
(2000) 11 DEL CK 0076
In the Delhi High Court
Case No : CWP 6446 of 2000

Amrit Banaspati Co. Ltd.

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 03-11-2000

Acts Referred:

Central Excises and Salt Act, 1944 — Section 35F

Citation : (2000) 55 DRJ 648 : (2000) 72 ECC 717 : (2003) 151 ELT 496

Hon'ble Judges : Dr. Arijit Pasayat, C.J.; D.K. Jain, J

Bench : Division Bench

Advocate : A.M. Singhvi, Medini Sud and Surti Chaudhary, for the Appellant;
K.K. Sud ASG, Jayant Bhushan and Neeraj Jain, for the Respondent

Final Decision : Dismissed

Judgement

Arijit Pasayat, C.J.—Petitioner has challenged the order dated 25.9.2000 passed u/s 35-F of the Central Excise Act, 1944 (in short, the Act) by the Central Excise & Gold Control Appellate Tribunal (in short, Tribunal) in stay application No. E/Stay/1290/2000-D in Appeal No. E/2368/2000-D.

2. Background facts so far as relevant are essentially as follows:

Petitioner is engaged in the manufacture of vegetable products falling under Chapter 15 of the Schedule to Central Excise Tariff Act, 1985 (in short the Tariff Act). A show cause notice dated 30.11.1998 was issued requiring petitioner to show cause as to why differential Central Excise duty amounting to Rs 72,27,073.20, not paid by it, should not be recovered u/s 11A of the Act by invoking the extended period of limitation as petitioner did not pay the duty on soap stocks manufactured by it and why penalty should not be imposed under Rule 173Q of the Central Excise Rules, 1944 (in short, the Rules) read with Section 11AC of the Act and as to why interest should not be charged u/s 11AB of the Act on the amount of demand. The basis for issuance of the notice was that during the course of manufacture of vegetable products falling under sub-

heading 1504.00 of the Schedule, the product, i.e. soap stock classifiable under tariff sub-heading 1507.00 also got manufactured as by product. In terms of classification, soap stocks was chargeable to nil rate of duty. But the concerned exemption notification was rescinded from 23.7.1996 which became effective from the date of presentation of 1996-97 Budget i.e. 23.7.1996. For vegetable products falling under sub head 1504 nil rate was prescribed w.e.f. 23.7.1996, whereas soap stock was made chargeable to duty @ 20%- ad valorem w.e.f. 23.7.1996. According to the Department, the requisite duty was not paid by the petitioner. However, petitioner by its Idler dated 9.8.1996 submitted that what in reality was residual substance was being described as soap stock and was not an excisable commodity. On consideration of the rival submissions, the Commissioner of Central Excise held that the petitioner during the period 23.7.1996 to 28.2.1997 had obtained soap stock as a by-product during the refining process of vegetable oil with caustic lye and this soap stock was sold/used by the petitioner in the manufacture of exempted excisable goods by suppressing the facts willfully from the department as detailed in the order. Duty of Rs. 72,27,073.20 was demanded. Penalty of similar amount was levied. There was direction to pay interest @ 20% w.e.f. 28.9.1996. Order of the Commissioner had been challenged before the Tribunal. An application for dispensing with pre-deposit was filed. By the impugned order, Tribunal has directed deposit of Rs. 35 lakhs. It has been indicated by the Tribunal in the order that on deposit of the said amount, balance duty and penalty would stand waived and stayed till disposal of the appeal. Deposit was directed to be made within six weeks from the date of communication of the order.

3. In support of the application, three submissions have been made. Firstly, it is submitted that the petitioner has been declared to be a sick company under the Sick Industries Special Provision Act, 1985 (in short, SICA). in that background Tribunal should not have directed any payment. Further the Tribunal has erroneously taken into account the financial stability of an alleged sister concern- M/s. Amrit Pulp and Paper Industries, It is, also, submitted that undue financial hardship which would be caused if any part of the demand is made is lost sight of. Learned counsel for the respondent on the other hand, submitted that by resorting to dubious methods, huge amount of excise duty to the tune of Rs. 72,27,073.22 has been withheld. It is also submitted that petitioners' financial position is not as bleak as is tried to be projected, and no hardship would be caused if payment is made.

4. Though learned counsel for the petitioner wanted to highlight certain factual aspects, which according to him, show that a prima facie case exists, we do not think it necessary to go into them in detail except to the extent necessary for disposal of the writ petition. We find, Tribunal has with reference to certain factual and legal aspects come to hold that there is no prima facie case made out in favor of the petitioner for allowing a total waiver of pre-deposit. We are of the view that the assessment done by the Tribunal to see whether there is prima facie case is in order. Tribunal recorded the following finding after noticing rival

stands. Perusal of the impugned order also shows that the appellants from December 1997 onwards on their own started paying duty on the soap stock. They paid duty on 5032.00 MT of soap stock cleared/consumed cap-lively for the manufacture of acid oil during 23.7.96 to 30.11.96. Similarly, they paid duty from December 1996 to February 1997, on 3920 MT of soap stock which was manufactured and cap lively used by them during this period. However, it revealed that they had not paid the duty on the correct total amount of (sic) the "soap stock". The differential duty amount had been demanded from them. Having paid the duty on the soap stock voluntarily, the plea of the appellants prima facie that their product, soap stock is not marketable and not excisable, cannot be said to have been wrongly rejected by the Commissioner. Since the matter is pending in appeal and disputed facts are involved, it would not have been proper for Tribunal to record any positive finding either in favor of the assessee or the Revenue.

5. So far as financial hardship is concerned, great emphasis is laid on the order passed by the Board for Industrial and Financial Reconstruction (in short BFIR) to contend that the petitioner has been declared a sick company within the meaning of Section 3(1)(o) of SICA, and Therefore direction for payment of the part of duty is not legal and proper. Strong reliance is placed on a decision of the Apex Court in Sangfroid Remedies Limited v. U.O.I., 1998 (103) ELT 5. It is also submitted that for recovery of the disputed amount, ultimately permission of BFIR u/s 22 of SICA would be necessary. Reliance is placed on a decision of Tata Davy Ltd. Vs. State of Orissa and Others, .

6. So far as the financial position is concerned, we find from the 59th Annual Report filed as Annexure - C that the sales have been shown to be in the neighborhood of Rs. 325 crores. Though ultimate result is stated to be a loss, we find that the cash flow position from the operating activities (that is before taking into account depreciation and interest) is in the neighborhood of Rs. 769 lakhs. It is true as contended by the counsel for the petitioner, that ultimately financial result is loss, as reflected in the financial statement. But what is to be considered while dealing with application u/s 35(F) is whether any undue hardship would be caused to the petitioner if it is required to liquidate whole or part of the disputed demand as a condition precedent for entertaining the appeal. So far as the decision in Sangfroid's case (Supra) is concerned, factual position was different and the Apex Court directed assessee to (sic.) deposit in the peculiar circumstances of the case. It has not been laid down as a principle that when ever an appellant is a sick company, pre-deposit has to be automatically waived. It is to be noted that though Tribunal has described Amrit Pulp and Paper Ltd. as a sister concern, it is in reality a subsidiary company. That being the position it was not wholly impermissible to take note of the financial status of the subsidiary company. Even if that aspect is excluded from consideration, the fact that sales for the period ending 31.3.2000 were in the neighborhood of Rs. 325 crores makes submission of the petitioner (that undue hardship would be caused to it if it is required to deposit Rs. 35 lakhs, as directed by the Tribunal) unacceptable.

Section 22 of SICA is also not of any consequence so far present dispute is concerned.

7. Section 35F of the Act deals with deposit pending appeal of duty demanded or penalty levied. Proviso deals with power of appellate authority to dispense with such deposit if it is of the opinion that deposit would cause, "undue hardship", imposing such conditions as would safeguard interest of revenue. assessed has to establish that undue hardship would be caused to it and while deciding the stay application the authority has to keep in view two aspects i.e. (a) form an opinion that deposit would cause undue hardship to the assessed and (b) safeguard interest of revenue if it considers dispensing with deposit desirable, by stipulating conditions. "Opinion" means something more than mere retaining of gossip or of hearsay, it means judgment of belief, that is a belief or a conviction resulting from what one thinks on a particular question. If a man is to form an opinion, and his opinion is to govern, he must form it himself on such reasons and grounds as seem good to him. (Per Lord Brawell in *All corft v. London (Bishop)*, 1891 RC 666. Opinion is judgment of belief based on grounds short of proof. "Hardship" connotes something harsher and more severe than trifling inconvenience, and negligible loss of profit or temporary loss of a commercial opportunity. Language used in Section 35-F is not merely "hardship"; t is undue hardship. For a hardship to become "undue" it must be shown that the particular burden which is required to be observed or performed is out of proportion to the nature of the requirement it self and the benefit which the applicant would derive from compliance with it.

Above being the position, we find nothing illegal in the order of the Tribunal directing deposit of Rs. 35 lakhs against the extra demand of Rs. 1.5 crores inclusive of penalty. We, Therefore find no reason to interfere with the quantum fixed. However, time for deposit is extended till the end of December, 2000. Writ petition stands dismissed with aforesaid direction.