

(1987) 08 BOM CK 0031
In the Bombay High Court
Case No : Writ Petition No. 283 of 1982

Arphi Incorporated

APPELLANT

Vs

Union of India and others

RESPONDENT

Date of Decision : 12-08-1987

Acts Referred:

Central Excises and Salt Act, 1944 — Section 11B

Citation : (1988) 16 ECC 109 : (1987) 31 ELT 627

Hon'ble Judges : H. Suresh, J

Bench : Single Bench

Judgement

1. The petitioners manufacture hearing aids, group hearing aids, and speech trainers (hereinafter referred to as "the said goods") at their factory at Prabhadevi, Bombay. The goods manufactured by the petitioners are liable to excise duty under Item No. 68 of the First Schedule to the Central Excise and Salt Act, 1944.

2. It appears that there was a Notification No. 55/75, dated 1st March 1975, whereby there was an exemption in respect of the goods which are exciseable under Item No. 68 but relating to artificial limbs and rehabilitation aids for the handicapped. The petitioners' case is that they were not aware of this notification. They started their factory in 1977 and classified their goods under Item 68 and paid the duty without realising that they were not liable to pay the said duty by virtue of the said exemption notification.

3. However, sometime in the month of April 1980, the petitioner came to know that they were exempt from the levy of excise duty by virtue of the said notification and, therefore, they filed a fresh classification list dated 23rd May 1980, wherein they claimed the benefit of the exemption under the said notification in respect of the said goods. This classification list was approved by the respondents on the 31st of July 1980. Accordingly, the petitioners filed a refund claim dated 6th August 1980 for Rs. 1,39,503.47 as excise duty collected without the authority of law during the period 1-2-1980 to 31-7-1980. By an

order dated 1st December 1980, the Assistant Collector, Respondent No. 2, granted refund of Rs. 51,608.05 an amount of duty refundable for the period 24th May 1980 to 31st July 1980. The ground for refund was that the classification list dated 23rd May 1980 was duly approved on 31st July 1980 and, therefore, the collection of duty during the period between the submission of the classification list and its approval was without the authority of law. However, he purported to reject the balance amount as non-refundable on the alleged ground that the classification list filed earlier had not been filed by claiming exemption during the period 1st February 1980 to 22nd May 1980 and, therefore, the refund was not due. Aggrieved by the said order dated 1st December 1980, the petitioners filed an appeal to the Appellate Collector of Central Excise u/s 33 of the Act and it appears when the appeal was pending, the present petition was filed. In the meanwhile, the petitioners filed another refund application dated 21st April 1981 wherein they claimed a refund of Rs. 4,41,498.42 as duty illegally collected for the period 2nd August 1977 to 30th January 1980. This application was rejected by an order dated 24th November 1981 solely on the ground that the claim was time barred in view of the provisions of Section 11B of the Act. It is against this order the petitioners have filed the present petition. The petition was filed on 12th February 1982.

4. The petitioners relied on several judgments recently given by our High Court as also various other High Courts and the Supreme Court in support of their contention. The contention is that the collection of excise duty was without the authority of law and, therefore, in such cases there can be no question of any limitation and that, therefore, the respondents were bound to grant their application for refund. I must mention here that as the facts stand before me and having regard to the record of the matter, it is clear that the petitioners were entitled to the benefit of the exemption notification. Therefore, there can be no question of collection of any duty, as such, from the petitioners.

5. However, Mr. Lokur submitted that it is always for the petitioners to file a proper classification list and to claim exemption, if any, that was available to them. He submitted that in the present case till about May 1980 the petitioners themselves did not claim any such exemption, even though they had filed the classification list with the concerned authorities. He, therefore, submitted that the petitioners were, therefore, not entitled to the benefit of the exemption notification and if that is so it cannot be said that the collection of duty was unauthorised. Mr. Lokur has also submitted that it can be said that the petitioners might have passed on the duty levied on them to their consumers and in that event any order of return or refund of the excise duty would accessarily make the petitioners unjustly enrich themselves, which cannot be permitted. He, therefore, submitted that there is no reason as to why this Court should grant this petition when on their own showing the petitioners had not claimed the benefit of the exemption notification till about May 1980.

6. Mr. Lokur also submitted that assuming that there was a mistake, and the

petitioners could have preferred a petition in this Court for the purpose of claiming refund of the duty paid by them within the period of three years from the date of discovery of the mistake, but still the Court will have to consider as to whether, with due diligence, the petitioners could have discovered the mistake earlier. He submitted that in that event if the petitioners were not vigilant in discovering the mistake, this Court cannot entertain such a petition.

7. In the present case, according to the petitioners, they discovered the mistake sometime in April 1980. The petition has been filed on 12th February 1982. Therefore, prima facie they have come to the Court within the period of three years from the date of discovery of the mistake. The notification herein is of the year 1976. But the petitioners started manufacturing all these goods sometime in May 1977. If that is so, they could not have discovered the mistake prior to the month of May 1977. In my view it is not necessary for me to go into the question whether the petitioners, with due diligence, could have discovered the mistake earlier, as all these questions are no longer res integra.

7A. All the questions raised in this matter appear to have been settled by the various judgments of our High Court. On the first question, Mr. Hidayatullah for the petitioners drew my attention to Judgment of the Division of our High Court being the case of Laukoplast (India) Ltd. v. Union of India, reported in 1983 ELT 2106 (Bom) wherein this very notification was considered. Facts in that case were identical as in the present case and the Court has allowed refund of the excise duty paid by the parties in ignorance of this exemption notification and, therefore, it is not open to the respondents to canvass any such proposition, as has been done by Mr. Lokur.

8. On the question of the doctrine of unjust enrichment, Mr. Lokur has draw my attention to the case of Union of India v. New India Industries Ltd., reported in 1983 ELT 1763 (Guj) , which is a case of the Division Bench of the Gujarat High Court. That was a suit and evidence was led and the claim was mainly u/s 72 of the Indian Contract Act. There, Mr. Ravani J., speaking on behalf of the Division Bench, after considering the evidence on record expressly held that the plaintiffs could not invoke the provisions of Section 72 of the Contract Act, as they (the plaintiffs) failed to plead and prove that the payments in question were made either under a mistake of law or under coercion, and that is how the plaintiffs were not entitled to claim relief of refund of the amount paid by them. However, on the question relating to the doctrine of unjust enrichment, Ravani J. had made very many observations, with most of which I would readily agree. But as far as this Court is concerned, having regard to the several decisions of the Division Benches including the judgment in I.T.C. Limited Vs. M.K. Chipkar and others, , the legal position as concluded here, appears to be that the theory of unjust enrichment cannot be invoked in case of claim of refund of excise duty recovered from the manufacturer without the authority of law. Mr. Jahagirdar J. in the case of Parle Products Ltd. and another Vs. Union of India and another, observed that the view expressed by Shah J. concurring with the view expressed by Lentin J. in

the said case is binding on him. Thereafter the learned Judge proceeded to summarise the proposition which emerged from the various decisions beginning from the decision of the Supreme Court in D. Cawasji and Co. and Others Vs. State of Mysore and Another, and the other decisions including the decision of Madon J. in the case of Golden Tobacco Company Ltd. Vs. Union of India and another, and of Shah J. in the above case.

9. But I always wondered whether the Revenue is really serious about this argument ? If so, to remedy the situation should it really depend on personal predelictions of individual Judges with the inevitable result of conflict of opinions ? I find, today, a large number of writ petitions in various High Courts, mostly relating to excise, but all for refund of taxes paid over for years together. I also find that in most of these cases the tax is paid for year together, and sometimes the revenue knowing fully well that the levy is not maintainable at all, but also with a feeling of certainty that the Courts would characterise such levy as without the authority of law resulting in refund of all that is recovered. I, for one, would not rule out a covert conspiracy, though no tangible evidence be possible, between the manufacturers and the revenue, all at the cost of the ultimate but helpless consumer. What is the solution ? If the Government is really sincere in its belief, it is for the Government to amend the law. Though it is not my function to suggest and formulate the law, but with a view to put an end to this unseemly controversy, I would say that the law should be amended to deny any claim for refund of any excise duty or tax, if in the opinion of an officer of not less than the rank of an Assistant Collector, the same has been passed on to any buyer or consumer. In other words, a manufacturer should be entitled to claim such a refund, if he has not passed on the burden to any consumer. I only hope, the Government would seriously ponder over this problem with speed and in all earnestness, as any neglect has only the consequential result of double drain of the consumers.

10. Having regard to the judgments as mentioned above, I must necessarily allow the present petition. I, therefore, pass the following order :

ORDER

11. Rule made absolute in terms of prayers (a) and (b)(ii), but the amount of refund shall be Rs. 4,41,498.42 (Rupees four lakhs fortyone thousand four hundred ninetyeight and forty two paise). However, the interest thereon shall be at the rate of 12 per cent. per annum from the date of the petitioner till payment. The payment to be made within 8 (eight) weeks from today. There will be no order for costs.