

(2016) 05 GAU CK 0053
In the Gauhati High Court
Case No : Writ Appeal No. 223 of 2011.

M/s. Dharampal Satyapal Ltd. - Appellant @HASH Union of India and Others

Date of Decision : 25-05-2016

Acts Referred:

Central Excises and Salt Act, 1944 — Section 5A(1)

Citation : (2016) 6 GauLJ 112 : (2016) 4 GauLT 1181

Hon'ble Judges : Ajit Singh, CJ. and Suman Shyam, J.

Bench : Division Bench

Advocate : Dr. A.K. Saraf, Sr. Advocate and Mr. A. Goel, Advocate, for the Appellant; Mr. S.C. Keyal, Asstt. SGI, for the Respondents

Final Decision : Allowed

Judgement

Suman Shyam, J.(Oral) - Heard Dr. A.K. Saraf, learned Sr. counsel assisted by Mr. A. Goel. learned counsel appearing on behalf of the appellant. Also heard Mr. S.C. Keyal, learned Asstt. SGI appearing on behalf of the respondent Nos. 1 to 4 as well as Ms. B. Sarma Goel, learned Sr. Govt. Advocate representing respondent No. 5.

2. This intra court appeal is directed against common judgment and order dated 10.12.10 passed by the learned Single Judge in W.P. (C) No. 749/2010 as well as W.P.(C) No. 750/2010 repelling the challenge made to the notifications No. 11/07-CE dated 1.3.2007 and No. 21/2007-CE dated 25.04.2007 withdrawing the exemption of excise duty in respect of the products covered by the respective notifications.

3. The brief factual background of the case is that the Govt, of India had earlier issued the "New Industrial Policy and other concessions for North Eastern Region. 1997" which was notified by the office memorandum No. EA/1/2/96-IPD dated 24.12.1997 announcing incentives by way of central excise and income tax exemption on various excisable commodities/goods including pan masala, with or without tobacco, for a period of 10 years from the date of commencement of the production or the date of issuance of the notification, whichever was later. The

purpose of announcing the incentives under the new Industrial Policy was to promote industrialization in the northeastern region with a view to remove the economic backwardness of the region. Thereafter, on 08.07.1999 the Central Government had issued notification No. 32/1999-CH and 33/1999-CE in exercise of powers conferred under sub-section (1) of Section 5 A of the Central Excise Act, 1944. The notification No. 32/1999-CK provided for exemption from payment of excise duty to goods specified in the First Schedule and the Second Schedule of the Central Excise Tariff Act, 1985, in respect of goods cleared from a units located in the Growth Centre or Integrated Infrastructure Development Centre or Export Promotion Industrial Park or Industrial Estates or Industrial Area or Commercial Estate as specified in Annexure to the aforesaid notification and the exemption from payment of excise duty was made available in respect of such units which had commenced commercial production on or after 24.12.97 or in respect of those industrial units which existed before 24.12.1997 but undertook substantial expansion by way of increase in installed capacity to the extent of 25% or more. The notification No. 33/1999-CE covered exemption from payment of excise duty in respect of goods specified in the schedule to the notification and cleared from units located in the State of Assam or Tripura or Meghalaya or Mizoram or Nagaland or Arunachal Pradesh. However, soon thereafter, the benefit of exemption pertaining to tobacco products, which was earlier made available under the notification Nos. 32/1999-CE and 33/1999-CE7., were withdrawn on 31.12.1999 only to be restored again by a separate notification No. 45/1999-CE issued on 17.01.2000. From the period in between 17.01.2000 to 21.01.2004 several notifications had been issued by the Central Excise Department withdrawing the benefit upon the tobacco products including cigarette and thereafter again partially restoring the same until such time notification No. 8/2004-CE dated 21.01.2004 was issued permitting exemption of 100% excise duty in respect of tobacco products including chewing tobacco, subject to the condition that the exempted amount shall be invested by the manufacturers in the plant and machinery in a manufacturing unit located in the northeastern region as well as in infrastructure or civil work or social work in those States. However, the withdrawal of exemption in respect of cigarette attained finality once the constitutional validity of the Section 154 of the Finance Act, 2003 was upheld by the Supreme Court in the case of R.C. Tobacco (P) Ltd. v. Union of India, (2007) 5 SCC 725. In this manner the Central Govt, had restored the exemption granted under the notification No. 32/1999-CE and notification No. 33/1999-CE in all products, save and except cigarette, subject to the condition as imposed under the notification dated 21.01.2004. While the said position was holding field and the Industrial Policy of 1997 was coming to an end, the Department of Excise had issued notification No. 11/2007-CE dated 01.03.2007 withdrawing the exemption granted under the notification No.8/2004-CE to the pan masala containing tobacco and chewing tobacco.

4. On 01.04.2007 the North East Industrial and Investment Promotion Policy (NEIIPP), 2007 was announced by the Govt, continuing with the various

subsidies/exemption granted under the previous Industrial Policy. However, a negative list was provided in the policy of 2007, inter-alia, covering all goods falling under Chapter 24 of the First Schedule of the Central Excise Tariff Act, 1985 so as to include all tobacco products and manufactured tobacco subsidies as well as pan masala as covered under Chapter 21 of the First Schedule to the Central Excise Tariff Act, 1985. Consequently, a separate notification bearing No. 21/2007-CE dated 25.04.2007 was issued by the Department of Central Excise withdrawing the exemption granted to pan masala under the original notification No. 32/1999-CE making it clear that the exemption shall not be available w.e.f. 31.03.2007.

5. Being aggrieved by the notification dated 25.04.2007, with which we are concerned in the present appeal, the appellant had approached this Court by filing W.P.(C) No. 749/2010. Likewise notification dated 01.03.2007 bearing No: 11/2007-CE was put to challenge in W.P.(C) No. 750/2010. It would be pertinent to note herein that both the notification dated 01.03.2007 as well as 25.04.2007 owe their origin to the Industrial Policy of 1997 as well as the Notifications No 32/99 CE and 33/99CE and have come into existence through a similar process-the only difference being that the notification dated 01.03.2007 covers pan masala containing tobacco and chewing tobacco whereas the notification dated 25.04.2007 is confined to pan masala without tobacco products falling under Chapter 21 of the First Schedule to the Central Excise Tariff Act, 1985.

6. By the common judgment and order dated 10.12.2010 the learned Single Judge had dismissed both the writ petitions, inter alia, holding that since the products covered by the impugned notifications were included in the negative list and in view of the fact that the policy of 2007 has not been assailed by the writ petitioners, the Central Govt, was not estopped from revoking the exemption granted earlier since the recourse was taken by following the warrant of public interest.

7. The common judgment and order dated 10.12.2010 was taken in appeal by the present appellant in the W.A. No. 81/2011 which was allowed by the Division Bench of this court by the judgment and order dated 20.04.2016. In the judgment dated 20.04.16 passed in W.A. No. 81/2011 the Division Bench has held that the notification impugned therein i.e. No. 11/2007-CE was hit by the doctrine of promissory estoppels and was not sustainable in law. The observations of the Division Bench made in the judgment and order dated 20.04.2016 are quoted herein below for ready reference:-

"26. Thus, in our opinion, prima facie, the impugned Notification No. 11/2007-CE is hit by the doctrine of promissory estoppels for the following reasons:-

(a) By the North East Industrial Policy, 1997 implemented by the Notifications No. 32-1999-CI: and No. 33-1999-CE, a promise was held out by the respondent authorities that excise and additional excise exemptions would be given to those investors who started production of identified goods for a period of ten years;

(b) The appellant believed that the promise was true and, if acted upon, would be entitled to a refund of excise duty, and had, therefore, acted upon such promise; and

(c) While acting upon such promise, the appellant altered its position by investing sixty-nine crores of rupees in land, buildings, plants and machineries, office equipments, vehicles and stocks.

(d) The authority issuing the Notifications Nos. 11/04-CE and 28/04-CE acted within the scope of his authority.

(e) The impugned Notification No. 11/07-CE is ultra vires Section 5A of the Excise Act and is, therefore, not operative; there is thus no difficulty in invoking the doctrine of promissory estoppel.

27. It is not, however, necessary for the appellant to further prove that any damage, detriment or prejudice was caused to it by making such investment. What is now to be seen is whether there is over riding public interest compelling the State-respondents to withdraw the benefits already extended to the appellant and whether it may still be within the competence of the respondent authorities to resile from the promise on giving reasonable opportunity of resuming the position of the appellant even where there is no such overriding public interest provided, of course, it is possible for the appellant to restore the status quo ante, but if that is not possible, the promise would become final and irrevocable. As already held by the Apex Court in Motilal Padampat Sugar Mills Co. Ltd. (supra), this Court will not act on the mere ipsi dixit of the Government, for it is the Court which has to decide and not the Government whether the Government should be held exempt from liability. This is the essence of the rule of law. The burden would be upon the Government to show that the public interest is so overwhelming that it would be inequitable to hold the Government bound by the promise and the Court will insist on a highly rigorous standard of proof in the discharge of this burden. The main reasons given by the respondent authorities are found at para 4(xi) to (xiv) of their counter-affidavit, namely, (i) the appellant misutilized the escrow account in respect of its investment. During the period w.e.f. 25.8.2003 to 21.1.2004 i.e. the period between the Notification No. 69/03 dated 25.8.2003 and the Notification No. 8/04-CE dated 21.1.04 which is known as pre-escrow period, the appellant is shown to have invested Rs. 100 crores out of which only an amount of Rs. 34 crores was certified by the Investment Appraisal Committee to have been invested and (ii) the Industrial Policy Resolution dated 1.4.2007 issued by the Ministry of Industry and Commerce inserted negative list which included tobacco products and pan masala enabling the withdrawal of these two items from tax exemption with retrospective effect in public interest taking into account health hazard and various other factors.

28. In so far as the impact of negative list is concerned, there is no difficulty in holding that these two items are still entitled to exemption inasmuch as towards

of the end of the North East Industrial and Investment Promotion Policy, 2007 (NEIP, 2007) i.e. Clause 2, it is clearly provided that industrial units which had commenced commercial production on or before 31.3.2007 will continue to get benefits/incentives under the NEIP, 1997 notwithstanding the inclusion of tobacco products and pan masala among the negative lists as items ineligible for benefits under NEIP, 2007. Indisputably, the units of the appellant had commenced commercial production on or before 31.3.2007. This is evident from the Office memorandum dated 1.4.2007 which categorically stated that industrial units which had commenced commercial production on or before 31.3.2007 would continue to get benefits/incentives under NEIP, 1997. Under the circumstances, the right of the appellant to get benefits/incentives made available under the Notifications No. 11/04-CE and 28/04-CE cannot be abrogated by the impugned Notification. Once it is found that the appellant has admittedly acted upon the promise held out by the respondents in the Notifications No. 11/04-CE and 28/04-CE and made some investment, though the quantum whereof is not ascertainable at this stage as will be evident hereafter, it may not no longer be possible to restore the status quo ante. Therefore, the State-respondents are barred by the doctrine of promissory estoppels from issuing the impugned Notifications No. 11/2007-CE dated 1.3.2007 withdrawing full and partial exemption of excise and excise tariff extended to the appellant made available to it by the Notification No. 8/2004-CE dated 21.1.2004 and Notification No. 28/2004-CE dated 9.7.2004....."

8. Since the notifications dated 1.03.2007 as well as 25.04.2007 arise out of the similar transactions and under similar circumstances the only difference being that the former notification applies to the pan masala containing tobacco whereas the notification dated 25.04.2007 relates to pan masala without tobacco, we are of the opinion that the ratio of the decision rendered by the Division Bench in W.A. No. 81/2011 would be squarely applicable even in the facts of this appeal and will be binding upon this court.

9. Although the learned counsel for both the parties have advanced elaborate arguments on the merit of the case by citing numerous authorities in support of their respective contentions, yet, for the reason stated above, there is no scope for this court to enter into the merit of such contentions since the said issues would be covered under the judgment and order dated 20.04.2016 passed in Writ Appeal No. 81/2011. As such, we are left with no other option but to allow this writ appeal. We accordingly, allow the appeal by quashing the impugned order dated 10.12.2012 passed by the learned Single Judge in W.P.(C) No. 749/2010 as well as the Notification dated 25.04.2007. The respondents are, therefore, directed to refund the excise duty component to the appellant as per its entitlement under the law.

10. There would be no order as to cost.