

(1996) 02 BOM CK 0029

In the Bombay High Court

Case No : Writ Petition No. 1996 of 1987

Excell Chemicals Pvt. Ltd. and Another

APPELLANT

Vs

Union of India and Another

RESPONDENT

Date of Decision : 06-02-1996

Acts Referred:

Citation : (1996) 3 BomCR 447 : (1996) 98 BOMLR 257 : (1996) 65 ECR 178 : (1996) 85 ELT 225

Hon'ble Judges : M.B. Shah, J;A.V. Savant, J

Bench : Division Bench

Advocate : Mr. N.H. Seervai, instructed by, Dhru and Co, for the Appellant; Mr. R.V. Desai and Mr. H.V. Mehta, for the Respondent

Judgement

A.V. Savant, J.—The 1st petitioner is a company manufacturing products known as "INDOSTAT SF52" and "INDOSTAT SF" which, the petitioners claim, are classifiable under Tariff Item 3402.90 and eligible for exemption from excise duty under Notification No. 101 of 1966 dated 17th June, 1966 as amended from time to time inclusive of the amendment by Notification No. 4 of 1968 dated January 20, 1968 which is at Exhibit "E".

2. The petitioners product is an organic surface active agent sold under the said brand names of "INDOSTAT SF52" and "INDOSTAT SF". The said products were covered under old Tariff Item 15AA of the First Schedule to the Central Excises & Salt Act, 1944 (hereinafter referred to as "the Act") However, by exemption Notification No. 101 of 1966 dated 17th June, 1966, the Central Government inter alia, exempted "Emulsifiers, wetting out agents, softeners and other like preparations intended for use in any industrial process" subject to the conditions mentioned in the said Notification. The petitioners contend that the products mentioned above, namely, "INDOSTAT SF52" and "INDOSTAT SF", are emulsifiers and as such eligible for exemption under the said Notification No. 101 of 1966 as amended by Notification No. 4/68-CE dated 20.1.1968.

3. It appears that the Petitioners had earlier filed classification lists in respect of

the said products and by letter dated 26.3.1981 (at Exhibit "B") the Petitioners were informed by the 2nd Respondent that their products were falling under Tariff Item 15AA and were, therefore, exempted by the relevant Notification mentioned against each product, namely, Notification No. 101 of 1966 dated 17.6.1966. Similar classification list was filed in 1986, being classification list No. 1 of 1986, which was approved by letter dated 25.6.1986 (at Exhibit "C").

4. The Petitioners submitted fresh classification lists Nos. 2, 3 and 4 of 1986. Under letter Exhibit "G" dated 9.10.1986, the Superintendent of Central Excise informed the Petitioners that the said three classification lists were provisionally approved by the 2nd Respondent under Rule 9B of the Central Excise Rules, 1944. By letter Exhibit "H-1" dated 24/29.12.1986, the 2nd Respondent informed the Petitioners that he had carefully gone through the submissions put up before him in respect of the said three classification lists Nos. 2, 3 and 4 of 1986, which were earlier provisionally approved, and that the said classification lists may be treated as finally approved, subject to the Deputy Chief Chemist's report. The Petitioners contend that the said final approval under the letter (Exhibit "H-1") could not be subject to the report of the Deputy Chief Chemist and that their products INDOSTAT SF52 and INDOSTAT SF were correctly classifiable under Tariff Item 3402.90 and were eligible for exemption under Notification No. 101 of 1966 dated 17.6.1966 as amended by Notification No. 4 of 1968 dated 20.1.1968 at Exhibit "E". Consequently, the Petitioners have prayed for refund of two amounts, namely, (i) Rs. 7,54,714.70, which was lying credited to their personal ledger account as per the order passed by the 2nd Respondent on 25.6.1986 (at Exhibit "D-1"), and (ii) Rs. 5,15,559.92 which was paid under protest. Thus the prayer is for refund of an amount of Rs. 12,70,274.62 consisting of the above mentioned two amounts.

5. It needs to be mentioned that in respect of the first amount of Rs. 7,54,714.70, the 2nd Respondent had conceded the claim of the Petitioners and in Assessment Memorandum R.T. 12 (Exhibit "D-1") issued on 25.6.1986 it has been specifically observed that the Petitioners were entitled to exemption from excise duty under Notification No. 101 of 1966 dated 17.6.1966 (as amended) and that the Petitioners may take credit for the duty paid, namely, Rs. 7,54,714.70 in their Personal Ledger Account. In response to this Memorandum (Exhibit "D-1") dated 25.6.1986, the Petitioners wrote to the 2nd Respondent on 3.7.1986 pointing out that they were entitled to a credit of Rs. 7,65,000/-. However, it is not disputed before us now that the Petitioners are entitled to get credit in their Personal Ledger Account only to the extent of Rs. 7,54,714.70 and not Rs. 7,65,000/-.

6. When this Petition was admitted on 20.7.1987, Rule was issued and interim relief in terms of prayer (c) of the Petition was granted. Under prayer (c), pending hearing and final disposal of this Petition, the Respondents were restrained from taking any action or steps in furtherance or implementation of the impugned action of Respondent No. 2 treating the approved classification list

as not final as stated in the letter Exhibit "H-1" dated 24/29.12.1986. In the said letter the final approval was made subject to the report of the Deputy Chief Chemist, to which the Petitioners have objected. The Respondents were further restrained from levying and collecting any excise duty or compelling the Petitioners to clear the goods under provisional assessment. However, this wide relief in terms of prayer (c) of the Petition was subsequently varied by order dated 27.8.1987 in Notice of Motion No. 1775 of 1987. Under the said order dated 27.8.1987, by consent, it was directed that "the Respondents may, if so advised, levy the excise duty but they shall not recover the same from the Petitioners". The Court even at that time appears to have made a distinction between the two claims, namely, one for refund of Rs. 7,54,714.70 and the other for refund of Rs. 5,15,559.92. The Respondents were directed to deposit in this Court the sum of Rs. 7,54,714.70 and the Petitioners were permitted to withdraw the same by merely executing a bond for the said amount in favour of the Prothonotary and Senior Master. However, as far as the sum of Rs. 5,15,559.92 was concerned, the Respondents were directed to deposit the said amount in this Court and the Petitioners were permitted to withdraw the same only upon their furnishing a Bank Guarantee of any Nationalised Bank in favour of the Prothonotary and Senior Master. There is no dispute that the amount of Rs. 12,70,274.62 was deposited in this Court and the Petitioners have withdrawn the same pursuant to the order dated 27.8.1987 in Notice of Motion No. 1775 of 1987.

7. We have heard both the Id. Counsels at length. Mr. Seervai appearing for the Petitioners has contended that in view of the amended Notification, namely, Notification No. 101 of 1966 as amended by Notification No. 4 of 1968 dated 20.1.1968 at Exhibit "E", exemption from excise duty was available in respect of the Petitioners' products, namely, emulsifiers/wetting out agents. Column 2 of the said exemption Notification describes the products which include the Petitioners' products. Column 3 of the exemption Notification stipulates two conditions, on compliance of either of which the Petitioners would be entitled to the benefit of the exemption from payment of excise duty, says Counsel. The said conditions are :

(i) Excise duty (inclusive of additional duty u/s 2A) should have been already paid in respect of the surface active agents used as raw-material in the manufacture of the emulsifiers, wetting out agents, etc.

OR

(ii) The surface active agents used as raw-material for the manufacture of the emulsifiers/wetting out agents should have been purchased from the open market on or after the 20th day of January, 1968.

8. There is no dispute before us that the Petitioners have purchased the raw material for their products from open market from small-scale traders like - (i) M/s. Rohini Chemicals, (ii) M/s. Silvo Liacle Chemicals Pvt. Ltd., and (iii) M/s. Tech

Chemicals etc. This is clear from the 2nd Petitioner's statement recorded by the Respondents on 19.5.1987, which is incorporated in the affidavit dated 7.7.1995 of Shri H. B. Sonawane, Assistant Commissioner of Central Excise, which is filed before us.

9. Mr. Seervai's contention is two-fold. Firstly, he contended that if the surface active agents used as raw material for the manufacture of the emulsifiers have been purchased from "open market" on or after 20th day of January, 1968, then the Petitioners would be entitled to the benefit of the exemption Notification at Exhibit "E". In support of this contention, reliance is placed on the fact that the Petitioners have purchased the said raw material after January 20, 1968 from the traders named above and, therefore, the Petitioners' case would be covered by the alternative condition of the exemption Notification mentioned in paragraph 7(ii) above. Secondly and in the alternative Mr. Seervai contended that the benefit of exemption is also available under the first clause of the said exemption Notification, namely, that though the Petitioners had purchased the said raw material which was exempt from payment of excise duty, it would be tantamount to payment of excise duty (inclusive of additional duty u/s 2A) in respect of surface active agents used as raw material in the manufacture of emulsifiers as contemplated by the first clause of the exemption Notification mentioned in paragraph 7(i) above.

10. In reply to the above, Mr. Desai appearing for the Respondents contended that the Petitioners are not entitled to the benefit of the exemption Notification at Exhibit "E" inasmuch as the Petitioners' case does not fall under either of the two conditions mentioned in Column 3 of the said exemption Notification at Exhibit "E". Firstly, he contended that the Petitioners' purchases were not from the "open market" as contemplated by the condition mentioned in paragraph 7(ii) above and, hence, no benefit can be granted to them under that clause. On the second point Mr. Desai contended that since the Challans in respect of the Petitioners' purchases from small scale units, from whom the Petitioners had purchased such raw materials, show that nil rate of duty was paid on account of the exemption available under the various Notifications, the Petitioners would not be entitled to claim the benefit of the first condition mentioned in Column 3 of the exemption Notification.

11. Having considered the entire material on record in the light of the settled legal position, we find merit in the contentions of Mr. Seervai for the reasons which follow :

The first contention of the Petitioners is that the surface active agents used as raw material for the manufacture of the emulsifiers have been purchased from open market after 20th January, 1968. We have referred to the details of these purchases as set out in the statement of the 2nd Petitioner Shri Ashwin Sheth, Director of the 1st Petitioner Company, recorded on 19th May, 1987 as reproduced in the affidavit filed by the Assistant Commissioner of Central Excise. In our view, it is clear that the purchases are made by the Petitioners from the

"open market" after 20th January, 1968. The same Notification No. 101 of 1966 dt. 17.12.1966 as amended by Notification No. 4 of 1968 was before the Supreme Court in the case of Ahura Chemical Products Pvt. Ltd. v. Union of India 1982 ECR 625D (SC) : ECR C 649 SC : 1981 ELT 613 (S.C.). The appellant before the Supreme Court was engaged in manufacture of various process chemicals required for the textile industry and amongst the process chemicals so manufactured by them were substances known as emulsifiers and wetting out agents. For use as raw material for the manufacture of the said emulsifiers/wetting-out agents, the appellant-Company had purchased a huge quantity of organic surface active agents from another Company and, therefore, claimed exemption under the same Notification viz., Exhibit "E". The relevant part of the amended Notification has been reproduced in paragraph 3 of the Supreme Court judgment at page 614 of the Report. In paragraph 7 of the judgment, the Supreme Court has clarified that the benefit of the exemption would be available in respect of the emulsifiers/wetting out agents provided that either of the following conditions was fulfilled.

(i) Excise duty (inclusive of additional duty u/s 2A) should have been already paid in respect of the surface active agents used as raw material in the manufacture of the emulsifiers, wetting out agents, etc.

OR

(ii) The surface active agents used a raw mSwinfenaterial for the manufacture of the emulsifiers/wetting out agents should have been purchased from the open market on or after the 20th day of January, 1968.

In paragraph 8 at page 616 of the Report it has been observed by the Supreme Court that in determining the eligibility of a person for the benefit of the exemption conferred by the Notification on the basis of the fulfilment of the second of the aforementioned conditions, it was wholly irrelevant to enquire whether duty of excise had already been paid in respect of the surface active agents purchased and utilised as raw material for the manufacture of the emulsifiers/wetting out agents. The sole question to be examined was whether the surface active agents used in the manufacture of the emulsifiers were purchased from the "open market" on or after the 20th day of January, 1968.

12. In the said case before the Supreme Court, the Assistant Collector as well as the Appellate Revisional authorities had taken the view that the exemption granted by the Notification would get attracted only if the surface active agents used as raw material had been already subjected to levy of duty at the primary stage. The Supreme Court held that this view was based on an erroneous interpretation of the provisions contained in Item 4 of the Table appended to the Notification at Exhibit "E". While considering the words "open market", the Supreme Court referred to the observations of Swinfen Eady, J. in Inland Revenue Commissioners v. Clay (1914) 3 K.B. 466, which reads as under :-

"The market is to be the open market, as distinguished from an offer to a limited

class only, such as the members of the family. The market is not necessarily an auction sale. The section means such amount as the land might be expected to realise if offered under conditions enabling every person desirous of purchasing to come in and make an offer, and if proper steps were taken to advertise the property and let all likely purchasers know that the land is in the market for sale."

Agreeing with the said observations, the Supreme Court held that the appellant before it was entitled to claim the benefit of the exemption Notification.

13. In view of the decision of the Supreme Court in Ahura Chemical Products (supra), it is not possible for us to accept Mr. Desai's contention that both the conditions mentioned in Column 3 of the Notification must be complied with and that it was not enough if the Petitioners' case fell only under the second condition, namely, that the surface active agents used as raw material for the manufacture of the emulsifiers was purchased from the open market after the 20th day of January, 1968. In our view, the Supreme Court has clearly rejected such a contention and held that in order to claim the benefit of the exemption Notification it was enough if either of the two conditions mentioned above was satisfied. On facts there is no dispute before us that the Petitioners have complied with the second condition and, in our view, they would, therefore, be entitled to the benefit of the exemption Notification at Exhibit "E".

14. However, Mr. Desai appearing for the Respondents invited our attention to the decision of the Supreme Court in the case of Collector of Central Excise, Bombay-I and Another Vs. Parle Exports (P) Ltd., . Reliance was placed on the observations appearing in paragraph 12 at page 748 of the Report to contend that the expressions used in the Tariff Schedules and in the Exemption Notifications should be understood by the language employed therein bearing in mind the context in which the expressions occur, and the words employed in the provision, imposing taxes or granting exemption should be understood in the same way in which those are understood in ordinary parlance in the area in which the law is in force or by the people who ordinarily deal with them. There can be no dispute about the proposition of law laid down by the Supreme Court as above. However, in the same paragraph the Supreme Court has further observed that the principle was well settled that when two views of a Notification were possible it should be construed in favour of the subject as Notification is part of a fiscal enactment. We have no doubt in our mind that in view of the decision of the Supreme Court in the case of Ahura Chemical Products (supra), the only view which is possible in the facts of the present case is that the Petitioners will be entitled to the exemption under the exemption Notification on their having satisfied both the alternative conditions mentioned in paragraph 7(ii) above.

15. Even on the second and alternative submission of Mr. Seervai, we are inclined to agree with his contention that in the facts of the present case even the first condition mentioned in Column 3 of the exemption Notification has been complied with. Our attention has also been invited to the Departmental Trade

Notice/Instructions TRU Circular No. 125/36/95-CX (F.No. 341/26/95-TRU) dt. 15.5.1995. The occasion for issuing these instructions arose since some doubts had been raised regarding the interpretation of certain Notifications under which exemption from excise duty had been granted on certain goods manufactured from duty-paid goods. There are a large number of Notifications which exempt specified goods, provided such goods have been made from other goods on which appropriate excise duty has already been paid. The Central Board of Excise had issued instructions from time to time that in such cases even if the inputs are exempted from excise duty, the exemption on the finished goods cannot be denied on that ground. Hence it was clarified that the exemption cannot be denied on the ground that the inputs were exempted from the whole of the duty of excise by virtue of some exemption Notification. It has been finally concluded that this logic would apply to other similar cases also where exemption has been given on the consideration that the finished goods have been made from inputs on which appropriate duty of excise has already been paid. In view of this categorical stand taken by the Revenue, we are of the view that even if the Petitioners have purchased the raw material from small-scale units which enjoyed certain exemptions under some Notifications, it would be tantamount to excise duty having already been paid in respect of the said raw material used in the manufacture of emulsifiers/wetting out agents etc. We are of the view that in the facts of the case before us, the Petitioners would also be entitled to succeed on the ground that they have fulfilled the first condition of the amended exemption Notification (Exhibit "E"). Thus on the pleadings before us we are of the view that in the manufacture of their products, the Petitioners have purchased raw material from small-scale units which had enjoyed some exemption from payment of excise duty. All such purchases made by the Petitioners from open market are after the 20th day of January, 1968. Thus the Petitioners would be fully covered by both the alternative conditions mentioned in Column 3 of the exemption Notification in respect of the Petitioners' product mentioned at Sl. No. 4 of the said Notification.

16. This brings us to the question of the relief that can be granted to the Petitioners. As indicated earlier, the prayer in the Petition is for refund of an amount of Rs. 12,70,274.62 consisting of two items, namely, (i) Rs. 7,54,714.70 and (ii) Rs. 5,15,559.92. As far as the amount of Rs. 7,54,714.70 is concerned, it must be borne in mind that the refund to that extent was already granted to the Petitioners under Exhibit "D-1", being the Assessment Memorandum issued on 25.6.1986 under which it was held that the Petitioners were exempted from payment of excise duty under Notification No. 101 of 1966 as amended by Notification No. 4 of 1968 dated 20.1.1988. The Petitioners were, therefore, directed to take credit for the said amount of Rs. 7,54,714.70 in their Personal Ledger Account. It is brought to our notice that the Petitioners could not avail of this facility of taking credit for the duty paid to the extent of Rs. 7,54,714.70 in respect of which refund was granted. No product of the Petitioners was subject to excise duty at the relevant time and hence there was no question of the

Petitioners taking credit in their Personal Ledger Account which carried no debit whatsoever since none of the products of the Petitioners at the relevant time was liable to excise duty. It was because of this, that the Petitioners could not avail of the refund which was already granted in their favour on 25.6.1986. That also appears to be the reason why, while passing the order on 27.8.1987 in Notice of Motion No. 1775 of 1987, this Court made a distinction between the Petitioners being permitted to withdraw the amount of Rs. 7,54,714.70 on merely furnishing a bond and their withdrawing the amount of Rs. 5,15,559.92 subject to furnishing a Bank Guarantee. As far as the amount of Rs. 5,15,559.92 is concerned, there was never an order in favour of the Petitioners granting refund of the said amount unlike the amount of Rs. 7,54,714.70. We are, therefore, of the view that the Petitioners' claim for refund in respect of the amount of Rs. 7,54,714.70 would stand on a different footing and would not be subject to the amended provisions of Section 11B of the Act. Having regard to the order of refund already made on 25.6.1986 to the extent of Rs. 7,54,714.70, in our view, the amended Section 11B of the Act will not apply in respect of the refund of the said amount.

17. However, in respect of the remaining amount of Rs. 5,15,559.92, we are of the view that in the light of the two Supreme Court decisions in the case of (i) Union of India and others Vs. Jain Spinners Ltd. and another, , and (ii) Union of India and others Vs. I.T.C. Limited, , the Petitioners' claim for refund of the said amount would be subject to the amended provisions of Section 11B of the said Act. Sub-section (3) of Section 11B says that notwithstanding anything to the contrary contained in any judgment, decree, order or direction of the Appellate Tribunal or any Court or in any other provision of the said Act or the Rules made thereunder or any other law for the time being in force, no refund shall be made except as provided in sub-section (2) of Section 11B. Sub-section (2) of Section 11B deals with the claim for refund made under sub-section (1) of Section 11B which requires that any person claiming refund of any duty of excise may make an application for refund of such duty to the Assistant Collector of Central Excise before expiry of six months from the relevant date and such an application shall be accompanied by such documentary or other evidence (including the documents referred to in Section 12A) as the applicant may furnish to establish that the amount of duty of excise in relation to which such refund is claimed, was collected from, or paid by, him and the incidence of such duty had not been passed on by him to any other person. Section 12B raises a presumption that every person who has paid the duty of excise on any goods under the said Act shall, unless the contrary is provided by him, be deemed to have passed on the full incidence of such duty to the buyer of such goods.

18. We have carefully perused the two decisions of the Supreme Court mentioned in the foregoing paragraph. In the case of Union of India & Ors. v. Jain Spinners Ltd. & Anr. (supra), the Revenue was directed to deposit the amount of excise duty claimed by the assessee by way of refund during the pendency of the Writ Petition in the High Court. Later on, while the Petition was

still pending in the High Court, Section 11B was inserted and the question arose before the Supreme Court as to whether the assessee could claim refund only on the basis of the order of the High Court without fulfilling the conditions under the amended provisions of the said Act. The Supreme Court answered the question in the negative as would be evident from the discussion in paragraphs 24 and 25 of the judgment at pages 1998 and 1999 of the Report Union of India and others Vs. Jain Spinners Ltd. and another, . This view of the Supreme Court in Jain Spinners" case has been followed in the case of Union of India & Ors. v. ITC Ltd. (supra) and the relevant discussion is to be found in paragraphs 13 to 15 at pages 2141 to 2143 of the Report Union of India and others Vs. I.T.C. Limited, . In this case of ITC Ltd., the amount in question was directed to be paid to the assessee by the Supreme Court by way of interim order dated 8.10.1982 during the pendency of the appeal of the Union of India in the Supreme Court. In the meanwhile, Section 11B was inserted in the statute. While deciding the appeal finally on 16.7.1993 the Supreme Court came to the conclusion that the interim order made by it did not finally conclude the "refund claim" of the assessee and cannot take the case of Union of India out of the purview of Section 11B(3) of the Act read with the First Proviso to Section 11B(1), as amended.

28. In the light of the aforesaid two decisions of the Supreme Court, we have no doubt in holding that the newly inserted Section 11B of the Act will have its application in so far as the Petitioners' claim for refund of Rs. 5,15,559.92 is concerned. In this case also, it was under the interim order passed by this Court on 27.8.1987 in Notice of Motion No. 1775 of 1987 that the Petitioners got refund of the said amount of Rs. 5,15,559.92. The amendment having come into force during the pendency of this Petition, we are of the view that the Petitioners are liable to deposit in this Court the said amount of Rs. 5,15,559.92 together with interest from the date of its withdrawal till the date of deposit.

20. In view of the above, we pass the following order :-

- (a) Rule is made partly absolute in terms of prayer (a) of the Petition.
- (b) The Petitioners are directed to deposit in this Court the amount of Rs. 5,15,559.92 within a period of four weeks from today along with interest at the rate of 12% per annum from 1.11.1987 till 1.3.1996.
- (c) In the event of the Petitioners failing to comply with the direction at clause (b) above, it will be open to the Respondents to encash the Bank Guarantees forthwith.
- (d) The 2nd Respondent, Assistant Commissioner of Central Excise, is directed to consider and decide afresh the question of refund of the said amount of Rs. 5,15,559.92 and interest deposited in this Court pursuant to this order in the light of the amended provisions of the Central Excises & Salt Act, 1944 as expeditiously as possible.

21. The Petition stands disposed of as above, with no order as to costs.