(1998) 03 DEL CK 0052

In the Delhi High Court

Case No : CWP 824 of 1998

Thane Belapur Industries Association APPELLANT

Vs

Union of India and Others RESPONDENT

Date of Decision : 23-03-1998

Acts Referred:

Citation : (1998) 102 ELT 258

Hon'ble Judges : R.C. Lahoti, J;Mukul Mudgal, J

Bench : Division Bench

Advocate : Mr. V. Sridharan, for the Appellant; Mr. P.N. Mishra, for the Respondent

Judgement

R.C. Lahoti, J.—The petitioner, an association of industries, has filed this petition mainly seeking the quashing of the circular No. F-296/46/97/CX-9 dated 14.1.1998 issued by the Central Board of Excise and Customs, also seeking setting aside of consequential OR ''follow-up'' orders issued by the subordinate officers of the Central Excise to various industries at various places. The impugned circular is a telex message addressed to all Chief Commissioners/ Commissioners of Central Excise throughout the country. It reads as under :-

"T E L E X

To

All Chief Commissioners of Central Excise

All Commissioners of Central Excise

From

B.P. Verma Member (Central Excise),

CBEC, New Delhi

F.No.296/46/97-CX.I(Pt)(.) You may recall that vide telex of even number dated

11.11.97 special check was ordered for MODVAT by all field formations (.) Reports received in this regard has disclosed misuse of MODVAT to the extent of Rs.133 crores, out of which Rs. 27 crores have been reversed/realized (.) In order to complete these checks in a more systematic and authentic manner, it is ordered as follows :

(1) Balance of the MODVAT misused beyond what has been reversed/recovered should also be recovered immediately.

(2) All such cases where misuse of MODVAT was noticed should immediately be referred to Cost Accountants u/s 14 of the Central Excise Act for a thorough check of the MODVAT of these units during the last five years, including checking of the input-output to examine whether there has been any suppression of production/clearance or diversion of inputs.

(3) In addition, if there are any other units also where it is suspected that MODVAT is being misused or manipulated, such units should also be referred to Cost Audit check u/s 14 immediately.

(4) Results of special MODVAT checks done in earlier periods should also be examined and if it is noticed that any unit has indulged in misuse of MODVAT, these cases should also be referred to the Cost Accounts u/s 14. These references to Cost Accountants must be completed within the next one week that is 21.1.1998 and a report sent to the Board indicating names of the units referred.

It is further ordered that till such time as the scrutiny by Cost Accountants is over and their report made available to the Department, such referred units should not be permitted to pay duty out of their MODVAT credits with immediate effect. However, they may be permitted to take the credits in their account and not utilise it without obtaining clearance from the Department."

2. The grievance of the petitioner may briefly be stated. According to them the MODVAT scheme was introduced by the Central Govt in the year 1986 with the object of avoiding multi-point and cascading effect of taxation. The scheme allows the manufacturers of various products to take credit of the excise duty paid on the inputs used by them or in relation to the manufacture of the final products while paying the excise duty on the final products manufactured by them. The manufacturers can pay the duty from the credit earned by them on the inputs. If any balance duty is payable then the same is paid in cash. For availing the facility of MODVAT scheme the manufacturers have to follow the prescribed procedure and maintain the requisite records. The scheme has to be found contained in Rules 57A to 57J of the Central Excise Rules, 1944.

2.1. With effect from April, 1994, the Central Govt extended the scheme of MODVAT to capital goods also by enacting Rules 57Q to 57U. By Section 83 of the Finance Act, 1997, Section 14 was introduced in the Central Excise Act, 1944. Under this provision where the department is of the view that the credit available is not within the normal limits or has been availed or or utilised by reason of fraud etc the manufacturer may be subjected to an audit by a Cost Accountant to be nominated by the department. The Act or the Rules nowhere contemplate the suspension of MODVAT scheme wholly or in part merely on initiation of special audit. However, the impugned circular from the Board has resulted in indiscriminate and wholesale notices being issued by the local officers resulting into virtual suspension of the statutory MODVAT scheme by executive action which is wholly without jurisdiction.

3. Feeling impressed by the contentions so raised, this Court directed a notice to show cause against the issuance of rule nisi to be issued to the respondent.

4. On 5.3.1998, the learned standing counsel for the respondents made a statement on instructions that the telex dated 14.,1.1998 issued by the Member (CX.I) CBEC was only advisory in nature and was intended only to curb misuse of MODVAT. It did not direct the Commissioners to restrict the genuine and lawful use of MODVAT by the manufacturers. It was also stated that the instructions contained in the said letter had application only to such cases where misuse of MODVAT had come to light and the said letter could not be utilised by the Commissioners for initiating indiscriminate wholesale action against each and every industry. It was further stated that the cost audit initiated u/s 14 shall be ordered only when required to be initiated and shall be subject to a time frame being specified so as to minimise the inconvenience caused to any manufacturer.

4.1 This submission of the learned counsel for the respondent was recorded in the order of the court dated 5.3.1998. It took care of the major part of the grievance raised in the petition. Further hearing was adjourned to 17.3.1998, on which date a, counter filed on behalf of the respondents had come on record. The hearing was adjourned confined to the controversy referable to the last para of the impugned circular dated 17.1.1998, in view of the counsel for the respondents having sought for time to seek further instructions and address the court on that aspect of the issue. Today the learned counsel for the parties have been heard fully and finally.

5. Section 14 has an inbuilt protection available to the person aggrieved. Proceedings there under can be initiated only by a high ranking officer like the Commissioner of Central Excise. He must have '' reason to believe'' of the availability of at least one of the two factors contemplated by Clauses (a) and (b) of sub section (2) thereof, whereupon only a cost accountant can be nominated for audit. Such cost accountant has to submit audit report within a period specified by the commissioner. In our opinion, in view of such inbuilt safeguards provided by the provisions, there is no possibility of misuse or abuse of the provision ordinarily. Still if anyone can make out a case of cost audit having been initiated unjustifiably or any one being harassed, he can individually seek relief making out a case therefore. No general protection restraining misuse of the provision can be issued, nor the impugned circular can be so read as providing a ground for assumed harassment. This position stands further clarified by the

statement made by the learned standing counsel for the respondents under instructions and recorded in the order of the court dated 5.3.1998.

6. So far as the last para of the impugned circular is concerned, it is ultra virus the jurisdiction of CBEC and has to be struck down for the reasons to be stated hereinafter.

7. As already noticed MODVAT scheme is statutory. It has a laudable public purpose behind. Sub-rule(2) of Rule 57A specifically provides for credit of specified duty allowed under sub rule(1) being utilised towards payment of duty on excise livable on the final products, whether under the Central Excise Act or under any other Act as may be specified in an appropriate notification so long as the manufacturers or the person concerned complies with the provisions of the Section and conditions and restrictions if any specified in the said notification. Sub-rule (2) of Rule 57G also provides for the manufacturer taking credit of the duty on the inputs received by him subject to his filing a declaration under sub-rule (1) and obtaining acknowledgement thereof. Wrongful filing or utilisation in an irregular manner of the MODVAT credit entails several penal consequences contemplated by Rule 57(I).

7.1 So are the provisions relating to MODVAT on capital goods, such as those contained in Rules 57R, 57S, 57T &c.

7.2 In short the Rules providing for MODVAT are self contained and exhaustive. They provide for the foundational facts on existence whereof MODVAT may be availed, allowed denied or varied, the manner of accumulating and utilising credit and the procedure-all exhaustively. There is no provision either in the Central Excise Act or the rules made there under or in Section 14 providing for the utilisation of MODVAT credit being deprived merely on account of initiation of special audit. Such deprivation having not been provided by the Act or the Rules made there under cannot be allowed to be done by an executive fiat merely.

8. MODVAT is a unique concession with a simplified mechanism granted to manufacturers on excisable goods. It has acquired a place of recognition in the excise law. The revenue has been benefited by the system as more and more manufacturers are inclined to pay excise duty so as to entitle the manufacturers of such duty paid inputs to avail MODVAT credit. At the same time it effectively reduces the purchase price of the inputs in the industry enjoying the advantage of the MODVAT facility. In Torrent Laboratories Pvt. Ltd. Vs. Union of Incia, a Division Bench of Gujrat High Court has observed that the basis of MODVAT is the mutual trust and confidence. While enacting MODVAT provisions the legislature has reposed a sort of trust or confidence on the assessee, the legislature expects the same type of candid and forthright behavior on the part of the assessee. In S.R.F. Limited Vs. Central Board of Excise and Customs, , the High Court of Madras has held that the MODVAT scheme introduced by statutory rules cannot be either nullified or short-circuited by means of clarification.

9. For the foregoing reasons the following part of the impugned circular dated

14.1.1998 is held to be illegal and ultra virus the powers of the authority issuing the same:-

It is further ordered that till such time as the scrutiny by Cost Accountants is over and their report made available to the Department, such referred units should not be permitted to pay duty out of their MODVAT credits with immediate effect. However, they may be permitted to take the credits in their account and not utilise it without obtaining clearance from the Department."

10. The above said part of the circular is hereby quashed. The petition is allowed in part to the extent indicated hereinabove. No order as to costs.

DASTI.

