
(2003) 03 DEL CK 0092

In the Delhi High Court

Case No : Civil Writ Petition No. 1572 of 2002

Pasupati Fabrics Ltd. and Another

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 31-03-2003

Acts Referred:

Textiles Committee Act, 1963 — Section 5A(7), 5D

Citation : (2003) 4 AD 154 : (2003) 107 DLT 15 : (2004) 113 ECR 353 : (2004) 165 ELT 35

Hon'ble Judges : A.K. Sikri, J

Bench : Single Bench

Advocate : Rajeev Sharma, for the Appellant; Harish Chander Rajinder Nischal, For Respondent Nos. 1 and 2, Rajiv Dutta and Ritu Bhall, for the Respondent

Final Decision : Dismissed

Judgement

A.K. Sikri, J.- 1. Petitioner No. 1, which is a company incorporated under the Indian Companies Act, is a 100% Export Oriented Unit (EOU). Petitioner No. 2 is its Company Secretary and General Manager (Admn.). In this writ petition, petitioners are challenging the action of the respondent No. 3 in demanding Textile Cess levied u/s 5A of the Textile Committee Act, 1963 (hereinafter to be referred as "Act" for short) from the petitioner No. 1 (hereinafter called as "petitioner company "for short"). The case of the petitioners is that as the petitioner company is a 100% EOU, it is exempted from payment of such cess. It is not in dispute that the petitioner company is otherwise exempted from payment of excise duty and other Central levies being 100% EOU.

2. The facts are in narrow compass and, may be noted in the first instance.

3. The petitioner company has been set up for manufacture of cotton fabrics. It applied to the respondents 1 and 2 for grant of permission/license to set up 100% EOU. At that time representation was made by the Government of India i.e. the respondents 1 and 2 that as per their policy, EOU would be exempted

from duties, cesses and other Central levies in the nature of excise, custom duties etc. A letter of permission dated 18.5.1994 was issued by the Ministry of Industry, which inter alia stated that the petitioner company was permitted to manufacture cotton shirting, bed sheeting on conditions attached thereto. Condition Nos. 2 and 3 annexed to the letter of permission are as under:

"2. Import of capital goods, raw materials and components for production under the scheme shall be exempt from custom duties in terms of customs notification in force, subject to the condition specified therein. Likewise, indigenously procured capital goods, components and raw materials required by the undertakings would also be exempt from the levy of excise duties in terms of customs notification, subject to the fulfillment of the conditions prescribed therein.

3. The finished products authorised for manufacture under the scheme shall be exempt from payment of excise duties on their export from India subject to the observance of the prescribed procedure."

4. It may be mentioned at this stage that Notification Nos. 125 and 127 of 1984 both dated 26.5.1984 exempting EOU from payment of excise were already enforced.

5. The Parliament has enacted Textile Committee Act, 1963 to provide for establishment of a Committee for ensuring the quality of textile and textile machinery and for matters connected therewith. Section 3 of the Act provides that the Central Government shall by a notification establish a Committee to be known as the Textile Committee. Section 4 of the Act provided that the function of the Committee shall be generally to ensure standard qualities of textiles both for internal marketing and export purposes and the manufacture and use of standard type of textile machinery. By virtue of the Textile Committee (Amendment) Act, 1973, Section 5A was inserted in the Textile Committee Act, 1963. Section 5A inter alia provided that there would be a levied and collected as a cess for the purposes of the Act, a duty of excise on all textile and textile machinery manufactured in India at such rates as a Central Government may by notification in the Official Gazette fixed. Section 5D which was also inserted by the Amendment Act, 1973 provides that if any manufacturer fails to pay the duty of excise levied u/s 5A, then the duty payable shall be recoverable as an arrear of land revenue. Section 5E empowered the Central Government to grant exemption from the payment of textile cess.

6. For ready reference Sections 5A and 5D of the Textile Committee Act are reproduced hereunder:

"5A. Imposition of Cess on Textiles and Textile Machinery Manufactured in India.

1. There shall be levied and collected as a cess for the purposes of this Act a duty of excise on all textiles and on all textile machinery manufactured in India at such rate, not exceeding one per cent ad valorem as the Central Government

may, by notification in the Official Gazette, fix:

Provided that no such cess shall be levied on textiles manufactured from out of handloom or powerloom industry.

2. The duty of excise levied under Sub-section (1) shall be in addition to any cess or duty livable on textiles or textile machinery under any other law for the time being in force.

3. The duty of excise levied under Sub-section (1) shall be collected by the Committee, in accordance with the rules made in this behalf, from every manufacturer of textiles or textile machinery (hereinafter in this section and in Sections 5C and 5D referred to as the manufacturer).

4. The manufacturer shall pay to the Committee the amount of the duty of excise levied under Sub-section (1) within one month from the date on which he receives a notice of demand Therefore from the Committee.

5. For the purpose of enabling the Committee to assess the amount of the duty of excise levied under Sub-section (1):

(a) the Committee, shall by notification in the Gazette of India, fix the period in respect of which assessments shall be made;

and (b) every manufacturer shall furnish to the Committee a return, not later than fifteen days after the expiry of the period to which the return relates, specifying the total quantity of textiles or textile machinery manufactured by him during the said period and such other particulars as may be prescribed.

6. If any manufacturer fails to furnish the return referred to in Sub-section (5) within the time specified therein, or furnishes a return which the Committee has reason to believe is incorrect or defective, the Committee may assess the amount of the duty of excise in such manner as may be prescribed.

7. Any manufacturer aggrieved by an assessment made under this section may appeal to the Tribunal, constituted u/s 5B for cancellation or modification of the assessment.

5D. Recovery of duty of excise.--If any manufacturer fails to pay the duty of excise levied u/s 5A within the period specified in Sub-section (4) of that section, or where an appeal has been preferred by him against an order of assessment under Sub-section (7) of Section 5A, within one month from the date of disposal of such appeal, the duty payable by him shall be recoverable as an arrear of land revenue."

7. After the commencement of trial production, the petitioner company wrote letter dated 6.9.1997 to the respondent No. 3 stating that as it was EOU, it was not liable to pay textile cess. However, the respondent No. 3 vide letter dated 19.12.1997 informed the petitioner company that textile cess was payable on the value of manufacture whether sale be for domestic market or for export and the

petitioner company was required to file Textile Committee Cess Return even for trial production exported/sold domestically and make payment thereof. It was followed by letters dated 12.2.1998 and 17.3.1998 whereby the respondent No. 3 threatened to take coercive action for recovery of Textile Committee Cess. The petitioner company responded vide letter dated 21.8.1998 reiterating that it was not liable to pay any such cess. However, respondent No. 3 replied back vide letter dated 11.9.1998 reiterating its demand. This time the petitioner company yielded to the demand of the respondent No. 3 and vide letter dated February 29, 2000 sent a cheque of Rs. 58,477/- towards payment of Textile Committee Cess for the quarter ended June, 1999. However, it is stated that payment was being made under protest. Notwithstanding this protest, petitioner company made further payments vide covering letters dated 7.2.2001, 26.5.2001 and 1.8.2001. In this manner till 30.6.2001 petitioner company deposited a sum of Rs. 10,73,875.93p. towards textile cess.

8. On 15.2.2002 the respondent No. 3 sent notice to the petitioner company proposing to assess the petitioner company for the period September to December, 2001 for the purpose of textile cess.

9. This time petitioner company instead of getting it assessed or paying cess duty filed the instant writ petition challenging the action of the respondent No. 3 in seeking to collect the textile cess. In the writ petition apart from seeking declaration to the effect that it is exempted from payment of textile cess levied u/s 5A of the Act being 100% EOU, it has also prayed for writ of mandamus directing respondent No. 3 to refund the amount of Rs. 10,73,875.93p. collected from the petitioner along with interest.

10. It is clear from the sequence of these facts that the main issue which falls for determination is as to whether company like the petitioner which is 100% EOU is exempted from payment of textile cess u/s 5A of the Act.

11. The petitioner company has founded its case on the following twin submissions:

1. Vide letter dated 18.5.1994 granting permission to the petitioner to set up 100% EOU under the 100% Export Oriented Scheme for the manufacture of cotton shirting etc., it was categorically stated that the petitioner shall not be liable to pay any excise duty. The permission was given subject to conditions stipulated in Annexure to the said letter and condition No. 4 of the said Annexure stipulated as under:

"4. The finished products authorised for manufacture under the scheme shall be exempt from payment of excise duties on their export from India subject to the observance of the prescribed procedures. Export duties shall be livable unless specifically exempted. The sale of goods in DTA would be permitted as per prescribed policy and excise duties shall be levied as per prescribed rates. The clearance of rejects, waste or scrap materials rags, trimmings, etc. shall be governed by the provisions of policy as notified from to time and clearance by

customs authorities in accordance with their notifications." It was submitted that as per the aforesaid condition the finished products authorised for manufacture under the scheme were exempt from payment of excise duties on their export from India. Consequently to such duty of excise could be levied on the petitioner even in terms of Section 5A of the Act. Referring to the language of Section 5A of the Act it was argued that this section clearly mentioned that what was levied and collected was "a duty of excise". Therefore, according to learned Counsel for the petitioner in terms of Section 5A of the Act, textile cess was in fact a duty of excise on all textiles and all textile machinery manufactured in India and thus exempted from payment of tax.

2. Second submission was based on principles of Promissory Estoppel. It was submitted that as per the existing policy of the Government of India, 100% Export Oriented Units are exempted from payment of excise duty and other Central levies. At the time the 100% Export Oriented Unit was set up by the petitioners, it was clearly represented to them that the unit being a 100% Export Oriented Unit will be exempted from all Central duties and cesses in the nature of excise. Thus the question squarely raised in this writ petition is the question of promissory estoppel and the question of legitimate expectation of the petitioners qua the Export Oriented Unit. The learned Counsel in support referred to celebrated judgment of Supreme Court in the case of Motilal Padampat Sugar Mills Co. Ltd. Vs. State of Uttar Pradesh and Others, . He also referred to another judgment of Single Bench of this Court in the case of Kimti Lal Rahi Vs. Union of India and Others, . Learned Counsel for the petitioner also referred to General Exemption Notification 125/84-C.E., and 127/84-C.E., both dated 26.5.1984 whereby Government had provided exemption to all excisable goods produced by such EOUs from payment of whole of the duty of excise as well as whole of the additional duties of excise livable u/s 3 of the Central Excise and Salt Act, 1944. He submitted that similar provision existed in the form of Section 5E of the Act and appropriate notification could be issued for providing exemption from cess duty of Section 5A of the Act as well.

12. Mr. Rajiv Dutta, learned Senior Counsel appearing for the respondent No. 3 refuted the aforesaid contentions of the petitioner by submitting that the real character of levy u/s 5A of the Act was cess and not excise duty. His further submission was that under Sub-section (5) of Section 5A of the Act the Committee was authorised to fix the period in respect of which assessment could be made and every manufacturer was required to furnish to the Committee a return, not later than 15 days after the expiry of the period to which the return relates. Assessment could be made on that basis and any manufacturer aggrieved by assessment made by the Committee could appeal as provided under Sub-section (7) of Section 5A to the Tribunal constituted u/s 5B for cancellation or modification of the assessment. His submission was that no such appeal was preferred by the petitioner. Not only this, according to the learned Counsel, no representation was even made before approaching this Court by means of this writ petition. He further submitted that issue of payment of such

cess u/s 5A had come up for consideration before the Division Bench of this Court in the case of Nath Bros Exim. International Ltd. Vs. Union of India and Others, , and was decided in favor of respondent No. 3. He also referred to another Division Bench judgment of Andhra Pradesh High Court dated 17th October, 2000 rendered in Writ Petition No. 18171/2000 in the case entitled Sanghi Spinners India Ltd. v. Union of India and Ors., squarely answering the question as posed in this writ petition, against the petitioner.

13. This writ petition in fact deserves to be dismissed on the short ground that petitioner has failed to avail efficacious remedy of appeal provided under Subsection (7) of Section 5A of the Act. As noted above, although petitioner company took the stand initially that it was not liable to pay any such cess, however, thereafter by letter dated February 29, 2000, it paid cess for the quarter ending June, 1999. No doubt in this letter the petitioner company had stated that the payment was being made under protest. Fact remains that the petitioner accepted the assessment and did not challenge it by filing appeal. Merely stating that payment was made under protest could not ensue to the benefit of the petitioner company without taking consequential and necessary steps of filing appeal also. Cess was levied against the petitioner company under the provisions of Section 5A of the Act. It was by the Committee which was acting in a quasi judicial manner. Order could be challenged in appeal to the Tribunal provided specifically for this purpose. If petitioner company was of the opinion that it was not required to any cess, it should have challenged the order by filing appropriate appeal before the tribunal. Not only that, no such appeal was filed, as per petitioner's own showing, it even continued to pay cess for further periods as well and cess was paid by covering letters dated 7.2.2001, 26.5.2001 and 1.8.2001 for the period till 30.6.2001. The petitioner company in this manner paid cess from 1.4.1999 to 30.6.2001 without challenging the assessments and/or levy of the cess. It is only when notice dated 15.2.2002 was received from respondent No. 3 whereby it was proposed to assess the petitioner company for the period from September to December, 2001 that petitioner this time rushed to the Court. The petitioner did not even make representation to the respondent No. 3 or to the Government against the proposed assessment, claim for refund of cess has to fail on this ground alone.

14. Although the petitioner has referred to notifications issued under Central Excise and Salt Act, 1944, as per petitioner's own admission there is no exemption notification issued by the Government u/s 5A of the Act. Nothing is produced on record to show that the petitioner company had approached Government for issue of similar notification. In the absence of any such notification u/s 5E of the Act it cannot be said that petitioner is not liable to pay any such cess.

15. There is no merit in the contention raised by the petitioner in challenging the cess. Learned Counsel for the petitioner is not correct in his submission that u/s 5A of the Act it is the excise duty which is charged and the petitioner is not liable

to pay excise duty by virtue Condition No. 4 of the Annexure attached to the Permission dated 18.5.1994 granted to the petitioner company for setting up of 100% EOU under the 100% Export Oriented Scheme. Although in the context of deciding the issue of double taxation, nature of levy of cess u/s 5A of the Act came up for consideration before the Division Bench of this Court in the case of Nath Brothers Exim International Ltd. v. Union of India (supra), and the Court held that this cess had the traces of fee and, Therefore, it was to be distinguished from tax. Observations to this effect are found in para 20 of the judgment which reads as under:

"20. Apart from the fact that having regard to the nature and purpose of the cess levied under the Act, although credited to the consolidated fund of India and then disbursed to the Textile Committee, but it still has the traces of fees, as was being levied prior to insertion of Section 5A in the Act and could perhaps be distinguished from a tax. We feel that the incidence of the two levies namely, under the Customs Act and under the Act are entirely different. The former being at the time of import of a particular item and the latter at the time of manufacture of textiles. There is no question of double taxation, as alleged by the petitioners. That apart, even Sub-section (20) of Section 5A itself provides for levy under the Act in addition to any cess or duty which may be livable on the same textiles or textile machinery under any other law for the time being in force. The question of want of parliamentary competence to frame such a provision has neither been nor can be raised, particularly after the decision of the Supreme Court in the Sirsilk Ltd. Vs. Textiles Committee and Others, , upholding the validity of the Act."

16. Merely because words "duty of excise" are used in Section 5A of the Act would not mean that what is charged is the excise. One has to see the real nature of the levy u/s 5A of the Act. It is imposition of cess which is prescribed. Moreover, excise duty is livable specifically under Central Excise and Salt Act, 1944 and it is not the same excise duty which is sought to be charged all over again. That was the reason that Division Bench of the Court in the aforesaid case rejected the argument of double taxation holding that what was being charged u/s 5A of the Act was in fact a cess which had traces of fee and was not tax which is charged under Central Excise and Salt Act, 1944. From this judgment it becomes abundantly clear that under this Act, what is charged is "fee" and not duty of excise as alleged by the petitioner. Division Bench judgment of Andhra Pradesh High Court in the case entitled Sanghi Spinners India Ltd. v. Union of India and Ors. (supra), was directly concerned with this issue as is clear from the following observations made by it while dismissing the said writ petition:

"On careful perusal of the above proceedings of the Government of India it seems to our mind that the Government of India has taken a policy decision not to grant exemption to the 100% export oriented companies from payment of Textile Committee Cess. Before us, the validity of the policy decision so taken is not assailed. The only limited relief sought in the writ petition is not to enforce

the demand till the above representation of the petitioner was considered and disposed of. Since the Government of India has already taken a policy decision, on a similar request directing the Government of India again to take a decision on the similar request made by the petitioner does not arise. We do not find any merit in the writ petition."

17. In view of the aforesaid observations as per which policy decision was taken not to exempt such EOUs from payment of cess, the argument in respect of principles of promissory estoppel also fails. What was promised by the Government in Condition No. 4 was exemption from payment of excise duty. That exemption is given to the petitioner as per its own admission and as per notifications issued under Central Excise and Salt Act, 1944. The promise was, Therefore, for exemption from payment of excise duties and not cess which is fee and that is the reason that no notification u/s 5E of the Act was issued whereas Government issued notification under Central Excise and Salt Act, 1944. Since there was no such promise for exemption from cess, question of promissory estoppel does not arise.

18. This writ petition is accordingly dismissed with costs quantified at Rs. 5,000/-.