
(1988) 07 AP CK 0015

In the Andhra Pradesh High Court

Case No : Writ Petition No. 8255 of 1984

Cuddapah Co-operative Sugars Ltd.

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 28-07-1988

Acts Referred:

Central Excise Rules, 1944 — Rule 11, 8, 8(1)

Citation : (1996) 1 APLJ 41 : (1989) 23 ECR 316 : (1988) 38 ELT 257

Hon'ble Judges : Seetharam Reddy, J;M.N. Rao, J

Bench : Division Bench

Advocate : K. Srinivasamurthy, for the Appellant; K. Jagannatha Rao for the Central Government, for the Respondent

Judgement

M.N. Rao, J.—The petitioner, M/s. Cuddapah Cooperative Sugars Limited, Doulatapuram, Cuddapah District, represented by its Administrative Officer, is seeking a writ or mandamus directing the respondents - Union of India, Appellate Collector of Central Excise and Assistant Collector of Central Excise, Anantapur, to refund Rs. 8,38,975.85 paid by way of excise duty for the period February 1978 to August 1978 when Notification No. 35/76-C.E., under which the petitioner-Factory was entitled to claim exemption, was in force.

2. The petitioner had set up a sugar factory in the year 1977 and it commenced production on 27.11.1977. The excise duty leviable on the sugar manufactured by the factory was normally at the rate of 37-1/2%. In order to help the newly started sugar factories the Government of India issued Notification No. 35/76-C.E. in exercise of the powers conferred under Rule 8(1) of the Central Excise Rules, 1944 with sub-section (3) of Section 3 of the Additional Duties of Excise (Goods of Special Importance) Act, 1957, on 25.2.1976 exempting for a period of three years from payment of excise duty and additional excise duty, sugar produced by a newly set up factory which commenced production for the first time on or after 1st April, 1975 which is in excess of 35% of its average production of sugar from so much of the duty of excise leviable thereon as is in

excess of duty calculated at 15% and 5% ad valorem respectively. In other words, as a result of this exemption a newly established sugar factory which would otherwise pay 37-1/2% excise duty would be liable to pay only at the reduced rate of 20%. For the period between February 1978 and August 1978 the petitioner paid excise duty at the normal rate of 37-1/2%. The petitioner made an application on 28.1.1982 requesting the Excise officials for refund of the excess amount of excise duty collected for the above period. That application was rejected by the Assistant Collector of Central Excise on 7.6.1982 in limine on the ground that it was preferred beyond the period of six months prescribed under Rule 11-B of the Central Excise Rules. On appeal, the Appellate Collector remanded the matter to the Assistant Collector with a direction to afford an opportunity to the petitioner and then dispose of the matter on merits against that order was dismissed by the appellate Collector on 27.12.1983.

3. The petitioner is seeking refund of the excess amount of Rs. 8,38,975.85 collected during the period February 1978 to August 1978 on the ground that the respondents were not entitled to retain what was illegally collected. One of the grounds on which the writ petition is grounded is that the mistake in regard to the applicability of the notification was on both sides - the petitioner as well as the Excise officials.

4. In the counter-affidavit, there is no denial about the applicability of Notification No. 35/76-C.E., dated 25.2.1976. The application filed by the petitioner seeking refund was admitted. The sole ground on which the claim of the petitioner is opposed is that the period of six months prescribed under Rule 11B of the Rules had expired long ago and, therefore, no refund could be ordered. The only remedy available to the petitioner, it is pleaded in the counter-affidavit, is that it should follow the procedure prescribed under the Act. The allegation that there was mistake on both sides is specifically denied.

5. The question that arises for our consideration is whether the petitioner is entitled to refund of Rs. 8,38,975.85 paid in excess of what was due during the period February 1978 to August 1978 ?

6. Rule 11 of the Central Excise Rules, in force at the relevant time and which deals with "claim for refund of duty", reads :

"11. Claim for refund of duty :- (1) Any person claiming refund of any duty paid by him may make an application for refund of such duty to the Assistant Collector of Central Excise before the expiry of six months from the date of payment of duty;

Provided that the limitation of six months shall not apply where any duty has been paid under protest.

Explanation : Where any duty is paid provisionally under these rules on the basis of the value or the rate of duty, the period of six months shall be computed from the date on which the duty is adjusted after final determination of the value or

the rate of duty, as the case may be.

(2) If on receipt of any such application the Assistant Collector of Central Excise is satisfied that the whole or any part of the duty paid by the applicant should be refunded to him, he may make an order accordingly.

(3) Where as a result of any order passed in appeal or revision under the Act, refund of any duty becomes due to any person, the proper officer may refund the amount to such person without his having to make any claim in that behalf.

(4) Save as otherwise provided by or under these rules no claim for refund of any duty shall be entertained."

(Rule 11 was deleted with effect from 17.11.1980).

7. During the relevant period, it is not in controversy, the petitioner was liable to pay the excise duty at the reduced rate of 20% by virtue of Notification No. 35/76. In the affidavit filed by the Administrative Officer of the petitioner in support of the writ petition, it is stated "At the end of 1981 the petitioner was informed by the General Manager, A.P. State Federation for Cooperative Sugar Factories Limited that we are entitled for a rebate in the excise duty and the excise duty we were paying was higher than what we ought to pay and he pointed out to us a Notification No. 35/76 dated 25.2.1976 stating that...". It is true that the claim was made on 28.1.1982 long after the expiry of the period of six months prescribed in Rule 11 of the Rules. In our view, this delay would not disentitle the petitioner from claiming refund. The collection of excise duty at the higher rates from the petitioner being contrary to the notification, it follows that the retention of the excess amount by the respondents was without the authority of law. The factory went into production only in November 1977 and long period of that date - on 25.2.1976 itself, Notification No. 35/76 came into force. When the duty was collected at the normal rate of 37-1/2% from the petitioner by the officials for the Excise department, they knew full well that being a newly started factory its liability to pay the duty was only at the reduced rates in terms of Notification No. 35/76.

8. Rule 8(1) of the Excise Rules confers power on the Central Government to exempt by Notification in the official gazette "any excisable goods from the whole or any part of duty leviable on such goods". The notification may specify the conditions subject to which exemption is granted. On the issue of such a notification, it is clear, the Excise officials are forbidden from collecting tax contrary to the terms of the notification : if they do so their action would indisputably be illegal. The wrong must be remedied by ordering refund of the illegally collected excess tax when the Department comes to know of it either suo motu or on the application of the aforesaid party. Such an illegality can neither be legitimised nor legalised by recourse to the rule of limitation. Rule 11 has no application to cases where the Department breaches a legal duty by acting contrary to the terms of the exemption notification. The failure on the part of the affected party to claim refund within the period of limitation prescribed in Rule 11

cannot absolve the Department of the legal duty cast upon it, the latter outweighs the former.

9. It appears that the petitioner-factory worked only during the period February 1978 to August 1978 and thereafter the production had come to a halt because of certain other difficulties. In the course of hearing, we have been told that the factory is not running now. In the particular circumstances of the case, we are satisfied that only towards the end of 1981 the petitioner came to know about the tax benefits incorporated in Notification No. 35/76 when the General Manager, A.P. State Federation for Cooperative Sugar Factories Limited brought the same to its notice. Had the petitioner been aware of the exemption it would not have paid the tax in excess of what it was lawfully required to pay. The collection of excess amount was per se illegal, unlike cases where the Departmental officials entertain doubts as to the application of correct provision of law or tariff item. In a situation like this, we think the equitable and discretionary relief under Article 226 of the Constitution of India should be exercised in favour of the petitioner. The delay that ensued in advancing the claim for refund is, therefore, not fatal.

10. In *Shri Vallabh Glass Works Ltd. & Another v. Union of India & Others* (1) (1984) 16 E.L.T. 171, dealing with the aspect whether limitation is an inflexible factor disentitling a person from claiming the relief, if otherwise on equitable considerations the relief should be granted, the Supreme Court ruled :

"There may be cases where even a delay of shorter period may be considered to be sufficient to refuse relief in a petition under Article 226 of the Constitution. There may be circumstances which may persuade the court to grant relief even though the petition may have been filed beyond the period of limitation prescribed for a suit."

11. The petitioner had knowledge about the notification only towards the end of 1981 and even assuming that exemptions granted under Rule 8 also are subjected to the rule of limitation, the period beings to run from the date of knowledge, but not from the date of payment of the excess tax. We would, therefore, reject the contention advanced on behalf of the learned standing counsel for the Central Government that the writ petition must fail on the ground of limitation.

12. It is urged by the learned standing counsel for the Central Government that if refund is ordered to the petitioner-factory, it would amount to unjust enrichment and in support of this, he relied upon a decision of the Supreme Court in *Amar Nath Om Prakash and Others Vs. State of Punjab and Others*, and a decision of this Court in *N. V. Ramaiah v. State* (3) AIR 1986 AP 361. Both these decisions have no application to the case on hand. The facts noticed in the present case do not justify any inference that granting of refund would result in unjust enrichment. The incentive was granted under Notification No. 35/76 obviously to enable the newly started factories to withstand competition from the established

factories. It is true, excise duty being an indirect tax, the burden is distributed on the purchasers. Had the petitioner applied for refund within six months from the date of payment, it would have not only got refund of the excess tax paid, but would also have retained the same without the necessity to reduce proportionately the incidence that was already passed on to the purchasers. In other words, the tax benefit that flows out of Notification No. 35/76 is in the nature of a subsidy to enable the newly established factories to meet the overhead charges and administrative expenses in the initial stage for a period of three years and thus face competition successfully from the established factories with no obligation to sell the commodity at a reduced rate because of the incentives granted. Viewed in this light the contention that granting of refund would result in unjust enrichment is devoid of merit.

13. For these reasons, the writ petition is allowed, and a mandamus will issue as prayed for.

14. The oral application made by the learned standing counsel for the Central Government for leave to appeal to the Supreme Court is rejected, as this case does not involve any substantial question of law of general importance which, in our view, requires the consideration of the Supreme Court.