
(2003) 05 CAL CK 0026

In the Calcutta High Court

Case No : Writ Petition No. 19214 (W) of 1996

Kusum Products Ltd.

APPELLANT

Vs

Union of India (UOI)

RESPONDENT

Date of Decision : 12-05-2003

Acts Referred:

Central Excise Rules, 1944 — Rule 57A

Citation : (2003) 90 ECC 790 : (2003) 157 ELT 258

Hon'ble Judges : Kalyan Jyoti Sengupta, J

Bench : Single Bench

Advocate : Anindya Mitra and Debal Banerjee and Prabuddha Basu, for the Appellant; None, for the Respondent

Judgement

Kalyan Jyoti Sengupta, J.—In this writ petition the petitioners raised questions whether in view of Notification No. 16/96, dated 23rd July, 1996 by which payment of excise duties on vegetable product having been abolished, the credit already accumulated on the strength of the Notification No. 45/89, dated 11th October, 1989 stood lapsed or not, if not, then whether such credit can be refunded or adjusted against excise duty payable in respect of other product of the petitioners. Short fact of the case is stated hereunder :

2. The petitioner No. 1 is manufacturer of banaspati product. For manufacturing of the said product various kinds of oil can be used as input, and the same are classified as major oils and minor oils. Soyabeans oil, cotton seed oil, which had hitherto been used by the petitioners as input, are classified as major oils while mahua oil, watermelon seed oil solution extracted from safola and rice bran oil are classified as minor oils. Both the major oils and minor oils require processing for manufacture of banaspati. However, minor oils require more processing with the help of special technology and equipment involving heavy capital expenditure. Pursuant to policy decision by a Notification No. 27/87, dated 1st March, 1987, the respondent No. 1 specified certain inputs namely fixed vegetable oils of the description in column 2 of the table annexed in the said

notification for use in the manufacture of final products namely vegetable products falling under sub-heading No. 1504.00 of the schedule of the Central Excise Tariff Act, 1985 and the rates in the corresponding entry in column 3 to the said table as the rate at which credit may be granted for input in the manufacture of final products for the purpose of Section AAA of Chapter V of Central Excise Rules. By the said notification the Central Government further stipulated that grant of credit and utilisation thereof shall, in addition to the provision of the section, be subject to certain conditions as specified in the said section. It was one of the conditions in the notification that the quantity of credit utilised for payment of duty of excise any clearance of the final product namely banaspati shall not exceed rupees one thousand per ton of vegetable products cleared and excess credit, if any, available shall not be refunded to the manufacturer or adjusted against or utilised for payment of duty of excisable goods under any circumstances.

3. Pursuant to the notification petitioners started using minor oils in substantial quantities as raw materials for manufacture of banaspati. Accordingly, they incurred substantial costs because of investment made for setting up necessary plants and introduction of necessary technology in their factories for processing minor oils. Such technology was not necessary previously for use of major oils as raw materials. By this process the petitioner had started availing itself of benefit for taking credit in terms of the notification until 11th September 1989 when it was notified that the aforesaid notification giving benefit of credit was withdrawn by another Notification 39/89, dated 25th August, 1989.

4. The petitioner having been aggrieved with the August notification along with other manufacturers challenged by filing a writ petition in this Court. During pendency of the writ petition by a notification dated 11th October, 1989 being No. 45/89 the earlier benefit of taking credit in relation to payment of excise duty was restored. The petitioner has also filed writ petition for allowing to utilise accumulated credit of a sum of rupees of one hundred eight lacs, which had accrued till 11th September, 1989. The petitioner moved further writ petition in this Court praying for refund of the amount lying outstanding in the register as unutilised credit. This writ petition for refund was disposed of by Hon"ble Justice Ruma Pal (as Her Lordship then was) by judgment and order dated 25th July, 1991, whereby the respondents directed to allow the petitioner to use unutilised credit already accumulated under the earlier Notification Nos. 27/87 and 192/87 while clearing the finished product of the petitioners. The petitioners contend that due to substantial utilisation of minor oils in the production of banaspati considerable amount of credit had accumulated in their favour by virtue of Notification No. 45/89. In view of this notification of 1996 the mode of utilisation of the credit already accumulated has been done away with as on 23rd July, 1996 the petitioners had to their credit a sum of Rs. 16,41,35,889/-. After abolition of duty of banaspati there was no scope for utilisation of accumulated credit in the manner provided in the Notification No. 45/89.

5. Mr. A.K. Mitra, Senior Advocate appearing with Mr. Debal Banerjee, Senior Advocate and Mr. Anirudha Bose, learned Advocate submits highlighting the fact of the case recorded as above that withdrawal of Notification No. 45/89 is wholly illegal and arbitrary by reason of the fact that the right already vested in favour of the petitioners cannot be taken away. His clients acting upon the Notification No. 45/89 has utilised minor oils as input for finished product of banaspati. In this process the petitioners had to change plant and machinery suiting for use of minor oils and thereby invested a large amount. Therefore, the credit accumulated in terms of the above notification shall be allowed to utilise. This right is a vested one and cannot be divested. The respondents are estopped from acting contrary to the Notification No. 45/89. In support of his submission he has drawn my attention to a judgment of the learned Single Judge of this Court, which is annexed, to the petition. He has also placed reliance on decision of this Court reported in 75 CWN 162 and a decision of Supreme Court reported in V.L. Das, .

6. His further contention in relation to the notification under Rule 57K of the Central Excise Rules, 1944 that abolishes payment of excise duty on banaspati on and from 23rd July, 1986, is that there was no scope for utilisation of accumulated credit in the manner provided in the Notification No. 45/89. The whole object was to give credit for use of the minor oils as measure of incentive.

7. The Notification 45/89 is a major incentive, therefore right to use credit is also a substantive right. The adjustment against excise duty payable on final product is only a mode of utilisation of the credit benefit accumulated in terms of the scheme. The mode of utilisation is machinery part and not the substantive part of the scheme. The substantive part is the grant of credit. The mode of liquidation of the credit is the machinery part and can be moulded to protect the substantive right conferred by the scheme, since the prescribed mode of utilisation has been rendered inapplicable and has become impossible by reason of order passed by the executive benefit of credit should be allowed to be given by some other method. He relies on a decision of this Court reported in Sm. Shanti Devi Mehra and Others Vs. Gyan Prakash Mehra, in this context. The executive order does not provide that the amount lying with the producer would lapse. There is no government notification that the accumulated credit would lapse. The amount of credit is a valuable right to property which one cannot be deprived except without due authority of law as provided in Article 300A of the Constitution of India. The right has not been taken away by any legislation whether supreme or delegated.

8. The Government is obliged to act fairly and reasonably to mould the mode of enjoyment of vested property right. The Government can always mould the machinery part of the scheme to give effect to substantive right. It is unreasonable and unfair on the part of the Government not to provide further mode of utilisation when the Government has by their own act rendered the mode of utilisation of the vested property right infructuous. The Government

must act fairly and reasonably otherwise it would be indirect expropriation of vested right of property. Therefore, according to them the Government should allow adjustment of accumulated credit against excise duty payable by the petitioners in respect of other items produced by it. Though there is no specific challenge in the writ petition however, by a supplementary affidavit the Notification No. 45/89 has been challenged insofar as it imposes bar of refund. Mr. Mitra contends that the bar is wholly unreasonable, arbitrary and unfair. Therefore, this should be read down by elimination.

9. The notification did not say that the mode of enjoyment would become lapsed by reason of any government action of abolition of excise duty in relation to banaspati product. The notification by implication and upon reasonable interpretation should mean that the balance amount of credit lying unadjusted when the mode of adjustment is rendered impossible by an act of the government, would be made available to the beneficiary in reasonable and fair manner. His further contention is that no refund clause in the scheme should mean that as long as it is possible to adjust the credit against the excise duty payable on the final product of banaspati, there will be no refund of enjoyment of credit in other manner but when that mode of utilisation or enjoyment will cease to be available by reason of action of the government, the accumulated credit will be made over in specie or to allow to adjust against excise duty payable in other excisable item of the producer of banaspati.

10. It appears at one point of time Mr. N.C. Roychowdhury and thereafter Mr. Pranotosh Mukherjee appeared on behalf of the Union of India, however, finally no lawyer on behalf of the Union of India appeared nor argued, therefore the hearing has to be concluded without having benefit of the submission of the lawyer of the Union of India.

11. Having heard Mr. Mitra and having considered document and material placed before me and the affidavit-in-opposition the following questions are to be addressed for decisions of this Court:

1. Whether the notification rescinding and/or withdrawing the Notification No. 45/89 can take away the benefit already granted in terms thereof or not, in other words credit which has already accrued in favour of the petitioners stood lapsed or not.

2. Whether in view of abolition of payment of excise duty on banaspati the petitioners are entitled to get any other mode of adjustment of the credit or not.

3. Whether the Notification No. 45/89 in so far as it relates to mode of adjustment of the accumulated credit can be read down that the accumulated credit could be adjusted.

12. As far as issue No. 1 is concerned I am of the view that the argument of Mr. Mitra has got force to hold that benefit of credit given by the Notification No. 45/89 cannot be taken away meaning thereby whatever credit accumulated in

the name of the petitioners cannot stand lapsed. This issue has authoritatively been decided by this Court in previous matter while dealing with issue of rescinding of earlier Notification being Nos. 27/87 and 192/87 by Justice Mrs. Pal on 25th July, 1991 (as Her Lordship then was). Her Lordship considering various judgments of the Supreme Court and High Court has been pleased to hold that the benefit cannot be taken away. I will simply reproduce language of Her Lordship here also :

"It cannot be said that on a construction of the notification that the word "rescind" or the word "withdrawn" by themselves have the effect of taking away the credit already granted and accrued in the asset is being withdrawn or rescind in the scheme and not the credit. The respondent's contention is that the word rescind and withdrawn relate to the credit is not acceptable on the basis of grammatical construction of the notification."

13. While holding so Her Lordship applied the principle of promissory estoppel. In the concluding portion of the judgment Her Lordship held the petitioners would be entitled to relief of the benefit available under Notification Nos. 45/89 and 46/89. Over and above I am of the view if the benefit already accrued is construed to have been taken away in view of rescinding of the notification, then it amounts to giving retrospective effect of an administrative order without mentioning date which is absurd proposition. It is settled law no retrospective effect can be given to an administrative order. Under these circumstances, I have no option but to hold that the petitioners are entitled to get the credit albeit rescinding of Notification No. 45/89 and it did not and does not lapse. So, first question is decided accordingly.

14. Next question remains whether petitioners can get other mode of adjustment of the accumulated credit otherwise than provided in the Notification No. 45/89. In this context, it is necessary to reproduce the relevant portion of Notification No. 45/89.

"1. The input, namely fixed vegetable oils of the description in column 2 of the table annexed and used in the manufacture of final product namely vegetable products falling under sub-heading No. 1504.00 of the schedule of the Central Excise Tariff Act, 1985 (5 of 86) and (2) the rates in the corresponding entry in column 3 of the table as the rate at which the credit may be granted for using of input in the manufacture of the final products for the purpose of Section AAA of Chapter V of the said Rules and stipulates that grant of credit of utilisation was in addition to the provisions of the said section be subject to the following conditions, namely :

(i) The credit shall be taken only in respect of quantity of oil subject to hydrogenation on or after 11th October, 1989 for the manufacture of the said final products of the credit shall be taken only on the date on which the oils has been so hydrogenated.

(ii) The credit taken during any calendar month shall be utilised for payment of

duty on the said final products only after commencing of the succeeding month.

(iii) The quantity of credit utilised for payment of duty of any individual clearance of the said final products shall not exceed one thousand per tonne of vegetable products cleared and the excess credit if any available in the credit amount shall not be refunded to the manufacturer or adjusted against or utilised for payment of duty on any excisable goods under any other circumstances."

15. The mode of utilisation of credit in terms of notification is only by way of adjustment of the Excise Duty leviable on the finished product banaspati to the extent of Rs. 1000/- per tonne.

16. The petitioners admittedly without any objection and demur had accepted this condition, stipulated in the aforesaid notification emanating benefit of credit. The notification did not compel any manufacturer to use specific minor oil as input of the finished product of banaspati. It was optional for the manufacturer concerned. Once such option is exercised, the conditions for benefit attached thereto are also deemed to have been accepted. The concerned manufacturer cannot back out therefrom. The consideration for using minor oils as a raw material to this finished product is exemption from payment of excise duty on the finished products to a certain limit. No other mode of adjustment nor refund of credit in terms of money is possible, simply it was neither agreed upon nor spelt out.

17. Now, the manufacturer need not pay any excise duty as the incidence of payment of excise duty has been removed altogether for the present keeping unadjusted credit outstanding, and making the product excise duty free.

18. It is true mode of liquidation of credit has been taken away, but it cannot be termed to be unconstitutional or arbitrary action, as the petitioners have not suffered at all. It is contended in the affidavit-in-opposition the scheme did not envisage any other mode of liquidation of credit. The question of refund does not arise firstly the scheme did not provide, secondly refund of credit presupposes realisation of the money. The credit is correlated to the excise duty leviable upon banaspati. No assurance was ever given that such benefit of credit could be extended otherwise than adjustment.

19. As far as the question of validity from the Constitutional point of view of the Notification No. 45/89 relating to "no refund" clause is concerned, I am of the view that the aforesaid notification is not a piece of legislation, rather it is policy decision. It is clear that the appropriate department adopted a policy to evoke interest in using minor oils instead of using major oils by extending certain benefit in the shape of partial exemption and/or remission of payment of excise duty. This policy decision as I have already observed has got no automatic binding effect upon any of the manufacturers, it will have binding effect only when the manufacturer concerned exercised option to use minor oils on the condition mentioned in the notification not otherwise. The notification does not affect any body's right, and if anyone has accepted all the conditions keeping

their eyes open cannot quarrel against unfavourable condition.

20. Therefore, the arguments of Mr. Mitra on the question of legality and constitutionality as against the aforesaid notification are absolutely misplaced here. The law Court cannot compel to formulate a policy decision to suit the purpose of a particular trader or manufacturer. The decision of this Court reported in *Sm. Shanti Devi Mehra and Others Vs. Gyan Prakash Mehra*, cited by Mr. Mitra is of no assistance to this Court, as in that case consent decree provided for mode of satisfaction, however such mode was subsequently found to be infructuous. Under such circumstances, it was possible for Court to provide different mode of satisfaction of the consent decree. In this case it is the Government who is to provide different mode, but not by intervention of the Court, but of its own accord.

21. Accordingly, I am unable to grant any relief in this writ petition excepting holding that credit accumulated and remaining unadjusted did not lapse but mode of adjustment stood extinguished. No tangible relief can be granted on this writ.

22. However, in future any excise duty is reimposed on the same product, then the petitioners will be entitled to exemption of excise duty to the extent of unadjusted credit in terms of earlier notification, because notification granting exemption benefit is not rescinded nor withdrawn. Before the entire legitimate credit amount could be adjusted, source of adjustment is done away with. It will be inequitable if accrued credit is allowed to be kept unadjusted. In the case of *Eicher Motors Limited and Another Vs. Union of India and Others Etc.*, , the Supreme Court in paragraph 4 therein observed amongst other "when on the strength of the rules available certain acts have been done by the parties concerned, incidents following thereto must take place in accordance with the scheme under which duty had been paid on the manufactured products and if such a situation is sought to be altered, necessarily it follows that right, which had accrued to a party such as availability of a scheme, is affected and, in particular, it loses sight of the fact that provision for facility of credit as good as tax paid till tax is adjusted on future goods on the basis of the several commitments which would have been made by the assessee concerned. Therefore, the scheme sought to be introduced cannot be made applicable to the goods which had already come into existence in respect of which the earlier scheme was applied under which the assessees had availed of the credit facility for payment of taxes. It is on the basis of earlier scheme necessarily the taxes have to be adjusted and payment made complete. Any manner or mode of application of the said rule would result in affecting the rights of the assessees".