decision : 22-01-1992

Acts Referred:

Central Excise Rules, 1944 — Rule 173L, 173L(3), 173L(4)

Central Excises and Salt Act, 1944 — Section 11A, 11B

Constitution of India, 1950 — Article 226

Citation : (1992) 60 ELT 64

Hon'ble Judges : J.M. Panchal, J;A.P. Ravani, J

Bench : Division Bench

Advocate : Kamal B. Trivedi, for Trivedi, Gupta and Dave, for the Appellant; B.B. Naik, for the Respondent

Judgement

A.P. Ravani, J.—Petitioner No. 1 is a company registered under the provisions of the Companies Act, 1956 and Petitioner No. 2 is authorised signatory and shareholder thereof. The petitioner company is engaged in the business of manufacturing of glass and glassware falling under Chapter 7015.00 of the Schedule to the Central Excise Tariff Act, 1985. Between October 8,1987 and October 28,1987, the petitioner company cleared 6,26,400 bottles on payment of excise duty. The bottles were supplied to its customers. Out of the bottles supplied, it received back 6,09,240 bottles as being defective. These bottles were received back on 4-1-1988 and on 9-1-1988. The petitioner on January 4,1988 and on January 9,1988 made declaration in appropriate form before the Assistant Collector of Central Excise concerned that defective bottles were received back by the petitioner. The petitioner, thereafter, submitted an application on February 18,1988 to the Collector of Central Excise and Customs and sought permission to destroy the bottles and re-make other goods therefrom. Permission was granted by the Collector, Central Excise on February 3,1989.

2. The petitioner submitted a claim of refund of excise duty of Rs. 3,40,058.27 ps. (Rupees three lacs forty thousand fifty-eight and paise twenty-seven only) on

March 29, 1989. The Assistant Collector, Central Excise issued show cause notice dated July 3, 1989 and called upon the petitioner as to why the refund claim should not be rejected as the account of return of the goods and production of other goods was not submitted before the Collector of Central Excise within prescribed time as required under sub-rule (3) of Rule 173L of the Central Excise Rules and also on the ground that the refund claim was not preferred within the period of six months as provided u/s 11B of the Central Excises and Salt Act, 1944. The petitioner appeared before the Assistant Collector and made submissions on facts as well as on law points. The Assistant Collector, by his order dated November 30, 1989, produced at annexure-A to the petition, rejected the claim inter alia on the ground that the provisions of submitting accounts to the Collector, Central Excise, within the prescribed period as provided under Rule 173L(3) of the Central Excise Rules was not complied with and that the claim was not filed within the period of six months as required u/s 11B of the Act. The petitioner has challenged the legality and validity of the aforesaid order by filing this petition.

3. When the petition came up for hearing, it was contended that the Assistant Collector who heard the show cause notice had retired before passing the order and his successor who has passed the impugned order had not provided an opportunity of being heard to the petitioner. Therefore it was submitted that the order was in violation of principles of natural justice. The submission and concession made by the learned counsel for the petitioner was recorded by this court in order dated November 25, 1991 as follows :-

"Learned counsel for the petitioner submits that if the petitioner is afforded an opportunity to get the hearing before an officer who himself passes the final order the petitioner would be satisfied. The petitioner concedes that the vice of contravention of the principles of natural justice as far as adequate opportunity of hearing having not been granted by the same person would stand removed if any other Assistant Collector duly empowered hears the petitioner and decides the refund claim after hearing the petitioner."

In view of the aforesaid concession, the court directed respondent No. 3 to hear and decide the refund claim submitted by the petitioner afresh. Accordingly respondent No. 3 has heard the petitioner and passed order dated December 11/13, 1991 which is produced at annexure "K" to the petition. This order is now under challenge in this petition.

4. The Assistant Collector, respondent No. 3 herein, inter alia held that it was obligatory on the part of the petitioner to fulfil all the conditions of Rule 173L of Central Excise Rules, 1944. In the instant case, there was delay in remaking the defective goods and rendering the accounts to the Collector of Central Excise for his satisfaction. Therefore, he held that the benefit of refund of duty under Rule 173L cannot be granted. It is also held by him that as provided u/s 11B of the Act, the refund claim should have been made within a period of six months from the date of re-entry of the goods in the factory. In this case the date of re-entry

was January 4, 1988 and January 9, 1988. Therefore, the limitation of six months would expire on July 8, 1988. In the instant case the claim for refund has been made on March 29, 1989. Thus, obviously the claim was preferred beyond the prescribed period of limitation. Therefore also, the Assistant Collector rejected the claim.

5. It is contended on behalf of the petitioner that in past there were cases of return of goods and the petitioner had preferred refund claim. At that time the department insisted for permission of the Collector regarding destruction of goods. Thus according to the petitioner, the department induced the petitioner company to understand that the permission of the Collector regarding destruction of goods was a pre-condition to the filing of the refund claim and to the furnishing of accounts. The contention is repelled by the respondents. In the affidavit-in-reply filed by one Shri P.R. Nikumbh, Assistant Collector of Central Excise and Customs, Division III, Vadodara, it is pointed out that in past in similar circumstances, the petitioner has been granted refund claim on March 4, 1989; March 8, 1989; April 6, 1989 and on April 8, 1989. At that time in show cause notices, the petitioner was required to explain as to why the refund claim be not rejected on the ground that there was no requisite permission of the Collector. But while adjudicating the claim the ground was decided against the department. Therefore, it cannot be said that the department has induced the petitioner to believe that permission of the Collector for destruction of the goods was condition precedent for filing the refund claim. Thus the submission made is based on facts non-existing and therefore it is incorrect to say that department misled the petitioner.

6. Moreover it is evident that, Rule 173L of the Central Excise Rules does not require that before making the claim for refund, permission of the Collector for destruction of the goods should have been obtained. Rule 173L read with the provisions of Section 11B of the Act and the definition of relevant date contained in Clause B(b) in Explanation to Section 11B of the Act clearly indicate that application for refund is to be made within six months from the date of return of the goods in the factory. For submitting such application, the assessee is not required to wait till the permission to destroy the goods is granted by the Collector. Section 11B of the Act provides for making application for refund of any duty of excise and such application should be made before the expiry of six months from the relevant date. In the instant case, the relevant date would be as provided in Clause (B)(b) of Explanation to Section 116 of the Act which reads as follows :-

"in the case of goods returned for being remade, refined, reconditioned, or subjected to any other similar process, in any factory, the date of entry into the factory for the purposes aforesaid."

7. Thus the position of law on the point is very clear. As provided under this provision, the application for refund is required to be made within six months from the date of re-entry of the goods in the factory. In the instant case, the

goods re-entered in the factory on January 4, 1988 and on January 9, 1988. Therefore, the claim should have been preferred on or before July 3, 1988 and July 8, 1988. Even if it is assumed that in past some officers of the department might have raised a contention that permission of the Collector to destroy the goods was condition precedent before filing the claim of refund, that would not change the position of law. Such erroneous belief of an officer of the department cannot be pleaded as estoppel. Moreover, as indicated hereinabove, even in that very proceeding, the adjudicating authority of the department had not considered this to be a good ground.

8. As disclosed in the affidavit in reply filed by Shri P.R. Nikumbh, Assistant Collector of Central Excise and Customs, Division III, Vadodara, the petitioner company as well as the learned advocates appearing for the petitioner were very much aware about the position of law. This fact is clear from the letters dated July 7, 1988 and February 2, 1989. In the aforesaid letters it is contended by the company that the permission to destroy the goods was not a condition precedent. In fact this contention has been upheld by the adjudicating authority of the department. Therefore, to say that the petitioner was induced to understand and believe by the department that the permission to destroy the goods was a condition precedent to file the claim of refund has no merits

9. It is contended that the filing of account with the Collector within the prescribed period of limitation as provided under Rule 173L(3) is a mere technical formality and since the petitioner has complied with the same, even after the prescribed period of limitation, the Assistant Collector should not have held that there was non-compliance of the provisions of Rule 173L(3). This contention also cannot be accepted. It is an admitted position that the petitioner has not applied for relaxation of this condition to the Collector, as provided under Rule 173L(4). In absence of any such application from the petitioner company and in absence of any relaxation having been granted by the Collector, the Assistant Collector was justified in holding that there was non-compliance of Rule 173L inasmuch as the accounts of destruction and of remaking of the goods were not submitted before the Collector within time.

10. In this connection reference may be made to a decision of the Supreme Court in the case of Indian Aluminium Company Limited Vs. Thane Municipal Corporation, In that case to avail of the concessional rate of octroi, importers were required to make declaration in prescribed form to the effect that the goods imported shall not be used for any other purpose for sale or otherwise etc. Thus an incentive was sought to be given to such entrepreneurs by such concession if the raw material which is imported is also utilised in the industrial undertaking without selling or disposing of otherwise. This being the object, a verification at the relevant time by the octroi authorities becomes very much necessary before a concession "could be given. Since the company in that case which had imported the goods within the Municipal Limit had failed to fulfil the obligation of filing the requisite declaration, the Supreme Court held that it cannot turn-

around and ask the authorities to make verification of record. The Supreme Court further observed that the verification at the time when the raw material was there is entirely different from a verification at a belated stage after it has ceased to be there. The Supreme Court further observed that the failure to file the necessary declaration would disentitle the company from claiming any such concession. Similarly in this case the petitioner company failed to submit the accounts to the Collector as provided under Rule 173L. This cannot be said to be a mere procedural requirement. In the absence of the necessary accounts having been filed within the prescribed period of limitation, it would not be possible for the department to make physical verification of the goods. Therefore, it cannot be said that the view taken by the Assistant Collector is in any way contrary to law, unjust or arbitrary.

11. In the instant case, the refund claim was required to be made within the prescribed period of six months from the relevant date. The relevant date would be the date on which the goods reentered the factory. In this case it would be January 4, 1988 and January 9, 1988 as provided in sub-clause (b) of Clause B of Explanation to Section 11B of the Act. Thus the period of six months would expire on July 8, 1988 while the claim has been preferred on March 29, 1989. The Assistant Collector is bound by the provisions of the statute. This is the law laid down by the Supreme Court in the case of Collector of Central Excise, Chandigarh Vs. Doaba Co-operative Sugar Mills Ltd., Jalandhar, . In that case the department sought to invoke the provisions of Section 11A of the Act and attempted to make recovery of the amount of duty after the period of limitation prescribed u/s 11A of the Act. The Supreme Court inter alia observed that "but in making claims for refund before the departmental authority, an assessee is bound within four corners of the Statute and the period of limitation prescribed in the Central Excise Act and the rules framed thereunder must be adhered to. The authorities functioning under the Act are bound by the provisions of the Act. If the proceedings are taken under the Act by the department, the provisions of limitation prescribed in the Act will prevail". The Supreme Court referred to its earlier decision in the case of Miles India v. Assistant Collector of Customs 1987 (30) E.L.T. 641. In that case the Supreme Court observed that the Customs Authorities were justified in disallowing the claim for refund as they were bound by the period of limitation provided under the relevant provisions of the Customs Act, 1962. Similarly in the instant case also, the Assistant Collector, who decided the refund claim was bound by the provisions of the Act and the rules. Therefore the refund claim rejected on the ground that the claim is made beyond the period of limitation is also eminently just and proper.

12. The learned counsel for the petitioner has submitted that the provisions of Section 11B of the Act would not be applicable to the refund claim arising under Rule 173L of the Central Excise Rules, 1944. In his submission Rule 173L is a complete code and it provides separate machinery and there is specific provision for claiming refund in certain circumstances. Therefore, it is submitted that as held by this court in the case of Torrent Laboratories Pvt. Ltd. Vs. Union of India,

it should be held that the provisions of Section 11B of the Act are not applicable and the period of limitation as provided under the general law of limitation should have been made applicable. The decision of this court relied upon pertained to MODVAT scheme. At the relevant time, in MODVAT scheme no period of limitation was prescribed. In that context, the aforesaid decision has been rendered by this court. It is not applicable to the facts and circumstances of this case. In the instant case, a bare look at the provisions of Section 11B indicate that it is applicable even to the case of the goods which are returned for re-making, refining or reconditioning to the factory. This is evident from the provisions of definition of "relevant date" which in case of returned goods, as far as Rule 173L is concerned is the date of re-entry of the goods in the factory [see sub-clause (b) of Clause (B) of Explanation to Section 11B]. Therefore the contention that the provisions of Section 11B of the Act are not applicable has no merits and the same fails.

13. The learned counsel for the petitioner has submitted that the claim of the petitioner is just. Hence it should not have been rejected on the technical ground of limitation. In support of this submission, observations made by the Supreme Court in several decisions have been referred to and relied upon. It is submitted that in a society governed by rule of law, state should not take technical plea of limitation and should not deprive a citizen of his legitimate claim. Therefore it is prayed that this court should exercise its discretion under Article 226 of the Constitution. The observations made by the Supreme Court in various decisions are required to be understood in proper context. Unless the entitlement is proved, the question of exercise of discretion does not arise. It is not possible to read any of the observations made by the Supreme Court to the effect that even though a citizen may not be entitled to relief, court should grant the same in exercise of its discretion under Article 226 of the Constitution. The observations of the Supreme Court would be applicable only when the petitioner proves the entitlement to the claim. It must be realised that as laid down by the Supreme Court in the case of Doaba Co-op. Sugar Mills Ltd. (supra), even the department is bound by the rules of limitation prescribed under the appropriate provisions of the Act and the Rules. In exercise of power under Article 226 of the Constitution of India, the court would be slow to say that the rules of game could be applied unilaterally, meaning thereby, the provisions as regards limitation be applied to the revenue only and it should not be applied to the assessee. If such course is adopted, we are afraid it may give rise to several complications and it may create several intractable problems in the fiscal management of the country.

14. In this connection, reference may be made to a decision of the Supreme Court in the case of M/s. Orissa Cement Ltd. and Others Vs. State of Orissa and others, . In para 71 of the judgment, the Supreme Court has inter alia observed that where a person affected by an illegal exaction, files an application for refund under the provisions of the relevant statute or files a suit to recover the taxes as paid under a mistake of law, the court can grant relief only to the extent permissible under the relevant rules of limitation. Even if he files an application

for refund or a suit for recovery of the taxes paid for several years, the relief will be limited only to the period in regard to which the application or suit is not barred by limitation. The Supreme Court has, *inter alia*, observed that if different periods of limitation were applied, it would result into discrimination between persons based on their choice of their forum for relief, a classification which, *prima facie*, is too fragile to be considered a relevant criterion for the resulting discrimination. Thus the contention that this court should exercise its discretion in favour of the petitioner and order to grant refund claim has no merits.

15. The learned counsel for the petitioner has relied upon a decision of the Supreme Court in the case of *Shri Vallabh Glass Works Ltd. and Another Vs. Union of India (UOI) and Others*, wherein it is observed that there is no period prescribed by law in respect of petition filed under Article 226 of the Constitution of India. However, the Supreme Court further observed that this cannot be a rigid formula. There may be cases where a delay of shorter period may be considered sufficient to refuse relief in a petition under Article 226 of the Constitution of India. There may be also cases where there may be circumstances which may persuade the court to grant relief even though the petition may have been filed beyond the period of limitation. Each case has to be judged on its own facts and circumstances taking into consideration the conduct, the parties, the change in the situation, the prejudice which is likely to be caused to the opposite party or the general public. These observations are required to be read together with the law laid down by the Supreme Court in the case of *Orissa Cement Ltd. (supra)* and in the case of *Doaba Co-op. Sugar Mills Ltd. (supra)*. Keeping in mind the law laid down by the Supreme Court in all these decisions, and having regard to the overall facts and circumstances of the case, we do not think that it would be open to this court to grant relief to the petitioner under Article 226 of the Constitution of India. Assuming that under Article 226 of the Constitution, we could exercise our discretion, in our opinion it would not be proper exercise of discretion to grant the relief to the petitioner.

16. Even on merits, the petitioner has failed to comply with the provisions of Rule 173L(3) of the Central Excise Rules, 1944. The petitioner did not submit the account to the Collector within the period of limitation. Thus the department has been deprived of the opportunity to make appropriate verification at the relevant time. Therefore, even on merits, it is not correct to say that the claim of the petitioner is just claim and that it is rejected only on technical ground.

17. For the aforesaid reasons, the petition is liable to be rejected. It is clarified that the petition is liable to be rejected on the ground of limitation as well as on merits. Thus on each of the aforesaid grounds the petition is liable to be rejected and it is hereby rejected. Rule discharged.