
(1982) 09 BOM CK 0047

In the Bombay High Court

Case No : Misc. Petition No. 314 of 1977

Deccan Sales Corporation and another

APPELLANT

Vs

R. Parthasarthy and others

RESPONDENT

Date of Decision : 22-09-1982

Acts Referred:

Central Excise Rules, 1944 — Rule 173G(1), 56A, 56A(3), 9(3)

Citation : (1982) 10 ELT 885

Hon'ble Judges : S.K. Desai, J

Bench : Single Bench

Judgement

1. In this miscellaneous petition a short but interesting question regarding the application of Rule 56-A of the Central Excise Rules, 1944, arises. The said Rule has undergone slight changes and hence we will have to consider the rule as it stood when the petitioners applied for a refund of the amount of Rs. 77,587/- which they did in 1970. In order, however, to understand the nature of the petitioners' claim and in order to consider whether the same is required to be upheld or repelled, I may state a few facts.

2. Petitioner No. 1 is a company inter alia carrying on business as manufacturers and dealers in fertilizer mixtures. Petitioner No. 2 is its shareholder and Managing Director. I shall refer to Petitioner No. 1 hereinafter as "the Company" for the sake of brevity.

3. The Company manufactures granulated compound fertilizers and for the purposes of manufacture uses as raw material certain base fertilizers. These base fertilizers are manufactured by other persons and certain excise duty is levied on the base fertilizers. The product manufactured by the Company was, during the period 1st March, 1969 to 28th February, 1980, subject to levy of excise duty. However, as in the process of manufacture the company had used as raw material excise duty paid goods viz. the base fertilizers, the Company sought credit under Rule 56-A of the Central Excise Rules, 1944. At this juncture the relevant portion of the rule as it then stood may be set out :

"56-A. Special Procedure for movement of duty-paid materials or component parts for use in the manufacture of finished excisable goods. - (1) Notwithstanding anything contained in these rules, the Central Government may, by notification in the official Gazette, specify the excisable goods in respect of which the procedure laid down in sub-rule (2) shall apply.

(2) The Collector may, on application made in this behalf and subject to the conditions mentioned in sub-rule (3) and such other conditions as may from time to time be prescribed by the Central Government, permit a manufacture of any excisable goods specified under sub-rule (1) to receive material or component part or finished product (like asbestos cement), on which the duty of excise or the additional duty u/s 2-A of the Indian Tariff Act, 1934 (32 of 1934) (hereinafter referred to as "the countervailing duty") has been paid, in his factory for the manufacture of these goods or for the more convenient distribution of finished product and allow a credit of the duty already paid on such material or component parts of finished product, as the case may be :

Provided that no credit of duty shall be allowed in respect of any material or component parts used in the manufacture of finished excisable goods -

(i) if such finished excisable goods produced by the manufacturer are exempted from the whole of the duty of excise leviable thereon or are chargeable to nil rate of duty, and

(ii) unless -

(a) duty has been paid for such material or component parts under the same item or sub-item as the finished excisable goods, or

(b) remission or adjustment of duty paid for such material or component parts has been specifically sanctioned by the Central Government :

Provided further that if the duty paid on such material or component part (of which credit has been allowed under this sub-rule) be varied subsequently due to any reason, resulting in payment of refund to, or recovery of more duty from the manufacturer or importer, as the case may be, of such material or component parts, the credit allowed shall be varied accordingly by adjustment in the credit account maintained under sub-rule (3) or in the account-current maintained under sub-rule (3) of rule 9 or rule 173-G(1) or, if such adjustment be not possible for any reason, by cash recovery from or, as the case may be, refund to the manufacturer availing of the procedure contained in this rule.

(3)

(i).....

(ii).....

(iii).....

(iv).....

(v).....

(vi) Except to the extent provided in the second proviso to sub-rule (2), the credit allowed in respect of any material or component parts shall be utilised towards payment of duty on the finished excisable goods in the manufacture of which such materials or component parts are used or on the materials or component parts themselves and no part of such credit shall be refunded in cash or by cheque".

4. As stated earlier, a few changes have taken place in Rule 56-A and we may note sub-rule (3)(vi) as it stands amended to-day. The said provision now reads as under :

"(vi)(a) The credit of duty allowed in respect of any material or component parts may be utilised towards payment of duty on any finished excisable goods for the manufacture of which such material or component parts were permitted to be brought into the factory under sub-rule (2) or where such material or component parts are cleared from the factory as such, on material or component parts.

(b) No part of such credit shall be utilised save as provided in sub-clause (a) or shall be refunded in cash or by cheque".

5. Broadly speaking, the procedure envisaged under Rule 56-A of the Central Excise Rules, 1944, seems to be to credit to the account of a manufacturer an amount equivalent to the amount of duty already levied and paid on the raw material or component parts used in the manufacture by him of the finished product. That credit is set off or adjusted against the amount of excise duty that he has to pay in respect of the finished product manufactured by him. However, the manufacturer would be entitled to avail of the proforma credit only after completing the formalities and following the procedure prescribed under the rules.

6. Under Rule 56-A the relief is selective and not general. Relief was extended to the goods manufactured by the company viz. compound fertilizers by a notification No. 110/69, dated 19-4-1969 issued by the Government of India. A copy of the said notification is annexed as Exhibit "A" to the petition. After being aware of the said notification the company made the necessary application to the Assistant Collector of Excise, Bombay Division, for permission to avail of the proforma credit and the permission was granted by the Assistant Collector by his letter dated 17-5-1969. According to the company during the period April, May and June 1969 it received 2818.500 metric tonnes of base fertilizers on which duty had already been paid and accordingly the company became entitled to proforma credit in the amount of Rs. 2,42,984/-. However, it would appear that the proforma credit was not made available to the company during this period but only given in October-December 1969. In paragraph 10 of the Miscellaneous Petition the reasons for this delay have been indicated. Briefly stated, it would appear that certain documents were sent by the suppliers which according to the suppliers were adequate for the purposes of obtaining the proforma credit. The Excise Inspector stationed at the petitioners factory, however, insisted that the

documents received by the Company were not sufficient to (enable it to claim) this credit and the suppliers ought to have submitted subsidiary A.R.I. forms. The Company thereafter made inquiries with the Central Excise Office at Baroda and the Company was informed that it was not necessary to issue the aforementioned forms and the documents already supplied were sufficient for the purpose of claiming and utilising the proforma credit. The view of the Baroda Excise authorities did not find favour with and was not accepted by the Bombay Excise authorities. There was protracted correspondence between the two authorities and ultimately as a result of this correspondence the Central Excise Department Office at Baroda finally issued to the Company requisite subsidiary A.R.I. forms. These were accordingly received towards the end of October, 1969.

7. However, in the meantime the Company had already manufactured its compound fertilizers and as the period March to May is the period when the demand for the product is at its peak the Company was on commercial and business considerations required to remove the manufactured product from its godown. For this purpose it was required to pay the excise duty leviable thereon and it, therefore, was required to deposit in the cash P.L. Account, the sum of Rs. 5,16,716.93 to enable the Company to clear the goods. Such a large cash deposit became necessary as the proforma credit was not given for the base fertilisers utilised in the manufacture, which credit was subsequently allowed as the extract of the account shows, in October 1969. It was obvious that had the credit been allowed earlier, the sum of Rs. 5,16,000/- and odd which is the cash deposit would have stood reduced by about Rs. 2,40,000/- which is the approximate quantum of the proforma credit allowed late in October for the period April-June 1969.

8. It would appear that with effect from 1st March, 1970 excise duty on these goods manufactured by the Company was removed in toto. The result was that there remained a credit balance of Rs. 1,41,838.63 to the credit of the Company in the proforma credit account. There was a certain stock of finished goods as on 28-2-1970 on which excise duty in the amount of Rs. 29,336.06 was payable. Similarly, certain stock of raw material was still lying unutilised. Credit had already been claimed on this raw material in the amount of Rs. 34,915.57 to which credit the Company became disentitled as excise duty was removed on the goods manufactured by it. After setting off these two figures of Rs. 29,336.06 and Rs. 34,915.57 against the credit balance already mentioned we get the figure of Rs. 77,587/- which represents the amount claimed in the petition as refundable to the Company by the Union of India.

9. Petitioner No. 1 Company by its letter dated 17-6-1970 explained the basis of the claim and called upon the respondents to transfer the higher amount inadvertently claimed from the proforma account to the Personal Ledger Account and then refund the same. Detailed statements and extracts from the account were sent along with the said letter. As a somewhat higher amount had been earlier claimed the Company was asked to remove the discrepancy which it did

by its letter dated 21-9-1970. By the said letter the claim was reduced to Rs. 77,587/- which is the amount claimed in the petition. It would appear that on the next day another letter was written by which an additional amount of Rs. 9,374/- was claimed, but the petitioners have not pressed for the higher figure in this petition.

10. The Assistant Collector of Central Excise, Bombay, Dn. IX by his order dated 13-2-1975 held that refund of Rs. 77,578/- was not valid. A copy of the said order is found as part of Exh. "K" collectively. It is difficult to understand precisely what is intended to be conveyed by the said order. Nothing is clear therein except the final decision. The Central Excise Consultant of the Company addressed a further letter to the Assistant Collector of Central Excise on 22-2-1975. By a communication dated 14-3-1975 the Company was informed that it could prefer an appeal within three months. It would appear that the appeal was filed on 30-6-1975. However, the Appellate Collector by his order dated 26-2-1976 chose not to go into the merits of the appeal, but dismissed it on the ground that it was time-barred despite the fact that it was filed within 3 months of the date of the letter dated 14-3-1975. On 18-3-1976 the Company preferred a revision to the Government of India. This revision was rejected by an order dated 15-7-1976.

11. One of the contentions of the petitioners in their revision application was that their appeal was in time since they had filed an appeal within three months of the receipt of the letter dated 14-3-1975 which was the information conveyed to the Company by the said letter. The Government of India, however, upheld the appellate order observing that wrong information had indeed been conveyed to the Company by the Assistant Collector, but this could not constitute an estoppel or extend the period of limitation. Being aggrieved by these orders a miscellaneous petition was filed in March 1977. It came up for hearing in July 1980 and Agarwal J. by his judgment and order date 28-7-1980 quashed the impugned appellate order dated 26-2-1976 as well as the impugned revisional order dated 15-7-1976 and directed the Appellate Collector to hear the petitioners' appeal against the order dated 13-2-1975 on merits. Accordingly the matter stood remanded back to the Appellate Collector of Central Excise who by his order dated 29-9-1980 held that refund could not be allowed of the amount of proforma credit by reason of the bar contained in clause (vi) of sub-rule (3) of Rule 56-A. according to his decision there was a mandatory bar against making refund and only adjustment was permissible. He rejected the Company's contention that it was entitled to a refund since adjustment was not possible after 1-3-1970. It is this decision of the Appellate Collector which is impugned by the petitioners by their subsequent amendments made in the petition by which paragraphs 11A to 11C and prayer (a-1) have been added to the petition.

12. This decision of the Appellate Collector has been assailed by the petitioners on several different grounds. The attacks fall into two broad classifications. One thrust is to impugn the application of clause (vi) to the petitioners' claim and

this attack is a multiple one. It is urged in the first place that such application and denial of relief to the petitioners on that ground would enable the respondents to take advantage of their own wrong by reason of not allowing to the petitioners credit of duty paid on base fertilisers at the time when it ought to have been allowed and allowing it much later. To recapitulate, the sum of Rs. 2,29,852/- was the amount of duty paid on raw materials i.e. base fertilisers purchased and received by the petitioners in their factories during the month of April, May and June 1969. The petitioners got the necessary credit in October 1979 after the peak season had passed with the result that the credit was not fully adjusted against the duty payable by the petitioners when excise was removed on 1st March, 1971. According to the petitioners they are not seeking refund directly under Rule 56-A but indirectly seeking relief in respect of deposits which they were compelled to make to the P.L. Account since proforma credit was not given to them in time. Thus, according to the petitioners, what they seek is replenishment of the P.L. Account and return of deposits required from them in the said account by reason of the respondents' failure to give credit in the proforma account expeditiously, quickly and diligently.

13. Alternatively, the petitioners have contended for a very limited or modified construction of clause (vi) in the sense that such provision only clarifies that cash refund is not permissible in the sense of cash payment, a situation which could arise when the excise duty on finished goods is lower than the duty on raw materials. According to the petitioners, whilst clause (vi) can be pressed into service in such a contingency it cannot be pressed in service in a case of claim of the nature as revealed in the petition. In other words, the petitioners are contending for acceptance of the position that their claim is for refund of the amount deposited in their personal ledger account which deposits became necessary on account of the special circumstances viz. failure or default or improper conduct on the part of the respondents and is not for cash refund of any part of the proforma credit simpliciter. According to the petitioners, cash refund of proforma credit simpliciter is only barred and that clause (vi) only comes into the picture in respect of such a claim. The petitioners have called upon the Court to consider the petitioners' claim as something totally different and not prohibited by clause (vi).

14. To put it in other words, the petitioners have asked the Court to give a limited application to clause (vi). In the alternative they have asked the Court to consider the petitioners' claim as being different from the one to which the provisions of the said clause (vi) were intended to apply. In the further alternative, the petitioners have contended that the respondents are not entitled to take shield or shelter behind clause (vi) because to allow them to do so would be to allow them to take advantage of their own wrong.

15. Without prejudice to these submissions based on interpretation, construction and application of sub-rule (vi) and in the even of the Court being unable to accept the petitioners' submissions and holding that the petitioners' claim would

be barred under Rule 56-A(3)(vi)(b), the petitioners have submitted that the said clause is void, unconstitutional and of no legal effect on several footings. These footings may now be noted and dealt with. In the first place, it was submitted that the clause was beyond the rule making power of the Central Government or in excess of such powers because of the principle of delegated legislation. It is difficult to follow the argument as set out in the amendment and indeed the point was expressly stated to be not pressed at the time of arguments.

16. It is then submitted that the said clause, if it is construed to allow the Government to retain and appropriate the amounts lying in the proforma credit accounts would amount to deprivation of property without authority of law. Accordingly it is submitted that the said sub-rule or rather the clause would violate Article 31(1) and 31(2) of the Constitution of India (which were existing) at the time when the rules were adopted. It is also contended that the clause violates Article 300(a) of the Constitution of India. It was next submitted that the said clause was violative further of Article 19(1)(f) & (g) of the Constitution of India. It was submitted, and this submission appears to have been accepted by the Supreme Court, that the invalidity, if any, would not stand removed with retrospective effect merely by reason of Article 19(1)(f) being removed from Part III (of the Constitution as a result) of the Constitution of India (44th Amendment) Act, 1979. The submission of the petitioners was that the sub-rule, in so far as it bars the payment of amounts lying to the credit of the citizen, would amount to imposition of excessive and disproportionate restriction on the fundamental rights guaranteed to the citizens to acquire, hold and dispose of their property as also on their right to carry on business. It is submitted that the restrictions are not saved under provisions contained in Article 19(5) of the Constitution of India.

17. The petitioners have also claimed hostile discrimination contending that there is not the slightest justification for retention and appropriation by the State of the amount really due and payable to citizens at the time when the account is closed by operation of law.

18. The answer given by Mr. Dalal to these submissions may be briefly stated. According to his submission, the refund provided by Rule 56-A was not a matter of right but of grace. My attention was drawn to the provisions contained in the rule whereby the facility is to be selective and not universal. It was contended that this facility may not be extended to a particular commodity in which case the manufacturer would have to pay excise duty fully without having the benefit of any adjustments or reduction in respect of the excise duty paid on the raw materials or component parts. It was contended that similarly the adjustments or refund to be given may be made subject to certain conditions and if the conditions are not strictly complied with, the manufacturer of the finished product would lose or not get the benefit of the provision. It was urged that such a provision could not be regarded as violative of Article 14, 19 or 31.

19. I would like to dispose of the constitutional challenge at the outset.

20. The levy of excise duty can broadly be considered to be a matter of taxation and in the matter of taxation it is well settled that there is no warrant for construing a taxing provision so as to bring it in accord with reason, commonsense or equity. The burden would fall on the person or persons falling squarely within the tax provision although the levy may be harsh or onerous. Similar relief would be available if justified by the phraseology although not rationally deserved.

21. Just as levy of excise duty can be selective and rates must depend upon the administrative decisions of the Government of India, relief can be selective and may be made subject to mandatory conditions. It is not possible to consider levy of excise as discriminatory because certain items are exempted or duty levied thereon is at an extremely low or negligible rate. It is undoubtedly true that if certain items are subject to levy of excise duty at an extremely high rate, different considerations may apply, but we are really not concerned with such a case here. Similarly, Article 14 or the concept of reasonableness now introduced thereunder by the Supreme Court is of little avail to the petitioners bearing in mind the object of relief.

22. The object is to grant specified benefits and if the benefit is limited or circumscribed by certain conditions, unless the conditions are irrational, it is not possible to invoke Article 14 to assist the petitioners in obtaining the necessary refund.

23. Once it is conceded that the provision is not unreasonable, irrational or arbitrary, the challenge under both Articles 19 and 31 must stand rejected and it is, in my opinion, unnecessary to discuss the challenge further.

24. In short, the constitutional challenge is not at all substantial although it would appear that the petitioners have through no fault of theirs failed to receive refund or set-off or adjustment although they were entitled to the same. The situation had come about because the manufacturing activity is a cyclical activity. The petitioners became entitled to the adjustment during the period of peak manufacture, but the same was actually allowed at time when the manufacturing activities were at a low ebb. By the time the peak season again commenced, the excise duty on the item manufactured by the petitioners stood totally abolished and hence further adjustment could not take place.

25. There are, however, two aspects of the matter which require elaborate consideration. The petitioners have a grievance that clause (vi) came into play in the instant case because of delay on the part of the excise authorities and in particular because of lack of co-ordination between the excise authorities at Bombay and Baroda. The Baroda excise authorities maintained that the documents given by them were sufficient to obtain refund which view was not accepted by the excise authorities at Bombay who denied to the petitioners the adjustments on the basis that the necessary documents were not produced. The petitioners could not submit these documents because they were not issued the

same by the excise authorities at Baroda who had collected excise on the component parts and raw material viz. base fertilisers utilised by the petitioners. However, I find certain difficulties in applying in the instant case the principle canvassed by the petitioners viz. that the party cannot take advantage of its own wrong. If clause (vi) on which reliance is placed by the Appellate Collector was required to be construed as a statutory bar on the claim for refund sought for by the petitioners, then there is no warrant for holding or coming to the conclusion that the excise authorities are taking shelter behind the said provision as a result of situation created by their own default. If there is such a default as alleged by the petitioners and it is wrongful or improper, the petitioners may or may not have a claim against the Union of India or the excise authorities in tort or otherwise. However, the clause is a part of the statutory rule binding on private parties as well as the department and if the provision operates to bar the petitioners claim the operation of the clause cannot be rescinded or stayed or obliterated merely because the situation has arisen by reason of some default or lack of diligence or improper conduct on part of the excise authorities. Even under assumption that there was wrongful conduct on part of the excise authorities, it would seem that the application of the principle canvassed for by the petitioners is not justified and cannot be allowed.

26. The petitioners appear, however, to be on firmer ground when they press for a more sympathetic interpretation and construction of the said clause. What has been urged in the petition and reiterated during the course of arguments is that what is prohibited is not cash payment but cash payment in excess of the quantum of excise duty leviable on the item manufactured by a party. To put it in other words, it is submitted that what is barred is an excess net claim by way of cash refund. If it can be shown that the quantum of excise duty both on the raw material components and base fertilisers exceeds the excise duty payable on the item manufactured by the party, then in such a case the party would only be entitled to cent per cent adjustment against its liability for excise duty but would not be entitled to any extra cash payment which alone is specifically barred. This is the limited interpretation sought for by the petitioners on the sub-rule.

27. As stated earlier, it is now well settled that where a taxing provision or an exemption provision is capable of more than one interpretation, then that interpretation must be put which would reduce the incidence of tax or enlarge the ambit of the exemption provision. This is a well settled principle for which no authority is required to be cited.

28. There is another principle of interpretation which is equally well settled. The principle is that if two interpretations of a provision are permissible and one interpretation may render the provision subject to serious constitutional challenge, the other interpretation ought to be preferred. In other words, the provision must be read down and given a restricted meaning to protect it from a legal challenge as to its vires or validity.

29. In the instant case it is not the case of the respondents that if refund is

directed to be made the petitioners will receive something in excess of the excise duty paid by them. Such a position only arises if the two accounts are kept distinct and viewed separately. If the two accounts are considered together and not viewed in isolation then it would be immediately perceived that all that is sought is reduction of liability to pay excise duty on the final manufactured product. Ordinarily such reduction of liability would be available through adjustment. In the instant case such adjustment could not take place and credit was delayed because the necessary documents (in the opinion of the Bombay Office) were not immediately made available. As and when the documents were made available the petitioners became entitled to receive the credit. It may be that ordinarily the petitioners or parties similarly situate may not require cash payment and would be content with adjustment against future liability to pay excise duty. In other words, cash refund is not to be equated with cash payment. To put it in another way, although ordinarily Rule 56-A would entitle the parties manufacturing a notified product to avail of the benefits by adjustment, there is nothing in clause (vi) to warrant the conclusion that this is the only manner in which the benefit could be given. If in the meantime the party has paid the full quantum of excise duty, a part of that quantum could be returned to it. What clause (vi) prescribes, in other words, is giving to the manufacturer a net surplus or advantage in cash on the footing that the quantum of excise duty collected on the raw materials component parts exceeds the quantum of excise duty payable by that manufacturer on the goods produced.

30. The limited interpretation sought to be canvassed for clause (vi) would make the clause equitable as also safe from constitutional challenge. The limited interpretation is also consistent with what is provided in the 2nd proviso to sub-rule (2). The 2nd proviso indicates that cash payment is within the contemplation of the draftsmen. In view of that provision clause (vi) must be read only to prohibit cash payment beyond the limit, the limit being the excise duty chargeable on the goods manufactured. It is in that limited sense that the bar must be construed and acted upon.

31. It is true that this interpretation does involve a slight modification if not straining of the language, but it is not totally impermissible and not totally unwarranted. If that be so, it becomes necessary to give a modified application to clause (vi) and giving the modified application the said clause (vi) cannot be held to come in the way of the petitioners claim.

32. On the other points there is no serious dispute that the petitioners were entitled to the benefit. It is almost conceded that had the benefit been given in time the petitioners would not have been required to bring in their personal account large sums of money as already explained. Indeed, the petitioners want a return to be made of (a part of) the said large sum of money subject to the limit of Rs. 77,587/- since the rest of the amount had already been adjusted.

33. The result of the foregoing discussion would be to hold that the Appellate Collector was in error in resorting to clause (vi) of sub-rule (3) of Rule 56-A for

denying to the petitioners their claim for refund. If the conclusion is that they were entitled to the amount, and the claim was not barred by limitation and also not prescribed by clause (vi) of sub-rule (3), then the said claim ought to have been allowed and the petitioners would be entitled to the relief sought for in this petition. In the circumstances, the order of the Appellate Collector is quashed. As the said order of the Appellate Collector (Ex. P) is quashed as being erroneous, a mandamus is issued in terms of prayer (b) of the petition. Rule is made absolute in these terms. The mandatory order to be carried out by the respondents on or before 30-1-1982; Parties to bear their own costs.

34. Courts have now recognised the right of parties similarly situate as the petitioners, to claim interest. The desirability of such power is illustrated by facts revealed in the instant case when the claim of Rs. 77,587/- which is now allowed by me was made as far back as 1970. The amount has been retained by the respondents for twelve years. However, the petitioners have in their prayer not claimed any interest and accordingly it may not be appropriate to award interest on the amount of Rs. 77,587/- till today. I think the interest should run from 1st December, 1982 if for any reason payment is not made by the respondents by the time allowed by the Court. I direct that interest will be payable on the amount of Rs. 77,587/- at the rate of 6% per annum which is the rate allowed in the C.P. Code from 1-12-1982 till payment. I may add further that the interpretation that I have put on clause (vi) is restricted to the clause as it stood in 1970 and need not necessarily apply to the amended form today. I wish to express no opinion on whether the change in language warrants any change in interpretation and application of the clause. That task is left for a future occasion.