
(1997) 07 BOM CK 0048

In the Bombay High Court

Case No : Writ Petition No. 111 of 1989, decided on July 4, 1997.

Fabril Gasosa

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 04-07-1997

Acts Referred:

Central Excises and Salt Act, 1944 — Section 11A, 11B
Contract Act, 1872 — Section 72

Citation : (1997) 72 ECR 545 : (1997) 96 ELT 241

Hon'ble Judges : R.K. Batta, J; N.P. Chapalgaonkar, J

Bench : Division Bench

Advocate : Shri H.K. Maingi, for the Appellant; Shri S.R. Rivonkar, Addl. Central Govt. Standing Counsel, for the Respondent

Judgement

Chapalgaonkar, J.—This petition raises a question whether the rule of limitation as contained in Section 11A of the Central Excise Act, 1944, is applicable for an application under Rule 57-I of the Central Excise Rules, 1944, as it stood before the amendment incorporated by the Notification No. 28/88-C.E. (N.T.) with effect from 6th October, 1988.

2. It is the case of the petitioner herein that the amendment effected in Rule 57-I on 6th October, 1988, introducing a clause of limitation in the said rule is inconsequential inasmuch as the same rule of limitation was very much on the statute book in the form of Section 11A and therefore, even before the amendment of Rule 57-I, the respondent State was prohibited from recovering any duty of excise which has not been levied or paid or has been short-levied, or short-paid after the period of six months from the relevant date and if the said non-payment or short-payment or non-levying or short-levying has occurred as a reason of any fraud, wilful misstatement, collusion or suppression of facts, or contravention of any of the provisions of the Act or the Rules made thereunder with intent to evade payment of duty by such person or his agent, they within five years from that relevant date, whereas the respondents contend that the

Modvat Scheme as is contained in Rule 57A to Rule 57U in Chapter AA of the Central Excise Rules, 1944, is a complete Code in itself and no rule of limitation was there before the Rule came to be amended on 6th October, 1988. Therefore when the authorities found that the excise duty was not properly levied or short-levied or there is a short-payment or non-payment, they have a right to recover it irrespective of any period of limitation. When the Modvat credit was wrongly claimed, the authorities had a right to recover it and it is not that they can recover it only within the period prescribed by Section 11A. Since there is not much dispute on the facts in the case, we address ourselves to the point required to be adjudicated.

3. There appear to be divergent views taken by different High Courts on the point. A learned Single Judge of the Karnataka High Court in *Thungabhadra Steel Products Ltd. Vs. Supdt. of Central Excise*, has taken a view that Rule 57-I as it stood before the amendment effected in 1988 should receive the same interpretation as it should receive after the amendment, since the provision of limitation was very much there in the substantive law. A Division Bench of the Madras High Court in the case of *Advani Oerlikon Ltd. Vs. Assistant Collector of Central Excise*, also ruled that a rule to stand the test of validity has to serve the purpose of the Act and though the Rule as it stood then did not contemplate any notice or any period of limitation for the demand, the rule of limitation as found in Section 11A of the Act has still to be applied. As against this, a Division Bench of the Gujarat High Court in *Torrent Laboratories Pvt. Ltd. Vs. Union of India*, has taken a different view and opined that the rule of limitation was not applicable to the recoveries under the Modvat Scheme before the limitation clause was incorporated by amending Rule 57-I on 6th October, 1988. The learned Judges of the Division Bench of the Gujarat High Court observed that there is always a presumption that the Legislature never intends evasion of a provision of the statute. The Courts would be slow to put a construction on the provision of the statute which would otherwise defeat legislative purpose. It is the duty of the Court to see that the Act is upheld and the objection with which the Act is enacted is furthered. In other words, the Court is required to uphold the integrity of the Act. They noticed that if the construction canvassed by the learned Counsel for the petitioners is adopted and it is held that the action taken under the unamended provisions of the Rules would lapse on account of the amendment of the Rule, the integrity of the Act itself would be undermined. Such a construction cannot be adopted as such cannot be the intention of the Legislature. They held that the notice which was later incorporated in it and before the amendment the rule of limitation contained in Section 11A was not applicable for the recoveries of illegal credit claimed by the parties under Modvat Scheme.

4. It is true that the law will have to be interpreted in a way which would further the object of the Act, but nevertheless Courts cannot overlook accepted rules of interpretation. When there is a provision of limitation, it certainly defeats a right which otherwise would have been there. As was pointed out by the Privy Council

in the case of AIR 1932 165 (Privy Council) :

"The fixation of periods of limitation must always be to some extent arbitrary and may frequently result in hardship. But in construing such provisions equitable considerations are out of place, and strict grammatical meaning of the words is the only safe guide."

Therefore, the argument that when the State has levied a tax there is a duty cast on the person concerned to pay the tax and it would be inequitable to defeat that right of the State to recover the tax or the duty, as the case may be, by applying certain provisions of limitation. But, if the statute provides limitation, then it will have to be observed strictly. Considerations of equity have no play in this arena which is strictly governed by the letter of the law. Section 11A of the Central Excise Act, 1944, lays down the procedure for recovery not levied or not paid, or short-levied, or short-paid or erroneously refunded by the Central Excise Officers and lays down a limitation of six months in the ordinary cases and five years when such non-payment or short-payment or short-payment short-recovery was caused by fraud, collusion, wilful mis-statement or suppression of facts, or contravention of any Act or Rule with intent to evade the payment of duty. In similar way, Section 11B lays down the procedure for the refund of any duty of excise erroneously paid or over paid and prescribes precisely the same limitation as prescribed by Section 11B for the recovery of the excise duty. Therefore, it is not that the State or assessee are dealt with differently so far as the rule of limitation is concerned. In both these cases the equitable considerations should not weigh and the rule of limitation will have to be strictly followed.

5. The Rule is a subordinate legislation and is authorised by some provision in the statute under which those Rules are made. The power to frame the Rules is derived from the Act itself and the Rules owe their existence to the Act under which they are made. If there is any provision in the Act itself and even if the Rules are silent on that aspect of the matter, it will always have to be presumed that the provisions in the Act would be applicable and will have to be considered while interpreting the Rules. If there is a conflict between the Act and the Rules made under that Act, the Act would always prevail. If something is provided in the Act, it is really not necessary to repeat the same in the Rules and therefore, if the entitlement of the refund or recovery is specified in the Rules without any mention of limitation, but the Act under which the Rules have been framed makes an unequivocal provision of limitation which may be applicable to those Rules, then the Rules will have to be read along with the provisions of the Act and not in isolation. Section 11A so far as is relevant for the purpose of this petition is reproduced below :-

"Section 11A. - Recovery of duties not levied or not paid or short-levied or short-paid or erroneously refunded. -

(1) When any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded, a Central Excise Officer may, within six

months from the relevant date, serve notice on the person chargeable with the duty which has not been levied or paid or which has been short-levied or short-paid or to whom the refund has erroneously been made requiring him to show cause why he should not pay the amount specified in the notice :

Provided that where any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded by reason of fraud, collusion or any wilful mis-statement or suppression of facts, or contravention of any of the provisions of this Act or of the rules made thereunder with intent to evade payment of duty, by such person or his agent, the provisions of this sub-section shall have effect as if, for the words, "six months", the words, "five years" were substituted."

This provision speaks about the recovery of any duty of excise which has been levied or paid or which has been short-levied or short-paid or erroneously refunded and takes in its cover all excise duties which have been erroneously paid, not levied or short-levied or short-paid. There is nothing in this Section which would enable us to presume that the duty which was paid against finished goods and to which the Modvat Scheme was applicable is excluded from the operation of this Rule, nor the Rule which stood before the amendment in the year 1988, had anything which would suggest that the rule excludes the operation of the limitation prescribed in Section 11A.

6. The learned Counsel for the Central Government, Shri Rivonkar, wanted to contend that the clause of limitation as contained in Section 11A being applicable to Rule 57-I even before the amendment then there was no need for amending the said Rule on 6th October, 1988. We do not wish to go into the purposes which necessitated the amendment of Rule 57-I in the year 1988, but as we see it, the amendment is inconsequential since the clause of limitation was very much therein the Act and it was applicable even to the recoveries under the Modvat Scheme. Probably, the State amended the Rule in exercise of its rule-making power to avoid misconstruction of the Rules and any further litigation. Adding a clause of limitation in Rule 57 does not raise a presumption that before such an amendment, no limitation was applicable to recoveries under Rule 57-I. The learned Single Judge of the Karnataka High Court in Thungabhadra Steel Products case cited above, after noticing that the decisions of the CEGAT rendered in a number of cases has supported the contention that the limitation was applicable to the recoveries even prior to the amendment, observed :

"From the very fact that the Central Government decided to amend the rule itself which was done with effect from 6-10-1988 by inserting limitation in Rule 57-I, it can be presumed that the intention of the Legislature was to amend the rule to bring it in conformity with the spirit and scope of Section 11A. The effect of the subsequent amendment to Rule 57-I is a point in favour of the petitioner in the interpretation of Rule 57-I, before amendment, as contended for the petitioner."

7. Learned Judges of the Madras High Court in Advani Oerlikon Ltd.'s case, cited

supra noted that there was no provision of any notice to be given to the assessee before any recovery is to be made under Rule 57-I as it stood before the amendment. The Division Bench went on to observe :

"The omission in Rule 57-I before amendment of any mention of a notice to the manufacturer, the person chargeable to duty to show cause, cannot/could not absolve the respondents of their obligation in terms of Section 11A of the Act to serve a notice upon the petitioners to show cause within the period of limitation prescribed therein."

If somebody has not paid the duty as was leviable but the Department had accepted it and now the Department wants to correct the error by recovering certain sums deducted wrongfully or credit to which the assessee was not entitled, the very nature of this recovery would require that a notice is to be served on the person from whom the recovery is to be made. This would be a part of the rule of natural justice. If this notice is a must then it will have to conform to the provisions of Section 11A which lays down that such a notice shall be issued within six months or five years, as the case may be, in the facts of the case. Rule 10 of the Central Excise Rules provided six months limitation for the recovery of duties not levied or not paid, or short-levied or not paid in full or erroneously refunded from the relevant date. This Rule came to be omitted with effect from 17th November, 1980 and on the same day Section 11A was inserted in the Central Excise Act, 1944, which makes elaborate provision regarding the limitation. A question somewhat related to one which we are required to answer was considered by the Construction Bench of the Supreme Court in the case of *Mafatlal Industries Ltd. and Others Vs. Union of India (UOI) and Others*, . The Supreme Court ruled that any refund for which the provision has been made in the Excise Act cannot be claimed in a civil suit taking recourse to Section 72 of the Contract Act. It rejected the contention that the theory of mistake of law and the consequent period of three years limitation commencing from the date when the mistake was discovered is applicable in such cases and the Supreme Court unequivocally ruled :

"All claims for refund ought to be, and ought to have been, filed only under and in accordance with Rule 11/Section 11B and under no other provision and in other forum."

The principle applicable for the refund u/s 11B is applicable for the recovery u/s 11A. If the recovery is to be made u/s 11A, then it has to be within the limitation as prescribed by that Section. In the instant case, there is no dispute before us that if Section 11A is applicable then the notice of recovery issued to the petitioner is not within limitation. This being the position, we hold that the notice is beyond limitation and therefore invalid.

8. Consequently, we strike down the Show Cause Notice issued by the Respondent No. 3 on 4th August, 1988, and confirmed by the Order of the Collector of Customs and Central Excise on 28th February, 1989. Rule made

absolute in the above terms. There will be no order as to costs.