
(1992) 04 CAL CK 0007
In the Calcutta High Court
Case No : Civil Order No. 10412 (W) of 1991

Bongaigaon Refinery and Petrochem. Ltd. APPELLANT
Vs
Collr. of C. Ex. (A) RESPONDENT

Date of Decision : 23-04-1992

Acts Referred:

Central Excise Rules, 1944 — Rule 44, 52A, 52A(2)
Central Excises and Salt Act, 1944 — Section 2, 35F, 5A(1)
Customs Act, 1962 — Section 129E
Factories Act, 1948 — Section 2

Citation : (1994) 46 ECC 87 : (1994) 69 ELT 193

Hon'ble Judges : Ruma Pal, J

Bench : Single Bench

Advocate : R.N. Bajoria, J.P. Khaitan, P.K. Jhunjhunwala and B. Saha, for the Appellant; N.C. Roy Chowdhury and Nilava Mitra, for the Respondent

Judgement

Ruma Pal, J.—The question involved in this Writ Petition is whether the Appellate Authority had properly exercised its discretion u/s 35F of the Central Excises and Salt Act, 1944, in rejecting the petitioner's application for dispensing with the deposit as a pre-condition to the petitioner's preferring an appeal.

2. The petitioner is a Government of India Undertaking and a manufacturer of Petroleum, Petrochemical and Petrochemical based products. The admitted facts are that the petitioner has a large area covering 3.926 square kilometers encircled by a boundary wall at Dhaligaon. With this area the petitioner has a refinery as well as other units producing, inter alia, Xylene and Polyester Staple Fibre.

3. The subject matter of the petitioner's appeal is a Notification under which the petitioner claims exemption. That Notification which is Notification No. 28/89-C.E., dated 1-3-1989 reads as follows :

"Exemption to goods other than blended or compounded lubricating oils and greases - In exercise of the powers conferred by Sub-section (1) of section 5A of

the Central Excises and Salt Act, 1944 (1 of 1944), the Central Government, being satisfied that it is necessary in the public interest so to do, hereby exempts goods (other than blended or compounded lubricating oils and greases) falling under Chapter 27 of the Schedule to the Central Excise Tariff Act, 1985 (5 of 1986) produced in a factory and -

(a) utilised in the factory in which the said excisable goods are produced, for the manufacture of any goods falling under the said Schedule or as fuel for such manufacture (excluding fuel used for any internal combustion engine) or both; or

(b) allowed to escape in the atmosphere by flare system or otherwise;

from the whole of the duty of excise leviable thereon which is specified in the said Schedule."

4. It is the petitioner's case that the Refinery Gas from the Refinery Unit is used partly in the Refinery Unit itself and partly consumed as fuel in the Xylene and Polyester Staple Fibre Unit. The Xylene produced in the Xylene Unit is used Polyester Staple Fibre Unit to produce Polyester Staple Fibre. It is therefore contended that the Refinery Gas utilised in the Polyester Staple Fibre Unit and Xylene Unit was exempted from payment of duty of excise because it utilised in the factory of the petitioner in which the Refinery Gas had, in fact, been produced.

5. The Excise Authorities had initially held that the three units separately described above formed one factory and allowed the petitioner the benefit of the notification. Subsequently, however, the Excise Authorities changed their minds and came to the conclusion that the three units were in fact separate factories and that the utilisation of the Refinery Gas not being in the same factory did not come within the "exemption notification". Being aggrieved by this decision of the Excise Authorities the petitioner preferred an appeal. The petitioner also filed an application for stay of the demand raised by the Excise Authorities on the ground that the petitioner was not entitled to the benefit of the notification. The Collector of Central Excise (Appeals) however, refused to dispense with the requirement for deposit u/s 35F of the Act. Being aggrieved by that decision, the petitioner moved a Writ Application before this Court (referred to as the first Writ Application).

6. The first writ application was disposed of by this Court by a Judgment dated 11th June, 1991. The detailed facts relating to this case have already been set out in that judgment. The court set aside the order of the Collector of Central Excise (Appeals) on the ground that the Collector had not properly addressed himself to the definition of the word "factory" in the Act nor had he considered the decisions cited by the petitioner before him in determining the merits of the petitioner's case. The matter was accordingly remanded back to the Collector (Appeals) directing him to determine the issue having regard to the principles of law enunciated in the decisions of 1991 (52) ELT 116 and 1990 (31) ECR 309 and The Delhi Cloth and General Mills Co. Ltd. and Another Vs. The Joint

Secretary, Govt. of India and Another, . The Collector was also directed to give the petitioner an opportunity of being heard. The respondents were restrained from raising any demand on the basis of the order of the Assistant Collector of Central Excise subject to the petitioner's undertaking to this court not to deal with or dispose of its assets without the leave of this court and except in the usual course of business.

7. Pursuant to the order of Court, the Collector, Central Excise (Appeals) reheard the petitioner and by an order dated 22nd July, 1991, again refused to waive the deposit of the amount due on the basis of the order appealed from. It is this order which is the subject matter of challenge in this writ application.

8. Briefly stated the petitioners have contended that the Collector had misdirected himself in law by incorrectly interpreting the notification in question and the decisions cited before him. It is further stated that the Collector was really required to come to a decision whether the petitioner had a prima facie case which required consideration. No such finding was arrived at by the Collector. It is further submitted by the petitioner that the Collector was required under the law also to consider whether the interest of the revenue would be in jeopardy if the petitioner was not asked to deposit the disputed amount. The petitioner has relied upon diverse notifications and decisions in support of this contention which would be considered later in this judgment.

9. The respondents have submitted that the notification as plainly read, requires that the excisable goods which were to be exempted under the notification had to be used in the same factory viz., in the very place where the excisable goods were manufactured. It is stated that at the time of the application for license by the petitioner in respect of the Refinery a plan had been submitted. That plan did not include the Xylene and the Polyester Staple Fibre Units. It is further stated that the fact that the Xylene Unit and the Polyester Staple Fibre Units were separate factories was evident because gate passes were issued in respect of the removal of the goods from the Refinery to the Xylene Unit and Polyester Staple Fibre Unit. Copies of the gate passes were handed over to this Court. Finally it is contended that the petitioner had not made out a case at any point of time that it was insolvent or unable to bear the hardship of making deposit of the amount in question. It is stated that the general rule is to require pre-deposit from the appellant, which general rule was to be dispensed with only in exceptional circumstances. The respondents have relied upon the decision reported in *Rubicon Vs. Collector of C. Ex.*, .

10. In my view, the impugned order cannot be sustained. The very fact that the matter was heard at length by the Collector (Appeals) and had been dealt with in a six page order, would show that the case of the petitioner could not be said to be entirely frivolous but required consideration in appeal. While holding that the Xylene Unit and Polyester Staple Fibre Unit were not parts of the same factory as the Refinery. The Collector, Central Excise, appears to have equated the word "premises" with buildings in the definition of "factory" in Section 2(e). This is

apparent from the reasoning of the Collector. No basis has been given for construing the meaning of the word "premises" in Section 2(e) of the Act as meaning "building". The Collector has sought to distinguish the decisions relied upon by the petitioner although in my view, it appears that the distinction is without a difference. For example, in the case of 1986 (6) ECR 297 the Tribunal was called upon to consider whether the two units were one factory within the meaning of Section 2(m) of the Factories Act, 1948. Section 2(m) of the Factories Act is substantially similar to Section 2(e) of this Act and the Central Excises & Salt Act, 1944, except that under the former there is a further requirement of a number of people to be employed before a particular unit could be considered to be a factory. The manufacturer had sought to claim exemption under a notification which granted benefit to goods not manufactured in the factory. The assessee had contended that the two units of the assessee were separate and that the goods manufactured in the second unit could not be said to have been manufactured in the assessee's factory. The Tribunal held that the two units comprised one factory because the chromic acid section was admittedly served by the same electricity and water connections. Payments for electricity and water were made by the appellants for the chromic acid section as well as the other sections. The wages and salaries of the workers in the chromic acid section were paid by the appellants. The raw material sodium bichromate was supplied by the appellants to the chromic acid section and the chromic acid manufactured out of the sodium bichromate was removed under the appellants' challans. It was also observed that the assessee was engaged with the manufacture of sodium bichromate, a vital input for manufacture of chromic acid and using it as such. The Tribunal, therefore, held that it was beyond the Tribunal's comprehension as to how in such circumstances the two units could not be said to be one factory. This test should equally be applicable to a case where the assessee claims that the two units comprise one factory. There is no dispute in this case that the units of the petitioner are interlinked in the manner stated by the Tribunal.

11. In Paragraph 2 of the writ petition it has been categorically stated by the petitioner that the LSHS and Refinery Gas produced in the refinery unit are used as fuel in the refinery unit itself as well as Xylene and Polyester Staple Fibre Units. The activities of different units are inter-related and inter-dependent. The factory is situated in an area which is bounded by a single boundary wall. In addition it has been stated :

"The said factory including all its Units are under your petitioner's common management and control. The staff and/or employees of the said Units are common. The expenditure for running the said factory including its different units is met out of a common fund. There is common water and power connections for the said factory which serve all its Units. A common profit and loss account and balance sheet is prepared in respect of the working of the said factory including its different units. Your petitioner states that the said factory is duly licensed under the provisions of the Factories Act, 1948."

The petitioner has been granted one factory license under the Factories Act in respect of the entire area. None of these facts have been controverted by the respondents.

12. In these circumstances it is difficult to appreciate how the Collector could have drawn any meaningful distinction with the principle enunciated in *Grauer & Weil India Ltd.* (supra).

13. The other factual aspect is covered by the second submission of the respondents, viz., whether at the time of application for license the petitioner had made a declaration of that factory premises under Rule 44 of the Central Excise Rules. It was fairly conceded by the respondents' Counsel that if at that time Xylene and Polyester Staple Fibre Units had also been mentioned, it would mean that they were within the factory. In Paragraph 4 of the writ petition it has been stated by the petitioner :

"Your petitioner states that it duly submitted to the proper officer a plan in respect of its factory covering the said area of 3.926 Square Kilometers used by it for its said manufacturing business. In the plan, the different Units of your petitioner's said factory namely, the refinery unit, the Xylene Unit and polyester staple fibre unit were duly shown. The said factory plan was duly approved by the proper officer."

This again has not been controverted by the respondents. Therefore on respondents' own showing the three units of the petitioner must be treated as one factory.

14. The third factual aspect which is covered by the third submission of the respondents related to the gate passes produced by the respondents before this Court. It is true that Rule 52A of the Rules requires that no excisable goods shall be delivered from a factory except under a gate pass signed by the owner of the factory and countersigned by the proper officer. It was therefore contended that since there is a gate pass issued in respect of the refinery gas and the LSHS, it was an indication that the delivery was being made from one factory to another; However, this submission overlooked the proviso to Sub-rule (2) of Rule 52A which reads as :

"Provided that in respect of removal of excisable goods consumed within the factory for manufacture of other goods in a continuous process the manufacturer may make out a single gate pass at the end of the day."

The gate passes produced relating to LSHS and refinery gas were single gate passes issued at the end of the day. These gate passes record the time of removal from 7 in the morning to 7 in the evening and show consumption within the factory. The gate passes have been duly checked by the Inspector of Central Excise. These would therefore suggest that the excisable goods being removed under the gate passes were being consumed within the factory for manufacture of other goods.

15. The submission of the respondents that the phrase "utilised in the factory" must mean in the very same place does not appear to be borne out by the language of the notification. The excisable goods manufactured in a factory can be utilised for the manufacture of any other goods. Any other goods would mean any of the excisable goods mentioned in the First Schedule of the Act. If that were so, the respondents' submission would mean that all the other goods would have to be manufactured in the very same place. That does not appear to be the intention of the notification.

16. When pressed, the respondents submitted that the same place would mean under the same roof, and that to be a factory of the goods would have to be manufactured under the same roof. The absurdity of this submission is demonstrated from the fact that if by some process of engineering a long roof was constructed covering the Xylene the Polyester staple fibre unit and the refinery, there would be no difficulty, according to the respondents in describing the three units as one factory. However, immediately upon the roof breaking down they would again become three factories. Such construction of the meaning of the word "factory" is unacceptable.

17. The petitioner has also relied upon other notifications which have granted exemption in respect of the excisable goods used elsewhere than in the factory of production. In such situation the procedure under Chapter X of the Central Excise Rules 1944 is required to be followed. It is not the respondents' case that this has ever been required to be done by the respondents as far as the refinery gas and LSHS is concerned.

18. According to the Collector the question was whether the refinery was dependent on the existing of the other two units. He goes on to say "had it been so two other units also would have been considered as a part of the refinery". That was not at all the question which was required to be determined by the Collector. The question was not whether the Xylene and polyester staple fibre units were parts of the refinery but whether the three units formed one factory.

19. The operative word is inter-dependent. In distinguishing the cases cited by the petitioner, the Collector has said in some cases they have referred to units and in other cases to "plant" and therefore were not applicable. This distinction would have same meaning had the Collector defined as to what was a unit, what was a plant and what was the distinction between a factory, a unit and a plant.

20. In my view the reasoning of the Collector appears to be riddled with logical and legal loopholes.

21. However, the Court is not called upon to determine the issue finally. The question is being considered only for the purpose of determining whether the petitioner has a prima facie case which called for consideration by the Appellate Authority.

22. This brings us to the provision of the Section 35F of the Act. Section 35F

reads as follows:

"35F. Deposit, pending appeal, of duty demanded or penalty levied. - Where in any appeal under this Chapter, the decision or order appealed against relates to any duty demanded in respect of goods which are not under the control of Central Excise authorities or any penalty levied under, this Act, the person desirous of appealing against such decision or order shall, pending the appeal, deposit with the adjudicating authority the duty demanded or the penalty levied:

Provided that where in any particular case, the Collector (Appeals) or [the Appellate Tribunal is of opinion that the deposit of duty demanded] penalty levied would cause undue hardship to such person, the Collector (Appeals) or, as the case may be, the Appellate Tribunal, may dispense with such deposit subject to such conditions as he or it may deem fit to impose so as to safeguard the interests of revenue."

23. The question as to what would constitute "undue hardship" has been the subject matter of a number of decisions.

24. In the case of R.P. David and Ors. v. Agricultural Income Tax Officer and Anr. - 1972 ITR 699 a Division Bench of the Madras High Court had to consider the proviso to Section 40 of the Madras Agricultural Income Tax Act, 1955. The language of the proviso is similar to the language of the proviso to Section 35F of the Act. The Court held that wherever a statute invests a discretionary power in Public Officer, it is normally for exercise in favour of the person concerned, unless there is some sound and relevant reason for denying the benefit of the discretionary power. The Court also held that the fact that the assesseees are financially sound and in a position to pay the tax is not in itself a ground for refusing to exercise the discretion under the proviso.

25. In the decision of V.I.P. Sea Foods Vs. Collector of Customs, a learned Single Judge of the Kerala High Court was called upon to consider whether the Tribunal had correctly exercised its discretion in refusing to exempt the petitioner from making a pre-deposit u/s 129E of the Customs Act, 1962 which is equivalent to Section 35F of the Act. The Court held that the Tribunal had not correctly appreciated the various relevant factors. The question was whether the petitioner had a prima facie case for consideration on merits. The learned Judge considered the case and found that the petitioner had indeed a prima facie case for consideration on merits. It was found that the petitioner did not have sufficient liquid resources to enable payment of the amount directed to be paid. In that view of the matter the Tribunal was directed to dispose of the appeal expeditiously on merits without insisting on deposit of the duty or penalty u/s 129E of the Customs Act.

26. In J.N. Chemical (Pvt.) Ltd. Vs. CEGAT, a Division Bench of this Court construed Section 35F of the Act. The Tribunal had not considered that another Bench of the Tribunal had already taken the view that a manufacturer similarly circumstanced as the writ petitioner in that case was entitled to the benefit of the

exemption of the notification. The Court held that in that background it was impossible for the Tribunal to arrive at the conclusion that it could not be said that the appellant had a good prima facie case so as to justify the disposition of the requirement of pre-deposit of the disputed amount of duty and penalty in question. It was stated that:

"The power to dispense with such requirement is conferred on the Tribunal to be exercised precisely in cases like these and, if it is not exercised under such circumstances, this Court will require it to be so exercised."

27. In 1989 (39) ELT 131 the Tribunal found that the petitioner in that case had a strong prima facie case in its favour although no financial hardship had been pleaded. The Tribunal dispensed with the pre-deposit of duty and penalty u/s 35F.

28. In this case also, in my view, the decisions relied upon by the petitioner for contending that the three units formed one factory appear to be on all fours with the facts of this case.

29. It cannot, therefore, but be held that the petitioner has a strong prima facie case in its favour to contend that the refinery gas and LSHS manufactured in the refinery were utilised in the same factory by servicing as fuel in the Xylene and Polyester Staple Fibre Unit.

30. After considering whether there was a prima facie case for consideration, the Collector went on to consider whether the petitioner was financially solvent. He said "the appellant has stated that their factory was not running at a loss so as to cause financial hardship and difficulties to make the pre-deposit. The application for dispensing with the pre-deposit of the amount of the duty cannot, therefore, be sustained.

31. As already seen the phrase "undue hardship" would cover a case where the appellant has a strong prima facie case. The phrase also in my view covers a situation where there is an arguable case in the appeal. In the former case the Appellate Authority should dispense with the pre-deposit altogether on the basis of the authorities referred to earlier. In the latter case the authority would have to safeguard the interest of the revenue. The Collector has not applied his mind to this aspect of the matter at all. He had to consider whether, if the deposit were waived, the interest of the revenue would be jeopardized. There was no suggestion or even allegation that there would be any jeopardy to the revenue if the pre-deposit were waived in the petitioner's case. Keeping in view the mandate that a discretionary power must be exercised in favour of the assessee unless there was good reasons to the contrary, no reason has been disclosed by the Collector for refusing to exercise his discretion in favour of the petitioner particularly when the revenue's interest was not said to be un-safeguarded. It is to be remembered that this Court, while remanding the matter back to the Collector had directed the petitioner to give an undertaking to this court that it would not deal with or dispose of any of its assets except in the usual course of business or with the leave of the court. This undertaking is still subsisting. The

Collector did not reject this safeguard as inadequate. The demand relates to a period for the clearance had already been made. There is no question of the petitioner recovering the amount from its customers.

32. In my view the situation is clearly covered by the decision of the House of Lords in *Julius. Lord Bishop of Oxford* (1880) 5 Appeal Cases 214 to the effect that the discretion of the Collector under the proviso to Section 35F to waive pre-deposit was in the circumstances of this case coupled with the duty to do so. For the reasons aforesaid the writ application must be allowed. The impugned order of the Collector is set aside. The Collector, Central Excise (Appeals) is directed to entertain and decide the appeal in accordance with law by dispensing with the requirement of pre-deposit of the amount of Excise Duty and penalty in dispute subject to the continuance of the undertaking given to this court by the petitioner.

33. There will no order as to costs.