

(2005) 11 KAR CK 0025

In the Karnataka High Court

Case No : Writ Petition No's. 35766 and 35767 of 2000

Kanoria Industries Ltd.

APPELLANT

Vs

Union of India (UOI)

RESPONDENT

Date of Decision : 11-11-2005

Acts Referred:

Central Excise Rules, 1944 — Rule 57A, 57B, 57C, 57V
Constitution of India, 1950 — Article 14
Finance Act, 2000 — Section 112

Citation : (2005) 190 ELT 295

Hon'ble Judges : D.V. Shylendra Kumar, J

Bench : Single Bench

Advocate : Pramod N. Kathavi and B. Pramod, for the Appellant; B. Papegowda and N.R. Bhaskar, ACGSCs, M.V. Chandrashekar Reddy and P.S. Dinesh Kumar, ACGSCs, for the Respondent

Final Decision : Dismissed

Judgement

D.V. Shylendra Kumar, J.—These two writ petitions are by assesseees under the provisions of the Central Excise Act, 1944 [for short, the Act] in the context of denial of what is known as Modvat credit which the petitioners had availed of in respect of high speed diesel (HSD) oil, which according to the petitioners was used as an input in the production of electricity at their units wherein they manufacture cement. The scheme of availment of Modvat credit under the Act is governed by the provisions of Rules 57A, 57B, 57C to 57V of the Central Excise Rules, 1944 [for short, the Rules].

2. In the case of writ petitioner in W.P. No. 35766 of 2000, the dispute arose in the context of Modvat credit that had been availed by the petitioner on the HSD oil used as input for production of electricity in turn used for manufacturing cement during the period December 1997 to March 1998, which credit though availed of by the petitioner was directed to be reversed in terms of endorsement dated 19-6-2000 issued by the Superintendent of Central Excise, Gulbarga. This

petitioner did comply with this suggestion and reversed the Modvat credit and to this extent nothing remains.

3. However, the communication dated 19-6-2000 being on the premise that in terms of Section 112 of the Finance Act, 2000, such Modvat credit having been disallowed, the petitioner was advised to reverse the entry and it is only because of Section 112 of the Finance Act, 2000 the petitioner is losing the valid Modvat credit that it had availed of earlier and but for this provision, the petitioner could have continued to reap the benefit of Modvat credit and the petitioner therefore feeling aggrieved by this endorsement as also the provision of Section 112 of the Finance Act, 2000, has challenged the constitutional validity of this statutory provision and for quashing the consequential endorsement and further direction for restoration of the Modvat credit entry.

4. Likewise, in respect of the petitioner in W.P. No. 35767 of 2000, the disputes relates to availment of Modvat credit for the period September 1997 to December 1997. However, in this case, the availment of Modvat credit was sought to be denied to the petitioner by issue of show cause notice, which was issued even before the enactment of Section 112 of the Finance Act, 2000 and on an independent ground and on adjudication of the show cause notice, the petitioner was denied this credit for the period and the matter, it appears, became concluded, as the petitioner has not pursued an adverse order it suffered at the hands of CEGAT in the second appeal, but nevertheless, has approached this Court for relief on the premise that the confirmatory order in the second appeal did cite the provision of Section 112 of the Finance Act, 2000 as one of the reasons to uphold the denial of Modvat credit.

5. Respondents had been put on notice and entered appearance through Sri B. Papegowda, learned Additional Central Government Standing Counsel, have also filed statement of objections. The common defence put up by the respondents in both these petitions is that the Modvat credit though had been availed when it had been allowed, the concession under Rule 57A of the Rules having now been withdrawn as it was done away in terms of Section 112 of the Finance Act, 2000 and the Supreme Court in the case of Commr. of C. Ex., Hyderabad Vs. Associated Cement Companies Ltd., , while passing orders on the review petition in the appeal of the Commissioner, having taken note of the provisions of Section 112 of the Finance Act, 2000 for reviewing its earlier order of dismissing the appeal and for allowing the appeal of the Commissioner on behalf of Revenue, an appeal which had been preferred against the order of the CEGAT, wherein the Tribunal had held that persons like the petitioners are entitled to avail of the Modvat credit in respect of USD oil if it is an input for production of electricity and in turn used for production of any excisable product. Though on facts and on the interpretation of the existing notification and its interpretation, governing Modvat credit, the Tribunal had allowed the appeal of the assessee for providing relief and the Supreme Court had earlier dismissed the appeal of the Revenue as against this order, nevertheless, the Revenue having brought to the notice of the

Supreme Court the provisions of Section 112 of the Finance Act, 2000, which was enacted as a validating legislation and which had now virtually taken away any benefit or concession that had been given to an assessee under the Modvat credit scheme, particularly in respect of such assessees like the petitioner, the order of the Tribunal was required to be set aside and in this view of the development of law, it is urged by Sri Papegowda, learned ACGSC that the matter is covered by the decision of the Supreme Court and the writ petitions are to be dismissed.

6. Sri Pramod N. Kathavi, learned Counsel for the petitioners would urge that as the petitioner has been deprived of Modvat credit to which the petitioners are otherwise entitled to in terms of the rules governing allowing of Modvat credit, only because of the provisions of Section 112 of the Finance Act, 2000, the petitioners are entitled to question the legality of this provision and further submits that even the Supreme Court while disposing of the review petition in the case of Associated Cement Companies Ltd. (supra) having observed at Para 3 of this order that the Supreme Court has not examined the constitutional validity of Section 112 of the Finance Act, 2000 in this appeal and were not permitting any contentions questioning such validity to be raised in the appeal and that can be subject matter as and when the question arises and to be dealt with in accordance with law, the matter is still open for the petitioners to question the validity of this provision and accordingly, the petitioners are pressing for a decision on the validity of Section 112 of the Finance Act, 2000.

7. In so far as the facts are concerned, they are not much in dispute. The only question is if the provisions of Section 112 of the Finance Act, 2000 are valid and in consonance with the constitutional requirements and as to whether passes the test of enactment of proper and competent legislation by the Parliament?

8. The main contention urged by Sri Pramod Kathavi learned Counsel for the petitioners is that a validating legislation as Section 112 of the Finance Act, 2000 is being described as one, is essentially legislated for the purpose of validating an earlier levy through a statute, a statute which has been declared invalid or unconstitutional and by removing the invalidity in such law. Submission of the Counsel is that a law which is otherwise not fully in consonance with the requirement of the constitutional provisions, under which a levy had been imposed and because of which courts have invalidated the levy, if is recanted retroactively and the defect or illegality which had been pointed out by the court is so removed with retrospective effect, the law becomes valid from its inception and therefore a judgment rendered in the context of examination of the invalid law becomes a judgment of no consequence and even a levy of tax imposed under the earlier law can now also be sustained in view of the validating legislation and it is only for such a situation a validating law can be made and not for any other situation.

9. Submission of Sri Pramod N. Kathavi is that the background under which Section 112 of the Finance Act, 2000 has been enacted is the decision of the

CEGAT in the case of India Cements Ltd. v. Commissioner of Customs and Central Excise, Hyderabad Appeal No. E/1120/96-Md. 1997 (95) E.L.T. 520 (Tribunal) and connected matters, a copy of which is produced as Annexure-D to W.P. No. 35767 of 2000; that for rendering of this decision, the Tribunal had not invalidated any provisions of law; that the Tribunal had only held that a reading of the relevant notification governing the availment of Modvat credit, the appellants therein had become entitled to the availment of such Modvat credit, but the Tribunal had not invalidated any provisions of law or rule and therefore there was no occasion at all for the Parliament to have enacted a validating levy and if there was no occasion, the very provisions of Section 112 of the Finance Act, 2000 cannot be sustained inasmuch as it is the submission of learned Counsel for the petitioners that there was no cause of action for the Parliament to make such a law, which in effect and substance takes away certain benefits which had accrued to persons like the petitioners in the earlier existing valid notifications. It is therefore the submission of the learned Counsel for the petitioners that Section 112 of the Finance Act, 2000 is unconstitutional.

10. One other contention urged on behalf of the petitioners is that the statutory provision also has the effect of bringing about an invidious classification, discriminating between the assesseees making use of inputs other than HSD oil for the purpose of generating electricity used in the manufacture of end product - cement - and the provisions having an ill-effect only on manufacturers of cement using HSD oil as an input for generation of electricity. In support of the submission, learned Counsel for the petitioners places reliance on Para-4 in the decision of the Supreme Court in the case of Shri Prithvi Cotton Mills Ltd. and Another Vs. Broach Borough Municipality and Others, .

11. In so far as the attach on the provisions of Section 112 of the Finance Act, 2000 on the ground that it is violative of Article 14 of the Constitution of India is concerned, the argument may not succeed for the reason that the classification that is made is providing or not providing for certain Modvat credit concession in respect of all manufacturers who use HSD oil as an input in the generation of electricity. It is uniformly denied to all such manufacturers of excisable products who use HSD oil as an input for generation of electricity. Though the argument is that the other manufacturers who use inputs other than HSD oil for generating electricity are nevertheless granted such Modvat credit benefit, the classification by this reason itself cannot be held to be unconstitutional for the reason that grouping of all manufacturers using HSD oil as an input for generation of electricity can be termed as a reasonable classification, as such manufacturers form a class by themselves and the object being essentially one of not extending a concession or benefit in respect of such manufacturers who use HSD oil as an input. The comparison is not as between the manufacturers who use HSD oil and who do not use HSD oil as an input. It is for this reason I am unable to accept the contention of learned Counsel for the petitioners that the provision is unconstitutional as violative of Article 14 of the Constitution.

12. In so far as the next, contention is concerned, which is again based on the decision of the Supreme Court in the case of Sri Prithvi Cotton Mills Ltd. (supra), even the ratio of this decision, as indicated in Para 4 itself, the validity of a validating law depends upon whether the legislature possesses competence to legislate over the subject matter and whether in making a validation law, it has removed a defect which the court had found as part of an existing law and makes adequate provisions in the validating law for valid imposition of tax.

13. In so far as the competence is concerned, it is not even in dispute. In so far as the theory of removal of defect which court has found etc., is concerned, the effect of Section 112 of the Finance Act, 2000 if one looks at it independent of its caption or title as validating levy etc., or as understood by the petitioners, as validating levy, it is only a provision which amounts to provision of law or rule made operational with retrospective effect having the effect of taking away a concession or exemption provided earlier. The only additional effect is that the subject matter statutory provision or notification under which the benefit is given or extended and such order, though might not have been subject matter of any decision of the court or Tribunal, nevertheless, the provision will have overriding effect for the purpose of denying the earlier concession. The provision of Section 112 of the Finance Act, 2000 reads as under :

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 utilized 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 duty 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 utilized but which would not have been allowed to be taken or utilized, 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 percent 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.

14. As noticed above, the effect of this law enacted by the Parliament i.e. plenary legislature is to take away the benefit that had been extended earlier under a rule viz., Rule 57A or 57B of the Rules. The section itself reads that notwithstanding the provision of such rules earlier, which includes a notification under this rule, for the period commencing on or from 16-3-1995 and ending with the date on which the Finance Act, 2000 received the assent of the President, no such credit is admissible, in the sense that even if it had been admitted earlier, it is now taken away.

15. Sub-section (2) further effectuates this provision even in the context of any judgment, decree or order of any Court or Tribunal or any other authority etc. The net effect of the provision is it takes care of both the situations where Modvat credit had been availed either by the assessee himself on the strength of the notification issued under Rules 57A and 57B or even when such credit had not been allowed but having been made subject matter of an order or decision of any Court or Tribunal etc., had been extended the benefit of such Modvat credit, nevertheless even such benefit is now sought to be withdrawn or taken away.

16. Even on applying the test as laid down by the Supreme Court in the case of Sri Prithvi Cotton Mills Ltd. (supra), the provision of Section 112 of the Finance Act, 2000 achieves that very purpose which has been indicated by the Supreme Court to be the object and the purpose for which a validating levy can be made. If such is the law as laid down and declared by the Supreme Court on application of this provision, it inevitably follows that the validity of Section 112 has to be necessarily upheld. It is for this reason, the contention urged by the learned Counsel for the petitioners has to be rejected.

17. In the result, these writ petitions fail and are accordingly dismissed. Rule discharged.