

(1983) 04 BOM CK 0009

In the Bombay High Court

Case No : Special Civil Application (Writ Petition) No. 254/B/82

Leukoplast (India) Ltd.

APPELLANT

Vs

Union of India and others

RESPONDENT

Date of Decision : 27-04-1983

Acts Referred:

Central Excise Rules, 1944 — Rule 11

Central Excises and Salt Act, 1944 — Section 11B, 11B(1), 11B(4), 11B(5), 27

Citation : (1983) 14 ELT 2106 : (1983) 140 ITR 42(1)

Hon'ble Judges : G.F. Couto, J;B.C. Gadgil, J

Bench : Division Bench

Judgement

Gadgil, J.—The petitioner company has filed this petition for a writ directing the respondents, namely the Union of India and the Assistant Collector of Central Excise, to refund the amount of Rs. 17,72,048.75 P. on the ground that this amount was paid as Excise Duty under a mistake of law and that the petitioner be entitled to have it back.

2. The petitioner company is manufacturing an article known as LEUKOPLAST Zinc Oxide Self Adhesive Plaster B.P.C. This is an excisable article under the Central Excises and Salt Act, 1944. Before 1975 there was some dispute as to whether this article falls under Item 60. However, that aspect is not relevant for this petition. A residuary Item No. 68 was included in the Schedule in 1975. That entry provides certain Excise Duty for all goods not elsewhere specified in the Schedule. After this addition of residuary Item No. 68 the petitioner started paying the Excise Duty. The petitioner's case is that by reason of an Exemption Notification No. 55/75 the abovementioned article was not excisable. It is not in dispute that under this Exemption Notification all drugs, medicines, pharmaceuticals and drugs intermediates were entitled to exemption. However, it appears that the petitioner in ignorance of this Exemption Notification started to pay and continued to pay the Excise Duty for a long period right from 1975. The petitioner alleges that on 11-3-1980 a clarification was made by the Central Board of Excise and Customs showing that the article in question was entitled to

have an exemption. It is in this way that the petitioner learnt that no Excise Duty was payable on the said article. The petitioner on 14th November, 1981, filled a Classification List under the Rules showing that though the said article was falling under Item No. 68, still it was exempted under Notification No. 55/75. The respondent No. 2 approved the said classification. According to the petitioner, this would show that right from 1975 the petitioner was not liable to pay any Excise Duty on the article in question and that the said Excise Duty was paid earlier on account of a mistake of law. Petitioner made an application (Annexure "E") on 25-1-82 for the refund of the Excise Duty for a period from 8-6-1981 to 31-12-1981. The respondent No. 2 granted the said refund application on 3-3-1982 vide Annexure "H" to the petition. But this refund was to a limited extent. u/s 11B of the Act refund is permissible for a period of 6 months before the refund application. Respondent No. 2 therefore granted refund from 25-7-1981 to 31-12-1981. The petitioner then made another application in 1982 for getting a refund for the Excise Duty paid from 1-1-1979 to 25-7-1981. The total amount of Excise Duty paid is Rs. 17,72,048.75P. That application was rejected on 12th October, 1982 (vide Annexure "K") mainly on the ground that the refund claimed was barred by time. As the Excise Authorities refused to refund the amount, the petitioner has filed the present petition claiming the refund on the ground that the amount question was not payable or recoverable as Excise Duty and that it has been paid under a mistake of law, as the petitioner was not knowing about the Exemption Notification.

3. The respondents resisted the petition by filing their return. It is not necessary to give the details of all the averments in the return, as during the course of the arguments only a few points have been pressed before us. It was firstly submitted that the petitioner has not exhausted the remedies of appeal provided by S. 35B of the Act and, as such, no relief should be granted. The second contention is that by getting a refund as claimed in the petition, there will be a sort of unjust enrichment of the petitioner and that the Court should not help the petitioner to get such unjust enrichment. Lastly, it was contended that in view of S. 11B the petitioner would not be entitled to claim any refund if such a claim was made after the period of limitation of 6 months.

4. It is true that S. 35B of the Act has provided a remedy by way of an appeal to the Central Excise (Appeals) and thereafter to the Appellate Tribunal under S. 35H. In our opinion, however, filing of such appeals would have been a sort of exercise in futility, as the Appellate Authorities will have to consider the claim of the petitioner under S. 11B and such claim has to be rejected by these authorities as it is made after the limitation period of 6 months. In the present petition, the petitioner does not want that the Excise Authorities should exercise their powers under S. 11B. What is claim is that the petitioner is entitled to have back the amount paid under a mistake of law though the claim of refund under S. 11B may not be permissible before the Excise Authorities on account of a bar of limitation. In view of this peculiar position, we do not think that the respondents can successfully urge that the petition should be dismissed simply

because certain appeals contemplated by the Act have not been filed.

5. As far as the point of unjust enrichment is concerned, this Court has taken a view in a number of matters that the refund cannot be refused simply because the petitioner must have passed on the liability to the customers. We may refer to the two decisions of this Court reported in Maharashtra Vegetable Products Pvt. Ltd. and Another v. Union of India and Others 1981 E.L.T. 468 and Wipro Products Ltd. and Another v. Union of India and Another 1981 E.L.T. 531. In paragraph 11 of the case of Maharashtra Vegetable Products Pvt. Ltd., the Division Bench of this Court has held as follows :-

"The contentions that a direction issued by this Court under article 216 is likely to result in unjust enrichment of the petitioner, in our view, is required to be considered in two aspects. Firstly, a defence of unjust enrichment would not have been available to the Union in a civil suit. If the petitioners had filed a civil suit and if they establish that Excise Duty outside the Act has been recovered, the question as to whether they had passed on the burden to the consumers or not would not have been relevant at all for deciding the liability of the Union of India to refund the excess amount recovered. The moment excess amount is shown to have been recovered by the Union and a mistake of law which resulted in such payment by the petitioners is established, a decree for refund would have to follow irrespective of any consequence such as unjust enrichment"

In the second case, namely Wipro Products Ltd., the Division Bench has taken a similar view and held that the question of unjust enrichment is totally irrelevant while deciding a claim for refund of Excise Duty. Mr. Neurenkar for the respondents, no doubt tried to get over the abovementioned two decisions by submitting that while exercising the extraordinary jurisdiction of this Court we should refuse a refund when the petitioner has already recovered the amount of the Excise Duty from its customers. In fact, it is this very argument that is repelled by the abovementioned two decisions and it will be very difficult for the respondents to successfully resist the claim on the basis of this plea of unjust enrichment.

6. S. 11B was introduced by an Amendment of 1978 and it came into force in 1980. Prior to that, there was Rule 11 which has made a provision for refund. There are certain decisions of this Court as regards the claim for refund in the background of Rule 11. That rule and the new S. 11B are practically similar. We would like to reproduce S. 11B. It reads as follows :-

"S. 11B. - Claim for refund of duty - (1) Any person claiming refund of any duty of excise may make an application for refund of such duty to the Assistant Collector of Central Excise before the expiry of six months from the date of payment of duty :

Provided that the limitation of six months shall not apply where duty has been paid under protest.

Explanation. - Where any duty of excise is paid provisionally under this Act or the rules made thereunder the period of six months shall be computed from the date of adjustment of duty after the final assessment thereof.

(2) If on receipt of an such application, the Assistant Collector of Central Excise is satisfied that the whole or any part of the duty of excise paid by the applicant should be refunded to him, he may make an order accordingly.

(3) Where as a result of any order passed in appeal or revision under this Act refund of any duty of excise becomes due to any person, the Assistant Collector of Central Excise may refund the amount to such person without his having to make any claim in that behalf.

(4) Save as otherwise provided by or under this Act, no claim for refund of any duty of excise shall be entertained.

(5) Notwithstanding anything contained in any other law, the provisions of this section shall also apply to a claim for refund of any amount collected as duty of excise made on the ground that the goods in respect of which such amount was collected were not excisable or were entitled to exemption from duty and no court shall have any jurisdiction in respect of such claim.

Explanation. - For the purposes of this section, "refund" includes rebates of duty of excise on excisable goods exported out of India or on excisable materials used in the manufacture of goods which are exported out of India."

Rule 11 consisted of four Sub-rules. They together, would be similar to S. 11B(1) to S. 11B(4), Of course there is some difference of language, but the meaning is the same. The distinguishing feature of S. 11B is that sub-section (5) is a new one and R. 11 did not have any such provision. Thus, the decisions as regards the right of a claimant to get refund in spite of the existence of R. 11. would be equally relevant if we had to take into account the provisions of S. 11B(1) to S. 11(b)(4). The abovementioned two decisions of the Division Bench of this Court have considered the question as to whether R. 11 would come in the way of a petitioner for claiming refund even though the claimant had not filed any application for refund within the period of limitation prescribed by the Act. In the case of Maharashtra Vegetable Products Pvt. Ltd., the Division Bench has held as follows in paragraph 7 : -

"Para 7. - So far as the contention that the claim for refund is barred by Rule 11 of the Excise Rules, we may refer to a very recent decision of this Court in Associated Bearing Company Limited and another v. Union of India, Special Civil Application No. 2118 of 1976 decided on 5th March, 1980 - 1980 ELT 415, to which one of us was a party. The contention whether a claim for refund on the ground that certain items which were in the nature of post-manufacturing expenses were taken into account for the purposes of chargeability to Excise Duty falls within Rule 11 of the Excise Rules has been considered at length in that Decision. And it has been held that levy in such a case being wholly without

jurisdiction and outside the provisions by Section 3 of the Act would not attract the bar of limitation prescribed by Rule 11. The contention that the claim for refund must be negated in respect of a period in excess of one year must also stand rejected."

Similar view is expressed in the case of Wipro Products Ltd. It would thus be clear that S. 11B would not come in the way of the petitioner for claiming a refund if sub-section (5) is omitted from consideration.

7. Mr. Neurenkar relied upon sub-section (5) for the purpose contending that the Legislature has made a specific provision that the provisions of S. 11B would apply to a claim for refund of the Excise Duty on any of the two grounds, namely that the goods were not excisable or that the goods were entitled to exemption from Excise Duty. It was therefore urged on behalf of the respondents, that in view of this sub-section (5), the only remedy that is available to the petitioner is to make an application under sub-sec. (5) for claiming refund on the ground that the goods in question were entitled to an exemption under the Exemption Notification No. 55/75. As against this, it was urged by Mr. Hidayatulla that the provisions of sub-section (5) would not come in the way of the petitioner when the petitioner has approached this Court for exercise of the writ jurisdiction under Article 226 of the Constitution. It is true that sub-section (5) contemplates that no Court shall have jurisdiction to entertain a claim for refund of the Excise Duty. What is argued, however, is that though a suit, if filed by the petitioner, would be barred under sub-section (5), still the petitioner would be entitled to have an appropriate remedy by way of refund if he approaches the Court under Article 226 of the Constitution. Reliance was placed by the petitioner on the decision of the Supreme Court in the case of Custodian of Evacuee Property Punjab and Others Vs. Jafran Begum, . It was a matter arising out of the administration of Evacuee Property Act. S. 46 of that Act has provided that no civil or revenue Court would have jurisdiction to entertain and adjudicate upon any question whether a property is or is not an Evacuee Property. The jurisdiction of the civil and revenue Court has also been taken away with respect to certain other matters as mentioned in that Section. The respondent before the Supreme Court filed a writ petition in the High Court claiming certain reliefs and the Contention of the Custodian of Evacuee Property was that the respondent should have gone to the authorities under the said Act and that he had no right to approach the High Court under Article 226 of the Constitution as a specific and special provision had been made by prescribing a particular forum for deciding certain questions. The Supreme Court rejected this contention and it would be advantageous to reproduce certain observations of the Supreme Court as they appear in paragraphs 5 and 10 of the judgment :-

"Para 5. - A distinction must be made between jurisdiction of the High Court under Article 226 of the Constitution and Jurisdiction of civil courts about entertaining civil suits in matters of this kind. Whatever may be the interpretation of Section 46 to which we shall address ourselves presently, the

jurisdiction of the High Court under Article 226 of the Constitution is not and cannot be affected thereby.

* * * *

Para 10. - Here u/s 7 the Custodian has to decide whether certain property is or is not evacuee property and his jurisdiction does not depend upon any collateral fact being decided as a condition precedent to his assuming jurisdiction. In these circumstances, Section 46 is a complete bar to the jurisdiction of civil or revenue court in any matter which can be decided u/s 7.

* * * *

But as we have said already, Section 46 or Section 28 cannot bar the jurisdiction of the High Court under Article 226 of the Constitution, for that is a power conferred on the High Court under Constitution."

A similar view was taken by the Supreme Court in an earlier decision of *Bharat Kala Bhandar Ltd. Vs. Municipal Committee, Dhamangaon*, . Certain tax levied by the Municipality under the Municipal Act was challenged as not legally recoverable. It appears that the Municipal Act contained adequate provisions which would enable a party to obtain a redress. In that background, there was a controversy as to whether a party can approach the High Court under writ jurisdiction. The Supreme Court has held as follows in paragraph 30 :-

Para 30. - Moreover, we must bear in mind the provisions of Article 265 of the Constitution when preclude the levy or collection of a tax except by authority of law, which means only a valid law. There was no corresponding provision in the various Acts for the governance of India which preceded the Constitution. Under Article 226 the Constitution has provided a remedy to a citizen to obtain redress in respect of a tax levied or collected under an invalid law. This remedy will not be affected by any provision like S. 67 of the Indian Income Tax Act or like S. 84(3) of the Municipalities Act."

Mr. Hidayatulla also relied upon two more decisions of the Supreme Court, namely in *In re : The Kerala Education Bill, 1957* reported in AIR 1958 S.C. 956 and *Murarilal Sarawagi and Others Vs. The State of Andhra Pradesh*, . It is, however, not necessary to consider these cases, particularly when they also lay down the same principle.

8. Mr. Neurenkar, however, contended that the above-mentioned decisions will be no help to the petitioner, as according to him there are certain decisions of the Supreme Court which show that the High Court or the Supreme Court would grant relief only when the petitioner or the claimant has made out a case that he is entitled to a refund as per the provisions of a particular enactment. He relied upon the decision of the Supreme Court in the case of *Madras Rubber Factory Ltd. Vs. The Union of India (UOI) and Others*, . It was case under the Customs Act, S. 27 of the Act has made provision for refund of duty. That section is similar to R. 11 or S. 11B of the Central Excises and Salt Act, S. 27 has also prescribed a

period of limitation for making an application and when the matter went to the Supreme Court, the Supreme Court has held as follows :-

"The appellant's case was governed by sub-section (1) of Section 27. No case of any running account was set up by the appellant nor was there anything in the records of this case to substantiate it. Custom duty was paid in respect of each of the five consignments on the date of its respective bill. Ultimately this position could not be disputed before us. The appellant, however, contended that the duty was paid always under general protest which covered the cases of these five consignments also. Hence under the proviso to sub-section (1) the limitation of six months does not apply."

The Supreme Court in the latter part of the judgment has observed that a claim made before it would not be permissible as the view taken by the Customs Authorities about the bar of limitation was quite correct. It was urged by Mr. Neurenkar that this decision would mean that the claim of refund will be governed by the restrictions of a particular section which has particular effect. It is however material to note that in the matter before the Supreme Court the concerned party has not initially moved the High Court under Article 226 of the Constitution or the Supreme Court under Article 32. The matter was taken up before the Supreme Court under Articles 136 of the Constitution directly from the order passed by the Central Government. In such matters it is necessary to bear in mind that the jurisdiction of the Appellate Authority would be limited to the jurisdiction of the authority which has passed the original order. The question as to whether a refund is permissible even if a claim is made beyond the period of limitation, could not have been decided by the Central Government in favour of the petitioner in view of the fact that there was a specific provision under the Act that the claim must be made within time. When the matter went to the Supreme Court, the Supreme Court considered this period of limitation as it was exercising a jurisdiction not under Article 32 of the Constitution. The fact that the concerned authority would ordinarily exercise the jurisdiction that was invested in the original authority can very well be seen from the decision of the Supreme Court in the case of *Raja Bahdur Kamakhya Narain Singh Vs. The Commissioner of Income Tax, Bihar and Orissa*, . It would not therefore be correct for Mr. Neurenkar to urge that whenever a provision for refund has prescribed a period of limitation the High Court or the Supreme Court would not be able to grant relief (after that period of limitation was over), if the recovery was illegal. The other case on which Mr. Neurenkar has relied upon is of *Burmah Construction Co. Vs. The State of Orissa and Others*, . It was a claim for refund of Sales Tax S. 14 of the Orissa Sales Tax Act has made a provision that a refund would be permissible if a claim is made within a prescribed period of 24 months. The petitioner did not lodge such a claim within time. It was rejected. The petitioner therefore filed a writ petition in the Orissa High Court. It was also rejected and when he took the matter before the Supreme Court the Supreme Court found that the petitioner was not entitled to a refund. There are certain observations in the judgment of the Supreme Court suggesting that the rejection of the claim on

the ground of bar of limitation was quite legal. Mr. Neurenkar relied upon these observations for the purpose of contending that even in a writ petition the provisions of limitation contained in a statute would be binding upon the claimant. No doubt prima facie such an impression is likely to be created. However, it is material to note that in the writ petition that was filed before the High Court, the petitioner has claimed for the enforcement of a liability of the Sales Tax Authorities imposed on them by a statute to refund the tax as per the provisions of the Act. Thus, though the matter was under Article 226 of the Constitution, the jurisdiction of the High Court that was invoked was for a limited purpose of asking the authorities under the Sales Tax Act to act in terms of that Act. It is in that background that the Supreme Court has held the claim has to be rejected as under the Act the claim was required to be made within prescribed period of limitation.

9. The above-mentioned discussion would therefore show that while exercising jurisdiction under Article 226 of the Constitution restrictions as to limitation would not come in the way of the petitioner for getting appropriate relief. Mr. Hidayatulla is right when he contends that the existence of Sub-section (5) in S. 11B would not make any difference particularly when the petitioner has approached this Court under Article 226 of the Constitution.

10. The net result is that the petitioner would be entitled to the refund of the amount in question. Mr. Hidayatulla contends that it would be appropriate if certain time is prescribed for the refund of the amount and we think that a period of two months will be alright. The rule is made absolute by directing the respondents to refund the amount of Rs. 17,72,048.75 P. to the petitioner within a period of 2 months from today, together with the costs of the petition. At this stage Mr. Neurenkar made an oral application for the grant of a certificate under Article 133(1)(a) that the matter involves a substantial question of law of general importance. We, however, do not think that any such certificate is necessary to be issued. The oral request is rejected.