
(1982) 04 DEL CK 0022
In the Delhi High Court
Case No : Civil Writ 971 of 1976

I.T.C. Limited

APPELLANT

Vs

Superintendent of Central Excise and others

RESPONDENT

Date of Decision : 12-04-1982

Acts Referred:

Citation : (1983) 12 ELT 281

Hon'ble Judges : S.S. Chadha, J;Prakash Narain, J

Bench : Division Bench

Judgement

S.S. Chadha, J.—This petition under Articles 226 and 227 of the Constitution of India seeks a writ of certiorari to quash and set aside the order dated December 30, 1975 (Ex. F to the writ petition) in so far as it relates to the dismissal of the two appeals relating to the two refund applications both dated February 27, 1973 and for issue of a writ of mandamus directing the respondents to refund to the petitioners a sum of Rs. 49,90,043.01 with interest thereon at 12% per annum from the date thereof till payment.

2. The petitioners are, inter alia, carrying on the business of manufacturing and selling cigarette and smoking tobacco and own and operate five cigarette factories including a cigarette factory at Saharanpur in the State of Uttar Pradesh. The manufacture of cigarette attracts excise duty under the Central Excises and Salt Act, 1944 (for short called the Act). The petitioners' case is this. The petitioners who are manufacturers sell their products to wholesale buyers and/or dealers who in their turn sell to secondary wholesalers. The said secondary wholesalers sell the products to retailers who resell them to consumers. The petitioners make all sales to wholesale buyers and/or dealers in large bulk entirely on a principal to principal basis and these sales are evinced by written contracts which represent normal commercial arrangements and are concluded in the usual course of business. The transactions between the petitioners and wholesale buyers and/or dealers are bona fide, at arm's length in the usual course of business and do not have any consideration other than the

price of the products. The parties do not also have any interest in each other's business. All the sales made by the petitioners during the period September 1, 1970 to February 28, 1973 were as aforesaid. During the aforesaid period, the petitioners followed the Self Removal Procedure laid down by Chapter VII-A of the Central Excise Rules (for short called the Rules).

3. During the period September 1, 1970 to February 28, 1973, the petitioners contend that they were under an error regarding the true interpretation of Section 4 and mistakenly and bona fide believed that for the purpose of Section 4(a) of the Act, the prices charged by the wholesale dealers to the secondary wholesalers formed the correct basis of assessment. On account of such bona fide error or misconception, the petitioners cleared their products and paid excess excise duty as follows :-

Period	Amount	-----	-----	1st September 1970 to 28th May 1971	Rs. 23,68,686.85
1st June 1971 to 19th February 1972	Rs. 26,21,356.16				
20th February 1972 to 16 March 1972	Rs. 2,97,876.81				
17th March 1972 to 31st January 1973	Rs. 25,41,704.70				
1st February 1973 to 28th February 1973	Rs. 2,61,024.22				

4. After the judgment of the Supreme Court in the case of A.K. Roy and Another Vs. Voltas Limited, , the petitioners made five separate applications for refund of the excess excise duty paid for the clearances in respect of the period September 1, 1970 to February 28, 1973. The petitioners made two applications for refund of Rs. 23,68,686.85 for the period 1st September, 1970 to 28th May, 1971 and for Rs. 26,21,356.16 for the period June 1, 1971 to February 19, 1972 on February 27, 1973. The petitioners also made three other applications for refund of the excess excise duty in respect of the three other periods. By an order dated October 9, 1973, the Assistant Collector of Central Excise rejected all the five refund applications. On appeal, the Appellate Collector of Central Excise by consolidated order dated December 30, 1975 allowed the appeals pertaining to the three refund applications for the three periods from February 20, 1972 to February 28, 1973 and set aside the orders passed by the Assistant Collector in respect thereto and ordered that consequential relief be granted to the petitioners. The Appellate Collector, however, disallowed the appeals pertaining to the other two refund applications both dated February 27, 1973 for the earlier period. The Appellate Collector held that the duty was paid by the petitioners on the price declared by them earlier before the judgment of the Supreme Court in Voltas case after which it came to their knowledge that they had paid a duty on higher price and this meant that the payment was made through misconception under Rule 11 of the Rules because of the wrong understanding of Section 4 of the Act. The Appellate Collector ruled that it attracted the mischief of Rule 11 and, Therefore, the period of limitation would be applicable and the two applications for refund were barred by time. Without exhausting remedy of the revision, the petitioners have approached this Court.

5. There is ample material on the record that the misconception by the

petitioners arose on account of the wrong interpretation placed by the judgments of the High Courts of Calcutta, Mysore and Andhra Pradesh in their decisions National Tobacco Co. of India Ltd. Vs. Collector of Central Excise and Others, , and the true legal position was authoritatively settled by the Supreme Court in Voltas case. This is clear from the impugned order dated December 30, 1975 passed by the Appellate Collector wherein it was held :

"I find force in the arguments of the appellants particularly because not only the appellants but even some high courts also had held the view before the Supreme Court Judgment in Voltas case that the assessable value u/s 4 of the Central Excises & Salt Act, 1944 should be the price at which manufacturer's goods were sold by the Sole Selling Agents and not the price at which they were sold by the manufacturers to the Sole Selling Agents/Distributors. The Supreme Court in their order on Voltas case over-ruled the earlier interpretation of law. Therefore the correct meaning of the law should have been as interpreted by the Supreme Court. In the above view of the matter the initial price charged by the appellants to their wholesale buyers should constitute the assessable value u/s 4(a) of the Central Excises and Salt Act, 1944 after excluding trade discount and excise duty as provided."

The correct basis of assessment u/s 4 of the Act is the price charged by the manufacturer to his wholesale buyers and/or dealers. The submission of the counsel for the petitioners is that the respondents have recovered from the petitioners the duty of excise which was not payable by the petitioners in accordance with law and thus a mandamus lies for ordering the refund of the duty of excise recovered without authority of law.

6. In Premraj and Ganpatraj and Company (P.) Limited (Now known as Madras Electrial Conductors (P.) Limited) Vs. The Assistant Collector of Customs and Others, and the judgment of the Division Bench in appeal reported in 1978 T L R 1976 and "Durga Shankar Industries Vijayawada v. Government of India and others", 1979 E.L.T. J 277, the view taken is that the levy of import duty will also be subject to the provision of Article 265 of the Constitution which gives the mandate that no tax shall be levied or collected except by authority of law, that there being admittedly an excess collection of import duty, the party who has paid the excess duty is entitled to get a refund of the same and that though the authorities cannot entertain a revision application u/s 27 of the Customs Act, beyond a period of six months from the date of the payment, that will not inhibit the court from granting the necessary relief by way of mandamus directing the authorities to refund the duty which was collected without the authority of law. In all those three cases, the Madras High Court granted relief by issuing a writ of mandamus if it was found that the excise/import duty collected from it was without authority of law or was contrary to the statutory notifications.

7. In Patel India Private Limited Vs. Union of India and Others, , the Supreme Court had proceeded on the basis that wherever an assessment has been made and excise duty has been collected under the Sea Customs Act, without authority

of law, the Limitation provided for in Section 40 of the Act will not apply and that the aggrieved party is entitled to claim refund without reference to the time limit prescribed in Section 40. In Section 40 of the Sea Customs Act, 1978, a time limit of three months has been prescribed for claiming refund of the excise duty paid by a party. The Supreme Court construing that provision pointed out that the said section will apply only to case where duties have been paid through inadvertence, error or misconstruction, and that only in those instances, the refund application has to be made within three months from the date of the payment. It was pointed out by the Supreme Court that there was a legal obligation on the part of the Government to return the excess duty, if really the said excess duty was not payable by the party under the provisions of the Sea Customs Act and a corresponding legal right in the party to recover it and such a right cannot be defeated on the basis of limitation prescribed in Section 40.

8. In C.W.P. 147 of 1979 decided on July 10, 1979 "M/s. Chemicals & Plastics & another v. Union of India and others", one of us (Chadha, J.) had held that if the State realises tax or duty in contravention of the law, the court would be fully justified in directing the State to act in accordance with law and to refund the excess amount of tax or duty which it had realised. This was quoted with approval by B. N. Kirpal, J. in "Vazir Sultan Tobacco v. Union of India", 1981 E.L.T. 14. The petitioners who had paid duty of excise in excess are entitled to claim the refund of the same even if the authorities under the Act could not entertain the refund application as the same is alleged to have been filed beyond the period prescribed by the Act and the Rules. The duty of excise can be which is levied in accordance with the Act and any money which is realised in excess of what is permissible in law would be a realisation made outside the provisions of the Act. The payment of the excess excise duty which has been made by the petitioners for the period September 1, 1970 to February 19, 1972 cannot be legally termed as payment of excise duty authorised by law as the authorities under the Act themselves did not treat the excess excise duty in identical circumstances paid for the subsequent period from February 20, 1972 to February 28, 1973, as authorised by law. The excess excise duty was not payable by the petitioners under the Act and there is a corresponding legal right in the petitioners to recover it. This right cannot be defeated by a mere limitation in the Act or the Rules when the collection is without the authority of law.

9. For the above reasons, the writ petition succeeds and is allowed. A mandamus is issued directing the respondents to refund to the petitioners the sum of Rs. 23,68,686.85 plus Rs. 26,21,356.16 or such other lesser sum as may be found on verification to be due within a period of six months from today. On the facts and circumstances of the case, we make no order as to costs.