
(2013) 08 GAU CK 0085
In the Gauhati High Court
Case No : W.P. (C) No. 1174 of 2013

Dharmapal Satyapal Ltd.

APPELLANT

Vs

The Union of India

RESPONDENT

Date of Decision : 07-08-2013

Acts Referred:

Citation : (2014) 1 GLD 288

Hon'ble Judges : Iqbal Ahmed Ansari, J;Indira Shah, J

Bench : Division Bench

Judgement

Iqbal Ahmed Ansari, J.—We have heard Dr. A.K. Saraf, learned senior counsel, for the petitioner, and Mr. R. Dubey, learned Standing Counsel, Central Excise Department, appearing on behalf of the respondents. The subject-matter of controversy, raised in the present writ petition, made under Article 226 of the Constitution of India, is substantially covered by the decision of a Single Bench of this Court in the case of Dharampal Satyapal Ltd. Vs. Union of India (UOI), . The said decision, rendered by the Single Bench, has been upheld and affirmed by the judgment and order, dated 19-01-2012, passed, in WA Nos. 392/2010 and 395/2010, by a Division Bench of this Court.

2. Before reverting to the decision rendered in the case of Dharampal Satyapal Ltd. (supra), it may be pointed out that the present writ petition has been filed putting to challenge as many as 4 (four) numbers of certificates/reports, dated 31-12-2012, issued by the Commissioner of Central Excise, based on the decision of the Investment Appraisal Committee (in short, "IAC") indicating to the effect that the IAC has reached a finding that the petitioner company's claim for an amount of Rs. 18,66,86,576.29 is inadmissible as investment. The petitioner alleges that while reaching the finding that its claim for the said sum of Rs. 18,66,86,576.29 is inadmissible as investment, the IAC has not assigned reasons. This apart, neither any notice to show cause was given to the petitioner company nor was the petitioner company given any opportunity to have their say, in the matter, by the IAC before the IAC arrived at the said finding and

rejected the petitioner company's claim for treating the said sum of Rs. 18,66,86,576.29 as investment made by the petitioner company within the meaning of the relevant scheme.

3. As a demand notice, dated 26-10-2013, has been issued by the Assistant Commissioner of the Central Excise on the basis of the above findings of the IAC, the demand notice, dated 26-10-2013, has also been put to challenge in the present writ petition inasmuch as the demand notice, which rests on the findings of the IAC, directs the petitioner company to make payment of excise duty of a sum of Rs. 18,66,86,576.29 along with interest, because the investment, claimed to have been made by the petitioner company, stands disallowed by the IAC.

4. The respondents have filed an affidavit resisting the writ petition, wherein they have contended to the effect, inter alia, that the investment, which have been disallowed by the IAC, were not treatable as investments within the Scheme, which provides for such investments to be exempted from payment of excise duty. The respondents further contend that no opportunity of showing cause or hearing was necessary to be accorded to the petitioner company before its claim for investments, having been made under the relevant scheme, were disallowed by the IAC.

5. Whether the respondents' insistence, on the impugned demand notice, is sustainable in law, some material facts, as set out hereinbelow, need to be taken into account.

(i) The petitioner company is engaged in the business of manufacturing of Zarda Scented Tobacco/Pan Masala, containing tobacco, falling under tariff heading 2403 99 30 and 2403 99 10 of the First Schedule to the Central Excise Tariff Act, 1985. Pursuant to the North Eastern Industrial Policy, dated 24.12.1997, two notifications, namely. Notification No. 32/1999-CE and Notification No. 33/1999-CE were issued by the Central Government u/s 5r A of the Central Excise Act, 1944, granting exemption, on certain goods and units set up in certain areas, from payment of excise duty.

(ii) By virtue of Section 154 of Finance Act, 2003, which received Presidential Assent on 14.5.2003, exemption from payment of central excise, in respect of Cigarette and Pan Masala, containing tobacco, was withdrawn retrospectively with effect from the date of issuance of the relevant notifications, dated 8.7.1999. However, exemption of Central Excise in respect of Chewing Tobacco, was withdrawn retrospectively with effect from 1.3.2001. Section 154 of Finance Act, 2003 also provided for recovery of the amount of central excise not paid by the manufacturers, because of exemption from payment of central excise duty. The said recovery, in the light of Section 154 of the Finance Act, 2003, was required to be made along with interest accruing thereon.

(iii) By Notification No. 69/2003-CE, there was a partial but conditional restoration of the exemption, which had been withdrawn vide Notification No. 6/2001-CE and Section 154 of the Finance Act, 2003, to the extent of 50% of the

duty payable. It was stipulated therein that the exemption would be subject to certain conditions, the conditions being that exemption from payment of central excise duty would be available only in respect of units, which were located in the States of Arunachal Pradesh, Assam, Manipur, Meghalaya, Mizoram, Nagaland or Tripura, and for those units, which had commenced commercial production on or after 24.12.1997, but not later than 28.02.2001 and that the unit ought to have continued its manufacturing activities after 28.02.2001 and ought to have availed of the benefit under Notification Nos. 32/99-CE and 33/99-CE. It was further stipulated under the Notification No. 69/2003-CE that the sum of duty payable, but for the exemption, was to be utilized by the manufacturer only for investment in plant and machinery in a manufacturing unit, which is located in the States of Arunachal Pradesh, Assam, Manipur, Meghalaya, Mizoram, Nagaland or Tripura and the investment had to be made before the expiry of six months from the end of each quarter. The manufacturer was made obliged to furnish details of the investments within one month of the expiry of the six months period, as described above, to a Committee, popularly known as the Investment Appraisal Committee (in short, "the IAC), which shall consist of the Chief Commissioner of Central Excise, Shillong, the Principal Secretary of the Department of Industry of the State concerned in which the unit was located and the Principal Secretary of the Department of Industry of the State in which the investment was made. The manufacturer was required to prove to the satisfaction of the IAC that the investment was made for plant and machinery in a manufacturing unit located in the concerned State. Finally, once the IAC was satisfied that the investment was made in plant and machinery in a manufacturing unit as stipulated in the relevant Notification, it was to issue a certificate to this effect to the manufacturer within a period of three weeks after the period of one month described above. This certificate was to be produced by a manufacturer, within a period of two weeks from the date of issuance of the said certificate, to the jurisdictional Central Excise Officer. This apart, the investment, made under the said Notification, could not have been withdrawn for a period of ten years from the date on which the investment was made.

(iv) However, on 21.01.2004, another Notification No. 8/2004-CE, in suppression of the earlier Notification No. 69/2003, was issued by the Central Government. The later Notification provided that exemption to the extent of 100% would be available to the manufacturer for investment made not only in plant and machinery in a manufacturing unit, located in the State of Arunachal Pradesh, Assam, Manipur, Meghalaya, Mizoram, Nagaland or Tripura, but also in infrastructure or civil works or social projects in any of these states. The other procedural stipulations, in the said Notification, remained similar to those already delineated in the Notification No. 69/2003-CE.

(v) Thereafter, the Notification No. 28/2004-CE, dated 09.07.2004, made a series of procedural amendments to the Notification No. 8/2004-CE, dated 21.01.2004, inasmuch as it was provided that the sum, equal to the excise duty, which was payable, but for the exemption, would be deposited by the

manufacturer within 60 days from the end of the quarter in an Escrow Account opened by the manufacturer for this purpose. Under Notification No. 28/2004-CE, dated 09.07.2004, the operation, including withdrawals from, and closure of, the said Escrow Account, had to be made with the prior approval of the jurisdictional Commissioner of Central Excise by taking into account the conditions specified in the said Notification. The manufacturer was also to invest the amount, deposited in the said Escrow Account, within two years from the date of the deposit and the amount, withdrawn from the Escrow Account, was to be utilized for the purpose specified within 60 days of its withdrawal.

(vi) The respondents/authorities concerned, however, in illegal and arbitrary manner, took steps for appropriation of various amounts from various Escrow accounts of the petitioner company and issued instructions not to allow any withdrawal in respect of the Escrow Accounts of the petitioner company. The said action was challenged before this Court by filing a writ petition being W.P. (C) No. 591/2008. The petitioner company, by filing W.P. (C) No. 2814/2008, also challenged the functioning of the Investment Appraisal Committee, constituted under the provisions of the Notification, dated 09.07.2004, aforementioned, by yet another writ petition, namely, W.P. (C) No. 1048/2008. The petitioner company challenged as arbitrary and unreasonable the action of the Deputy Commissioner of Central Excise, Guwahati, in issuing letters of demand on the ground that the investment, made by the petitioner company had not been approved by the Investment Appraisal Committee.

(vii) All the writ applications were allowed by this Court by judgment and order, dated 6.01.2010. This Court, by order, dated 26.9.2010, in Misc. Case No. 479/2010 arising out of W.P. (C) No. 591/2010, ordered the exclusion of the period during which the Escrow Account had remained frozen and the period, during which the various amounts remained appropriated for the calculation of two years period as provided in the Notification.

(viii) The petitioner company, thereafter, made application for withdrawal of the amount from the Escrow Account. However, no order was passed by the Commissioner of Central Excise, although the petitioner company made repeated requests seeking permission to withdraw various amounts for the purpose of making investments in terms of the notification. On the other hand, the respondents filed two appeals before a Division Bench of this Court against the judgment and order, dated 06.01.2010, and 29.06.2010, aforementioned, which came to be numbered as W.A. No. 394 & 395 of 2010. The said appeals were dismissed by this Court by judgment and order, dated 19.1.2012.

6. It is pertinent to mention herein that in the meantime, the provisions of the Notification No. 69 of 2003 and Notification No. 8 of 2004, dealing with the time period for making withdrawal applications and investments, were amended with retrospective effect vide Section 72 of the Finance Act, 2011, which came into force on 08.04.2011 and the time period of investment to be made within six months, as provided in the Notification No. 69 of 2003, was increased to two

years and the time period of 2 (two) years, provided in Condition C & D of the Notification No. 8 of 2004-CE, was replaced by 4 (four) years.

7. The Division Bench of this Court in its order, dated 19.01.2012, held that there was no conflict in the applicability of retrospective amendment, made by Section 72 of the Finance Act, 2011, and the judgment of this Court rendered on 06.01.2010 and 29.06.2010. The Division Bench also held that the judgment of this Court, dated 06.01.2010 and 29.06.2010, were fully executable and the parties were to act in accordance with the terms and conditions of the Finance Act, 2011, and the respondents were to deal with the matter and finalize the same within 3 months from the date of receipt of the order.

8. After the judgment and order of the Division Bench of this Court and in compliance with Section 72 of Finance Act 2011, the petitioner company, admittedly, received Investment Appraisal Certificates/Reports, wherein certain amounts were said to be not admissible without giving any reason for the inadmissibility/ineligibility of the investment. This apart, no hearing whatsoever was given to the petitioner company before holding the investment to be not allowable.

9. It is pertinent to mention here that the provisions, embodied in the relevant Notification, specifically stated that the manufacturer has to prove to the satisfaction of the Investment Appraisal Committee that the investment was made for the purposes specified in the notification. The same principle was followed by Section 72 of the Finance Act, 2011. However, the petitioner company was never intimated about any date of hearing by the Investment Appraisal Committee nor was any explanation/clarification sought for from the petitioner company. The investment, made by the petitioner company, has been held to be inadmissible without assigning any reason, which is in express violation of the relevant Notification read with Section 72 of the Finance Act, 2011.

10. With regard to the above, this Court, in its judgment and order dated 6.01.2010, passed, in W.P. (C) Nos. 591, 1048 and 2814 of 2008, reported Dharampal Satyapal Ltd. Vs. Union of India (UOI), has clearly laid down the duties of the Investment Appraisal Committee, while examining the claim of investment made by a manufacturer. Paragraphs 168 and 169 of the said judgment, which are relevant in the present context, are reproduced below:

168. I may say, at the cost of repetition that if the IAC find that the "investment" relate to pre-Escrow Account period, as is the case at hand, then, the examination, by the IAC, of the question, as to whether the "investments" so made, fall under any of the permissible categories of "investments" or not, would be a valid exercise of powers under the notification, dated 21.01.2004. This exercise of power is subject to a caveat and the caveat is that if the IAC finds that an "investment" or some of the "investments" are not covered by any of the categories, mentioned in the Notification, dated 21.01.2004, it cannot

straightway reject the "investments" as not certifiable. The principles of natural justice bind the IAC to give a notice to the manufacturer to show cause, clearly specifying, in the notice, as to why the "investment" is, in the considered view of the IAC, not an "investment" made in any of the allowable projects.

169. Coupled with the above, even though the IAC finds, in a, sought to be recovered, relates to post Escrow Account period, given case, that the "investments" claimed to have been made, are of "doubtful" quality, it cannot straightway reject such "investment" as an "investment" which is not certifiable. When the IAC finds that the claim of investment is of doubtful quality, the opinion, which is to form, or the view, which it takes, must be treated as a tentative finding or opinion of the IAC and the IAC must allow manufacturer to show cause against such a tentative finding of the IAC. What the IAC has to do, in such a case too, is that it has to issue notice, to the manufacturer concerned, stating therein the reason, which did not satisfy the IAC that the details of the investments are correct. Only upon giving notice to show cause, in every case, as indicated hereinbefore, that necessary decision can be given either allowing the investments as certifiable or disallowing the investments as not certifiable. Whatever decision is, eventually, reached by the IAC, must be communicated, along with the reasons therefore, to the manufacturer so that the manufacturer knows as to why his claim for investment has been rejected and he can, if required, take recourse to appropriate provisions of law. Extended logically, it would mean as I have already discussed above, that when a IAC takes a decision refusing to approve an investment, the jurisdictional excise officer, in terms of the Notification dated 21.01.2004 cannot straightway direct "forfeiture" of the amount, which is not certified by the IAC. In such circumstances too, jurisdictional Commissioner, or the Jurisdictional Excise Officer, as the case may be, is required to issue notice to the manufacturer directing him to show cause as to why the amount, which has been certified by the IAC, be not recovered from him in terms of the provision of Section 11A read with provision of Section 11B, or be not, "forfeited" from the Escrow Account of the manufacturer in terms of the provisions contained in the notification dated 9.07.2004, if the amount, sought to be recovered, relates to post Escrow Account period.

11. From the observations and directions issued by this Court in the judgment and order, dated 6.1.2010, which have been upheld in writ appeals by judgment and order, dated 19.1.2012, it becomes clear that if the IAC is not satisfied with any of the claims of the manufacturer, it may reject the investment; but the same can be done only by assigning reasons for rejection. This apart, the satisfaction of the IAC carries with it a duty of giving to any person, against whom the decision is to be taken, a fair opportunity to make any relevant statement, which he may desire to bring forward and a fair opportunity to correct or controvert any relevant statement brought forward to his prejudice.

12. In the present case, some of the investments, made by the petitioner company, have been held to be inadmissible without giving any reason and

without affording any opportunity of hearing to the petitioner company to explain and/or clarify the objection, if any of the Investment Appraisal Committee before the IAC's decision holding the investment to be inadmissible was rendered. This is wholly contrary to, and in violation of, the judgment and order, dated 6.01.2010. The conduct of the IAC exposes it to contempt of Court for defying the directions, which had been given in the judgment and order, dated 06.10.2010, between the parties concerned.

13. Because of what have been discussed and pointed out above, it becomes abundantly clear that the impugned four investment certificates, whereby a sum of Rs. 18,66,86,576.29 has been held to be inadmissible by the IAC as well as the impugned demand notice, issued pursuant thereto, are liable to be set aside and quashed and the respondents/authorities concerned are bound to act in accordance with the judgment and order passed by this Court in W.P. (C) Nos. 591, 1048 and 2814 of 2008, reported in *Dharampal Satyapal Ltd. Vs. Union of India (UOI)*, .

14. Notwithstanding the contention of the respondents that no notice to show cause and no opportunity to have their say were required to be given by the IAC to the petitioner company before the claim for investments, having been made under the scheme, in question, were disallowed, it may be noted that it has been, as rightly pointed out, on behalf of the petitioner company, clearly held, in *Dharampal Satyapal Ltd. (supra)*, that the principle of natural justice binds the IAC to give notice to show cause clearly specifying in the notice as to why, in the considered view of the IAC, not an investment made in any of the project. This Court has further held that even when the IAC finds, in a given case, that the investments, claimed to have been made, are of doubtful quality, the IAC cannot reject the investment; rather, the opinion, which the IAC, so forms, must be treated as its tentative opinion and the IAC must allow the manufacturer to show cause against its such tentative finding.

15. In the present case, it is the admitted position that before disallowing the claim for investments, which the petitioner company has made, neither any show cause notice was given to the petitioner company in terms of the requirement of law as indicated above nor was any opportunity of hearing given to the petitioner to have their say in the matter.

16. In the circumstances mentioned above, while the finding of the IAC to the extent that it has allowed the petitioner company's some claims for investments, the same needs no interference, but its action, so far as the same relates to rejection of the claims of investment, the decision, being contrary to the position of law as has been laid down by this Court, has to be interfered with and the matter needs to be remanded to the IAC for doing the needful in accordance with law.

17. While dealing with the above aspect of the case, it is also pertinent to point out that one of the reasons of the IAC having not been able to certify the claim

of investments, which the petitioner company has made, was continuous absence of the representative of the Government of Tripura in attending the meeting of the IAC. In similar situation, which became the subject-matter of decision in W.P. (C) No. 111/2013, a Division Bench of Tripura High Court has issued certain directions on 09-07-2013. The observations made and the directions, which have been given by the order, dated 09-07-2013, aforementioned, read as under:

On 7th May 2013, we had passed a detailed order which reads as follows:

The Government of India issued a policy known as the New Industrial Policy and other concessions in the North-eastern region. Various Notifications, vide Nos. 32/99-CE, 33/99-CE, 8/2004 and 28/2004 r/w Section 72 of the Finance Act, 2011, were issued by the Central Government granting certain benefits of refund of excise duty to the assessee in case they made investments in the North-eastern States and used the amount refunded for purchase of plant, machinery etc. The scheme was to end on 31st December, 2012.

As per the terms of the scheme the Investment Appraisal Committee comprising of one official of the Revenue Authority along with one representative of the State Government concerned was to verify on or before 31st December, 2012 whether in fact the assessee had-utilized the amount of excise refunded to it for the purposes which were provided for in the scheme. With regard to the plant in question no such certification could be done because the representative of the State of Tripura did not attend the meeting of IAC.

In our view, without entering into any other disputes, at this stage, it would be better if the State ensures that an appraisal in accordance with the terms of the scheme is done at the earliest possible.

The State is therefore directed to take up the matter with the Excise Department at the Central Government level so that another meeting of the IAC with regard to the investment made in Tripura can be held. Holding of such a meeting at an early stage would also be for the benefit of the State because it is only this Committee which can find out whether the assessee has actually used the amount of excise refund to it for the purpose provided for under the scheme. In case the Committee finds that such refund excise has been used for other purposes the State can be a beneficiary along with the Central Government.

Mr. Datta, learned counsel, may obtain instruction within 6 (six) weeks as to how soon the said Committee can hold its meeting.

List on 2nd July, 2013.

The interim direction to continue till the next date.

Pursuant to the said order we have been informed by the learned Advocate General that the State has approached the Central Board of Excise and Customs on 6th June, 2013 to constitute a Committee to finally assess whether the assessee has made the investments in accordance with the notifications referred

to in our earlier order.

Counter has been filed by the Union of India and the stand of the Union of India is that since the scheme came to an end on 31st December, 2012, there is no statutory provision now for constitution of any Committee to make the assessment.

Mr. Biswas is right that technically the time is over, However, as already indicated in our earlier order, somebody must assess whether the investments made by the assessee were done in accordance with law and whether it is actually entitled to the benefit of the earlier notification? This question is definitely a question of fact which cannot be decided by this Court. There is no statutory body or authority which can decide this question. No doubt, the notification expired on 31st December, 2012 but as stated in our earlier order, the Committee could not meet for certain reasons. Therefore, it would be in the interest of all concerned, i.e., the assessee, the State Government as well as the Central Government that an appraisal is done by the Investment Appraisal Committee. It would not be proper to change the constitution of the Committee also at this stage. In case, the assessee has actually made the investments in terms of the earlier notification he is entitled to full benefits. In case it is found that the assessee has not made the investments in accordance with the earlier notification, or that part of the investments are not in accordance with the earlier notification, the State as well as the Central Government would be beneficiaries as per the notification. Therefore, we do not understand why such a stand has been taken by the Union of India. We consequently reject this objection and direct that an Investment Appraisal Committee constituted as per the earlier notification shall meet and decide latest by 31st October, 2013 whether the investment made by the assessee are in terms of the notifications referred to in our earlier order as above.

A copy of this order be supplied to the learned counsel of the parties.

In view of the detailed order passed by us the demand notice is kept in abeyance till the next date.

18. We find ourselves in complete agreement with the directions, which have been given by the Division Bench of Tripura High Court, in W.P. (C) No. 111/2013, by its order, dated 09-07-2013 and we, too, direct that when the petitioner company has claimed to have made the investment in terms of the Notification, which form the subject-matter of the writ petition, the petitioner company is entitled to the benefit, which the relevant scheme has promised.

19. Considering, therefore, the matter in its entirety and in the interest of justice, the impugned demand notice, dated 26-10-2013, is hereby set aside and the matter is remanded to the IAC for its disposal bearing in mind the position of law as has been indicated by this Court in Dharampal Satyapal Ltd. (supra) and also by the Division Bench of this Court in WA Nos. 394/10 and 395/10. We further direct that the steps, in tune with the directions given by the Tripura High Court, in its order, dated 09-07-2013, shall be taken by the respondents/

authorities concerned so that the claim of the petitioner company, as regards making of investments, is, adequately and fully, decided by the IAC.

20. The whole exercise, as directed above, shall be completed expeditiously and, preferably, within a period of three months from the date of receipt of a copies of this order by the respondent Nos. 2 and 3, namely, Chief Commissioner Central Excise, Customs and Service Tax, Shillong and The Assistant Commissioner, Central Excise, Guwahati, Assam.

21. With the above observations and directions, this writ petitions shall stand disposed of.

22. No order as to costs. Furnish a copy of this order to the learned Standing Counsel, Excise Department.