
(1997) 10 DEL CK 0040

In the Delhi High Court

Case No : Civil Miscellaneous Appeal No. 6758 of 1997 and Civil Writ Appeal No. 3492 of 1997

Supreme Steels and General Mills

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 28-10-1997

Acts Referred:

Central Excises and Salt Act, 1944 — Section 3A

Citation : (1997) 70 DLT 773 : (1997) 96 ELT 232

Hon'ble Judges : R.C. Lahoti, J;J.K. Mehra, J

Bench : Division Bench

Advocate : R. Santhanam, Rajendra Singhvi and Rakesh Tikku, for the Appellant;

Judgement

J.K. Mehra, J.

(1) Since common questions were involved in a number of writ petitions, we proceeded to hear arguments in these cases and sought assistance from all Counsel appearing in various matters.

(2) Arguments of both the parties were heard at some length. In these cases, challenge has been laid to the validity and virus of Section 3A of Central Excise Act, 1944 apart from Notification Nos. 24/97,30 to34/97,57/97and58/97and all other connected notifications. In addition, the petitioners have also made a grievance of the scheme whereby modivat credit standing to the credit of various petitioners to the with drawal of modivat credit w.e.f. 1.8.1997. Not only that, by that very scheme/ decision, respondent No. 1 has deprived the petitioners of the modivat credit already accrued and available to them. The lapse of the modivat credit in the account of assesseees is in the nature of giving retrospective effect to the said notification whereby the credit already earned is sought to be taken away. In the original Act prior to enactment of Section 3A, the charging section imposed liability to excise duty on the goods manufactured which was in consonance with Entry No. 84 in List I of Seventh Schedule of the Constitution of

India. Although the petitioners have raised important questions of law, as would appear from what is observed hereinafter. We are confining our order only to interim relief, sought by the petitioners in these petitions except C.W.P. Nos. 1231 /96 and 1400/96 wherein no application for interim relief is pending, as our Bench is breaking on 5.11.1997 and Diwali festival intervening in between, we are not left with enough time to hear arguments in the main petitions.

(3) After the arguments had been heard and the matter had been posted for orders, an application was received in C.W.P. No. 3490/97 whereby petitioners Nos. 1,2 and 5 have prayed for withdrawing from the writ petition. The said prayer . has since been allowed by a separate order. In the circumstances, this order in respect of C.W.P. No. 3492/97 is confined only to petitioner Nos. 3 and 4.

(4) Before we proceed to consider various contentions, it will be appropriate to notice certain provisions of law as under:

"ENTRY No. 84 in Seventh Schedule of Constitution of India. Duties of excise on tobacco and other goods manufactured or produced in India except....."

Sections 3 and 3A of the Central Excise Act, 1944 read as under :

"3. Duties specified in the First Schedule to be levied-(1) There shall be levied and collected in such manner as may be prescribed duties of excise on all excisable goods other than salt which are produced or manufactured in India and duty on salt manufactured in, or imported by land into, any part of India as and at the rates, set forth in the Schedule to the Central Excise Tariff Act, 1985. Provided that the duties of excise which shall be levied and collected on any excisable goods which are produced or manufactured- (i) in a free trade zone and brought to any other place in India; or (ii) by a hundred per cent, export-oriented undertaking and allowed to be sold in India, shall be an amount equal to the aggregate of the duties of customs which would be livable u/s 12 of the Customs Act, 1962 (52 of 1962), on like goods produced or manufactured outside India if imported into India, and where the said duties of customs are chargeable by reference to their value, the value of such excisable goods shall, "GA Power of Central Government to change excise duty on the basis of capacity of production in respect of notified goods. (1) Notwithstanding anything confirmed in Section 3, where the Central Government having regard to the nature of the process of manufacture or production of excisable goods of any specified description, the extent of evasion of duty in regard to such goods or such other factors as may be relevant, is of the opinion that it is necessary safeguard the interest of recent specify, by notification in the Official Gazette such goods as notified goods and there shall be levied and collected duty of excise on such goods in accordance with the provisions of this section. (2) Where a notification is issued under Sub-section (1), the Central Government may, be rules, provide for determination of the annual capacity of production or such factor or factors relevant to the annual capacity of production of the factory in which such goods are produced by the Commissioner of Central Excise and such

annual capacity of production shall notwithstanding anything" contained in any other provision is, 1962, (52 of 1962) and the Customs Tariff Act, 1975 (51 of 1975). Explanation 1.-Where in respect of any such like goods, any duty of customs livable under the said Section 12 is livable at different rates, then, such duty shall, for the purposes of this provision, be deemed to be livable under the said Section 12 at the highest of those rates. Explanation 2.-In this proviso- (i) "free trade zone" means the Kandia Free Trade Zone and the Santa Cruz Electronics Export Processing Zone and includes any other free trade zone which the Central Government may, by notification in the Official Gazette specify in this behalf; (ii) "hundred per cent export-oriented. undertaking" means an undertaking which has been approved as a hundred per cent export-oriented undertaking by the Board appointed in this behalf by the Central Government in exercise of the powers conferred by Section 14 of the Industries (Development and Regulation) Act, 1951 (65 of 1951), and the rules made under the Act. 1-A. The provisions of Sub-section (1) shall apply in respect of all excisable goods other than salt which are produced or manufactured in India by, or on behalf of. Government, as they apply in respect of goods which are not produced or manufactured by Government. (2) The Central Government may, by notification in the Official Gazette, fix, for the purpose of levying the said duties, tariff values of any articles enumerated, either specifically or under general headings, in the Schedule to the be deemed to be the annual production of such goods by such factory : Provided that where a factory producing notified goods is in operation on, during a part of the year the production thereof shall be calculated on proportionate basis of the annual capacity of production. (3) The duty of excise on notified goods shall be levied at such rate as the Central Government may be notification in the Official Gazette specify and collected such manner as may be prescribed: Provided that, where a factory producing ratified goods did to produce the notified goods during any continuous period of not less than seven days, duty calculated on a proportionate basis shall be abated in respect of such period if the manufacturer of such goods fulfills such conditions as may be prescribed. (4) Where an assessed claims that the actual production of notified goods in his factory is lower than the production determined under Subsection (2), the Commissioner of Central Excise shall after giving an opportunity to the assessed to produce evidence in support of his claim, determine the actual production and redetermine the amount of duty payable by the assessed with reference to such actual production at the rate specified the Sub-section (3). (5) Where the Commissioner of Central Excise determines the actual production under Sub-section (4), the amount of duty already paid, if any, shall be adjusted against the duty so redetermined and if the duty already paid falls short of, or is in excess of the duty so redetermined, the assessed shall pay the deficiency or be entitled to a refund, as the case may be. (6) The provision of this section Central Excise Tariff Act, 1985 as chargeable with duty ad valorem and may alter any tariff values for he time being in force. (3) Different tariff values may be fixed-(a) for different classes or descriptions of the same excisable goods; or (b) for excisable goods of the same class of description- (i) produced or

manufactured by different classes or producers or manufactures; or (ii) sold to different classes of buyers Provided that in fixing different tariff values in respect of excisable goods falling under Sub-clause (i) or Sub clause (ii), regard shall be had to the sale prices charged by the different classes of producers or manufacturers or, as the case may be, the normal practice of the wholesale trade in such goods". shall not apply to goods produced or manufactured. (i) in a free trade zone and brought to any other place in India; or (ii) by a hundred per cent export-oriented undertaking and allowed to be sold in India. Explanation 7-For the removal of doubts, it is hereby clarified that for the purposes of Section 3 of the Customs Tariff Act, 1975 (51 of 1975), the duty of excise leviable on the notified goods shall be deemed to be the duty of excise leviable on such goods under the Schedule to the Central Excise Tariff Act, 1985 (5 of 1986), read with any notification for the time being in force. Explanation 2-For the purpose of this section, the expressions "free trade zone and hundred per cent export-oriented undertaking shall have the meanings assigned to them in Section 3."

(5) The modvat scheme as it stood prior to the amendment in Rule 57F(4A) was contained in Rules 57A to 57J whereby the manufacturer of the final product became entitled to utilisation of the credit the moment the inputs/raw materials etc, are received in the factory for use in the manufacture of the end/final product. The credit so earned by the manufacturer of the final product/end product could be utilised adjusted in payment of duty on the final products even though it did not contain any of the inputs recently acquired in the said factory. In other words there was no postponement of utilisation of the credit till the date of utilisation of the input in the manufacture of final products. The said credit earned on the inputs was to remain always available to the manufacturer for utilisation of payment of excise duty on the final product.

(6) It is contended by the learned Counsel for the petitioners that the said credit stood completely crystallised and the right to utilise it stood vested in the manufacturer of the final product. The petitioners submit that the amended rule takes away the modvat credit already standing in the manufacturer's account. The petitioners contend that under the provision to Rule 57F (4A), the credit available in inputs lying in stocks or contained in finished products which was lying in stock on 16.3.1995, is protected provided the final product has been cleared on payment of duty from the factory prior to 16.3.1995. It is, Therefore, contended that the rule seeks to lapse the credit which has already become final and absolute and vests in the petitioners as their property and is, Therefore, confiscatory in nature on account of its retrospective operation whereby the credit already standing in the account of manufacturer is taken away. Not only that, it creates new disability. A statute is deemed to be retrospective which takes away or impairs any vested right acquired under existing law and creates a new obligation or imposes a new duty or attaches a new disability in respect of the transactions or considerations already past. Therefore, the operation of this rule is contended to be retrospective in nature which is beyond the rule making powers of the Government under the Act. The petitioners have placed reliance on

Sri Vijayalakshmi Rice Mills, New Contractors Co. and Others Vs. State of Andhra Pradesh, K. Eapen Chake v. The Provident investment Company (P) Ltd. and Govind Das and Others Vs. The Income Tax Officer and Another, , in support of their argument that the lapse of modivat credit already earned by the manufacturer is retrospective in nature. Counsel for the petitioners have very strongly contended that Central Government has no power to make rules with retrospective effect under the Central Excises Act. They placed reliance in this behalf on The Cannanore Spinning and Weaving Mills Ltd. Vs. Collector of Customs and Central Excise Cochin and Others, .

(7) Mr Santhanam, Advocate has referred to the power conferred on Central Government to make rules u/s 37(1) of the Act wherein Section 37(2)(xvia) was introduced vide Section 51 of the Finance Act, 1986 conferring powers on Central Government to make rules providing credit of duty paid or deemed to have been paid on goods used in or in relation to the manufacture of excisable goods and it was pursuant to this provision that the modivat scheme was framed and enacted under Rules 57A to 57J. It was contended that the said new section empowered the Government to make rules for providing modivat credit of duty paid on the goods used in the manufacture of excisable goods/final products and no rule which provided for taking away the credit already earned, could be deemed to have been authorised by Section 37(2)(xvia). Therefore, the said rule taking away the credit already earned, is ultra virus the Act. It is not in dispute that the Government could make all rules ancillary or incidental to the main object of levy and collection of excise duty. In reply to a Court question, it was conceded that the Government could prospectively withdraw the entire modivat scheme and such construction would be fully protected u/s 21 of General Clauses Act, but it had no power to lapse the credit already accrued.

(8) Another argument advanced on behalf of the petitioners was that the impugned rule of lapsing of credit on specified commodities only and in respect of only a class of goods is purely whimsical and not based on relevant criteria apart from being discriminatory and is hit by Article 14 of the Constitution of India. They also placed reliance on the Division Bench judgment of this Court in the case of Hindustan Liver Limited v. Union of India, Cw 90/90 decided on 30.11.1990, whereby such deprivation of credit was struck down and this Court had directed respondents to permit the petitioners to utilise the credit of money already earned by them as a result of the duty paid on inputs before the notification.

(9) In this case, this Court had approved the ratio of the decisions of Gujarat and Punjab & Haryana High Courts in the cases of Amrit Banaspati Co. Ltd. and Another Vs. Union of India (UOI) and Others, , and Dipak Vegetable oil Industries Ltd. Vs. Union of India, . Subsequently similar matters came up for decision before High Courts of Karnataka, Andhra Pradesh, Madras and Rajasthan. In the following judgments other High Courts have also approved the aforesaid view :

(1) The Modern Mills Ltd. Vs. Union of India, , Agarwal Industries Ltd. Vs. Union

of India, , Madras Vanaspati Ltd. Vs. Union of India, , Hemraj Udyog Vs. Union of India (UOI), .

(10) In view of the consistent line of decisions mentioned hereinabove, it cannot be said that the petitioners have no case in their favour. On the contrary it is a matter which calls for consideration in detail in view of the aforesaid important question of law. In the circumstances, we allow the application and direct that the operation of the rules relating to lapsing of modivat credit shall remain stayed till the disposal writ petition and the petitioners will be entitled to utilisation of modivat credit already earned by them. This however, will be subject to the condition the teach of the petitioners file an undertaking with the respondent to the effect that in case the ultimate result of the writ petition is against them and they are held to be not entitled to the lapsed, modivat credit, they will deposit the amount of excise duty payable which is adjusted by them against the credit earned together with interest @ 18%. P.a

(11) COMINGTOTHEQUESTIONOFVALIDITYOROTHERWISEOFSECTION3AOFEXCISEACT, we are unable to accept the contention of Mr. Tikku that in the Entry No. 84, List I of Seventh Schedule of the Constitution of India, the word "manufactured and produced" should be deemed to include the words "to be manufactured or to be produced" because prima fade this construction is contrary to the plain and unambiguous language in the said entry. It appears to be only an argument of despair resorted to by Mr. Tikku. The entry could not, but refer only to the goods which are actually produced/manufactured and it could not by any stretch of imagination refer to goods to be produced or deemed to be produced. Viewing the provisions of Section 3A in the light of the provisions to Entry No. 84, it appears that the petitioners have prima facie case to challenge the validity and virus of Section 3A. A reference he also made to ratio of A.B. Abdul Kadir and Others Vs. State of Kerala, . Furthermore, it may be noticed that excise is a duty on goods and not on persons. It cannot be imposed until goods come into existence nor can there be any discrimination on the same goods being produced by different manufacturers or by different methods such as those produced by Arc Furnaces from those produced by Induction Furnaces.

(12) Mr. Santhanam has taken us through various notifications referred to hereinabove to show that in actual working and practice, the said notifications are discriminatory and vocative of Article 14 also. Particular reference has been made on Notification Nos.24/97,30-34/97,47/97and 58/97. Thus Section 3 is challenged on various grounds of being ultra virus of the Constitution of India. The Notifications are challenged on the ground of being arbitrary and superfluous apart from being discriminatory in their working and in nature. Various other rulings were also cited at the Bar which, it is not necessary for the time being to deal with in detail. Some of those rulings are noted hereunder :

1. Union of India and another etc. etc. Vs. A. Sanyasi Rao and other etc. etc., .
Govind Saran Ganga Saran Vs. Commissioner of Sales Tax and Others, .
McDowell and Co. Ltd. Vs. Commercial Tax Officer, . Kunnathat Thathunni Moopil

Nair Vs. The State of Kerala and Another, . Khandelwal Metal and Engineering Works and Another Vs. Union of India (UOI) and Others, . State of Punjab Vs. Jaswant Theatre and Another, , Dhirish Traders Vs. Union of India, . Goodyear India Ltd. v. Union of India, (1990) 49 Elt 39 DelHI. Coil. of Central Excise v. Wipro Information Technology, (1988) 33 ELT172Tri. C.C.E. v. Garware Paints Ltd., (1986) 25 Elt 399 Tri.. 1994 (70) ELT 738 .

(13) It is very peculiar that while referring to these notifications, we find that the term "composite plant" has been differently defined in different notifications and at times even within the same notification. The notifications also appear to convey an impression of being arbitrary for another reason i.e., the basis of levy of duty in the current year is the assumed production worked out on the basis of the last year's figures or on the basis of the installed capacity. Similarly under Notification No. 24/ 97, products produced by induction furnaces only are covered while products produced by are furnaces, have been left out. Further relief is provided if the factory remains shut down continuously for seven days. Impliedly denying relief in the cases of shut down for less than 7 days continuous or for intermittent shut down each for less than seven days. This also prima facie appears to be arbitrary and irrational.

(14) In the light of the above arguments, it will be appropriate and in the interest of justice and equity to stay the operation of Notification Nos. 24/97 dated 25.7.1997; 30/97,31/97,32/97,33/97,47/97,48/97 all dated 1.8.1997; 44/97,45/ 97,58/97 and 59/97 all dated 30.8.1997. Ordered accordingly.

(15) Before parting, we would like to mention by way of abundant caution that whatever has been stated in this order is solely for the purpose of holding that the petitioners have strong prima facie case for grant of interim relief in their favor and is not an expression of final opinion in any of the issues arising for decision in the main writ petitions. Hearing expedited. Let these matters be set down for final hearing on 10.3.1998.