
(1994) 01 MAD CK 0084

In the Madras High Court

Case No : Writ Petition No. 5036 of 1988

Medopharma

APPELLANT

Vs

Supdt. of Central Excise, Madras

RESPONDENT

Date of Decision : 27-01-1994

Acts Referred:

Central Excise Rules, 1944 — Rule 52A, 57, 57A, 57G, 57G(2)
Central Excises and Salt Act, 1944 — Section 11A

Citation : (1994) 70 ELT 505

Hon'ble Judges : Kanakaraj, J

Bench : Single Bench

Advocate : Mr. R. Kishnamoorthy, for the Appellant; Mr. K. Jayachandran, Addl. Central Govt. Standing Counsel, for the Respondent

Judgement

1. All these writ petitions relate to the propriety of claiming Modvat Credit on the inputs purchased by the petitioners from the open market without properly complying with Rule 57-G of the Central Excise Rules. The writ petition have been filed at various stages of the proceedings initiated by the respondents. W.P. No. 5036 of 1988 has been filed by Medopharm, a partnership firm, challenging the order dated 7-3-1988, which is only a show cause notice seeking to recover the amount of Modvat Credit wrongly availed of, and proposing to impose penalty for the violation of the Rules.

2. W.P. No. 9006 of 1988 has been filed by the said Medopharm represented by its Managing Partner questioning the order of the first respondent dated 8-2-1988 made on an appeal, confirming the demand for the amount of Modvat Credit wrongly availed of by the petitioner and imposing a penalty for the violation of the Rules. W.P. No. 9007 of 1988 has been filed by Medopharm Pharmaceuticals by its Proprietrix against a similar order dated 8-2-1988 made by the Collector of Central Excise (Appeals). W.P. No. 9008 of 1988 has been filed by the said Medopharm represented by its partner against the order 8-2-1988 made by the Collector of Central Excise (Appeals). W.P. No. 9009 of 1988 has

been filed by Managing Partner of Medopharm, against the order dated 8-2-1988 made by the Collector of Central Excise (Appeals). W.P. No. 9010 of 1988 has been filed by Medopharm Laboratories represented by its Proprietrix against the order dated 8-2-1988 made by Collector of Central Excise (Appeals) W.P. No. 10430 of 1988 has been filed by Medopharm Laboratories represented by its Proprietrix against the order dated 30-3-1988 made by the Collector of Central Excise. W.P. No. 10431 of 1988 has been filed by Medopharm Pharmaceuticals represented by its Proprietrix against the order of the Collector of Central Excise (Appeals) dated 17-5-1988. W.P. No. 10511 of 1988 has been filed by Alfred Berg & Co. (I) Private Limited, represented by its Director, for a Declaration to declare first proviso to Rule 57G(2) of Central Excise Rules, 1944, as unconstitutional. W.P. No. 9674 of 1989 has been filed by Medopharm, a partnership firm, for a mandamus to forbear the respondents from disallowing Modvat credits in respect of inputs purchased in the open market.

3. All the writ petitions can be disposed of if we decide the issue raised in W.P. No. 10511 of 1988 seeking to declare the first proviso to Rule 57G(2) of the Central Excise Rules, 1944 as unconstitutional. This is because if this Rule is strictly enforced the impugned show cause notice and other impugned orders are unimpeachable. Learned Senior Counsel Mr. R. Krishnamoorthy, appearing for the petitioners, has argued alternatively that even if the first proviso to Rule 57G(2) of the Central Excise Rules is not invalidated, the said first proviso must be read down to give a meaning in favour of the petitioners and upholding their right to avail of Modvat credit notwithstanding the failure to file the documents required under the said Rule.

4. The case of the petitioners as set out in W.P. No. 5036 of 1988 may be noticed to understand the scope of the proceedings. The petitioners are said to be a manufacturer of patent or proprietary medicines classified under Chapter 30 of the Central Excise Tariff. In the year 1986, the Central Government introduced a scheme known as Modvat, under which a manufacturer is allowed to take credit for the Excise-duty paid on the inputs and deduct the same from the excise duty payable on the final products. Rules 57A to 57P of the Central Excise Rules (hereinafter called "the Rules") deal with the procedure for availing the credit. Rule 57G enjoins upon the petitioner to send a declaration to the Assistant Collector of Central Excise indicating the final product and the inputs to be used in the manufacturer of the same and also to get an acknowledgment from the Assistant Collector. The petitioners claim that they had filed such a declaration and obtained the acknowledgment. Consequently, they availed of the Modvat credit. Rule 57G lays down that the payment of duty on the inputs should be proved by Gate-passes or A.R. 1 forms or Bill of Entry or any other document. Rule 57G(4) lays down that monthly returns are to be submitted to the Superintendent of Central Excise and the documents evidencing payment of excise duty on the inputs should be made available for inspection. It is the contention of the petitioners that they have been submitting such returns. It is stated that in respect of certain inputs purchased are also covered by gate

passes. In respect of purchase of printed boxes, Polythene jars and corrugated boxes from various persons in the open market the necessary documents were not filed. The further contention is that paper and paper board which go into the manufacturer of the Boxes and are excisable goods and they would have suffered excise duty at the time of removal from the factory. The dealers who make the boxes cannot be expected to have the gate-pass entry. Similarly, polythene jars are excisable goods and if these jars are purchased from a factory, then only gate-passes will be available. The petitioners contend that they purchased these goods (inputs) from dealers and not from manufacturers. The petitioners are small scale industries and they cannot directly buy from manufacturers. Therefore, they contend that only the available documents were produced before claiming the Modvat Credit. Long after the availing of the Modvat credit the respondents had started taking proceedings for expunging the credit. The main complaint against the petitioners is that they did not produce the gate-passes in proof of payment of excise duty on the inputs. Rule 57-G which refers to gate-passes of A.R. 1, a Bill of Entry cannot be strictly applied to the case of the petitioners because gate pass and A.R. 1 are issued only when the goods are purchased from a factory. The question of Bill of Entry will arise only in the case of imports of goods. Only when goods are purchased from a factory a Gate Pass or A.R. 1 is issued and goods can be purchased from a factory only when a person does a large scale business. Small manufacturers like the petitioners cannot purchase such inputs from factory and they can only buy from dealers. It is on these facts that the petitioners contend that the proviso the Rule 57G of the Rules must be either struck down or read down in such a way as not to insist on Gate Pass or A.R. 1 in all cases.

5. It is well-known that certain goods incur excise-duty even though they are made out of duty paid goods. To avoid the incidence of duty on duty or what is called the cascading effect, several scheme had been introduced. The proforma credit scheme did not take care of several situations and therefore, a Modified Value Added Tax system was devised which follows the Vat scheme of taxation. The Vat scheme of taxation means that there shall be a further charge of duty, only on the value added. This is what is called the Modvat scheme. This scheme was introduced in the year 1986 and the Central Excise Rules 57A to 57P govern the manner and method of availing of the Modvat Scheme. Rule 57G prescribes the procedure to be observed by a manufacturer intending to take credit of the duty paid on inputs. Rule 57A sub-rule (1) says that he shall file a declaration with the Assistant Collector of Central Excise indicating the description of the final products manufactured in his factory and the inputs intended to be used in each of the final products. Under sub-rule (2) he has to get acknowledgment of filing such a declaration and then take credit of the duty paid on the inputs received by him. The proviso which is the bone of the contention in these batch of writ petitions is as follows :-

"Provided that no credit shall be taken unless the inputs are received in the factory under the cover of a Gate Pass, an A.R. 1, a Bill of Entry or any other

document as may be prescribed by the Central Board of Excise and Customs (constituted under the Central Boards of Revenue Act, 1963 (54 of 1963) in this behalf evidencing the payment of duty on such inputs."

From A.R. 1 is the application for removal of excisable goods on payment of duty. Rule 52-A says that no excisable goods shall be delivered from a factory except under a Gate Pass signed by the owner of the factory and countersigned by the proper officer. Mr. R. Krishnamoorthy learned Senior Counsel for the petitioners, submits that there is no nexus between the requirements of the proviso with the objects sought to be achieved under the Modvat scheme. According to him, requirements and the proviso are unreasonable and discriminatory. He further contends that there is a presumption that such goods, as are used by the petitioners as inputs, had already suffered excise duty. Further it is unreasonable to expect such small manufacturers to prove that the inputs had suffered excise duty under cover of a Gate Pass or A.R. 1 form to evidence the payment of duty on such inputs. The allegation of discrimination is based on a notification, Order No. 342/1/88-TRU dated 12-7-1990 in and by which in respect of certain inputs specified in the order the excise duty was deemed to have waived and credit may be allowed for the specified duty. This notification was necessitated on the basis of certain representation received from the trade which were duly considered by the Government. I must straightway reject the contention of the petitioners based on Article 14 of the Constitution of India because it is well known that in a taxing statute each class of goods is treated separately for the purpose of incidence of tax. Therefore, if certain persons engaged in a particular trade had made representations in respect of the difficulties experienced by them and such difficulties had been considered by the Government and an exemption is granted regarding the applicability of a particular Rule, the same cannot be questioned as amounting to discrimination. Nor can the traders in other goods claim a similar exemption automatically. It is always open to them to make representations to the Government and seek a proper exemption if they are so entitled to.

6. On the question of unreasonableness and the proviso not being having any nexus to the objects of the scheme, I do not agree with the arguments advanced on behalf of the petitioners. I have already explained the Modvat scheme and the Scheme is to prevent a duty on duty or to prevent the cascading effect of excise duty at various stages. Therefore, the primary requirements for the applicability of the scheme is to prove the payment of duty at one stage, for a person to claim credit for the same at a subsequent stage. It is therefore, idle to contend that the proviso which requires proof of payment of duty on inputs by certain well known methods like the production of Gate Pass or A.R. 1 forms, is arbitrary or unreasonable. The difficulties which are projected by the petitioners cannot be taken note of by a Court which is concerned only with implementation of the statute. Where the statute is mandatory, the Court cannot take note of the difficulties of the parties and give relief. As I have already pointed out if the petitioners encounter any difficulty in the application of the scheme it is for them to make representations to the appropriate Government and seek to get the

relief.

7. I will now refer to the authorities relied on by the learned counsel for the petitioners in respect of the relief sought for. Vapson Products and another Vs. Union of India and others, relates to the satisfaction of the assessee of an exemption notification. It is with reference to the said notification that the Bombay High Court held that a customer who was purchasing the goods in the open market need not secure documents for establishing the actual payment of excise duty from the vendor. This judgment has been rendered in a totally different context and cannot be applied to the present case. FMC Stellan Ltd. v. CCE, Allahabad 1993 44 ECR 215 a judgment of the Tribunal relates to the credit of inputs received during transitional period between 1-3-1986 to 31-3-1986. Rule 57H is a transitional provision which provides for allowing credit of duty paid on inputs received by a manufacturer immediately before obtaining the dated acknowledgement of the declaration made under Rule 57G provided certain conditions are satisfied. We are not concerned with such a case. Therefore, this decision does not advance the case of the petitioners. 1992 (42) ECR 246 also relates to the goods covered by the deeming provision and therefore, cannot be relied upon by the petitioners. Aluminium Industries Limited v. Collector of Central Excise, Cochin 1963 65 E.L.T. 460 : 1993 21 ETR 498 relates to a procedural infraction and cannot be equated to the non-fulfilment of the requirements under proviso to Rule 57G. Thermal Coatings (Private) Limited, New Delhi v. Collector of Central Excise, New Delhi 1993 3 E.L.T. 176 : 1993 21 ETR 121 relates to substantial compliance of sub-section (1) of Section 57G relating to the filing of a declaration. The Tribunal had taken note the classification list filed by the assessee and the subsequent correspondence to hold that there was a substantial compliance of sub-section (1) of Section 57G.

8. The result of the above analysis shows that there is no judgment which holds that a requirement under proviso to Rule 57G need not be complied with or deemed to be complied with in certain circumstances. I do not think that by applying the principles of "reading down a provision of law" the Court can give a go-bye to the very requirements. Such an interpretation is not called for. Consequently, I reject the contention that the impugned proviso to Rule 57G is neither unconstitutional or can be read down to suit the convenience of the petitioners.

9. In respect of some of the cases there is a further argument that the respondents have no jurisdiction to issue the show cause notice or pass an order seeking to recover the credit already availed by the petitioners. This argument is based on Rule 57-I. Sub-rule (1) of Rule 57-I is as follows :-

"Rule 57-I. Recovery of credit wrongly availed of or utilised in an irregular manner :- (1)(i) Where credit of duty paid on inputs has been taken on account of an error, omission or mis-construction, on the part of an officer or a manufacturer, or an assessee, the proper officer may, within six months from the date of such credit, serve notice on the manufacturer or the assessee who has

taken such credit and where the credit has already been utilised, why the amount equivalent to such credit should not be recovered from him :

Provided that where such credit has been taken on account of wilful misstatement, collusion or suppression of facts on the part of a manufacturer or an assessee, the provisions of this clause shall have effect as if for the words "six months" the words "five years" were substituted."

The petitioners also rely on Section 11A of the Central Excises and Salt Act for the proposition that a demand for duty, short paid or not paid can be made within six months from the relevant date. The petitioners therefore, contend that the period of limitation runs from the date of filing the return. Therefore if at all the respondents could have made a demand only on or before 30-9-1986. This contention is met by the learned counsel for the respondents by referring to one of the impugned orders namely, the order dated 27-10-1987 made by the Assistant Collector in W.P. No. 9006 of 1988. The following sentence is referred to :-

"The R.T. 12s of M/s. Medopharm have been assessed provisionally pending verification of their MODVAT records (in support of the credit taken) which were not produced by them and pending finalisation of the classification list No. 1/86-87."

The authorities have therefore, held that since R.T. 12s have been assessed provisionally the contention that the issue is time barred was not acceptable. It is pointed out by the learned counsel for the respondents that this position is the same in all other writ petitions wherein a demand had been made.

10. In appreciating the rival submissions on the question of limitation it is necessary to notice a few more facts. For example, I will refer to the order in original dated 27-10-1987 which was confirmed by the Appellate Authority on 8-2-1988, which stands challenged in W.P. No. 9006 of 1988. It is only on the verification of the R.G. 23A Part I and II furnished by M/s. Medopharm, it was noticed that they had taken credit in a sum of Rs. 4,16,012-10 claiming the same as the duty involved in the input stock held as on 1-3-1986. They had availed the credit even before availing and obtaining permission under Rule 57H of the Rules. They applied under Rule 57H only on 29-3-1986. The respondents therefore, asked the petitioners to produce documentary evidence for the credits taken by them. In fact they were asked to pay duty by writing several letters. The petitioners were writing letters claiming that the inputs were deemed to have suffered duty and therefore, they had the credit in their RG 23A forms. On one occasion they had stated that they were under the impression that the Government policy enabled them to take credit for the duty suffered on the inputs. By a letter dated 14-2-1987 they took a stand that no quasi judicial order can be passed without a show cause notice. It was under these circumstances a show cause notice dated 29-6-1987 was issued directing the petitioners to show cause as to why

"(1) the R.T. 12 assessment for the months 3/86 to 12/86 should not be finalised to the extent of wrong availment of MODVAT credit without prejudice to the department stand as mentioned in the show cause notice C. No. V/14E/17/11/86 VC dt. 26-6-1986.

(2) the amount of Rs. 4,78,250-02 (Rs. 4,16,012.10 + Rs. 48,624.51 + 13,613.41) being the amount of wrong credit availed should not be demanded under rule 57-I.

(3) why a penalty should not be imposed under rule 173Q for the contravention of rules mentioned above."

It is clear from the above facts that the petitioners had availed of the credit without any permission from the authorities and therefore, the question of limitation either u/s 57-I or Section 11A of the Act will not at all arise. Consequently I hold that the plea of limitation based on Section 11A of the Act or under Rule 57-I of the Rules cannot be substantiated. Certain decisions have been cited with regard to the plea of limitation and I do not propose to refer those decisions because the factual basis for the plea of limitation, does not exist. The only argument advanced on behalf of the petitioners, is that there was no question of any provisional assessment and the respondents having accepted the claim for credit cannot now turn round and say that it was only a provisional assessment. This argument cannot be accepted because the petitioners have taken credit on inputs which are not supported by the duty paying documents and also without waiting for the permission of the Assistant Collector to be granted under Rule 57H. In this view of the matter neither Rule 57-I nor Section 11-A will come to the aid of the petitioners.

11. For all the above reasons, no relief can be granted in any of the writ petitions and all the writ petitions are dismissed. However, there will be no order as to costs.