
(1988) 03 AP CK 0007

In the Andhra Pradesh High Court

Case No : Writ Petition No's. 7634, 7638, 7639, 7640 and 7641 of 1984

Tungabhadra Machinery and Tools Ltd.

APPELLANT

Vs

Union of India (UOI)

RESPONDENT

Date of Decision : 16-03-1988

Acts Referred:

Central Excise Rules, 1944 — Rule 73Q(1)
Central Excises and Salt Act, 1944 — Section 11B
Constitution of India, 1950 — Article 226, 265

Citation : (1989) 21 ECR 337 : (1988) 37 ELT 179

Hon'ble Judges : Jeevan Reddy, J; Jagannadha Rao, J

Bench : Division Bench

Advocate : K. Subrahmanya Reddy, C.V. Rajeeva Reddy and C.V. Vinitha Reddy, for the Appellant; K. Nagaraja Rao, Addl. Central Government Standing Counsel, for the Respondent

Final Decision : Dismissed

Judgement

Jeevan Reddy, J.—These five writ petitions are filed by M/s. Tungabhadra Machinery and Tools, Ltd., Kurnool, for refund of excise duty which, according to it, was illegally collected from it.

2. The petitioner-company has its factory at Gondiparla village in Kurnool District. Its main business is designing, fabricating and erecting machinery. It also undertakes construction of projects on a turn-key basis. The petitioners entered into a contract with Mysore Paper Mills Ltd., Bhadravati, whereunder it undertook to design, fabricate and erect (i) Evaporator Plant, (ii) Blow Tank, and (iii) Blow Heat Recovery System. It entered into a similar contract with Andhra Pradesh Rayons Ltd., Kamalapuram, for designing, fabricating and erecting (i) Blow Tank, and (ii) Blow Heat Recovery System. The said machinery was to be erected in the respective premises of the two factories. The petitioner says, for the purpose of the said works, it purchased pumps, motors, instruments and valves. It also purchased, steel sheets, angles, rods and girders in the open

market, which were brought to the petitioner's factory at Gondiparla, where they were tent cut and joined in requisite shapes and then transported to the respective sites. There they were welded, fabricated and erected. The machinery was implanted into earth. According to the petitioner further, the Central Excise authorities advised it to prepare Gate-Passes (at its factory in Gondiparla) indicating therein the nature of the unfinished parts required for fabrication and erection of the machinery (turn-key projects), to meet the procedural formality of Central Excise Rules, and collected duty on such unfinished components by way of debit entries in the P.L. Account maintained as per the provisions the Central Excise Rules. Under their advice, the petitioner submitted monthly R.T. 12 Returns at the end of each month, showing the value of the unfinished parts and materials used in the turn-key projects, whereupon the Department collected duty on the value of such materials. The Superintendent of Central Excise concerned scrutinized the R.T. 12 Returns, finalized the assessment, and certified that the petitioner/assessee has paid the required duty correctly. All this happened before 17-11-1980.

3. The petitioner filed these writ petitions in April, 1984 with the following allegations: The petitioner has learnt recently from the decision of the "CEGAT reported in J.K. Export industries, Junaghadh v. Collector of Central Excise, Ahmedabad 1983 ELT 2390, that no duty is payable on turn-key projects erected at the site of the customer, inasmuch as the turn-key projects are not classifiable as "goods" coming within the purview of Tariff Item No. 68. According to the said decision, they become immovable property on account of their immovable nature. The petitioner also learnt that no duty need be paid on the component parts used in the fabrication and erection of turn-key projects, inasmuch as they are items purchased in the open market upon which duty has already been paid by the appropriate manufacturer, and further that the unfinished component parts which are made at the petitioner's factory premises, are not "goods", attracting duty; the said unfinished component parts are not marketable goods, known to market. They have no market as such. As soon as this mistake of law was discovered by the petitioner, the petitioner wanted to file an application before the authorities for refund of tax, but finding that such an application would be time barred by virtue of Section 11B of the Act, it approached this Court through these writ petitions. The particulars of duty paid, which is sought to be recovered back with 12% interest, are as follows :-

(1) W.P. No. 7634/84 : Rs. 86,369.61 Ps. paid during the period 1-3-1979 to 31-5-1980;

(2) W.P. No. 7638/84 : Rs. 46,710/- paid during the period 1-4-1979 to 31-7-1980;

(3) W.P. No. 7639/84 : Rs. 3,77,908.95 Ps. paid during 1-4-1979 to 31-10-1980;

(4) W.P. No. 7640/84 : Rs. 33,860.77 Ps. paid during the period 1-6-1979 to 30-6-1980;

(5) W.P. No. 7641/84 : Rs. 44,489.36 Ps. paid during the period 1-6-1979 to 31-3-1980.

4. Mr. K. Subrahmanya Reddy, learned counsel for the petitioner, urged the following contentions:

(i) that the unfinished components removed from the gate of the petitioner's factory at Gondiparla (Kurnool District), are not "goods". They have no market, nor are they marketable as such; they are not available in the market for sale. They are merely so prepared for the purpose of transporting to the site of the customer where they are welded, fabricated, and joined together and the machinery/plant erected. Levy of excise duty on such unfinished components is not warranted by law and is, therefore, violative of Article 265 of the Constitution;

(ii) that the turn-key projects undertaken and completed by the petitioner at the site of Bhadravati Steel Mills and A.P. Rayons are also not "goods". Since they are firmly implanted in the earth, they become Immovable property. No duty is leviable on the value of such turn-key projects/plant/machinery; and

(iii) the petitioner came to know of the illegality of the levy only when the decision of the "CEGAT" was reported in J.K. Export Industries, Junagadh v. Collector of Central Excise, Ahmedabad 1983 ELT 2390 and soon thereafter approached this Court by way of these writ-petitions. The claim of the petitioner is, therefore, within limitation, and must be allowed.

5. On the other hand, Sri K. Nagaraja Rao, the learned Additional Standing Counsel for the Central Government, urged :

(i) that the petitioner not having challenged the levy of duty in the manner prescribed by the Act and the Rules, cannot, after a period of four years or more, ask for refund of duty. The duty has been properly levied, and its validity cannot be questioned at this distance of time. Moreover, for granting the relief prayed for by the petitioner, several factual aspects have to be investigated and determined which cannot be done by this Court in these writ petitions;

(ii) that, in any event, refunding the duty would amount to unjustly enriching the petitioner, inasmuch as it must have, and must be deemed to have passed on the burden of the said duty to the customers, i.e., M/s. Mysore Paper Mills Ltd., Bhadravati, and A.P. Rayons Ltd. The customers have not come forward with any such claim. The petitioner has not stated in its writ petitions that it has not passed on the said duty to the customers; and

(iii) that the decision of the "CEGAT" reported J.K. Export Industries 1983 ELT 2390 has no relevance in the facts of the present case and, in any event, cannot be treated as a decision leading to the discovery of illegality of tax on the part of the petitioner. The writ petitions filed beyond three years of the payment of tax are barred by limitation, and should not be entertained.

6. From the statement of facts contained in the writ petitions themselves, it is

dear that duty was paid without any protest or objection during the years 1978-1980. The petitioner did not file an appeal, or question the said levy in the manner prescribed by the Central Excise and Salt Act, 1944, or the Rules made thereunder. This is not a case where a particular provision in the Act or the Rules has been declared to be void, or invalid. Above all, we find that the decision of the CEGAT" in J.K. Export Industries (supra), which the petitioner wants to treat as the starting point for limitation for filing these writ-petitions, has absolutely no relevance or connection with the facts of the present case. In our opinion, therefore, the petitioner cannot treat the knowledge of the said decision as giving it a fresh period of limitation for claiming the refund of duty, or for filing these writ petitions. The facts in the said decision are the following : The appellant, J.K. Export Industries, fabricated, manufactured and installed one Soyabin Dal Plant in its factory premises. The authorities levied duty upon the value of the said Dal Plant, and also imposed personal penalty under Rule 73-Q(1). The appellant questioned the same by way of an appeal before the Tribunal, which considered the question whether the Dal Mill which is attached to the earth, is chargeable to duty under Item 68 of the Central Excise Tariff. The Tribunal upheld the contention of the appellant that the Dal Mill cannot be called "goods", inasmuch as the Dal Mill Plant was manufactured by assembling the duty-paid parts, and it is firmly attached to earth, not intended to move thereafter. It was held that on account of such firm implantation in the earth, the machinery becomes immovable property and, therefore, not "goods" liable to excise duty.

7. Now coming to the facts of the case before us, duty in this case was not levied upon the value of the machinery, fabricated and erected at the site of the customers, nor at that stage. Duty was levied on the value of the component parts when they were removed from the petitioner's factory premises at Gondiparia, in Kurnool District. In other words, duty was not levied on the value of the "turn-key project", to use the expression employed by the petitioner, nor upon the value of the machinery/plant as fabricated and erected at the site of the said customers. Thus, there is absolutely no connection or similarity between the facts of the two cases. In the case before the CEGAT, the duty was not levied upon the component parts, nor was it held in that case that such component parts do not constitute "goods", so as to attract duty under the Act. We, therefore, fail to see as to how the said decision could have put the petitioner on notice that the levy of duty in its case was illegal? It is evident that having woken up late, the petitioner is trying to make use of the said decision as a point of discovery of illegality of tax which, in fact and in truth, can ~ neither be true, nor can be accepted.

8. It is then argued by Mr. Subrahmanya Reddy that according to the decision of the CEGAT reported in 1986 (9) ECC 35 , no duty is leviable on such unfinished components used in the fabrication and erection of steel sheds. It is argued that the work undertaken by the petitioner is similar to the work of erection of sheds, considered in the said decision. Reliance is also placed upon the decision of the

Supreme Court in Union Carbide India Limited Vs. Union of India (UOI) and Others, , where it was held that aluminium cans or torch-bodies produced by Union Carbide India Ltd., by extrusion process are not "goods", since they are not sold as such and, therefore, must be held to be not marketable goods. It was observed that to become "goods", an article must be something which can ordinarily come to the market to be bought and sold, and that the aluminium cans prepared by Union Carbide are not sold as such but are employed by it in the manufacture of flashlights after undergoing a lot more processing. On the basis of these decisions, it is argued that the unfinished component parts removed from the gate of the petitioner's factory cannot be called "goods" and therefore, the levy of duty upon them was illegal. It is argued that the said decisions, at any rate, can be treated as starting point for limitation, and the present writ petitions cannot be said to be barred by limitation, it is also argued that there is no period of limitation as such prescribed for filing writ petitions, and that particularly where tax/duty has been collected in violation of Article 265 of the Constitution, this Court should ignore the pleas of limitation and should grant relief. We are not impressed. That duty cannot be levied upon unfinished components or upon semi-finished goods was not laid down for the first time in Union Carbide India Limited Vs. Union of India (UOI) and Others, or in 1986 (9) ECC 35 . It was so held as far back as in Union of India v. Delhi cloth and General Mills Co., Ltd. 1977 ELT 199. Indeed, the very same principle was reiterated in S.B. Sugar Mills v. Union of India - 1978 ELT (336), and Union of India v. Ramlal Mansukhrai - AIR 1971 S.C. 233. We are, therefore, unable to agree with Mr. Subrahmanya Reddy that the decisions reported in Union Carbide India Limited Vs. Union of India (UOI) and Others, , or in Aruna Industries, Visakhapatnam v. Collector of Central Excise, Guntur 1986 (25) ELT 680 ap rendered during the pendency of these writ petitions, can be treated as decisions putting the petitioner on notice about the illegality of the duty levied and collected from it. We are equally unable to agree that wherever tax is collected contrary to law - for the purpose of this argument we shall assume that duty has been collected on the component parts contrary to law -this Court should ignore all pleas of limitation and direct refund of the tax/duty. It is well settled by several decisions of the Supreme Court that the period of limitation applicable to a suit should ordinarily be applied in the case of writ petitions also. It is true that the Limitation Act does not apply to writ petitions filed under Article 226 of the Constitution, but that does not mean that this discretionary power would be exercised without regard to the delay, laches, or conduct of the petitioners. It would be rather curious if the courts say that while a suit is barred because of the provisions of the Limitation Act, a writ petition for the very same relief is not barred. It is on this principle that the same rule of limitation has been generally followed by courts in the case of writ petitions.

9. Mr. K. Subrahmanya Reddy also relied upon a recent decision of the Supreme Court in Salonah Tea Co. Ltd. and Others Vs. Superintendent of Taxes, Nowgong and Others, to contend that in case of tax collected illegally or unauthorisedly,

the Court should not observed any period of limitation in the case of a writ petition. In this case, the Supreme Court reiterated that ordinarily the Court applies the rule of three years for claiming refund of tax paid under a mistake, and that this 3-year period is computed from the date when the mistake is discovered. It, however, observed that this period is not an inflexible rule, and that it is for the Court to exercise its discretion having regard to the facts of each case. Indeed, on the facts of that case it was found that the petition for refund was filed within one month of the knowledge. It was further observed in that case that the High Court will exercise its power under Article 226 to direct refund, unless there have been avoidable laches, indicating abandonment of his claim, on the part of the petitioner, or where the laches have remained unexplained. In this case, it would be seen that the petitioner not only paid the duty unquestioningly and without any protest, he did not even challenge it by way of an appeal or otherwise, and has preferred this claim more than four years after the payment of duty. Once we hold that the decision of the "CEGAT" in J.K. Export Industries, Junagadh v. Collector, Central Excise, Ahmedabad - 1983 ELT 2390 cannot be treated as a fact leading to the discovery of mistake on the part of the petitioner, it must be held that the petitioner practically abandoned its claim, and that its present claim is a stale one.

10. We also find that granting the relief to the petitioner would amount to unjustly enriching it. It is not stated by the petitioner that it has not passed on the burden of this duty to its customers, which means that it has already collected the said amount from its customers. It is riot even stated that the said customers have called upon the petitioner to pay over the said sum on the ground that it was not payable in law. In such a case, granting the refund would amount to conferring an uncalled for benefit upon the petitioner. The law on this subject has been elaborately discussed by a Bench of this Court, of which one of us (Jeevan Reddy, J.) was a member, in N.V. Ramaiah Vs. State of Andhra Pradesh and Others, . The Bench followed the decision of the Supreme Court in State of Madhya Pradesh Vs. Vyankatlal and Another, , and the decision of the Gujarat High Court in Union of India v. Ahmedabad Manufacturing and Calico Printing Company, Ltd. - 1984 (17) ELT 246 guj, laying down an identical proposition. It may also be pointed out that in D. Cawasji and Co. and Others Vs. State of Mysore and Another, , where refund was ordered, the Supreme Court had not considered or pronounce upon the theory of unjust enrichment. We do not think it necessary to repeat the said discussion over again here. Also because, in view of our finding on the question of limitation, it is really unnecessary.

11. We must also say that we cannot dismiss the argument urged by the learned Additional Standing Counsel for the Central Government that for upholding the petitioner's claim it is necessary to undertake an investigation into facts. Whether the articles/goods upon which duty was levied at the gate of the petitioner's factory were really unfinished goods, i.e., component parts, and whether they were marketable or not, is a question upon which we cannot

express an opinion straightaway without a further investigation into facts.

12. For all the above reasons, the writ petitions fail and are, accordingly, dismissed; but, in the circumstances, there shall be no order as to costs.