

(2000) 05 AHC CK 0014

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition (Tax) No. 41 of 2000

Saraya Distillery

APPELLANT

Vs

Commissioner of Central Excise (Appeals)

RESPONDENT

Date of Decision : 04-05-2000

Acts Referred:

Central Excise Rules, 1944 — Rule 57A, 57G, 57G(1), 57G(5)
Central Excises and Salt Act, 1944 — Section 35F

Citation : (2001) 73 ECC 67 : (2000) 92 ECR 457 : (2001) 127 ELT 326

Hon'ble Judges : P.K. Jain, J

Bench : Single Bench

Final Decision : Allowed

Judgement

P.K. Jain, J.—This petition has been filed by the petitioner with following prayers :-

(1) Issue a writ of certiorari quashing the order dated 30-9-1999 served on 24-10-1999 read with order dated 24-2-1999 passed by the Commissioner (Appeals) of Central Excise, Allahabad.

(2) Issue a writ of mandamus directing the Commissioner (Appeals) to decide the appeal No. 109-CE/APPL/ALLD/98 filed by the petitioners without insisting on any pre-deposit within a stipulated period and further to direct the respondents not to initiate recovery proceedings during the pendency of the appeal.

(3) Issue any other writ, order or direction which this Hon"ble Court may deems fit and proper under the circumstances of the case.

2. Counter and rejoinder affidavits have been exchanged, therefore, the petition is being finally disposed of at the preliminary hearing.

3. Petitioner claims that it is engaged in manufacture of country liquor, Indian made and foreign made liquor, rectified ethyl alcohol and denatured ethyl alcohol out of which only denatured ethyl alcohol is an excisable item. The excise duty

on denatured ethyl alcohol was imposed with effect from 1-3-1994. In view of the provisions contained in Rule 57G of the Central Excise Rules, 1944 for availing the facility of Modvat credit, the petitioner filed the declaration on 22-7-1994. An application dated 27-8-1994 requesting the Assistant Commissioner to condone the delay in filing the declaration was also moved. Assistant Commissioner, formerly designated as Assistant Collector issued show cause dated 21-12-1994. However vide order dated 14-8-1995, the Modvat credits were allowed by the Assistant Commissioner to the tune of Rs. 7,19,820/- only. An appeal was filed by the department which was allowed by the Commissioner (Appeals) by order dated 30-1-1997 and the matter was remanded to the Assistant Commissioner with certain directions. The Assistant Commissioner, however, by order dated 30-11-1997 rejected the application dated 27-8-1994 and disallowed Modvat credits to the tune of Rs. 9,29,189.50 paise.

4. Feeling aggrieved by the order of the Assistant Commissioner, the petitioner filed an appeal before the Commissioner, Central Excise (Appeals) which is pending for disposal. An application, u/s 35F of the Central Excise Act was also moved for stay-cum-waiver. The said application has been rejected by the Commissioner (Appeals) and the petitioner has been directed to deposit the amount of credit disallowed by the Assistant Commissioner. Subsequently, an application for modification in the order dated 24-2-1999 was moved which has also been rejected. These orders are challenged on the grounds that the petitioner has a good prima facie case and the Commissioner (Appeals) did not apply the mind to the facts. It is submitted that the Commissioner (Appeals) did not take into account that the petitioner had given a scientific ... for consumption molasses in the final dutiable of goods i.e. denatured ethyl alcohol. The main ground on which the petition is contested is that the declaration was filed after lapse of time provided by the rules and that the petitioner has failed to establish that inputs were used in production of the final products.

5. Rule 57G(1) provides that every manufacturer intending to take credit of the duty paid on inputs under Rule 57A shall file a declaration with the Assistant Collector of Central Excise having jurisdiction over his factory, indicating the description of the final products manufactured in his factory and the inputs intended to be used in each of the said final products and such other information as the said Assistant Collector may require and obtain a dated acknowledgement of the said declaration.

Sub-rule (5) of Rule 57G further provides where a manufacturer was not in a position to make a declaration under Sub-rule (1) and make the declaration subsequently, the Assistant Collector may, for reasons to be recorded in writing, condone the delay in filing of the such declarations and allow the manufacturer to take credit of the duty already paid on the inputs even though the procedural requirements laid down under this rule have not been complied with.

Provided that such permission may be granted by the Assistant Collector only

when he is satisfied that the contents in Clauses (a), (b) and (c) of Sub-rule 5 are satisfied.

6. Annexure A-I is copy of the application in Rule 57G(5) made by the petitioner. In this application, it is categorically stated that the conditions given in the proviso to Rule 57G(5) were complied with. It further appears that the petitioner claimed that since the excise duty on the denatured alcohol was imposed for the first time with effect from 1-3-1994, the petitioner could not know about it and could not make the declaration within the required period. The Commissioner of Appeals while remanding the matter to the Assistant Commissioner by order dated 30-1-1999 observed in its order that ignorance of law is not sufficient cause for condonation of delay. It is not provided in the Rule 57G(5) that goods must be in existence on the date of filing of declaration. Yet the Commissioner (Appeals) remanded the matter to the Assistant Commissioner for de novo adjudication with a direction that the case shall be adjudicated afresh after correctly providing the scientific basis on which actual quantity of molasses used ultimately in the manufacture of Ethyl Alcohol is arrived at. This clearly indicated that even though an observation was made in the body of the order that ignorance of law is not sufficient cause for condonation of delay, yet the Commissioner (Appeals) felt that it was a fit case for de novo adjudication in the light of the directions given by the Commissioner (Appeals) and he impliedly condoned delay. The Assistant Commissioner, however, while passing the order dated 30-11-1997 pursuant to the remand order passed by the Commissioner (Appeals) rejected the claim of the petitioner and one of the grounds was that the party could not come up with any positive cause to explain the delay of five months in filing the Modvat declaration under Rule 57G except that they were ignorant about the law. This was not permissible in view of the fact that despite an observation, the Commissioner of Appeals felt that the matter required de novo adjudication and directed the Assistant Commissioner to adjudicate the matter afresh in the light of the directions given in the operative order by impliedly condoning delay. At another place, the Assistant Commissioner observed in its order that the learned Commissioner (Appeals) has opined that the proper course for the party would have been to reverse the Modvat credit attributable to the exempted goods prior to their clearance. I could not agree more with this observation of the Commissioner (Appeals). A direction was given to the Assistant Commissioner to adjudicate after correctly providing the scientific basis of which actual quantity of molasses ultimately in the manufacture of Ethyl Alcohol is arrived at. There appears prima facie substance in the submission of Sri Mathur that this does not appear to have been done by the Assistant Commissioner.

7. While considering an application for stay-cum-waiver u/s 35F, the Commissioner (Appeals) is required to look at the prima facie merits of the appeal as well as undue hardship that may be caused to the petitioner. It is no doubt true that at the preliminary stage, the Commissioner (Appeals) is not required to go into the merits meticulously and in details, yet the facts stated

above ought to have been considered by the Commissioner (Appeals) while deciding application u/s 35F. In his order dated 24-2-1999 the Commissioner (Appeals) has observed that the main ground of denial was that the appellant failed to state any positive cause to explain the delay of 5 months in filing the declaration for the period March 1994 to 20-7-1994 and that he has carefully considered the plea of the appellants regarding deposition of the pre-deposit of the dues. This prima facie shows that the learned Commissioner while dismissing of the application u/s 35F has not at all applied his mind to the merits of the case. Once in earlier appeal filed by department delay was impliedly condoned. Stay-cum-waiver...be refused as such grounds.

8. In this view of the matter, the petition is allowed. Order dated 24-2-1999 and order dated 30-9-1999 are hereby quashed and the Commissioner (Appeals) is directed to hear and decide the appeal expeditiously without insisting upon any pre-deposit.

9. Any observation made in this body of the judgment shall not have any bearing on the merits of the appeal.

10. Parties shall bear their own costs.