(1989) 09 CAL CK 0023

In the Calcutta High Court

Case No : C.O. No. 1513 (W) of 1988

Bengal Cardboard Ind. and Printers (P) Ltd. APPELLANT

Vs

Asstt. Collr. of C. Ex. RESPONDENT

Date of Decision : 04-09-1989

Acts Referred:

Central Excise Rules, 1944 — Rule 57A , 57B, 57C, 57D, 57E
Central Excises and Salt Act, 1944 — Section 11A

Citation : (1992) 62 ELT 684

Hon'ble Judges : B.P. Banerjee, J

Bench : Single Bench

Advocate : Mukul Prokash Banerjee, for the Appellant;P.K. Dutta, for the Respondent

Judgement

B.P. Banerjee, J.—In this writ application the petitioner challenged the validity of the Circular No. MF (DR) letter No. B 22/27/86-T H U dated 20th June, 1986 issued by the Respondent No. 4 Union of India in so far as the same seeks to deny the manufacturer the right to opt out from the MODVAT Scheme during a financial year as also the order dated 23-11-1987 issued by the Assistant Collector of Central Excise, Calcutta, whereby the petitioners were not permitted to opt out from the MODVAT scheme during the financial year in question as also two notices dated 31st December, 1987.

2. The petitioner''s case in short is that the petitioner was the manufacturer and seller of printed cartons and the petitioner has his factory at 72, Tiljala Road, Calcutta. It is not disputed that Central Excise duty is leviable on the said printed cartons manufactured by the petitioner at the rate provided under Heading 4818.13 of the First Schedule to the Central Excise Tariff Act, 1985. By the Finance Act, 1986 the scheme of credit for inputs used for the manufacture of excisable goods were introduced which was known as Modified Value Added Tax (referred to as MODVAT). Under the MODVAT SCHEME while making payment of excise duties of finished products the excise duty levied on the materials used by

the manufacturers are adjusted, or in other words, if any duty is paid on the materials used in the manufacturing process, in that event, while making payment of excise duty on the end-product, the duty which is already paid in respect of those materials are deducted, or in other words some reliefs are given to the manufacturers. The petitioner opted for the MODVAT Scheme instead and place of benefit available to the petitioner as a small scale industrial unit. The petitioner filed declaration in this regard on 30th March, 1987 in accordance with 57-O (1) of the Central Excise Rules in prescribed manner indicating the description of final product manufactured in the factory and inputs intended to be used in respect of the final product and on & from 1st April, 1988 the petitioner availed of the benefit of the credit of duty paid on the inputs received by it for the purpose of manufacture of the said goods at its said factory and that according to the petitioner till 9th June, 1987 the petitioner availed of MODVAT Credit to the tune of Rs. 19,594.11 p. in respect of the said inputs.

3. The petitioner''s case is that by the Notf. dated 20th May, 1987 the Central Government sought to restrict the credit that could be taken on inputs in respect of the final products on paper and paper board classifiable under Chapter 48 of the Tariff Act to the extent of Rs. 8007- per tonne or the actual duty paid whichever is less and that the petitioner found that the very purpose for which it had opted for benefit under the MODVAT Scheme in preference to the benefit that it was entitled to or was availed of as a small scale industrial unit had completely ceased to exit and accordingly the petitioner intended to opt out from the said scheme. By the letter dated 17th June, 1987 the petitioner informed the Respondent No. 1 about its decision to opt out from the said scheme. It is stated that by the order dated 23rd November, 1987 the petitioner was informed by the Assistant Collector of Central Excise as follows :-

"The previous Classification List No. 1/87-88 submitted through the Range Superintendent has been approved. In the said Classification list you have declared your intention to avail MODVAT benefit with effect from 1-4-1987.

Accordingly, such benefit was actually availed of by you as admitted in your letter mentioned above. As per the Classification of Govt. of India you are not permitted to opt out of MOD VAT scheme during the pendency of the current financial year for reasons mentioned above."

4. Thereafter, a show cause notice was issued upon the petitioner dated 31st December, 1987 whereby the petitioner was directed to show cause why the amount of Rs. 2,90,829.39 should not be realised u/s 11A of the Central Excises & Salt Act. In the said show cause notice it was alleged that the petitioner can not avail of the benefit under MOD VAT scheme and also at the same time claims concessional rate of duty. Another show cause notice was issued on the same date whereby the petitioner was directed to show cause why the differential duty in the month of April, 1987 should not be paid. It is not necessary to go into the details in this case, in as much as, the petitioner''s case is that the petitioner can opt out at any time from the said MODVAT Scheme and that the restriction

contained in the circular that the person who intends to opt in the said scheme, can not be allowed to be opted out within the financial year was ultra vires the provision of Central Excises & Salt Act, 1944 and/or the Central Excise Rules, 1944 and of the Constitution of India.

5. It is stated that the petitioner voluntarily opted under MODVAT Scheme on and from 1st April, 1987 in terms of Notification No. 177/86 dated 31st March, 1986 in preference to the benefit that it was available of as a small scale industrial unit and that under the circular and/or classification issued by the Central Government in this behalf, once a manufacturer opts in for paying duty under the MODVAT Scheme at the beginning of the financial year in respect of any specified goods, the said manufacturer will have no option to go out from MODVAT Scheme within the financial year, is at liberty to opt out only in the next financial year or in other words, once the manufacturer intends to take the advantage of the MODVAT Scheme for entire financial year and within that period he is not given liberty to opt out who shall do so at the very beginning of the next financial year. It may be mentioned herein that the said MODVAT Scheme was in the form of concession granted to the manufacturers . Rule 57A of the Central Excise Rules provides the provision for credit of duty paid at excisable goods used as inputs and that goods notified for the purpose of credit of duty under MODVAT Scheme is in the nature of a concession for the purpose of giving incentive to the manufacturers so that the manufacturers are given the credit of the excise duty paid on inputs while making payment of end-products. When the petitioner opted in under MODVAT Scheme it was well within the knowledge of the petitioner that the scheme of exemption under Notification No. 175/86-C.E., dated 1-3-1986 provides for an integrated method of computation of value of clearances made in a financial year. It would not be possible to permit a manufacturer to opt out of MODVAT Scheme once he has exercised the option of paying duty (and to avail of MODVAT) at the beginning of the financial year in respect of any specified goods. The manufacturer will have the option to go out of MODVAT and avail of full exemption, subject to being eligible, only in the next financial year. On behalf of the respondents it was submitted that once the petitioner had opted in under the MODVAT Scheme with the knowledge that if the petitioner opts in, the petitioner would not be permitted to opt out during the financial year, in as much as, the said scheme provides for an integrated method of computation of value of clearance made in a financial year.

6. In this connection reference was made to the decision of C.E.G.A.T. South Regional Bench, Madras in the case of 1989 (20) ECC 101 wherein the Tribunal relying upon another order of the said Bench in Excise Appeal No. 195/86 in Order No. 260/87 dt. 27-4-1987 held that :-

"The question whether a manufacturer having once exercised his option to operate under the MODVAT Scheme would be legally in a position to opt out of it before the end of the financial year was considered and settled by this Bench of the Tribunal in the order relied upon by the Learned Counsel. The Tribunal had found the MOD VAT Scheme is covered by the Rule 57A to 57J of the Central Excise Rules, 1944 and that a perusal of these rules showed that there is nothing in these rules to indicate that the option by the manufacturer to operate under MODVAT Scheme should be given only at the beginning of the financial year or that once having opted to come under that Scheme he can choose to go out of it only at the end of the financial year. It is also noted that this position has since been recognised by the department itself as reflected in the clarificatory trade notice referred to by the learned counsel, with the stipulation, rightly, that the value of clearances under MODVAT Scheme should also be included for determining the aggregate value of clearances under Notification No. 175/86 dated 1-3-1986. In view of the position, the impugned order is set aside and the appeal allowed."

7. In the said clarificatory Trade Notice No. 42/GL-64/CE/MODVAT/ CAL/II/88 dated 24th June, 1988 it was stated that :-

"It has been decided that a manufacturer may be permitted to opt out of MODVAT in the same financial year. However, for the purpose of computing the aggregate value of clearance made under Notification No. 1''75/86-C.E., dated 1-3-1986 during the said financial year, the value of clearance effected under MODVAT should also be included for determining the aggregate value of clearances."

8. It could not be shown that the above decision of the Tribunal on this point had been taken up further and had been reversed. The said Trade Notice in question also permits opting out of the MODVAT Scheme within the financial year and as such the Revenue''s contention is that once the petitioner had opted in the petitioner would not be opted out of the MODVAT Scheme because the said Scheme provided for an integrated method of computation of value of clearance made in financial year, or in other words, it has suggested that one year is necessary under the said Scheme to compute the value of clearance as a matter of policy, otherwise it would create prejudice to the Revenue. The Trade Notice in question had made it clear that there was no bar for opting out at any time within the financial year and that the Trade Notice makes it abundantly clear that there is no difficulty in allowing a person to opt out within the financial year. There could not be any estoppel against the statute and that it can not be said that once the petitioner had opted in, the petitioner could not opt out within the financial year. The Government have also power to revoke the Scheme at any point of time and it could not be contended that once the Government had introduced the scheme, the Government could not revoke the Scheme before the completion of next financial year. These are policy matters and that the principle of promissory estoppel is wholly inapplicable either in favour or against the petitioner in the facts and circumstances of the case. In my view, the Tribunal has correctly decided the point and that the subsequent trade notice has clarified this position that at any point of time a person may opt out of the scheme within the same financial year. The subsequent Trade Notice made the position clear

and from that it is also abundantly clear that opting out within the financial year could create any administrative inconvenience and/or anything which creates an administrative difficulty as suggested by the learned Advocate appearing on behalf of the respondents. In my view the petitioner could not be compelled to keep under the MODVAT Scheme when the petitioner has exercised such option. The Revenue did not suffer in any manner whatsoever in case any concessional benefit given to a party refused to avail of the same. It is the choice of the party as rightly pointed out by the Tribunal in the aforesaid judgment that there is no law imposing prohibition in such matter. The Scheme has to be interpreted in a manner which is consistent to spirit of such scheme. The Court seeks to avoid a construction that causes unjustifiable inconveniences to persons subject to such notification and it is not a case of evasion or avoidance of liability to pay excise duty. The question whether the petitioner could enjoy benefit as small scale industry or enjoy benefit under the MOD VAT Scheme, is entirely a matter for the petitioner to decide and in my view, if the petitioner is allowed to opt out it will not cause any loss to revenue or the Revenue would not be inconvenienced in any manner whatsoever. Under such circumstances, I am not inclined to accept the Revenue''s contention. The scheme is nothing more than granting certain concessional benefit, and it can not be said that the petitioner who wants to take a benefit, should continue to accept the benefit for a particular and fixed period of time. That is not the scheme or the spirit of such scheme. The authorities concerned realised this difficulty and thereafter had come out with the clear trade notice permitting opting out and that the said trade notice issued by administrative circular clarifies point in issue and it can not be said that the trade circular is applicable from the date of issue in view of the fact that same was not a change in the scheme. If there was no difficulty from the date of the said trade notice in opting out, there could not be any difficulty at the point of time when the petitioner could be opted out. This is not a case where the construction of the said scheme in the manner submitted by the petitioner and held by the Tribunal in the above case, would result in unworkable and impracticable result and the construction would not defeat the purpose of the said scheme. If the construction defeats the purpose of the scheme, the Court would avoid construing such a provision which would defeat the purpose and object of the scheme. There is another aspect of the matter that two show cause notices were issued demanding excise duty on the ground that the petitioner was not entitled to opt out from the said scheme and claim benefit otherwise available to the petitioner.

9. In the result, the writ petition succeeds. The decision communicated to the petitioner by the Memo dated 22-11-1987 which is annexure T'' to the petition is set aside and the respondents are restrained from giving any effect or taking any steps pursuant to the Circular bearing No. M.F. (D.R.) and to treat the petitioner as opted out in terms of the petitioner''s prayer made in this behalf for opting out of the said scheme and to proceed against the petitioner for the purpose of realisation of excise duty and the petitioner is eligible except under the MODVAT Scheme. It is also made clear that the petitioner is liable to pay all excise duties

payable by the petitioner as if the petitioner is not governed by the MODVAT Scheme and the respondents would be at liberty to realise the excise duty accordingly from the petitioner. The only determination that is made in the Writ application, is that the petitioner should be deemed to have been opted out from the said MODVAT Scheme with effect from the date of his prayer, but the petitioner''s liability to pay excise duty in usual and ordinary course except under the MODVAT Scheme remains and the petitioner is liable to pay the same. The show cause notices that were issued demanding excise duty were set aside only to the extent that it cannot realise duty under the MODVAT Scheme when the petitioner had opted out of such scheme. I also make it clear that this determination will not affect the right of the respondents to proceed for realisation of excise duty, payable by tne petitioner, otherwise than in accordance with the MODVAT Scheme.

10. The writ petition succeeds to the extent indicated above. There will be no order as to costs.

12-9-1989 (Mentioned)

As prayed for let the operation of the order be stayed for a period of two weeks from date.

