

(1991) 07 BOM CK 0076

In the Bombay High Court

Case No : Writ Petition No. 1028 of 1981

TIPCO, Industrial Plastic Corpora

APPELLANT

Vs

Union of India (UOI), M.C. Thakur, Assistant (sic)tion Private
Limited and Another and Collector of Central Excise and
Another

RESPONDENT

Date of Decision : 11-07-1991

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (1991) 37 ECR 588

Hon'ble Judges : M.L. Pendse, J;A.V. Savant, J

Bench : Division Bench

Final Decision : Allowed

Judgement

M.L. Pendse, J.—The petitioner No. 1 is the Private Limited Company and, inter alia, manufactures Phenol resin. The phenolic resin is manufactured in various forms, namely, lump, solid, liquid and powder. The basic ingredients of phenolic resin are phenol and Formaldehyde and the phenolic resin is the result of Phenol and Formaldehyde being reacted with each other. Prior to June 1, 1971 the Phenolic resin and phenolic moulding powder were assessed for the purposes of excise duty under Item No. 15-A of the First Schedule to the Central Excises and Salt Act, 1944 and the duty payable was 40% ad valorem. On June 1, 1971, the Government of India, in exercise of powers conferred by Sub-rule (1) of Rule 8 of the Central Excise Rules, 1944 issued Exemption Notification whereby artificial or synthetic resins specified in Notification and falling under Item No. 15A of the First Schedule was exempted from so much of the duty of excise leviable thereon as is in excess of the rate specified in the corresponding entry in Column (3) of the Table. The duty payable under the Exemption Notification in respect of Phenolic resin was reduced to 20% ad valorem. The notification recites that the expression "phenolic resins" means synthetic resins manufactured by reacting any of the phenols with formaldehyde and includes chemically modified phenolic resins and liquid phenolic resins but does not include blends of the phenolic

resins with other artificial or synthetic resins.

2. The petitioners claim that manufacture of phenolic moulding powder falls within Item 3 read with Explanation III of the Notification dated June 1, 1971 and consequently the levy of duty cannot be at the rate of 40% ad valorem as prescribed under Item 15A of the First Schedule to Central Excise Tariff. The petitioners complained that in spite of the Exemption Notification, the Department unlawfully and illegally levied and recovered the duty at the rate prescribed under Item 15A of the First Schedule. The petitioners thereupon preferred Writ Petition No. 413 of 1975 under Article 226 of the Constitution of India challenging the order passed by the Department denying benefit of Exemption Notification No. 122/71 to the Company. The petition was allowed by decision dated April 16, 1981 delivered by one of us (Pendse, J.) and reported in 1983 ELT 425 : 1989 (25) ECR 360 (Bom). The claim of the Department that phenolic moulding powder manufactured by the petitioners is not entitled to advantage of the Notification dated June 1, 1971 was turned down and the Department was directed to refund the excess duty paid by the petitioners.

2A. Before the date of the judgment on April 16, 1981, the Government of India had issued Exemption Notification No. 7/80 on February 27, 1980 and Item No. 3 in the table annexed to the Notification dealt with phenol formaldehyde moulding powder. The Exemption Notification provided that artificial or synthetic resins and plastic materials specified in the table are exempt from so much of the duty of excise leviable thereon as is in excess of the duty of excise specified in the corresponding entry in the table, provided the same is manufactured from raw Naphtha or any chemical derived therefrom and for which appropriate amount of duty of excise has already been paid. After issuance of Notification No. 7/80, the petitioner Company filed fresh classification list on February 29, 1980 claiming exemption under the said Notification. When the Notification No. 7/80 was brought to the attention of the Single Judge who delivered judgment on April 16, 1981, it was made clear that the decision recorded is in respect of application of Exemption Notification dated June 1, 1971 and application of Notification No. 7 of 1980 was not considered.

3. On April 25, 1981, The Department informed the Company that in view of the judgment delivered on April 16, 1981 by the High Court, the Company is required to file classification list under Notification 7/80 with effect from February 27, 1980. The Department also demanded differential duty at 10% from February 27, 1980 till April 25, 1981. On May 29, 1981, the Department informed the Company that the products manufactured are covered under Notification 7/80 and the Company is liable to pay duty at the rate of 30% ad valorem from February 27, 1980. Some correspondence then transpired between the Company and the Department and ultimately show cause-cum-demand notice dated July 29, 1981 was served on the Company demanding duty amounting to Rs. 23,54,527/- for the period commencing from February 27, 1980 and ending with June 30, 1981.

4. The Company then filed the present petition on July 31, 1981, challenging legality of show cause notice dated July 29, 1981. The Single Judge of this Court by order dated August 3, 1981 directed the Company to file representation before the Department in respect of correct rate of duty and directed the Assistant Collector of Central Excise to dispose of the representation within four weeks. Accordingly, the representation was filed by the Company and after some correspondence, the Assistant Collector of Central Excise passed order on September 7, 1981 holding that the products manufactured by the Company are not covered either under Exemption Notification dated June 1, 1971 or February 27, 1980 and the Company is liable to pay excise duty at the tariff rate as prescribed under Item 15A of the First Schedule to the Central Excise Act. The petitioners then sought amendment of the petition to challenge order dated September 7, 1981 and the amendment was granted on December 17, 1982.

4A. In the meanwhile certain events have occurred which require reference. On May 5, 1982, Central Board of Excise and Customs issued circular to all the Collectors of Central Excise intimating that according to the opinion of the Chief Chemist furnished on April 5, 1982, transformation of phenolic formaldehyde resin into phenolic moulding powder would not amount to manufacture. The circular was confirmed subsequently on October 6, 1982 by communication issued by the Government of India, Ministry of Finance, Department of Revenue to all the Collectors of Central Excise. The communication recites that since phenolic resin includes phenolic moulding powders also, the further modification of such phenolic resin by fillers, additives, etc. does not amount to "manufacture" of any new or distinct product and, therefore, no further duty of excise can be levied on such modified phenolic resin, that is to say, phenolic moulding powder. In view of the decision of the Government of India, the manufacture of phenolic moulding powder was not treated as process of manufacture inviting payment of excise duty.

4B. One more event which requires reference is filing of refund claim of Rs. 10,44,863.63 by the Company before the Superintendent of Central Excise on June 17, 1982 in respect of difference of duty on phenolic formaldehyde resin and actual duty paid on phenolic formaldehyde moulding powder for the period November 12, 1981 and May 11, 1982. The refund application filed by the Company had remained pending. Another refund application was also filed on June 23, 1983 for the period between May 12, 1982 and December 17, 1982.

5. On May 12, 1982, the Company filed revised classification list effective from May 12, 1982 claiming that no duty is payable on phenolic formaldehyde moulding powder in view of the decision taken by the Government and communicated by Circular dated May 5, 1982 and October 6, 1982 to all the Collectors of Central Excise in India. On July 7, 1983, the Assistant Collector served notice upon the Company to explain why revised classification list effective from May 12, 1982 should not be approved from December 18, 1982. After receipt of reply from the Company on July 20, 1983, the revised

classification list providing that no duty is payable on phenolic formaldehyde moulding powder was approved with effect from December 18, 1982. The petitioners sought further amendment to the petition by adding certain paragraphs and prayers and the amendment was granted and now, the petition is placed before us for final disposal.

5A. Return was filed on behalf of the respondents when the petition was called out for hearing and Shri Diwan, earned Counsel appearing on behalf of the petitioners, submitted that hearing should proceed on the basis that the petitioners are denying each and every averment made in the return.

6. Shri Diwan submitted that initially there was dispute between the Company and the Department as to whether the advantage of Exemption Notifications dated June 1, 1971 and February 27, 1980 was available in respect of manufacture of phenolic formaldehyde moulding powder but in view of the occurrence of subsequent events, the dispute has lost its relevance. The earned Counsel urged that both the Company and the Department were under mistake of fact and law that the manufacture of phenolic moulding powder amounts to process of manufacture liable to levy of duty under Item 15A of the First Schedule to the Central Excise Act. The earned Counsel urged that the Company went on paying duty under mistake right from year 1962 onwards and the dispute was raised regarding the rate of duty in view of issuance of the Exemption Notification. Shri Diwan submits that the mistake committed by the petitioners and the Department was known when the Central Board of Excise and Customs issued circular dated May 5, 1982 setting out the opinion furnished by Chief Chemist on April 5, 1982 and subsequently, the decision taken by the Government of India on October 6, 1982. Shri Diwan submits that in view of the Circular and the decision, the duty was not payable on phenolic moulding powder but only on phenolic formaldehyde resin and the recovery of duty by the Department right from year 1962 was without authority of law. The submission is correct and deserves acceptance. The Circular dated May 5, 1982 addressed to all the Collectors of Central Excise recites that the Central Board had examined the matter as to whether conversion of duty-paid phenol formaldehyde resins into phenol formaldehyde moulding powder involves chemical reaction and whether the change would constitute a chemical modification. The circular recites that the question was examined with the Chief Chemist who opined that the physical change without chemical process of conversion would not constitute "manufacture. The decision dated October 6, 1982 by Government of India, Ministry of Finance, Department of Revenue and the copy of which is annexed is Ex. "EE" to the petition clearly recites that since phenolic resin includes phenolic moulding powders also, the further modification of such phenolic resin does not amount to "manufacture" of any new or distinct product and, therefore, no further duty of excise can be levied on such modified phenolic resin, that is to say, phenolic moulding powder. In view of the Circular and the decision, Shri Diwan is right in his submission that the process of manufacture of phenolic moulding powder from phenolic resin cannot be termed as manufacture and

liable to payment of excise duty. Shri Mehta, earned Counsel appearing on behalf of the respondents, did not dispute the claim and very rightly, as the return filed by Indra Prakash Lal, Assistant Collector, and sworn on July 10, 1991 does not even make an attempt to controvert the Govt.s" decision. In view of these subsequent events, which inter alia support the petitioners, the question of validity of order dated September 7, 1981 or order dated July 20, 1983 accepting revised classification of price list claiming no duty payable only from December 18, 1982 instead of May 12, 1982 loses all its significance and is only of academic interest. It is, therefore, not necessary to examine as to whether the petitioner Company was entitled to advantage of Exemption Notifications dated June 1, 1971 and February 27, 1982 as the petitioner Company was not liable to pay any excise duty all along.

7. Shri Diwan then submits that as the duty was recovered by the Department right from the year 1972 onwards under mistaken belief and such duty was paid also under mistaken belief, the Company is entitled to claim refund of the entire amount of duty. Shri Diwan referred to the decision of the Supreme Court reported in : 1988(33)ELT249(SC) *Salonah Tea Company Ltd. Etc. v. Superintendent of Taxes, Nowgong and Ors., etc.*) where Chief Justice Mukharji speaking for the Bench observed:

Normally speaking in a society governed by rule of law taxes should be paid by citizens as soon as they are due in accordance with law. Equally, as a corollary of the said statement of law it follows that taxes collected without the authority of law, as in this case, from a citizen should be refunded because no State has the right to receive or retain taxes or monies realised from citizens without the authority of law.

While examining the limitation for making claim for refund in writ jurisdiction, the Chief Justice observed:

Normally in a case where tax or money has been realised without the authority of law, the same should be refunded and in an application under Article 226 of the Constitution the Court has power to direct the refund unless there has been avoidable laches on the part of the petitioner. It is true that in some case the period of three years is normally taken as a period beyond which the Court should not grant relief but that is not an inflexible rule.

Shri Diwan submitted and, in our judgment, with considerable merit that in the present case, the payment of duty by the Company and the recovery of the duty by the Department was a mutual mistake on assumption that the process of transformation of phenolic resin into phenolic moulding powder amounts to manufacture liable to payment of excise duty. The mutual mistake committed by the Company and the Department became known only in year 1982 when Circular dated May 5, 1982 and the decision dated October 6, 1982 was issued by the Government of India. Shri Diwan submitted that in these circumstances, there is no reason why the petitioners should be deprived of the refund of the

duty paid right from year 1962 onwards. Shri Mehta submitted that the doctrine of mistake of law should not be permitted to be extended for such a long period and urged that the Supreme Court decision reported in *Shri Vallabh Glass Works Ltd. and Another Vs. Union of India (UOI) and Others*, lays down that assessee is not eligible for relief in respect of payments made beyond the period of three years from the date of filing of the Writ Petition. The submission is not correct. The Supreme Court was examining the question as to what is the point from which the limitation will commence to run when mistake became known and in that context observed that relief in respect of payments made beyond the period of three years may not be granted. We are unable to read the decision of the Supreme Court as laying down that the assessee who has paid the duty under mistake is not entitled to refund for a period beyond three years from the date of filing of the petition even though the mistake came to be known just prior to filing of petition. The issue was squarely canvassed before this High Court and in the decision reported in *Shalimar Textile Mfg. Pvt. Limited Vs. Union of India and others*, one of us (Pendse, J.) held that under Article 265 of the Constitution, no tax can be levied or collected except by authority of law, and in case any such tax is levied and collected without any authority of law, then it would not be permissible for the Department to refuse refund of such amount on the spacious ground that the claim for refund was made belatedly. It was further held that the authority which was recovering tax without jurisdiction cannot be permitted to retain the amount merely because the tax payer was not aware that the recovery was without jurisdiction and consequently if recovery is illegal and without jurisdiction, the claim of refund is not governed by law of limitation. It was further held that the refund would be admissible irrespective of the period covered by the refund application and not restricted only for a period of three years prior to the date of knowledge of mistake of law. Another Single Judge in the decision reported in *Devidayal Electronics and Wires Ltd. Vs. Union of India and others*, after considering the decision of the Supreme Court in *Shri Vallabh Glass Works Limited* case reached the identical conclusion. We are in respectful agreement with the view taken by the Single Judge and the claim made by the petitioners for refund of duty from year 1962 cannot be denied on the ground of limitation.

8. Shri Mehta then submitted that the petitioners are not entitled to refund in view of the doctrine of unjust enrichment. It was urged that the excise duty being indirect tax is invariably passed on to the consumers and as the monetary burden is shifted to the consumers, the refund should be refused as the Company is not going to return the amount to various consumers. It was urged that as the duty was not paid from the pocket of the manufacturer, the refund to the manufacturer is entirely unjust. It was also claimed that the Government cannot be asked to make refund of money paid in distant past because the money so received has already been spent. We are not impressed by this submission for more than one reason. Indeed, by catena of decisions of this Court, the claim for unjust enrichment raised by the Department has been turned

down. The Full Bench of this Court in the decision reported in 1990 (46) E.L.T. 23 (Bom.) : 1990 (30) ECR 145 (Bom) (New India Industries Ltd. v. Union of India) observed that Court ought not presume that the burden of tax has been passed to the consumers and upon that assumption reject the consequential prayer for refund. The Full Bench further observed that it is for the Department to raise such a plea on affidavit and Court should decide the question according to the facts and circumstances of the case. The Court is required to satisfy itself that the tax burden has been shifted to the consumers and the order of refund would result in securing unjust enrichment. The Full Bench then observed that even when in a given case the Court is satisfied that the burden of tax has been passed on to the consumers, still there would be no uniform formula for moulding the consequential relief for benefiting those who had ultimately borne the burden. In the affidavit in the present case on behalf of the Department, there is no averment that the burden was in fact shifted to the consumers save and except claiming that the excise duty is invariably passed on to the customers. It is not the averment which is suffice to examine the claim of unjust enrichment by Writ Court in absence of any data produced by Department. In accordance with the decisions of the Full Bench, it is not possible to examine the claim of unjust enrichment, even assuming that such plea is permissible. A contention that the Government should not be directed to make refund because the Government has spent the duty amount received is only required to be stated to be rejected. If such contention is to be accepted, then there would be no refund even to the assesseees under the Income Tax Act because normally the duty or tax collected is immediately spent by the Government. It is no defence that the amount is spent when the recovery of dues is without authority. In our judgment, the Department is liable to refund the duty wrongfully recovered.

9. Accordingly, petition succeeds and it is declared that the process of manufacture of phenolic moulding powder from phenolic resin is and was not liable to payment of excise duty at any stage in view of the decision of the Government of India that the process does not amount to manufacture inviting levy of excise duty. The petitioner Company is entitled to claim refund of duty paid from year 1962 onwards. The Company is entitled to file claim for refund from year 1962 onwards before the Department and the Department shall allow refund after proper verification and without raising objection of limitation u/s 11B of the Act. The refund application to be filed within a period of three months from today.

9A. In view of this order, the order dated September 7, 1981 and any other order if passed adverse to the petitioners in this respect stands vacated. The Department shall process and dispose of the refund applications which were pending in accordance with the observations made in the judgment. The Bank guarantees furnished by the petitioners to stand discharged. The rule is made absolute accordingly. In the circumstances of the case, there will be no order as to costs.