(1980) 01 MAD CK 0052

In the Madras High Court

Assistant Collector of Central Excise, Customs House, Pondicherry and Another — APPELLANT

Vs

New Horizon Sugar Mills (P) Ltd., Pondicherry — RESPONDENT

Date of Decision : 01-01-1980

Acts Referred:

Central Excise Rules, 1944 — Rule 173G, 53, 8, 8(1)
Central Excises and Salt Act, 1944 — Section 33

Citation : (1980) CENCUS 44 : (1980) 6 ELT 10

Hon'ble Judges : S. Mohan, J;M.M. Ismail, J

Bench : Division Bench

Judgement

Ismail, J.—This is an appeal preferred against the order of Gokulakrishnan J. dated 19-8-1978, allowing W. P. No. 7257 of 1975 field by

the respondent herein. The matter lies in a very narrow compass. The respondent herein is a Sugar Mill having been established in or about the

year 1956. It went into production of sugar for the first time in 1960. Sugar is a commodity coming under the Central Excises and Salt Act, 1944

(1 of 1944) and excise duty is leviable thereon under item 1 of the First Schedule to the Act. However, Rule 8 of the Central Excise Rules, 1944,

enables the Government to exempt excisable Articles from the payment of duty either wholly or in part. In this case, the Government of India

issued a notification No. 146/74-C.E., dated 12-10-1974, which reads as follows -

In exercise of the powers conferred by sub-rule (1) of rule 8 of the Central Excise Rules, 1944, the Central Government hereby exempts sugar,

described in column (2) of the Table below and falling under sub-items (1) of item No. 1 of the First Schedule to the Central Excises and Salt Act,

1944 (1 of 1944) from so much of the duty of excise leviable thereon as is specified in the corresponding entry in columns (3) and (4) of the said

Table.

TABLE

Sl. Description of sugar Duty of free Excise levy

No. sale sugar sugar

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1. Sugar produced in a factory

during the period commencing on

the 1st day of October, 1974 and

ending with the 30th day of

November, 1974 in excess of the

average production of the

corresponding period of the

preceding five sugar years in

respect of which -

(a) the overall production of Rs. 60 per Rs. 16 per

the factory for the entire sugar quintal quintal

year does equal the average

production of the proceeding five

sugar years.

(b) the overall production of the Rs. 82 per Rs. 22 per

factory for the entire sugar quintal quintal

year equal or exceeds the average

production of the preceding five

sugar years.

2. Sugar produced in a factory

during the period commencing on

the 1st December, 1974, and

ending with the 30th September,

1975, which is in excess of the

average production of the

corresponding five sugar years,

that is -

(a) on excess production upto Rs. 20 per Rs. 5 per

7.5% quintal quintal

(b) on excess production on the Rs. 40 per Rs. 10 per

next 10% quintal quintal

(c) on excess production on the Rs. 50 per Rs. 14 per

next 10% quintal quintal

(d) on excess production on the Rs. 60 per Rs. 18 per

next 10% quintal quintal

(e) on excess production beyond Rs. 82 per Rs. 22 per

37.5% quintal quintal

Explanation : - In the notification -

(a) `Average production'' in relation to sugar produced in the period by a factory which had gone into production for the first time in 1967-68 or

earlier, means the simple average production during the corresponding period of the preceding five sugar years;

(b) `free sugar sale'' means sugar other than levy sugar;

(c) `levy sugar'' means sugar required by the Central Government to be sold under an order made under clause (f) of sub-section (22) of Section 3

of the Essential Commodities Act, 1955 (X of 1955);

(d) `sugar year'' means the period of 12 months beginning with the 1st day of October and ending with the 30th day of September next following.

2. In computing the production of sugar during the periods mentioned in column (2) of the said Table -

(a) in respect of a factory mentioned in the said table -

(i) the date, as furnished in form R. G. 1 prescribed in appendix I to the Central Excise Rules, 1944 or in such other record as the Collector may

prescribe under Rule 53 or rule 173G of the said Rules shall be adopted, and

(ii) any sugar obtained by refining gur or khandsari sugar shall not be taken into account;

(b) in respect of a factory mentioned in serial Numbers 1 and 2 of the said Table -

(i) any sugar obtained by reprocessing of sugar house products left over in process at the end of the bass period or earlier shall be taken into

account; and

(ii) any sugar obtained by reprocessing of defective or damaged sugar or brown sugar, if the same has already been included in the quantity of

sugar produced, shall not be taken into account.

3. In the case of a factory which had gone to production for the first time after 19-7-1968, the first two years of production shall not be taken into

account while computing average production of the preceding five sugar years. Where production in one or more sugar years among five sugar

years was nil, the production in such sugar year or sugar years shall be ignored and the average production shall be the average of the production

of the corresponding period of the remaining sugar years.

4. Nothing contained in this notification shall apply to a factory which has been producing sugar only for three years or less.

2. Subsequently, the Government of India issued a Corrigendum to this notification on 14-7-1975. The purpose of the corrigendum was to take

away the second sentence in paragraph 3 of the said notification and read it as a separate paragraph, namely, paragraph 4 and renumber the

existing paragraph 4 as paragraph 5.

The respondent''s production of sugar for five years, viz., 1969- 70 to 1973-74, was as follows -

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Sugar year

Production during sugar year

Production during period

Quantity

1969-70

144763 quintals

October 1969

November 1970

Nil quintal

Nil quintal

1970-71

177747 quintals

November 1970

October 1970

Nil quintal

Nil quintal

1971-72

226203 quintals

October 1971

November 1971

Nil quintal

Nil quintal

1972-73

185153 quintals

October 1972

November 1972

Nil quintal

31435 quintals

1973-74

257963 quintals

October 1973

November 1973

Nil quintal

10925 quintals

...

...

Total 42360 quintals

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3. With reference to this production as well as the notification of the Government of India, the respondent submitted its claim for refund of excise

duty to the Assistant Collector of Central Excise, Pondicherry. While so doing, the respondent worked out the average production as 42360

quintals divided by 5, as equal to 8472 quintals. However, the Assistant Collector of Central Excise, Pondicherry, questioned the correctness of

this calculation by 2 and not by 5, because the production of sugar during October-November 1969, October- November 1970 and October-

November 1971, was nil, and therefore, those three years must be excluded. the respondent put forward the contention that the calculation of the

Assistant Collector of Central Excise, Pondicherry, was erroneous and, on the terms of the notification referred to above, its calculation alone was

correct. We may point out in thin behalf that according to the calculation of the respondent herein, it was entitled to a rebate of Rs. 6,59,104 while,

according to the calculation of the Assistant Collector of Central Excise, the respondent was entitled to a rebate of only Rs. 1,12,660. It is against

this background of controversy between the respondent herein and the Assistant Collector of Central Excise, Pondicherry, the respondent herein

filed the writ petition in question, viz., W. P. No. 7275 praying for the issue of a writ of Mandamus or other appropriate writ or direction of a like

nature directing the respondents therein, namely, the Assistant Collector of Central Excise, Pondicherry and the Union of India, Ministry of Finance

(Department of Revenue and Insurance), New Delhi, to grant the respondent herein its claim for rebate of Rs. 6,59,104 under the terms of the

notification No. 146-74- C.E., dated 12-10-1974. We may mention straightway that there is no controversy before the court that if the calculation

of the respondent is correct, it is entitled to a rebate of Rs. 6,59,104, and if, on the other hand, the calculation of the Assistant Collector of Central

Excise, Pondicherry is correct, the respondent would be entitled only to Rs. 1,12,660 by way of rebate.

4. An elaborate counter affidavit was field on behalf of the appellant herein before the learned Judge, putting forward the contention that the

production of the total quantity of 42,360 quintals of sugar has to be divided only by 2 and should not be divided by 2. The writ petition came to be disposed of by Gokulakrishnan J. The learned Judge allowed the writ petition by issuing a writ of Mandamus as prayed for. It is against this

judgment and order, the writ appeal has been filed.

5. We shall now refer to the case put forward by the appellate before the learned Judge. In the counter affidavit filed on behalf of the appellant

herein, it was contended -

Para 4 of the Explanation to the Notification No. 156/74 (a mistake for 146-74) says that where production in one or more years among five

sugar years was nil, the production in such sugar year or sugar yeas shall be ignored and the average of the production shall be the average of the

production of the corresponding period of the remaining sugar years."" Para 4 of the Explanation is applicable to all sugar factories irrespective of

whether the factories commenced production in or prior to 1967-68 or after 1968-69.

The counter affidavit under proceeded to state -

As the petitioner''s calculation for his claim for rebate was not in accordance with the explanation 4 to the notification, the Assistant Collector,

Pondicherry, instructed the factory to revise the claim.

6. However, as the learned Judge points out in his judgment, the learned counsel appearing for the appellants, argued before the learned Judge that

clause (4) of the explanation carried out by the Corrigendum will not govern clause (1) (a) of the Notification. The learned Judged has referred to

this argument in more than one place. After referring to this argument, the learned Judge draw the inference that clause 3 and clause 4 of the

Explanation go together as applying only to sugar mills which started production in 1967-68 and subsequent years, and those two clause remain

untouched by the Explanation; if so, on the basis of para 1(a) of the Explanation, the respondent herein rightly divided the total production by 5 and

claimed rebate on that basis.

7. Mr. U. N. R. Rao, leaned counsel appearing for the appellants contends before us that paragraph 4 will govern paragraph 1 just like any other

paragraph and therefore we have to consider the controversy on the application of paragraph 4 to paragraph 1 also. In other words, we have to

take paragraphs 1 and 4 together and decide the controversy before us.

8. We are of the opinion that even if it is assumed that paragraph 4 applies to sugar factories which started production prior to 1967-68 also, still

the language in that paragraph will not apply to the respondent''s case. We have already referred to the fact that the respondent mill was

established in 1956, and if commenced production of sugar in 1960, and therefore, the respondent is a factory which commenced production prior

to 1967- 68. Paragraph 4 of the Explanation which we have already extracted states -

Where production in one or more sugar years among five sugar years was nil, the production in such sugar year or sugar years shall be ignored

and the average production shall be the average of the production of the corresponding period of the remaining sugar years.

9. We have already given the particulars of production in the respondent factory. That shows that during the years 1969-70, 1970-71 and 1971-

72, though the production of sugar during the months of October-November was nil, yet the production cannot be said to be nil during the sugar

year as such. Consequently, paragraph 4 on its own terms, will not apply to the respondent. However, as soon as we put this position to the

learned counsel for the appellants. Mr. U.N.R. Rao, he wanted us to read paragraph 4 as if, after the word `production'' in the commencement of

the paragraph, the words `during the relevant months or corresponding period'' were present and not to read the word `production'' as indicating

production during the whole of the sugar year. We are unable to accede to this request. The expression `sugar year'' has been defined in

Explanation 1 (d) and it takes in the twelve months period from the 1st October to the 30th September. Therefore, when paragraph 4 uses the

expression `sugar year'', we have to understand that expression only as defined in paragraph 1(d) of the Explanation and not otherwise. However,

what Mr. Rao wants us to do is to introduce certain words in paragraph 4 which are not there, to qualify the expression `production'' occurring in

the opening of that paragraph. As the paragraph now reads, it refers to production in one or fore sugar years. But, how Mr. Rao wants us to read

that paragraph is, as though it refers to production not in one or more sugar year, but in the relevant periods, that is, October- November, or

December-September, as the case may be, in one or more sugar years. If the language is deficient to bring out the real intention of the authors who issued the notification, it is not for this court to supply the deficiency. In view of this, we hold that paragraph 4 not being applicable to the

respondent herein, it is paragraph 1(a) that applies to the respondent, the calculation made by the dispute that if paragraph is correct. In view of

this, we agree with the final conclusion of the learned Judge that the respondent herein was entitled to a rebate of Rs. 6,59,104.

10. One other contention that would appear to have been advanced before the learned Judge was based on Art. 226(3) of the Constitution of

India, as amended by the Forty-Second Amendment. That provision stated -

No petition for the redress of any injury referred to in sub- clause (b) or sub-clause (c) of clause (1) shall be entertained if any other remedy for

such redress is provided for by or under any other law for the time being in force.

11. In the context of that provision, it would appear that on behalf of the application herein reliance was placed on Section 33 of the Central

Excises and Slat Act, putting forward the contention that the respondent herein had an alternative remedy. The learned Judge, after referring to

Secs. 33 and 35 of the Act, held that the respondent herein did not have an alternative remedy by way of an appeal or revision and consequently,

the respondent was entitled to approach this court under Art. 226 of the Constitution of India. Just now, Art. 226(3) of the Constitution of India as

amended by the Forty-Second Amendment is no longer in force. Independent of this, the matter in controversy in the writ petition did not involve

any investigation into controverted questions of fact, and merely in solved an interpretation of the statutory notification of the Government of India

referred to above. In such a context, we are of the opinion that the respondent was justified in approaching this court under Art. 226 of the

Constitution of India nd the fact that the respondent should have a filed a suit is no bar to this court granting relief under Art. 226 of the

Constitution of India. In these circumstances, the appeal fails and is dismissed, There will be no order as to costs.

12. After we dictated the above judgment, Mr. U. N. R. Rao, learned counsel for the appellants, orally applies for the grant of a certificate under

Art. 133 of the Constitution of India for preferring an appeal to the Supreme Court of India. We are not satisfied that the matter involved a

substantial question of law of general importance which in our opinion needs to be decided by the Supreme Court so as to justify the grant of a certificate and consequently we reject the request.

