(2010) 04 AHC CK 0087

In the Allahabad High Court

Flex Industries Ltd. APPELLANT

Vs

Union of India (UOI) RESPONDENT

Date of Decision : 27-04-2010

Acts Referred:
Central Excise Rules, 1944 — Rule 57A, 57A(4), 57B, 57I
Central Excises and Salt Act, 1944 — Section 11A
Finance Act, 2000 — Section 112, 112(2)

Citation : (2010) 256 ELT 75

Hon'ble Judges : Rajes Kumar, J;Pankaj Mithal, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Rajes Kumar, J.—In the present petition the petitioner seeks the following reliefs

(i) send for the entire records from the respondents, leading to the enactment of the Section 112 including it''s aims and objectives and further records leading to issuance of notices, for its kind perusal;

(ii) declare Section 112 of Finance Act, 2000, ultra vires of the constitution and strike down the same;

(iii) issue a writ or Certiorari quashing the provisions of Section 112 of the Finance Act, 2000 which retrospectively denies the availment of Modvat Credit on HSD Oil and further to quash the letter dated 4-8-2000 of the Superintendent Central Excise Range IX Division-II, Noida; (iv) issue a writ or Mandamus directing the respondents to keep the operation of letter dated 4-8-2000 in abeyance till the disposal of this writ petition;

(v) issue any other writ, order or direction which this Hon''ble Court may deem fit and proper under the circumstances of the case; (vi) and to award the cost of this writ petition to the petitioners.

2. The brief facts giving rise to the present petition are that the petitioner is

engaged in the manufacture of Plastic Films, Flexible Plastic Packaging Material and Gravure Printing Cylinders falling under Chapters 39 and 84 of the Central Excise ''Tariff Act, 1985. The manufactured commodity is liable to Central Excise Duty. The petitioner was also entitled for Modvat credit on the inputs and capital goods used in the manufacturing of final products in accordance to the rules. The petitioner has claimed Modvat credit on High Speed Diesel Oil (hereinafter referred to as ''HSD oil'') falling under Chapter 27 of the Central Excise Tariff Act, 1985 from March, 1997, after the insertion of Rule 57B with effect from 1-3-1997. The Modvat Credit has been availed on the ground that HSD oil was being used for generation of electricity or steam, used for the manufacture of final products, within the factory premises. The petitioner was served with the show-cause notices for the period from March, 1997 to June, 1998 on the ground that the Modvat credit on HSD oil was wrongly availed as it was not legally available as per Notification No. 5/94(N.T.) dated 1-3-1994, as amended from time to time. The petitioner filed reply to the show-cause notices. In the reply it was contended that the petitioner was entitled to avail Modvat credit under Rule 57B, which has extended the Modvat credit facility to those inputs which were not covered under Rule 57A and the notification issued thereunder.

3. The adjudicating authority has not accepted the plea of the petitioner and has confirmed the demand. It has been held that the Modvat credit on HSD oil was not available to the petitioner.

4. It is the case of the petitioner that against the order of the adjudicating authority, the petitioner filed appeal before the Commissioner (Appeals) on 26-4-2000, which is pending. Meanwhile, Section 112 has been amended by the Finance Act, 2000, which provides "Notwithstanding anything contained in any rule of the Central Excise Rules, 1944, no credit of any duty paid on high speed diesel oil at any time during the period commencing on and from the 16th day of March, 1995 and ending with the day, the Finance Act, 2000 receives the assent of the President, shall be deemed to be admissible." The provision has come into force with effect from 12-5-2000. Clause (b) of Sub-section (2) of Section 112 further provides that "recovery shall be made of all the credit of duty, which have been taken or utilised but which would not have been allowed to be taken or utilised, if the provisions of Sub-section (1) had been in force at all material times, within a period of thirty days from the date on which the Finance Act, 2000 receives the assent of the President and in the event of non-payment of such credit of duty within this period in addition to the amount of credit of such duty recoverable, interest at the rate of twenty-four per cent. per annum shall be payable, from the date immediately after the expiry of the said period of thirty days till the date of payment."

5. Inconsequence of Section 112 of the Finance Act, the Superintendent, Central Excise, Range IX, Division II, Noida, vide letter dated 4-8-2000, after the expiry of thirty days from 12-5-2000, has directed the petitioner to deposit all the amount of Modvat credit taken on HSD oil along with interest, which is impugned

in the present petition.

6. Heard Sri A.P. Mathur, learned Counsel for the petitioner, and Sri S.P. Kesharwani, learned Senior Standing Counsel.

7. Sri A.P. Mathur, learned Counsel for the petitioner, submitted that the apex Court in the case of Commr. of C. Ex. Vs. Associated Cement Companies Ltd., has held that HSD oil used as fuel for generation of electricity used in the manufacture of cement is eligible to Modvat credit prior to the amendment of Rule 57B on 2-3-1998. The Apex Court held that unamended Rule 57B leaves no doubt on the issue in question. It provides that notwithstanding anything contained in Rule 57A the manufacturer of final product shall be allowed to take credit of the specified duty paid on the goods used for generation of electricity or steam used for manufacture of final product or for any other purpose within the factory of production. Therefore, he submitted that the Modvat credit on HSD oil was admissible under the existing Rule 57B during the relevant period. He, however, submitted that subsequently the apex Court has allowed the review application, filed by the department, in view of Section 112 leaving the issue of validity of Section 112 open. He submitted that under clause (b) of Sub-section (2) of Section 112 of the Finance Act, 2000 the recovery can be made within a period of thirty days from the date on which the Finance Act, 2000 received the assent of the President. In the instant case the recovery proceedings was initiated after expiry of 30 days. He submitted that the proviso to Section 11A and Rule 57-I does not apply to the present case as there is no case of suppression of fact, misrepresentation, collusion or fraud and, therefore, the recovery cannot be made beyond the period of thirty days from the date the Finance Act, 2000 received the assent of the President. He submitted that if the petitioner could be aware that Modvat Credit would not be admissible on HSD oil, the price of the final product would have been increased. He further submitted that Section 112 of the Finance Act is contrary to the scheme of Modvat Rules. Sub-rule (4) of Rule 57A provides that the credit of specified duty under the scheme shall be allowed on inputs used in the manufacture of final products whether directly or indirectly, whether contained in the final product or not. The exclusion of the HSD oil from the list issued under Notification No. 5/94 dated 1-3-1994 was wholly unjustified and against the spirit of the Modvat scheme. Learned Counsel for the petitioner lastly submitted that in case if the petitioner is held liable to pay the demand after disallowing the claim of Modvat credit on HSD oil by virtue of Section 112 of the Finance Act, 2000, which is retrospective in nature, the interest cannot be demanded.

8. Sri S.P. Kesharwani, learned Senior Standing Counsel, submitted that in the present case the demand has been confirmed by the adjudicating authority in respect of the Modvat credit availed on the HSD oil which was not admissible according to the adjudicating authority. Therefore, the demand was within the limitation provided u/s 11A of the Act. He submitted that the validity of the provision can be questioned only on two grounds, viz. (1) lack of legislative

competence and (2) violation of fundamental rules. Reliance is placed on the Supreme Court decision in the case of Greater Bombay Co-op. Bank Ltd. Vs. United Yarn Tex. Pvt. Ltd. and Others, In the present case the petitioner has failed to establish both the conditions. He further submitted that the petitioner has not laid down the factual foundation for assailing the validity of the statute. Therefore, the contention of the petitioner about the validity of Section 112 is liable to be rejected. He submitted that it is settled principle of law, as laid down by the Apex Court that there is a presumption of validity of the provision, unless otherwise shown. In support of the contention he relied upon the following decisions:

(1) Greater Bombay Co-op. Bank Ltd. Vs. United Yarn Tex. Pvt. Ltd. and Others,

(2) The Anant Mills Co. Ltd. Vs. State of Gujarat and Others,

(3) Chiranjit Lal Chowdhuri Vs. The Union of India (UOI) and Others,

(4) Union of India Vs. Elphinstone Spinning and Weaving Co. Ltd. and Others etc.,

(5) The State of Bihar and Others Vs. Charusila Dasi,

(6) Kedar Nath Singh Vs. State of Bihar,

(7) State of Bihar and others, etc. etc. Vs. Bihar Distillery Ltd., etc.,

(8) Arun Kumar and Others Vs. Union of India (UOI) and Others, and

(9) AIR 1981 SC 2138 - para 8.

9. He further submitted that the Legislature has a power to enact any provision with retrospective effect. The Legislature is competent to enact any provision with retrospective effect and such provisions are held as valid by the apex Court. Reliance is placed on the following decisions:

(1) Rai Ramkrishna and Others Vs. The State of Bihar,

(2) ITW Signode India Ltd. Vs. Collector of Central Excise,

(3) Hiralal Rattanlal Vs. State of U.P. and Another etc. etc.,

10. He thereafter submitted that clause (b) of Sub-section (2) of Section 112 provides an opportunity to deposit the amount within thirty days, failing which the interest was liable to be paid. Therefore, the petitioner had an opportunity to deposit the amount within thirty days from the date of assent by the President. Since the petitioner failed to deposit the amount within the said period, the petitioner is liable for the interest. He submitted that the interest arises by operation of law and is mandatory.

11. Having heard learned Counsel for the parties, we have given our anxious consideration to the rival submissions. Section 112, introduced by the Finance Act, 2000, reads as follows:

112. Validation of the denial of credit of duty paid on high speed diesel oil. - (1) Notwithstanding anything contained in any rule of the Central Excise Rules, 1944, no credit of any duty paid on high speed diesel oil at any time during the period commencing on and from the 16th day of March, 1995 and ending with the day, the Finance Act, 2000 receives the assent of the President, shall be deemed to be admissible.

(2) Any action taken or anything done or purported to have been taken or done at any time during the said period under the Central Excise Act or any rules made thereunder to deny the credit of any duty in respect of high speed diesel oil, and also to disallow such credit to be utilised for payment of any kind of duty on any excisable goods shall be deemed to be, and to always have been, for all purposes, as validly and effectively taken or done, as if the provisions of Sub-section (1) had been in force at all material times and, accordingly, notwithstanding anything contained in any judgment, decree or order of any court, tribunal or other authority,-

(a) no suit or other proceedings shall be maintained or continued in any court, tribunal or other authority for allowing the credit of the duly paid on high speed diesel oil and no enforcement shall be made by any court, tribunal or other authority of any decree or order allowing such credit of duty as if the provisions of Sub-section (1) had been in force at all material times;

(b) recovery shall be made of all the credit of duty, which have been taken or utilised but which would not have been allowed to be taken or utilised, if the provisions of Sub-section (1) had been in force at all material times, within a period of thirty days from the date on which the Finance Act, 2000 receives the assent of the President and in the event of non-payment of such credit of duty within this period, in addition to the amount of credit of such duty recoverable, interest at the rate of twenty-four per cent, per annum shall be payable, from the date immediately after the expiry of the said period of thirty days till the date of payment.

Explanation. - For the removal of doubts, it is hereby declared that no act or omission on the part of any person shall be punishable as an offence which would not have been so punishable if this section had not come into force.

Under the aforesaid section, Modvat credit on HSD oil was not admissible at any time during the period commencing on and from 16th day of March, 1995 and ending with the day the Finance Act, 2000 received the assent of the President. Therefore, during the period in dispute Modvat Credit on HSD oil was not admissible. The contention of the manufacturer that since Rule 57B was not amended, Modvat credit was available, has not been accepted by the apex Court while allowing the review application in the case of Commissioner of Central Excise, Hyderabad v. Associated Cement Companies Ltd. (supra). In the present case the show-cause notice was issued u/s 11A and the demand has been confirmed disallowing the claim of Modvat Credit on HSD oil. The demand has been confirmed within the period of limitation. Therefore, the plea of the petitioner that the demand could not be raised beyond the period of thirty days from the date of enforcement of the Finance Act, 2000 cannot be accepted. Clause (b) of Sub-section (2) of Section 112 provides that the recovery shall be made on all the credit of duty which have been taken or utilised to which would not have been allowed to be taken or utilised, if the provisions of Sub-section (2) had been enforced at all material times within the period of 30 days from the date on which the Finance Act, 2000 receives the assent of the President and in the event of nonpayment of such credit of duty in addition to the amount of credit to such duty recoverable interest at the rate of 24% per annum shall be payable from the date immediately after the expiry of the said period of thirty days till the date of payment. The above provision has provided the opportunity to the manufacturer to deposit the amount within thirty days from the date on which the Finance Act, 2000 receives the assent of the President, failing which the interest was chargeable. Therefore, if the amount would not have been deposited within thirty days as provided under clause (b) of Sub-section (2) of Section 112 the petitioner would be liable for interest. The petitioner is not able to show that the Legislature was not competent to make such amendment and such amendment violates the fundamental right of the petitioner. No foundation has been laid down in this respect in the writ petition. Therefore, the submission of the petitioner about the validity of Section 112 of the Finance Act, 2000 has no substance and is liable to be rejected. It is settled principle of law that the Legislature is competent to make the amendment with retrospective effect. The amendment with retrospective effect has been held valid and held within the ambit of the legislative power in the various cases, referred herein above.

12. For the reasons stated above, the petition is devoid of merit and is, accordingly, dismissed. Interim order, if any, stands vacated. There shall be no order as to costs.

