

(1985) 02 KAR CK 0028
In the Karnataka High Court
Case No : Writ Petition No. 10327 of 1980

Somaiya Sugar Works

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 19-02-1985

Acts Referred:

Central Excise Rules, 1944 — Rule 10, 12, 173J, 8

Citation : (1986) 10 ECC 27 : (1986) 24 ELT 252 : (1986) 159 ITR 464

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

Bench : Single Bench

Advocate : K. Shivashankar Bhat, the Central Govt, for the Appellant;

Judgement

1. The petitioners are manufacturers of Sugar and during the period 1-12-1973 to 30-9-1974 they had produced excess sugar and had claimed a rebate under Notification No. 152/74, dated 20-11-1974 issued under Rule 8(1) of the Central Excise Rules ("the Rules"). Under the notification a concessional rate of excise duty on each quintal of excess sugar produced at varied rates on levy sugar and free sale sugar, was payable as per the table. A reduced rate of duty was provided on the excess sugar produced by the petitioner-company as an incentive to produce more sugar. By applying the concessional rate of levy to the excess sugar produced, proforma credit of Rs. 33,79,904.30 Ps. was allowed as per the endorsement (Annexure E), dated 11-6-1975 issued by the Asst. Collector of Central Excise, Belgaum. The actual date on which this sum was taken to credit in the books of the Company was 13-6-1975.

2. On 3-4-1978, the third respondent issued a show cause notice to the petitioners why a sum of Rs. 9,14,370.39, out of Rs. 33,79,904.40 Ps. should not be recovered or readjusted in its personal ledger account in accordance with the Trade Notice No. 95/1975 issued by the Collector of Central Excise, Bangalore. The ground on which the said sum was sought to be readjusted in the running account of the petitioner-company was that the petitioner had availed of the concessional rate of duty in respect of 21,264.274 quintals of sugar which was

exported by the Company during the relevant period and further that the sugar exported was exempt from the whole of the duty by the Central Government and that therefore the petitioner was not entitled to the rebate on the very same sugar exported.

3. This show cause notice was issued applying the Notification No. 197/62, dated 17-11-1962 by the Government of India in exercise of its powers conferred by Rule 12 of the Central Excise Rules Exempting export sugar from duty. The said notification reads as follows :-

"(1) Procedure for grant of rebate of the excise duty paid on excisable goods and exported out of India :

In exercise of the powers conferred by rule 12 of the Central Excise Rules, 1944, as in force in India and as applied to the State of Pondicherry, the Central Government is pleased to direct that, in supersession of the notifications of the Government of India in the Ministry of Finance (Dept. of Revenue) No. 10-Central Excises, dated the 5th April, 1949, No. 45-Central Excises, dated the 1st November, 1954, No. 12-Central Excises, dated the 5th April, 1949 and No. 47/54-Central Excises, dated the 1st November, 1954, rebate of the duty paid on the excisable goods specified in the Table annexed here to shall, on their exportation out of India, or the State of Pondicherry, as the case may be, to the destinations mentioned in column (3) thereof, be made to the extent and subject to the conditions and limitations, if any, set out in the corresponding entries in columns (4) and (5) :

* * *	-----	SI.
Excisable goods pertaining	Destination to particular excisable goods	No. of conditions per- rebate
-----	-----	(1) (2) (3) (4)
(5) -----	1. Sugar - Any country or The Other than sugar territory outside Whole contained in India excluding confectionery, Nepal, Bhutan Coffee and Sikkim * * *	
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4. To the show cause notice, the petitioner replied that it was not open to the department to recover the sum of Rs. 9,14,370.39, for the reasons stated in the show cause notice and contested the same on various grounds :-

(i) that there was no suppression of any material by the petitioner-company as regards the sugar exported by them;

(ii) that the recovery initiated was barred by limitation;

(iii) the Government is estopped from recovering the amount having allowed the proforma credit by applying Notification 152/74;

(iv) the Notification 197/72 issued under Rule 12 of the Rules is not applicable to the petitioner's case.

5. The Assistant Collector made an order on 6-6-1980 disagreeing with the contentions of the petitioner and held that the quantity of sugar exported out of the excess production was not entitled to any rebate since the Government had exempted the sugar exported out of India, from the whole of the duty paid on it. He also relied upon the Trade Notice 95/75 issued by the Collector of Central Excise for revoking or adjusting the concessional duty which the petitioner had availed of as per Notification 152/74. He, therefore, directed a sum of Rs. 9,14,370.39 to be debited to the Personal Ledger Account of the petitioner.

6. The petitioner has explained in the writ petition that no appeal was filed against the order of the Asst. Collector since the department was bound to follow the Notification 197/62 issued by the Government of India, and hence, it has approached this Court for necessary relief.

7. It is argued by Sri Tilak Hegde that the proforma credit admissible under Notification 152/74 was granted by the Government on 11-6-1975 and the same was credited in the accounts of the petitioner-company on 13-6-1975 and that therefore, the show cause notice issued to withdraw the exemption to the extent indicated in the show cause notice dated 3-4-78 is clearly barred by time. It is further urged, that while giving effect to the Notification 152/74, it is not open to the department to press into service the notification issued under Rule 12 and to withdraw the concessional duty granted as per notification issued under Rule 8(1).

8. It is contended by Sri Shivashankar Bhat on behalf of the respondents that the Assistant Collector was justified in excluding the quantity of sugar exported out of its excess production, for the purpose of giving effect to the notification of the Government exempting the export sugar from the whole of the duty of excise.

9. He has also further contended that no question of limitation arises on the facts of the case and the mentioning of Rule 10 in the show cause notice should be ignored. It is therefore asserted on behalf of the respondents that the petitioner cannot have the benefit of total exemption from duty in respect of sugar exported, as also the concessional rate in respect of the very sugar under a different notification issued under Rule 8 of the Rules. His further submission is that granting of concessional rate of levy in terms of the Notification 152/74 has nothing to do with the application of the notification issued under Rule 12 and what is sought to be done by the Department is only an adjustment in the running account of the company as to the proper excise duty leviable and to be appropriated in the account-current.

10. Sri Tilak Hegde has, in support of his contentions, relied upon the following decisions :

(i) Ajantha Paper Products v. Collector of Central Excise - ILR 1982 (All.) 2626 : 1982 E.L.T. 201 (All.)

(ii) Shakthi Sugars Ltd. v. Union of India (Mad.) (unreported). - 1983 E.L.T. 484

(Mad.).

(iii) Union of India and Others Vs. I.T.C. Limited and Another,

(iv) Ethikoppa Cooperative Agri. Society Ltd. v. Union of India - [I.L.R.1979 A.P. 2454] : 1979 E.L.T. 533 (A.P.)

(i) Ajantha Paper Products v. Collector of Central Excise [1982 E.L.T. 201 (All.)]. It was held in the said decision that erroneous refund also falls under Rule 10 of the Central Excise Rules.

The question before the High Court was whether the proceedings started under R. 10 can be continued after 17-11-1980 when R. 10 was omitted and whether the proceedings taken under the said rules lapsed with the omission of the Rule.

Relying on the Supreme Court decision in Royala Corporation case Their Lordship held that the notice issued under R. 10 after 17-10-1980 will lapse.

It is, therefore, necessary to refer to the observations of the Supreme Court in Royala Corporation case. That was a case which arose under the Defence of India Rules, 1962. Prosecution launched after repeal of the Rule 132A(2) of (4) was challenged in the said case.

It was held that the prosecution launched after the omission of the rule was illegal. It was also further observed that the amendment rules saved action already taken while Rule 132A(2) was in force. The question was whether the action initiated after the rule was omitted, could be justified in law ? On this interpretation the complaint made for the offence under R. 132A(4) of the Defence of India Rules after 1-4-1965 when Rule 132A(2) was omitted, was held invalid.

(ii) In Shakthi Sugar Mills and other connected cases, the demand was made more than one year after the amounts were credited in the petitioner's account. The demand made to pay the short-duty after one year from the date of the crediting of the accounts, was resisted by the petitioners on the ground of limitation.

Dealing with the question of limitation prescribed by R. 10, His Lordship Justice Varadarajan of the Madras High Court (as he then was), held that demands made by the department beyond one year from the date of crediting the accounts of the petitioners, were barred by limitation.

It was the department's case that credit was given erroneously for larger sum of excise duty rebate than what the petitioners were entitled to. This was construed as a case of short-levy falling under R. 10.

(iii) Etikoppa Cooperative Agri. Society v. Union of India I.L.R.1979 A.P 2454 : 1979 E.L.T. 533. The Andhra Pradesh High Court was dealing with R. 10 after 1977 and before its substitution in 1980 and the limitation provided under R. 173P. His Lordship Chinnappa Reddy (as he then was) held that for purpose of

computing period of limitation under Rule 173J, the date on which the duty was adjusted in the owner's current account is relevant viz., one year from that day.

(iv) Union of India v. I.T.C. Ltd. [1985 (20) E.L.T. 655 (Kar.)]

Sri Shivashankar Bhat has argued that what was sought to be withdrawn was not an amount of duty levied and paid by the petitioner under that Act, but it was a payment made outside the Act. Therefore, it called for readjustment in the running account of the petitioner and the excess concession is sought is the withdrawn as a consequence.

11. It is alternatively contended by Sri Bhat that under the proviso to Rule 10, the limitation for withdrawing or rectifying any order of assessment or withdrawal of concession, etc., is five years in a case of suppression of information by the assessee.

12. Under Rule 12, the sugar exported is eligible for total exemption from the levy of duty. Rule 12 reads thus :

"Rule 12. Rebate of duty on goods exported. - (1) The Central Government may, from time to time, by notification in the Official Gazette, grant rebate of duty paid on excisable goods, if exported outside India, to such extent, and subject to such safeguards, conditions and limitations as regards the class of goods, destination, mode of transport, and other allied matters as may be specified therein :

* * * * 1. Sugar other than sugar contained in Confectionery, Coffee. Any Country or territory outside India The excluding Nepal, Bhutan and Sikkim. Whole."

Therefore, the application of the concessional rate as per Ext. A, to exported sugar is beyond the scope of that notification and totally inapplicable to export sugar. The Department realised the mistake that the Notification 152/74 was applied even in respect of export sugar during the relevant period. Therefore, what was sought to be done by the Department was to make an re-computation and readjustment in the running account of the assessee by applying the Notification which exempted the exported sugar from the levy of excise duty.

13. Rule 10 speaks of duty levied or short-levied or erroneously refunded or the duty payable under the Act is not in full and a limitation of six months is provided from the relevant date to call upon the assessee to show cause why action should not be taken under that Rule.

14. Under the proviso (c) to Rule 10, where an erroneous refund had occasioned by reason of omission or misdirection or suppression of facts by the assessee, an enlarged period of five years is provided for the issue of the show cause notice and to reopen the proceedings.

15. The "relevant date" for the purpose of this rule means :

"(ii) "relevant date" means -

(a) in the case of excisable goods on which duty has not been levied or paid or on which duty has been short-levied or has not been paid in full, the date on which the duty was required to be paid under these rules;

(b) in the case of excisable goods on which the value or the rate duty has been provisionally determined under these rules, the date on which the duty is adjusted after final determination of the value of the rate of the duty, as the case may be;

(c) in the case of excisable goods on which duty has been erroneously refunded, the date of such refund."

Therefore, the arguments of Sri Bhat is that export sugar being exempted from the whole of the duty under Rule 12, and action taken to correct the accounts or set right the mistake is not governed by the limitation prescribed under the Rules.

16. Sri Shivashankar Bhat has referred to Rule 173(1) of the Central Excise Rules under which an assessment is contemplated in cases of levy of excise duty under the Act. According to his submission, since no assessment is made in this case regards the excess refund, there was no bar for the Department to take steps to withdraw the rebate that the petitioner had availed of in respect of the sugar exported, to which the petitioner was not entitled to.

17. The Department took action to withdraw the said rebate since it was found, on facts, that the petitioner had wilfully suppressed the fact that they had exported 21,264.274 quintals of sugar out of the excess production.

18. Sri Bhat placed reliance on the Division Bench decision of this Court in Union of India and Others Vs. I.T.C. Limited and Another, and contended that the extra rebate granted to the petitioner should be construed as a payment outside the Act and the rebate allowed was not authorised by law. That was a case where the assessee had made a claim for refund of the difference of excise duty paid by mistake. This Court held that the said payments did not represent the duty authorised by law and therefore no period of limitation was applicable to such a case.

19. The Division Bench relied upon a decision of the Supreme Court in Patel India Pvt. Ltd. v. Union of India - 1973 S.C. 1300 : 1983 E.L.T. 1945 (S.C.), and the later decision in Shri Vallabh Glass Works Ltd. and Another Vs. Union of India (UOI) and Others, in confirming the order of the learned Single Judge and dismissing the appeal filed by the Union of India.

20. Sri Bhat also relied upon another decision of the Supreme Court in D.R. Kohli and Others Vs. Atul Products Ltd., for the proposition that whenever there is no assessment at all under the Act, no question of applying limitation arises if the refund is in respect of a duty which was not leviable at all under the Act.

21. The last contention urged on behalf of the respondents is that this is a case

of unjust enrichment by the petitioner-company since the petitioner has had the benefit of total exemption in respect of export sugar and also the concessional duty under the notification, Ext. A, in respect of the very quantity of sugar exported. Sri Bhat submits that this Court should not interfere in exercise of its discretionary jurisdiction with the order of the Asst. Collector dated 6-6-1980 and dismiss the Writ Petition.

22. Two notifications that are relevant to be considered in this case are :

(i) Notification 152/74 issued under Rule 8(1), and

(ii) Notification 197/62 issued under Rule 12.

Dealing with the Notification 152/74 first, it may be seen that the Government, in exercise of its powers conferred under Rule 8(1) of the Central Excise Rules, exempted a part of the duty at varying rates leviable on excess sugar in accordance with the Table annexed to the said notification. The rates, the period and other details for working out the said exemption are given in the Table annexed to the notification.

23. Under Rule 12, the Central Government may, by a notification, grant rebate of duty paid on excisable goods, if exported out of India to the extent specified in the notification.

24. The Notification 197/62 is one such notification issued in exercise of the power conferred under the rule under which is granted, rebate of the duty on the excisable goods specified in the table annexed thereto. Sugar is one the excisable goods on which the extent of rebate allowed under the notification, is the whole of the duty paid under the Act.

25. Therefore, the question is : whether the action of the Government proposing to withdraw the rebate given by mistake and recomputing the incentive rebate granted in respect of the excess sugar produced by the petitioner-company is justified in law, and whether any limitation is applicable to such withdrawal ?

26. Sugar is one of the excisable goods as defined u/s 2(d) of the Act. Under Rule 8, as already stated, the Government may exempt any excisable goods from the whole or any part of the duty leviable on such goods.

27. Rules are framed under Chapter VII-A of the Rules governing the removal of excisable goods by producers, manufacturers or private warehouse licences. Chapter VII-A is an elaborate code providing for application for grant of licence, filing the classification list and the price list by the manufacturers and other related matters. Rule 173F and FF provide for what is known as "self-removal system" and Rule 173G provides for the maintenance register known as "R.G. 23", filing of returns by the manufacturer and assessment by the proper officer under Rule 173-I. It is the contention of Sri Shrivashankar Bhat that the provisions of Chapter VII-A are applicable to a case where the goods in question is exigible to duty under the Act and are not applicable to goods which are

exempt from payment of duty.

28. Therefore, on a careful consideration of the petitioner's contentions vis-a-vis that of the Revenue, what emerges from the facts of the case is, that the petitioner was not entitled to any concessional rate of duty on the sugar exported by it and the same was not in accordance with the Notification 197/62 and the grant of the concessional rate by the Department in respect of this very sugar, which was exempt from the whole of the duty, was a mistake. Consequently, the proforma credit granted by the Department on applying the Notification 152/74 was sought to be withdrawn. This refund granted in the proforma credit represented the incentive that the petitioner had availed of under Notification 152/74 to which the export sugar was not eligible.

29. The case of the department is that the duty paid on export sugar which was exempt from levy of duty under Rule 12, was a payment made outside the Act. The concessional duty the export sugar suffered under Rule 8 by a wrong application of the Notification 152/74 should be withdrawn and the refund given to the petitioner reversed in the accounts of the company. This submission of the Department has to be accepted on the facts of the case.

30. On a proper interpretation and application of the Notification 197/62 no part of the sugar exported is liable to suffer duty under the Act.

31. On the facts of the present case, the petitioner-company had availed of the rebate on the portion of the excess sugar which was exported.

32. As a result of the enquiry conducted by the Department, it was discovered that the petitioner had enjoyed the benefit of both the exemption under Notification 197/62 and the concessional duty on the very same quantity exported, under Notification 152/74.

33. Both cannot be availed of by the petitioner having regard to the exemption provided to export sugar under Rule 12, which is governed by a separate notification issued by the Central Government, viz., Notification No. 197/62.

34. It is not disputed by the petitioner that 21,264.274 quintals of sugar was exported. It is also not in dispute that the sugar exported was exempt from the whole of the duty. It, therefore, follows that the petitioner-company was not entitled to any rebate in the levy of duty on that quantum of the sugar exported and the concessional duty availed of by the petitioner was sought to be withdrawn and rectified by the department in the accounts of the company.

35. The ratio of decision of the Supreme Court in D. R. Kohli, and of this Court in Union of India and Others Vs. I.T.C. Limited and Another, squarely apply to the facts of this case.

36. In the result, the writ petition is dismissed and the order made by the Assistant Collector, as per Annexure E, is upheld.