

(1990) 10 KAR CK 0031
In the Karnataka High Court
Case No : Writ Petition No. 11366 of 1986

M/s. Eros Pharma

APPELLANT

Vs

Assistant Collector of Central Excise, Bangalore and Another

RESPONDENT

Date of Decision : 09-10-1990

Acts Referred:

Central Excises and Salt Act, 1944 — Section 11B

Citation : (1990) 4 KarLJ 341

Hon'ble Judges : S. R. Rajasekhara Murthy, J

Judgement

This is yet another case in which the claim for refund of excise-duty paid under mistake is resisted by the Central Government. The claim for refund was made in the following circumstances:

The petitioner-firm is a manufacturer of various patent and proprietary medicines which are exigible to Central Excise duty under Item 14-E of the Central Excise Tariff. The medicines manufactured by the petitioner were sold by the petitioner in bulk-packings. The petitioner was clearing the goods in bulk-packings on the basis of its price-list dated 1-2-1971, which was approved by the Superintendent of Central Excise, MOR II.

The petitioner claimed exemption under Notification No.161/66-CE, dated 18-10-1966 as amended by Notification No. 147/1970, dated 25-7-1970 which provides for an ad-hoc discount for valuing the patent or proprietary medicines falling under Item No. 14-E. The manufacturers were allowed a discount of 10% on the wholesale price specified in the price-list. Another option given to the manufacturers was by way of 25% discount on the retail price. The petitioner opted to avail of the latter benefit.

For the two periods-16-12-1968 to 30-4-1972 and 1-5-1971 to 29-2-1972,-the Superintendent of Central Excise, MOR II, Bangalore issued show cause notices demanding short levy on the bulk packings cleared during the two periods. On the petitioner objecting to the said demands, the matter was adjudicated by the first-respondent, Assistant Collector of Central Excise, Bangalore I Division,

Bangalore, who, upheld the demand. In the appeals filed by the petitioner against the said order, the Collector (Appeals), Madras by his order dated 13-11-1973 confirmed part of the demand and set aside the remaining as time-barred.

There was no further appeal by the petitioner against the order passed by the Collector (Appeals). But the petitioner filed fresh price-lists showing enhanced assessed- value for the bulk-packings by 5% and continued to pay the duty under protest in order to obtain the clearance.

In the meanwhile, there was a decision rendered by the Customs, Excise, Gold (Control) Appellate Tribunal ("CEGAT") in the case of E. Merck (India) Pvt. Ltd., Bombay v Collector of Central Excise, Bombay. The Tribunal ruled that the enhancement of the assessable value by 5% on the basis of paragraph 18 of the Drugs (Price Control) Order, 1970, was illegal. It was further held, that since the goods cleared from the factory were in bulk they have to be valued according to the listed retail price at which they were sold. This ruling of the "CEGAT" was accepted by the Department and has become final.

After coming to know of the said decision reported in 1983 ELT 966-A, the petitioner preferred a claim petition on 13-1-1984 for the refund of Rs. 15,781.25 ps. paid for the period 1-3-1972 to 30-6-1983. The petitioner also preferred another claim petition for refund of Rs. 1,309-78 ps., for the period 1-7-1983 to October, 1983.

Though the facts involved in E. Merck's case were identical with the petitioner's case, the first-respondent by his order dated 28-1-1985 rejected the claim for refund Rs. 15,781-25 ps. on the ground that it was barred by limitation under Section 11-B of the Central Excise Act and allowed refund of Rs. 677.88 ps. only out of Rs. 1,309-78 ps. by his order dated 19-4-1985.

The petitioner filed appeal before the Collector (Appeals), Madras, against the order of the Assistant Collector, rejecting the refund claim in respect of Rs.15,781-25 ps. The Collector, by his order dated 29-5-1985 rejected the appeal relying on Section 11-B of the Central Excise Act. On further appeal to the CEGAT, the order of the Appellate Authority was upheld and the appeal was dismissed by its order dated 7-2-1986. The Tribunal held that a statutory authority (Assistant Collector) under the Act cannot travel beyond the confines of law and the claim for refund was rightly rejected relying on Section 11-B. The petitioner has challenged the said order in this writ petition which was filed on 5-6-1986.

It was urged by Sri G.K. Shevgoor, learned counsel for the petitioner that the excess duty paid by the petitioner was paid under a mistake and the petitioner was, therefore, entitled to the refund of the excess duty paid. The petitioner's claim, as reiterated by the learned counsel was based on the decision of the CEGAT in Merck's case, which was accepted by the Department, as correct. The said decision was rendered on 22-4-1983; the claim for refund was made on

13-1-1984 and 23-4-1984 for refund of Rs.15,781.25 ps and Rs. 1,309.78 ps., respectively, immediately after the decision of the CEGAT, was rendered in E. Merck's case.

Elaborating the contentions, the learned counsel argued that the excess-duty paid by the petitioner was a payment made outside the Act, i.e., the excess duty collected by the Department was not authorised under the Act. It is, therefore, the case of the petitioner that the excess duty is a sum recovered by the Department without "authority of law" within the meaning of that expression occurring in Article 265 of the Constitution and hence, the Central Government was under an obligation to refund the excess duty. The petitioner, therefore, claims that it is entitled to the refund of the excess duty paid by it under a mistake of law and collected by the Department illegally.

In support of his contentions, the learned counsel for the Petitioner relied upon the following decisions:

1. Shiv Shanker Dal Mills v State of Haryana, AIR 1980 SC 1037;
2. Assistant Collector, Central Excise v Kashyap Engineering and Metallurgicals (P) Ltd., 1989(2) Kar. L.J. 414: (1990)45 ELT 375 (Kar.);
3. Indian Pistons Ltd. v Collector of Central Excise, (1990)46 ELT 3 (SC);
4. Union of India v Binny Ltd. 1990(1) Kar. L.J. Sh. N. 33: ILR 1990 Kar. 1297; and
5. Union of India v ITC Ltd., (1985)21 ELT 655 (Kar.).

and urged that the Central Government can no longer resist the claim for refund in the light of the settled law laid down by the Supreme Court and reiterated by this Court in the two decisions referred to above. (2 & 5)

But, Sri Ashok Haranahalli, the learned Standing Counsel for the Department, opposed the writ petition on the ground that the petitioner's claim for refund was rightly rejected by all the authorities under the Act and he relied upon the provisions of Section 11-B in support of his contention. He also referred the ratio of the decision of the Supreme Court in Sri Vallabh Glass Works v Union of India, AIR 1984 SC 971 (see also AIR 1970 SC 898-paragraph 38, M/s. Tilokchand Motichand & Others v H.B. Munshi, Commissioner of Sales Tax, Bombay).

I have considered carefully the arguments of the learned counsel for both sides. It is the law now well settled by the Supreme Court that any excess duty paid either by mistake of law or fact, the assessee should get back the excess duty paid, as a matter of rule. It is also the view of the Supreme Court that the limitation prescribed under a particular enactment under which the excess duty/tax was paid is not applicable to cases of payments made, either by mistake of law or by mistake of fact. As early as 1970, the Supreme Court held in the case of Patel India (P) Ltd. v Union of India & Others, AIR 1973 SC 1300, that the limitation of three months imposed under Section 40 of the Sea Customs Act for

making a refund application cannot be made applicable to erroneous assessments and should be applied only to erroneous payments, made under the Act.

In Shiv Shanker Dal Mills case, the Supreme Court held, that no law of limitation can apply to cases of wrong recovery made either by public bodies or the Government. But the Supreme Court imposed a limitation of three years for making such claims for refund. It was laid down, in *D. Cawasji and Co. v State of Mysore & Another*, AIR 1975 SC 813; that any such application for refund must be made within three years from the date of knowledge, reckoned from the day on which the mistake was discovered or came to the claimant's knowledge. Same was the view, which was reiterated by the Supreme Court in *Sri Vallabh Glass Works case* AIR 1984 SC 971, and the Court held that any claim for refund made beyond the period of three years prescribed for a suit under the Limitation Act should not normally be entertained. This again depends on the facts of each case. The Supreme Court also observed in *Sri Vallabh Glass Works case*, that this rule should not be applied as a rigid formula in all cases and the High Court should examine each case on its own merits and circumstances. Whatever was said by the Supreme Court was having in view the normal ordinary remedy open to a party to recover by way of suit, of the excess duty paid within three years from the date of payment, viz., the date when the right to sue accrues as required under Article 113 of the Limitation Act, 1963, which is a residuary provision for filing suits for which no period of limitation is provided in the schedule. In this context, two other earlier decisions of the Supreme Court in *State of M.P. v Bhavilal Bhai*, AIR 1964 SC 1006 and *State of Kerala v Aluminium Industries Ltd.*, 1965(16) STC 689 (SC) may be usefully referred to, in which it was observed that the restriction as to limitation to recover by way of suit, should be kept in view.

Coming to the decisions of this Court, touching this question, the first of them is, *Union of India v ITC (P) Ltd.*, 1985(21) ELT 655(Kar.), rendered in the year 1985. The Division Bench of this Court (of which I was a member) held, that any excess duty paid, which was outside the Act and not authorised by law should be refunded to the assessee, and followed the principle enunciated by the Supreme Court in the case of *Patel India (P) Ltd.* It was also held that the excess duty paid, whether under mistake of law or fact, should not make any difference so long as the levy was not authorised under the particular enactment.

In *Kashyap Engineering case* 1989(2) Kar. L.J. 414: 1990(45) ELT 375, this Court ordered refund of the entire excess duty paid for five years between 1975 and 1980.

In the last of the cases, namely *Binny Ltd.*, 1990(1) Kar. L.J. Sh. N. 33: ILR 1990 Kar. 1297, a Division Bench of this Court took the view that any mandamus for refund of the excess duty paid and recovered, should be issued only to the Union of India under Article 226 of the Constitution and no such mandamus can be issued to the authorities functioning under the Act. This Court held, that the

Assistant Collector of Central Excise had rightly rejected the claim for refund relying on Section 11-B, since he has no authority or duty to consider the claim for refund of any excess amount paid by way of excise duty even though under a mistake of law.

On the facts of the present case, it is not disputed by the Department that the petitioner preferred its claim for refund within three years from the date of the order of the Appellate Collector which was delivered on 22-4-1983 and the claim for refund was made on 13-1-1984 and 24-4-1984. As held by the Supreme Court in D. Cawasji's case, any claim for refund of the tax paid under a mistake of law should be filed within three years of the knowledge of this mistake. In that case, it was the declaration of the Health Cess Act as void that was taken as the starting point for limitation. This period of limitation of three years should be adopted, according to the Supreme Court, normally even for entertaining a writ petition for the same relief. Other instances of payment under mistake that can be envisaged are, payment made through inadvertence, error or misconstruction. That the assessee who was placed in a similar position as the petitioners in E. Merck's case, who succeeded before the Appellate Collector and whose view was accepted by the Department as the correct interpretation, is also not in dispute.

In the light of the enunciation of the law by the Supreme Court in the decisions cited above, it is no longer open to the Union of India to oppose the claim for refund on any tenable ground.

But such claims are not being considered by the Central Government in the light of several decisions of the Supreme Court and reiterated by this Court. It is needless to issue mandamus in every case to the Central Government to consider the claim for refund of any excess duty paid, in accordance with law and in the light of the decisions of the Supreme Court without driving the assessee to approach the High Court for a mandamus to be issued in exercise of its jurisdiction under Article 226 of the Constitution. Since the Central Government is offering resistance in all such cases of refund on ground of limitation which can no longer be accepted by Courts, I am impelled to observe that hereafter in all such cases, the petitioners who are driven to Court, would be entitled to interest on the refund amounts and the Court will have to award the same, if the claim is unreasonably withheld by the Central Government and opposed.

In the result, the writ petition is allowed, and I direct issue of mandamus to the Union of India to consider and dispose of the refund of the petitioner for the two sums of Rs. 15,781.25 ps. and Rs. 1,309.78 ps. made in his claim petitions (Annexures-F and G), within eight weeks from the date of receipt of this order. The petitioner is entitled to cost of Rs. 500/-. I do not award interest in view of the small amount involved in this case.