

(2014) 04 DEL CK 0136
In the Delhi High Court
Case No : W.P. (C) 1175/1994

Hindalco Industries Limited and Another APPELLANT
Vs
Assistant Collector, Central Excise, Mirzapur and Others RESPONDENT

Date of Decision : 23-04-2014

Acts Referred:

Central Excises and Salt Act, 1944 — Section 11B, 11-B, 11D, 11-D, 11D(1)
Constitution of India, 1950 — Article 14, 19(1)(g), 300A

Citation : (2014) 305 ELT 3 : (2014) 45 GST 534 : (2014) 28 GSTR 233

Hon'ble Judges : Siddharth Mridul, J;Badar Durrez Ahmed, J

Bench : Division Bench

Advocate : Parag P. Tripathi, Sr. Advocate, Mr. Ajay Bhargava, Ms. Vanita Bhargava, Mr. Shahid Rizvi, Mr. Ankur Khandelwal and Mr. Arunabh Ganguly, Advocate for the Appellant; Satish Kumar for Respondent No. 2 and Ms. Meera Bhatia for Respondent No. 3, Advocate for the Respondent

Judgement

Badar Durrez Ahmed, J.—In this writ petition there is a challenge to the constitutional validity of Section 11D of the Central Excise Act, 1944 as being ultra vires Articles 14, 19(1)(g) and 300A of the Constitution of India. There is also a prayer for quashing the demand dated 16.02.1994 which has been raised by the Central Excise Department on the petitioner.

2. At the outset, it may be pointed out that while the challenge to the constitutional validity of Section 11D of the said Act has been prayed for, Mr. Parag Tripathi, the learned senior counsel appearing on behalf of the petitioner, submitted that the provisions of Section 11D can be interpreted in such a manner which would not bring forth the challenge to its constitutional validity.

3. Before we examine the rival contentions of the parties it would be necessary for us to set out some facts. The petitioner, Hindalco Industries Ltd. (hereinafter referred to as "Hindalco") manufactures aluminium. The sale price of aluminium was subject to an Aluminium Control Order. In order to manufacture aluminium the petitioner drew electricity from two sources--UPSEB and Renusagar Power

Company. It may be pertinent to note that Renusagar Power Company and Hindalco are sister concerns. Initially excise duty was sought to be collected from Renusagar Power Company in respect of electricity supplied by it to Hindalco for the manufacture of aluminium. That was the subject matter of challenge in a writ petition being CW No. 1008/1978. That dispute was resolved by a decision of this court on 09.07.1993 whereby it was held that if the corporate veil was lifted, it would appear that the electricity produced by Renusagar was actually captively consumed by Hindalco. On captive consumption of electricity there is no excise duty liability on account of exemption. Therefore, the sum and substance of the decision of 09.07.1993 was that Renusagar was exempted from its liability to pay duty on the electricity produced by it and consumed by Hindalco for the manufacture of aluminium.

4. The demand notice dated 16.02.1994 is in respect of the period 01.03.1978 to 30.09.1983 (hereinafter referred to as "relevant period"). The said demand notice is as under:-

Central Excise Division, Mirzapur.

C. No. V(3)16-Demand/94/257

Dated: 16.2.1994

Demand Notice

To,

M/s. Hindalco Industries Ltd.,

Renukoot,

Distt. Sonbhadra.

Whereas M/s. Hindalco Industries Ltd., Renukoot, Distt. Sonbhadra (hereinafter referred to as M/s. Hindalco) are engaged in the Manufacture of Aluminium and articles thereof (hereinafter referred to the said goods) falling under erstwhile T.I. 27 of the 1st Schedule to the Central Excise & Salt Act, 1944. (Now Chap. 76 of C.E.X. T.A. 85).

1. Whereas the said M/s. Hindalco Purchased electricity from U.P.S.E.B. as well as from M/s. Renusagar Power Co. Ltd. Renusagar Distt. Sonbhadra (hereinafter referred to Renusagar) for the manufacture of Aluminium and articles thereof.

2. Whereas duty on electricity was imposed during the period from 1.3.78 to 30.9.83 (hereinafter referred to as the relevant period) at the rate set out in erstwhile T.I. 11-E of the Ist schedule to the Central Excise and Salt Act, 1944.

3. And whereas during the relevant period the sale of Aluminium and articles thereof were regulated under the said order and the price of indigenous Aluminium was fixed by the Controller appointed by the Central Govt. for the purposes of the said order having regard to all relevant factors including the

estimated cost of production or manufacture thereof and whereas only one price was fixed for one specification of indigenous Aluminium for all the manufacturers in India.

4. Whereas the cost of electricity constituted a substantial part of the cost of production of the said good and whereas during the relevant period the sale price was fixed under clause 4 of the said order on the basis of the estimated cost of production which included the cost of electricity including duty leviable thereon under T.I.-II-E of the erstwhile first schedule to the Central Excise & Salt Act, 1944.

5. Whereas inter-alia the element of the duty on electricity was included in the sale price fixed for indigenous Aluminium manufactured by the manufactures in India and where as the price charged by M/s. Hindalco from the buyers clearly included the element of duty on electricity consumed by them in the manufacture of aluminium amongst above.

6. Whereas Section 11-D was inserted in the Central Excise and Salt Act, 1944 by virtue of the Central Excises and Customs Laws (Amendment) Act 1991 (40 of 1991) w.e.f. 20.9.91 vide Notf. No. 30/91-CE-(NT) dated 19.9.91 with retrospective effect and whereas a sequel to the provision of Section 11D every person who has collected any amount from the buyers of any goods in any manner representing duty of Excise implicit or explicit in the provision was required to forthwith pay an amount so collected to the credit of Central Government notwithstanding anything to the contrary contained in any order or direction of the Appellate Tribunal or any court or in any other provisions of this Act or the Rule made thereunder.

7. Whereas M/s. Hindalco collected the sale price of the said goods from the buyers which included inter alia the element of duty amounting to Rs. 1459.37 lacs leviable on electricity purchased from M/s. Renusagar Power Co. and consumed during the relevant period and whereas they ought to have suo-moto paid the same as required under Sec. 11-D of the Central Excise and Salt Act, 1944.

8. Whereas it is observed that out of total sum of Rs. 1459.37 lacs M/s. Hindalco have M/s. Hindalco have made provision for Rs. 547.26 lacs and the rest Rs. 912.11 lacs have been sequestered in the Aluminium regulation account and whereas instead of keeping the said sum with them or in the Aluminium Regulation Accounts it should have been deposited to the credit of Central Government as envisaged under the provision of Section 11-D.

Now therefore, M/s. Hindalco, Renukoot, Distt. Sonebhadra are required deposit Rs. 1459.37 lacs to the credit of Central Govt. as contemplated under the provision of Section 11D of Central Excises and Salt Act, 1944, with in 10 days of the receipts of this notice failing which they would be liable to action under rule 230 of the Central Excise Rules, 1944.

If aggrieved by this notice they should appear before the designed within 7 days of the receipt of this notice.

Sd/-

(A.R. Bose)

Assistant Collector,

Central Excise,

Mirzapur,

Copy forwarded to:

1. The Collector of Central Excise,

Allahabad, for information.

2. The Superintendent Central Excise,

Range-1, Renukoot,

for information & necessary action.

Assistant Collector.

5. On going through the said demand notice it is evident that the Department is invoking the provisions of Section 11D of the said Act on the ground that when the price of aluminium was fixed it included a component of excise duty on electricity. Since Renuagar was exempted from paying excise duty by virtue of the said decision of 1993, the amount which was embedded in the price of aluminium and which allegedly represented the excise duty on electricity, became surplus in the hands of the petitioner and, therefore, according to the Department the same was recoverable u/s 11D. Consequently, a demand for an amount of Rs. 1459.37 lakhs was raised and the petitioner was required to deposit the said amount to the credit of the Central Government within ten days of receipt of the notice failing which the petitioner was to be held liable to action under Rule 230 of the Central Excise Rules, 1944.

6. Mr. Parag Tripathi appearing on behalf of the petitioner raised several issues. The first issue that he raised was that the impugned demand notice was not preceded by any show cause notice nor was any opportunity given by the Department to the petitioner to explain its case. Therefore, it was contended that it was a clear violation of the principles of natural justice. Apart from this, it was pointed out that these principles of natural justice were inbuilt in Section 11D by virtue of sub-Section (2) and sub-Section (3). Although, these sub-Sections (2) and (3) were inserted in the year 2000, they were to operate with retrospective effect from 20.09.1991, which is the date on which Section 11D was inserted into the said Act. In other words sub-Sections (2) and (3) would have to be taken as having been incorporated in Section 11D from the very inception, i.e., with effect

from 20.09.1991.

7. Insofar as this submission is concerned we are in entire agreement with Mr. Tripathi that the demand notice, without the issuance of a show cause notice, would be bad in law even de hors sub-Sections (2) and (3) of Section 11D as that would be in clear violation of the principles of natural justice as has been well settled by several decisions including Union of India (UOI) and Others Vs. Madhumilan Syntex Pvt. Ltd. and Another, . Thus, on this ground alone, the impugned demand dated 16.02.1994 is liable to be quashed.

8. The second point urged on behalf of the petitioner by Mr. Tripathi was that even if one were to read the demand notice dated 16.02.1994 it would be apparent that it is in respect of the period 01.03.1978 to 30.09.1983 and that was much prior to the introduction of Section 11D, which happened only on 20.09.1991. Insofar as this plea is concerned, Mr. Satish Kumar the learned counsel appearing on behalf of the Department, submitted that Section 11D was retrospective and that, in any event, even if it was to be regarded as prospective in operation, it would apply in the facts of the present case because the decision of the High Court came in 1993 whereby the exemption sought by Renusagar Power Company was upheld and it is then that the amount representing the excise duty element on electricity became surplus in the hands of Hindalco. Therefore, clearly, according to Mr. Satish Kumar, Section 11D, even if it was regarded as having prospective operation, would, in any event, apply. In response, Mr. Tripathi submitted that first of all Section 11D does not have retrospective operation. It was introduced prospectively w.e.f. 20.09.1991. It is his submission that even if an amount as recognized u/s 11D had been collected a day prior to 20.09.1991 the same could not be recovered u/s 11D as the said provision came into operation only on 20.09.1991. He further submitted that several amendments have been introduced in Section 11D such as in sub-Section (1) and sub-Sections (2) and (3). Sub-section (1) of Section 11D was amended by insertion of certain words in the year 2000 but the amendment was to take retrospective effect from 20.09.1991. Similarly, sub-Sections (2) and (3) were inserted in the year 2000, again with retrospective effect from 20.09.1991. According to Mr. Tripathi, if there was any confirmation needed, these circumstances clearly provide the same insofar as the prospective operation of Section 11D w.e.f. 20.09.1991 was concerned.

9. On the issue of retrospectivity also we agree with the submission made by Mr. Tripathi that Section 11D has not been made retrospective expressly and there is nothing which requires us to imply or infer the retrospective operation of the same. In this regard we may take note of the Supreme Court Decision in the case of Hindustan Metal Pressing Works Vs. Commissioner of Central Excise, Pune, wherein the Supreme Court observed as under:-

6. Admittedly, refund of the excise duty paid in excess was granted in 1989. Thereafter, sub-section (2) of Section 11-B which incorporates the principle of "unjust enrichment" had come into force w.e.f. 20-9-1991, which inter alia

provides that duty of excise paid in excess would be refunded if the manufacturer had not passed on the incidence of such duty to any other person. This provision is not at all attracted. There is basic error in approach by the authorities below as the assessee has not filed any application u/s 11-B of the Act for refund of the excise duty paid by him. There is no question of application of principle of unjust enrichment as incorporated in Section 11-B. Other relevant provision would be Section 11-D which also came into force from 20-9-1991. It inter alia provides that every person who is liable to pay duty under the Act or the rules made thereunder, and has collected any amount in excess of the duty assessed or determined and paid on any excisable goods under the Act or the rules made thereunder from the buyer of such goods in any manner as representing duty of excise is required to forthwith pay the amount so collected to the credit of the Central Government. If such amount is not paid to the credit of the Central Government, the Central Excise Officer can serve a notice requiring him to show cause why the said amount should not be paid by him to the credit of the Central Government. As stated above, the amount was refunded to the assessee in 1989, hence there is no question of application of this provision.

(underlining added)

10. From the above extract it would be evident that while the Supreme Court examined the provisions of Section 11B and held that it would apply prospectively it also observed that Section 11D also came into force on 20.09.1991. Therefore, the plea of retrospectivity taken by the learned counsel for the Department cannot be accepted.

11. Finally, Mr. Tripathi submitted that the petitioner would, in any event, not be covered u/s 11D. Before we examine his submission and the counter point taken by Mr. Satish Kumar, it would be appropriate to set out Section 11D in its entirety. The said Section reads as under:-

11D. Duties of excise collected from the buyer to be deposited with the Central Government.--(1) Notwithstanding anything to the contrary contained in any order or direction of the Appellate Tribunal or any Court or in any other provision of this Act or the rules made thereunder, every person who is liable to pay duty under this Act or the rules made thereunder, and has collected any amount in excess of the duty assessed or determined and paid on any excisable goods under this Act or the rules made thereunder from the buyer of such goods in any manner as representing duty of excise, shall forthwith pay the amount so collected to the credit of the Central Government.

(1A) Every person, who has collected any amount in excess of the duty assessed or determined and paid on any excisable goods or has collected any amount as representing duty of excise on any excisable goods which are wholly exempt or are chargeable to nil rate of duty from any person in any manner, shall forthwith pay the amount so collected to the credit of the Central Government.

(2) Where any amount is required to be paid to the credit of the Central

Government under subsection (1) or sub-section (1A), as the case may be, and which has not been so paid, the Central Excise Officer may serve, on the person liable to pay such amount, a notice requiring him to show cause why the said amount, as specified in the notice, should not be paid by him to the credit of the Central Government.

(3) The Central Excise officer shall, after considering the representation, if any, made by the person on whom the notice is served under subsection (2), determine the amount due from such person (not being in excess of the amount specified in the notice) and thereupon such person shall pay the amount so determined.

(4) The amount paid to the credit of the Central Government under sub-section (1) or sub-section (1A) or sub-section (3), as the case may be shall be adjusted against the duty of excise, payable by the person on finalisation of assessment or any other proceeding for determination of the duty of excise relating to the excisable good referred to in subsection (1) and sub-section (1A).

(5) Where any surplus is left after the adjustment under sub-section (4), the amount of such surplus shall either be credited to the Fund or, as the case may be, refunded to the person who has borne the incidence of such amount, in accordance with the provisions of section 11B and such person may make an application under that section in such cases within six months from the date of the public notice to be issued by the Assistant Commissioner of Central Excise for the refund of such surplus amount.

12. It was submitted by Mr. Tripathi that three conditions are necessary before Section 11D could apply:- (1) There must be a liability to pay excise duty in respect of the goods manufactured by the petitioner; (2) an amount in excess of the duty assessed/determined ought to have been collected by the petitioner; and (3) the collection of the excess amount should be representative of the duty of excise. In this context Mr. Tripathi submitted that the petitioner manufactures aluminium. Excise duty is a duty on manufacture. Therefore, the excise duty liability of the petitioner would be the excise duty payable on aluminium. Insofar as the aluminium manufactured by the petitioner is concerned, the duty that was payable by the petitioner has been paid and there is no issue with regard to this. As such the petitioner has not collected any excise duty which the petitioner was liable to pay in excess of what the petitioner was assessed on in respect of the aluminium produced by it. Therefore, there is no question of the applicability of Section 11D.

13. Mr. Satish Kumar, on the other hand, argued that the price for aluminium which the petitioner charged from its buyer in terms of the Aluminium Control Order included an element of excise duty paid on electricity consumed by it and, therefore, it may be inferred that the petitioner collected duty in excess of the amount that it was entitled to collect. Consequently, according to Mr. Satish Kumar, the conditions precedent to Section 11D were squarely met and,

therefore, the recovery could have been made u/s 11D.

14. Once again we agree with the submission made by Mr. Tripathi that the conditions precedent for invoking Section 11D have not been satisfied. Section 11D(1) has specific reference to a person who is liable to pay duty under the Act. In the present case it is Hindalco which is that person. Hindalco's liability to pay duty is in respect of the aluminium manufactured by it inasmuch as a duty of excise is a duty on manufacture and not on the sale of any product. Insofar as aluminium is concerned the price charged for it is by virtue of the Aluminium Control Order. The duty leviable on aluminium based on such price has been collected and paid by Hindalco. There is no excess on this account. Therefore, the question of invoking Section 11D would not arise.

15. In view of the foregoing discussion the impugned demand notice dated 16.02.1994 is quashed. There shall be no order as to costs. The writ petition stands allowed as above.