(2002) 02 BOM CK 0108

In the Bombay High Court

Case No : Writ Petition No. 1166 of 1988

Klin-O-Pack APPELLANT

Vs

Union of India (UOI) and Others RESPONDENT

Date of Decision : 25-02-2002

Acts Referred:

Central Excise Rules, 1944 — Rule 57A, 57B, 57C, 57D, 57E
Central Excises and Salt Act, 1944 — Section 11A

Citation : (2002) 3 ALLMR 85 : (2002) 4 BomCR 134 : (2003) 85 ECC 766 : (2003) 154 ELT 359 : (2002) 4 MhLj 686

Hon'ble Judges : V.C. Daga, J;J.P. Devadhar, J

Bench : Division Bench

Advocate : N. Thakkar, instructed by Manilal Kher Ambalal and Co, for the Appellant; K.R. Chaudhari, instructed by H.D. Rathod, for the Respondent

Judgement

V.C. Daga, J.—In this writ petition, the petitioners are challenging the validity of the order passed by the Assistant Collector of Central Excise, Division VII, Bombay-1, dated 15th January, 1988, so far as it denies right to opt out of Modvat scheme during the financial year and confirmed demand against the petitioners in the sum of Rs. 77,977.96 and Rs. 67,041,64. The facts in nutshell are as under:

2. The petitioners are a small scale industry duly registered with the Director of Industries, Bombay. The petitioners inter alia manufacture aluminium collapsible tubes classifiable under Chapter Sub-Heading No. 8512.11 of Central Excise Tariff Act, 1985. Under the Finance Act, 1986, the provisions of Rule 57-A to Rule 57-J were introduced by way of amendment to the said Rules (popularly described as "Modvat Rules"). Under the Modvat scheme while making payment of excise duty on finished goods, the duty on the raw materials used by the manufacturers are adjusted or in other words, if any duty is paid on the materials used in the manufacturing process, in that event, while making payment of excise duty, on the end-product, the duty which is already paid in respect of those materials are deducted.

3. The petitioners opted for Modvat scheme to claim benefits available to the petitioners as a small scale industry unit. The petitioners filed declaration in this regard on 11-4-1986 in accordance with Rules in the prescribed manner indicating the description of final product manufactured in the factory and inputs intended to be used in the final product on and from 11-4-1986.

4. The petitioners in the aforesaid backdrop availed the benefit of the credit of duty paid on the inputs received by them for the purposes of manufacture of the said goods at their factory and according to the petitioners till 11-4-1986 they had availed MODVAT credit to the tune of Rs. 77,977.96 and Rs. 67,045.64 in respect of the said inputs.

5. The petitioner vide his letter dated 11-4-1986 filed classification list effective from 11-4-1986 addressed to the Superintendent of Central Excise, Range VI, Division VII, Bombay inter alia claiming benefit of Notification No. 175/1986 as amended by Notification No. 216/1986 dated 2nd April, 1986. It was declared in the said classification list that the petitioners have taken benefit of Modvat Scheme upto 11-4-1986 and from this date the petitioners discontinued the benefit of Modvat Scheme. The petitioner by their letter dated 11-4-1986 addressed to respondent No. 3 inter alia informed that they want to avail small scale industries exemption from 11-4-1986 onwards and requested for cancellation of their Modvat option which the petitioners had exercised. It is not clear from the facts available on record whether or not the request made by the petitioners was accepted by the Excise Department. However, it appears that two show cause-cum-demand notices dated 28-10-1986 and 23-3-1987 came to be issued which required the petitioners to show cause as to why central excise duty in the sum of Rs. 77,977.96 and Rs. 66,041.64 should not be recovered from them u/s 11A of the Act. Reasons stated in both the notices are identical. The said reasons read as under:

"M/s Klin-O-Pack are manufacturer of Aluminium Collapsible tubes classifiable under Chapter No. 8312-11 and had opted for Modvat on 21-34986 and availed the Modvat facilities from 1-4-1986 to 13-4-1986 and thereafter withdrew themselves from Modvat. As per the orders issued in this connection from the Ministry, an assessee already opted for Modvat will have the option to go out of Modvat and avail of exemption subject to being eligible only in the next financial year and that it would not be possible to permit a manufacturer to opt out of Modvat scheme once he has exercised an option of paying duty at the beginning of the financial year in respect of any specified goods."

The petitioners filed their replies to these two show cause notices contending therein that the petitioners had opted for Modvat scheme in the month of March 1986 and continued for a couple of days till 11-4-1986. When they came across a Notification No. 216/1986, they found it more beneficial, as such decided to opt for higher benefit allowed by the Government and also challenged the legality and validity of these show cause notices on the following amongst other grounds :

(a) There is nothing either under MODVAT rules or in the notification No. 175/86 or in Notification No. 216/86 that the assessee cannot opt out in a financial year out of Modvat scheme.

(b) In the Ministry''s letter it is stated that an assessee can opt for the Modvat scheme in the middle of the year. Therefore, to this extent the notice is not proper and correct because when he can opt in, he can also opt out.

(c) The Notification No. 216/86 was issued on 2-4-1986. The Government at the time knew very well that some assessee could be under Modvat scheme on that day and even thereafter for some time. Therefore, the Government''s intention has never been to issue a notification as well as to forbid those assessee who were under the Modvat from taking benefit of the same.

(d) If the notification is issued and the assessee is entitled to it the excise authorities cannot deny that on the basis of Ministry''s letter without any specific provision for such denial."

6. The Assistant Collector Central Excise, Division VII, Bombay II, after hearing the petitioners rejected their contentions and held that the trade notices on the subject did not permit such change over during the same financial year, as such it was not permissible to permit the petitioners to opt out Modvat Scheme once having exercised an option to opt for Modvat Scheme. Thus, contentions of the petitioners were rejected and demands referred to hereinabove were confirmed. The aforesaid common order is subject matter of challenge in this writ petition filed under Article 226 of the Constitution of India.

7. The learned Counsel for the petitioners reiterated contentions raised while opposing show cause notices and relied upon the judgment of the Calcutta High Court in the case of Bengal Cardboard Ind. and Printers (P) Ltd. Vs. Asstt. Collr. of C. Ex., wherein the Calcutta High Court had occasion to deal with identical question which is involved in this petition. The Calcutta High Court while dealing with identical question had held that there was no bar for the manufacturer to opt out of Modvat in the same financial year and that there could not be any impediment in allowing the unit to opt out of Modvat Scheme and to switch over to other beneficial scheme, namely, Small Scale Industries Exemption Scheme. The petitioners case is that the petitioners can opt out at any time, from the said Modvat Scheme and that the restriction contained in the trade notice/circular that person who intends to opt out of the said scheme cannot be allowed to be opted out within the same financial year is ultra vires the provisions of Central Excise and Salt Act, 1944 and/or Central Excise Rules, 1944.

8. The case sought to be made by the petitioners is opposed by the learned counsel appearing for the respondents. He submitted that the scheme of exemption under Notification No. 175/1986 dated 1st March, 1986 provided for an integrated method of computation of value of clearance made in a financial year. As per the notification, if a manufacturer avails of Modvat relief in respect of the specified goods, the concessional duty (normal duty less 10% Adv.) would

be applicable. Keeping in view this position and the fact that there is no one to one correlation between the inputs and final products under Modvat Scheme, it is not possible to permit a manufacturer to opt out of Modvat Scheme when the option to avail benefits of Modvat Scheme is exercised at the beginning of the financial year in respect of the specified goods. It can only be permitted in the next financial year. In this view of the matter, the learned counsel for the respondents prayed for dismissal of this petition with costs.

9. Having heard the rival parties at length, the question is whether a manufacturer having once exercised his option to operate under Modvat Scheme, would be legally in a position to opt out of it before the end of the financial year. We were taken through the Modvat Scheme and the relevant rules of Central Excise Rules, 1944 and that perusal of these rules showed that there is nothing in these rules to indicate that the option once exercised to operate under Modvat Scheme, the manufacturer cannot go out of it during that financial year. It is only in the trade notice issued by the Central Board of Excise and Customs, New Delhi, (''CBEC'' for short), bearing Circular No. 23/88-ex-8 dated 10-6-1988, stated that a manufacturer can choose to go out of it only at the end of the financial year.

10. In our view, trade notice in the form of circular issued by the CBEC cannot have the effect of restricting the operation of the Modvat Scheme, which is based on statutory rules. The Modvat Scheme or rules governing the said scheme do not prohibit such switch over from one scheme to other during the financial year. There cannot be any estoppel against statute. It cannot be said that once the petitioners had opted in, the petitioners could not opt out within the same financial year. The petitioners could not be compelled to operate under the Modvat Scheme when the petitioners has exercised such option. Revenue cannot be said to suffer in any manner whatsoever in such cases. No prejudice to the revenue has been shown to us. Any circular, trade notice or instructions contrary to the Rules/MODVAT Scheme could not be legal and valid. In this view of the matter, we hold that the petitioners were entitled to opt out of Modvat Scheme. In the result, impugned show cause cum demand notices dated 28-10-1986 (Exh.E) and 23-3-1987 (Exh.G) are quashed and set aside. Rule is made absolute in terms of prayer Clause (a) with no order as to costs.

