

(1978) 08 MAD CK 0029

In the Madras High Court

Case No : Writ Petition No. 7257 of 1975

New Horizon Sugar Mills (P) Ltd.

APPELLANT

Vs

Assistant Collector of Central Excise and Others

RESPONDENT

Date of Decision : 19-08-1978

Acts Referred:

Central Excises and Salt Act, 1944 — Section 35, 37
Constitution of India, 1950 — Article 226, 226(3)

Citation : (1979) CENCUS 234 : (1979) 4 ELT 75 : (1979) ILR (Mad) 450

Hon'ble Judges : Gokulakrishnan, J

Bench : Single Bench

Judgement

Gokulakrishnan, J.—The petitioner herein has come forward with the present petition for the issue of a writ of mandamus directing the respondents to grant the petitioner's claim for rebate of Rs. 6,59,104 under the terms of the Notification No. 146/74-Central Excises, dated 12-10-1974.

2. The necessary facts to understand and appreciate this writ petition are as follows : The petitioner is a sugar mill having been established in or about the year 1956. It went into production of sugar for the first time from the year 1960. The Central Government, acting under the provisions of the rules framed u/s 37 of the Central Excises and Salt Act, 19-14, passed an order dated 12-10-1974, which is Order No. 146/74-CE (G.S.R. 421-E) providing exemption from duty in respect of sugar. The said order contemplates exemption in respect of two categories of factories, viz., one in respect of factory which commenced production for the first time in 1967-68, or earlier and the other in respect of factories which commenced production for the first time after 1967-68. The Notification also lays down different exemptions in respect of two different periods of the sugar year 1974-75, viz. for the period October-November 1974, and the period December 1974 to September 1975. The present writ petition concerns the period covering the two months of October and November 1974.

3. For the period October-November 1969, the petitioner produced "Nil" sugar;

for the period October-November 1970 it produced "Nil"; for the period October-November 1971 it produced "Nil"; for October 1972 it produced "Nil" and for November 1972, it produced 31435 quintals of sugar and for October 1973 it produced "Nil" and for November 1973, it produced 10,925 quintals of sugar. The petitioner worked out the average production during the period October-November of the above-mentioned preceding five sugar years at 8472 quintals by dividing the total production during October-November of the said five sugar years viz. 42360 quintals by five. As the production during October-November 1974 was 23800 quintals of sugar, which is in excess of the average production of the October-November period of the preceding five sugar years by 15328 quintals, the petitioner is entitled to rebate in Central excise duty for Rs. 6,59,104 by applying the relevant rates of rebate specified in the Notification dated 12-10-1974.

4. The respondents, represented by the Assistant Collector of Central Excise, Legal, Madras, instructed the petitioner factory to revise their claim for rebate on the ground that as during the corresponding periods in three of the preceding five years the factory has not produced any sugar and had produced sugar only during the corresponding periods (October-November) of the remaining two years, the average production should be arrived at by dividing the total production of 42360 quintals by 2. According to the respondents, the average production would thus work out to 21180 quintals. On this basis, the Assistant Collector held that the factory would be eligible for a rebate of Rs. 1,12,660 on the excess production of 2620 quintals. Accordingly the Assistant Collector, Pondicherry, instructed the petitioner to revise its claim for rebate.

5. According to the petitioner, it has become entitled to the amount claimed by it as per the terms of the Notification dated 12-10-1974. It was because of the inducement held out by the Government of India, the petitioner produced more quintals of sugar in the year 1974-75 and the right of the petitioner to claim the rebate cannot be deprived in the manner done by the respondents. The petitioner worked out the average production during the period October-November of the preceding five sugar years, by dividing the total production by five, even though in some of the years, there was nil production during October-November, which the respondents insisted upon the petitioner working out the average eliminating the years during which there was no production, and, in this case, by dividing the total production by two, since there was production during October-November only in two of the preceding five sugar years. The petitioner has therefore come forward with the present writ petition to direct the respondents to grant the petitioner rebate as claimed by it.

6. Mr. V.K. Thiruvengkatachari, the learned counsel appearing for the petitioner, took me through the affidavit and counter affidavit filed by the respective party and also through the Notification dated 12-10-1974. According to the learned counsel, the average production in the corresponding period of the preceding five years, envisaged in Clause 1 of the Notification dated 12-10-1974, clearly gives

the right to the petitioner to take the five sugar years, preceding 1974-75, even though there may not be any production in certain of the years during the months of October and November, and the figure must be arrived at by dividing the total production during these five years by five. Mr. Thiruvenkatachari also pointed out that the "sugar year" contemplated under Explanation 1 (d) means the period of 12 months ending with the 1st day of October and ending with the 30th of September next following and that as such the simple average production during the corresponding period of the preceding five years mentioned in Clause (1) (a) must be interpreted to mean that "Nil" production in certain of the years during October and November must also be taken in to account for arriving at the average. Mr. Thiruvenkatachari also drew my attention to Corrigendum No. 150/75-Central Excise dated 14-6-1975, regarding sugar, whereby Clause 3 of the Notification dated 12-10-1974 was corrected. Clause (3) was split into two viz. as Clauses (3) and (4) and the old clause (4) was re-numbered as clause (5). According to the learned counsel, the petitioner filed his claim on 11-1-1975 while the Corrigendum referred to above was issued only on 14-6-1975. Part of the provisions in clause (3) which has been made as clause (4) by the Corrigendum cannot be said to take away the right which has already vested with the petitioner.

7. Mr. Chengalvarayan, the learned counsel appearing for the respondents, submitted that clause (4) carved out by the Corrigendum No. 150/75, dated 14-6-1975, will not govern Clause (1) (a) of the Notification.

8. In the counter affidavit filed by the respondents, I find the respondents aver as follows :

"Para 4 of the Explanation to the notification No. 156/74 says that "where production in one or more sugar years among five sugar years was nil, the production in such sugar year or sugar years shall be ignored and the average production shall be the average of the production of the corresponding period of the remaining sugar years". Para 4 of the Explanation is applicable to all sugar factories irrespective of whether the factories commenced production in or prior to 1967-68 or after 1967-68."

I also find in the counter affidavit the respondents state --

"As the petitioner's calculation for his claim for rebate was not in accordance with the Explanation 4 to the Notification the Assistant Collector, Pondicherry, instructed the factory to revise the claim."

In spite of the above said averments in the counter affidavit, Mr. Chengalvarayan, learned counsel for the respondents, reiterated his argument that Clause (4) carved out by Corrigendum will not govern Clause (1). If that be so, I have to consider only the interpretation to Clause 1(a) of the Notification. Mr. Chengalvarayan, learned counsel for the respondents, also submitted that it is not the average period of production that has to be taken into account in computing the average, but it is the average production for the period. Since

there was no production for three years preceding 1974-75, during the months of October and November, the learned counsel for the respondents submitted that the average ought to be arrived at by dividing the total production for the preceding five years during the months of October and November by two. According to the learned counsel the petitioner produced sugar only for two years during October-November prior to 1974-75.

9. I have carefully considered the Notification dated 12-10-1974. As pointed out by Mr. Thiruvengkatachari, learned counsel for the petitioner, the Corrigendum was issued much later to the claim made by the petitioner. The argument of learned counsel appearing for the petitioner that Clause (4) carved out by the issue of the Corrigendum will not take away his vested right, need not be considered, inasmuch as Mr. Chengalvarayan, learned counsel for the respondents, submitted that this carved out Clause (4) will not govern or relate to Clause (1) of the Notification. The Notification definitely makes a distinction between the sugar mill which started production during 1967-68 and prior thereto, and sugar mills which started production subsequent to 1967-68. It is only in cases of those mills which started production subsequent to 1967-68, the Notification states --

"Where production is one or more sugar years among five sugar years was nil, the production in such sugar year or sugar year? shall be ignored and the average production shall be the average of the production of the corresponding period of the remaining sugar years".

In the notification itself, "sugar year" is defined in Explanation 1(d) as --

" "sugar year" means the period of twelve months beginning with the 1st of October and ending with the 30th of September, next following".

Thus, it is clear that the average to be worked out is on the basis of the number of years preceding 1974-75 during which time the factory was in production. Admittedly, the present petitioner mill went into production as early as 1960. No doubt, the petitioner had not produced sugar in the months of October-November 1969, October-November 1970 and October-November 1971. Since, as per Clause (1) of the Notification it is mentioned "the average production of the corresponding period the preceding five sugar years", I am of the view that the average should be calculated in this case by dividing the total production by five, even though there was no production during the period October and November in certain of the years. That is the intention of the Notification, and that is why two different types of rebate have been provided, and for the mills which started production in 1967-68, or before, and the other for the mills which started production after 1967-68.

10. The distinction Mr. Chengalvarayan sought to make out is that average period of production is not mentioned in Clause (1) of the Notification while the Notification refers only to "average production". I do not think the reference to "average production, would in any way give right to the authorities to exclude

the years in which there was no production during the months of October and November even though the Mill was producing in other months.

11. Hence, the calculation made by the petitioner and the interpretation given by the petitioner to Clause (1) of the Notification dated 12-10-1974, is correct. Mr. T. Chengalvarayan next argued on the maintainability of the writ petition. He read out Article 226(3) of the Constitution of India. This provision came into being by the 42nd Amendment. It reads as follows --

"No petition for the redress of any injury referred to in Sub-clause (b) or Sub-clause (c) of Clause (1) shall be entertained if any other remedy for such redress is provided for by or under any other law for the time being in force."

* * *

Referring to the above said provisions, Mr. Chengalvarayan, submitted that the proper remedy for the petitioner will be by way of an appeal and revision to the respective authority as provided u/s 35.

12. Mr. Thiruvengkatachari, learned counsel for the petitioner, submitted that the appeal or revision is in respect of a case where a person is aggrieved by any decision or order passed by a Central Excise Officer under the Act or the rules made thereunder. According to the learned counsel, there is neither a decision nor an order in this case for the petitioner to invoke the provisions of Section 35 of the Act.

13. The Assistant Collector, who is the first respondent herein, only wrote to the petitioner on 24-10-1975 rejecting the claim for rebate as made by the petitioner and requiring the petitioner to revise its claim. Even in the counter affidavit it is stated that the petitioner has come forward by way of a writ petition challenging the Assistant Collector's "view". Therefore, the rejection of the claim of the petitioner for rebate made by the Assistant Collector and his "view" as stated in the counter affidavit, cannot take the place of a "decision or order" contemplated u/s 35 of the Central Excises and Salt Act. Further, the present petition is for the issue of a writ of mandamus directing the respondents to grant the petitioner's claim for rebate of Rs. 6,59,104 under the terms of the Notification No. 146/74-Central Excises, dated 12-10-1974. I am, therefore, of the view that the petitioner has the remedy only under Article 226 of the Constitution of India and will not be hit by Clause (3) thereof.

14. Taking all these aspects into consideration and also the fact that the Notification No. 146/74 dated, 12-10-1974 clearly upholds the calculation made by the petitioner for the purpose of getting the rebate, in that the five years' period mentioned in Clause (1) of the Notification includes the corresponding period of the years in which there was no production of sugar by the factory, I find that the writ prayed for has to issue.

15. In these circumstances, the respondents are directed to grant the petitioner's claim for rebate of Rs. 6,59,104, which is in accordance with the

terms of Notification No. 146/74 Central Excises, dated 12-10-1974. There will however be no order as to costs.