
(1995) 12 AHC CK 0095

In the Allahabad High Court

Case No : Civil Misc. Writ No's. 1785-1791 of 1993 and 915-916 of 1995

U.P. State Cement Corporation Ltd.

APPELLANT

Vs

Union of India (UOI)

RESPONDENT

Date of Decision : 18-12-1995

Acts Referred:

Central Excise Rules, 1944 — Rule 192, 196, 8
Central Excises and Salt Act, 1944 — Section 11A, 35G, 5A
Constitution of India, 1950 — Article 226

Citation : (1996) 86 ELT 6

Hon'ble Judges : M.C. Agarwal, J

Bench : Single Bench

Final Decision : Allowed

Judgement

M.C. Agarwal, J.—These nine writ petitions by the same petitioner against the same respondents raise a common controversy. They were, therefore, heard together and are disposed of by this common judgment.

2. The petitioner U.P. State Cement Corporation Limited operates a factory for the manufacture of cement. For this purpose, it has set up split location plants at three places, namely, Dalla, Churk and Chunar. At Dalla and Churk plants, only cement clinker is produced which is an intermediary product used in the manufacture of the final product, namely, cement. The cement clinker produced at the Dalla and Churk plants is transported to Chunar plant located at a distance of about 125 Kms. where it is used for the manufacture of cement. Cement clinker and cement are both excisable goods under Excise Tariff Nos. 2502.10 and 2502.20 respectively. u/s 5A of the Central Excises and Salt Act (hereinafter referred to as "the Act"), the Central Government has the power to exempt generally either absolutely or subject to such conditions (to be fulfilled before or after removal) as may be specified in the notification excisable goods of any specified description from the whole or any part of the duty of excise leviable thereon, if it is satisfied that it is necessary in the public interest so to do. Since

cement clinker is used for the manufacture of cement which in itself is subject to excise duty, the Central Government issued notification exempting cement clinker from excise duty if used in the manufacture of cement. It is the admitted case of the parties and, therefore, it is not necessary to refer to the notifications, the last one being No. 8/92-C.E., dated 1st March, 1992.

3. Rule 192 of the Rules framed under the Act deals with the application for concession and the relevant portion thereof is quoted below :

"192. Application for concession. - Where the Central Government has, by notification under Rule 8, or Section 5A of the Act, as the case may be, sanctioned the remission of duty on excisable goods other than salt, used in a specified industrial process, any person wishing to obtain remission of duty on such goods, shall make application to the Collector in the proper Form stating the estimated annual quantity of the excisable goods required and the purpose for and the manner in which it is intended to use them and declaring that the goods will be used for such purpose and in such manner. If the Collector is satisfied that the applicant is a person to whom the concession can be granted without danger to the revenue, and if he is satisfied, either by personal inspection or by that of an officer subordinate to him that the premises are suitable and contain a secure store-room suitable for the storage of the goods, and if the applicant agrees to bear the cost of such establishment as the Collector may consider necessary for supervising operation in his premises for the purposes of this Chapter, the Collector may grant the application, and the applicant shall then enter into a bond in the proper Form with such surety or sufficient security, in such amount and under such conditions as the Collector approves."

4. Rule 196 of the said Rules confers the power on the authorities to demand duty in respect of the exempted excisable goods not duly accounted for. The relevant portion of Rule 196 is quoted below :

"196. Duty leviable on excisable goods not duly accounted for. - 1. If any excisable goods obtained under Rule 192 are not duly accounted for as having been used for the purpose and in the manner stated in the application or are not shown to the satisfaction of the proper officer to have been lost or destroyed by natural causes or by unavoidable accident during transport from the place of procurement to the applicant's premises or during handling or storage in the premises approved under Rule 192, the applicant shall, on demand by the proper officer, immediately pay the duty leviable on such goods. The concession may at any time be withdrawn by the Collector if a breach of these rules is committed by the applicant, his agent or any person employed by him. In the event of such a breach, the Collector may also order the forfeiture of the security deposited under Rule 192 and may also confiscate the excisable goods, and all goods manufactured from such goods, in store at the factory."

5. In pursuance of the aforesaid provisions of the Act, Rules and the concerned notifications, permission was granted to the petitioner to transport cement

clinker from its plants at Dalla and Churk without payment of excise duty. For the purpose of actual transport, the petitioner had to submit application for removal of excisable goods from one warehouse to another in Form AR 3 which requires the various details regarding the quantity of goods, their value, duty, rate and the manner of transport etc. to be filled in. It also requires that an officer of the central excise shall verify the despatch of the consignment from the warehouse of removal and another excise officer will verify the receipt of the consignment at the warehouse of destination.

6. The handling and transport of the cement clinkers from Dalla and Churk clinkerisation plants to Chunar results in certain losses. The Superintendent of Central Excise issued notices to the petitioner for various periods demanding duty in terms of Rule 196 of the Central Excise Rules in respect of the quantity of cement clinkers not accounted for at the destination and the Assistant Collector after hearing the petitioner raised demands for the shortage. A common order dated 21st May, 1992, was passed which is the subject matter of Writ Petition Nos. 1785, 1786, 1788, 1789, 1790 and 1791 of 1993. An order dated 30th September, 1992, was passed for the period 1st January, 1992, to 31st March, 1992, which is the subject matter of Writ Petition No. 1787 of 1993. An order dated 30th March, 1994, was passed by the Assistant Collector for the period 1st January, 1993, to 31st March, 1993, which is challenged in Writ Petition No. 916 of 1995, and an other dated 12th August, 1988, was passed by the Collector, Central Excise, which is challenged in Writ Petition No. 915 of 1995.

7. The relevant information is depicted in the following chart :-

Period	Shortage	Date of Demand	Petition No.	shown notice u/s	Writ raised
1-10-1990 to 30-12-1990	6.5%	20-2-1991	Rs. 4,51,849.00	1786/93	1-10-1990 to 30-6-1990
5.67%	24-9-1990	Rs. 5,58,221.00	1787/93	1-1-1992 to 31-3-1992	0.96%
17-6-1992	Rs. 1,08,956.00	1788/93	1-1-1991 to 31-3-1991	3.5%	11-5-1991
Rs. 2,92,767.00	1789/93	1-10-1991 to 31-12-1991	3.15%	26-2-1992	Rs. 2,10,696.00
1790/93	1-1-1990 to 31-3-1990	4.24%	19-6-1990	Rs. 5,45,701.00	1791/93
1-7-1990 to 30-9-1990	6.14%	10-12-1990	Rs. 4,08,834.00	915/95	1-10-1980 to 30-11-1982
6%	20-2-1984	Rs. 6,46,577.57	916/95	1-1-1993 to 31-3-1993	2.67%
24-6-1993	Rs. 4,78,365.00				

8. In reply to the show cause notices, the petitioner had submitted that clinker is transported from Dalla and Churk units to Chunar unit in open railway wagons as well as in trucks and the quantity of clinkers that reaches Chunar is always short. The shortage ranges approximately between 3% to 6%. According to it, the requisite record in the prescribed Form AR 3A is maintained at both ends which is verified by the jurisdictional inspector of central excise who also endorses his verification on the copy of AR 3A where the entries of losses are recorded. According to the petitioner, the loss is natural because clinker is a dusty semi-

solid product and is transported in open wagons of the railways which are in dilapidated condition resulting in spillage of the goods. The clinker also gets dried up during the transport and some of it drops down through the small cracks in the wagons and some of it drops down when the train stops with a jolt. According to the petitioner, the loss was due to these natural causes and no duty could be demanded in respect of the resultant shortage. This contention was not accepted and the Assistant Collector who raised the demands as aforesaid allowing no margin for shortage.

9. On appeal, the Collector of Central Excise allowed shortage to the extent of 5% only by a common order dated 6th November, 1992, to be calculated in respect of each AR 3A consignment. On further revision, the Government of India allowed transit losses to the extent of 2% without specifying whether it is to be calculated in respect of each AR 3A, as ordered by the Collector (Appeals) or it is to be calculated with reference to certain periods, as was done by the Assistant Collector. That is why Writ Petition No. 1787 of 1993 has been filed although the average shortage during that period was less than 2%.

10. In respect of the period 1st January, 1993, to 31st March, 1993, which is the subject matter of dispute in Writ Petition No. 915 of 1995, and for which the order raising the demand was passed by the Collector of Central Excise, the petitioner preferred an appeal to the Central Excise and Gold (Control) Appellate Tribunal, New Delhi and the Tribunal dismissed the same by order dated 16th March, 1995, and the same is challenged in that writ petition.

11. In these writ petitions, the petitioner's case is that the shortage in the clinkers at the destination occurs in the handling and transport thereof to a place about 125 Kms. away and the shortage is incidental to the very nature of things and is beyond its control and, therefore, the central excise authorities have no authority to demand excise duty on the shortage. In Writ Petition No. 915 of 1995, an additional plea is that the notice was issued after the expiry of six months as prescribed in Section 11A of the Central Excises and Salt Act and was, therefore, barred by time.

12. In their counter affidavit, the case set up by the respondents is that exemption is available only in respect of the clinkers used in the manufacture of cement. It is admitted that the clinker is transported by the petitioner by road/rail and the quantity of clinker sent from Dalla and Churk units always fell short on receipt at the factory at Chunar. According to the respondents, the losses in the petitioner's case were exorbitant and could not be treated as natural or unavoidable and that the authorities concerned have granted a reasonable percentage of transit loss which is quite judicious.

13. In these cases, the respondents have not disputed that the transit losses have actually occurred in the handling and transport of cement clinker from the clinkerisation plants to the cement plant at Chunar. If there had been any dispute about the extent of the loss or about the causes due to which it occurs, the same

would have been a question of fact beyond the purview of investigation under Article 226 of the Constitution of India, but the fact that the losses, as detailed above, have actually occurred during the handling and transport of the materials in motor trucks and wagons is admitted and there has never been any allegation by the respondents that the petitioner is deliberately causing those losses to avoid excise duty. That would simply be absurd.

14. By virtue of Rule 196, excise duty can be demanded in respect of an exempted item in respect of goods that are not shown to have been lost or destroyed by natural causes or by unavoidable accident during transport or during handling or storage in the premises approved under Rule 192. In the present case, the two places of storage are about 125 Kms. away from each other and the goods are, admittedly, carried in open trucks and open railway wagons. Neither of them is pilfer or spillage proof. The extent of shortage is not regulated by any statutory provision nor has the Collector while granting the concession under Rule 192 prescribed the extent of handling loss that would be permissible. Therefore, any loss that occurs during transit for causes which are normal has to be allowed. Rule 196 is wide enough and shows that transit loss on account of any conceivable reason would be allowed unless it can be shown that the loss is fictitious and manipulated and deliberately caused for some ulterior motive. The said rule speaks of loss by natural causes or by unavoidable accident or other losses for other reasons during handling or storage. The words "natural causes" while certainly referring to the forces of nature like flood and earthquake is not restricted to them. What these words take in their scope is also causes that are related to the nature and the normal manner of its handling and transport etc.

15. Rule 192 requires that the concession of exemption shall be granted if the Collector is satisfied that the applicant is a person to whom the concession can be granted without danger to the revenue. It was on such satisfaction that the petitioner, a company owned by the State of Uttar Pradesh, was granted the facility of exemption on the levy of excise duty on cement clinkers. The Excise Rules take sufficient care to ensure fraud on the revenue and the goods have to be transported from one place to another under checking and inspection by the excise authorities at both ends who have to record the necessary certificates on the AR 3 forms.

16. Cement clinker is not a commodity which is marketable in the normal course and, as stated above, it has not been the case of the respondents that a part of the goods was removed by the petitioner during transport for ulterior motives. The chart, given above, shows that the shortage is not uniform and is different for every period. According to the petitioner, the shortage varies primarily because of the quality of wagons supplied by the railways to carry the goods. The variation shows that the shortage is not manipulated. In these circumstances, the shortage has to be deemed to be natural, normal, incidental and unavoidable in the handling and transport of clinker from one place to another and it cannot

be said that clinker to the extent of the shortage was not duly accounted for by the petitioner.

17. In this case, the respondents have not given any material to fix the extent of shortage at 5% or 2%. It has been stated that in some other factories, the extent of shortage is much less, but it is not shown that there is any other factory in India which has its clinkerisation units as far away as 125 Kms., a part of which is hilly. The petitioner has annexed as annexures with the writ petitions a copy of a project report along with a certificate by Holtec Engineers Private Limited which is Annexure "6" to the writ petition in which it is stated as under :

"For calculating the variable cost of PBFS cement, clinker from Dalla unit becomes an input for Chunar unit and to arrive at the landed cost of clinker we have taken the transport/transit losses for clinker @ 3% which is an average figure based on our own experience in the industry as well as the feed back from actual operating plants. The transit/transport losses are mainly on account of the following:

Dust losses during the transport as well as unloading point at Chunar.

At times the kiln produces dusty clinker due to disturbed kiln operation. In such an event the dust losses are still higher.

The normal loss of clinker during the transit distance from the wagon/trucks due to spillage of material through certain crevices in wagon/trucks coupled with the relatively difficult terrain (hilly) between Dalla and Chunar."

18. This report is dated 20th January, 1993, and, as stated therein, this is not the report about the transit losses in the petitioner's units exclusively. The argument of the learned counsel for the respondents that the petitioner's own document shows an average loss of 3% only and that the same could at the most be allowed is not acceptable. As the document shows, the technical expert has based its conclusion on its own experience and feed back from actual operating plants. Therefore it is not a report exclusively based on a study of the petitioner's transport pattern and is not of much use. As stated above, the shortage is not uniform. At times, it is as low as .96% during a period of three months. In another period of three months, it was 2.67% and the maximum is 6.5%. It is important to notice that the respondents have not got any study made of their own, probably because it was almost unnecessary because of the close supervision exercised by their own officers posted at the respective units.

19. For the above reasons, the conclusion by the authorities below that only .5% or 2% shortage is for the causes permissible under Rule 196 and the excess quantity of excisable goods is not duly accounted for is based on no material and is thoroughly arbitrary. In my view, the entire loss, as shown by the petitioner, was due to natural causes and incidents during handling of the material and its transport from one place to another and the shortage was duly accounted for. In this view of the matter, the impugned orders deserve to be quashed.

20. It was contended on behalf of the petitioner in Writ Petition No. 915 of 1995 that the notice dated 20th February, 1984, in respect of the period 1st October, 1980, to 30th November, 1982, is without jurisdiction being not permissible u/s 11A of the Act. Under that section, a notice can. be issued within six months when the duty of excise has not been levied or paid or has been short levied or short paid etc. Patently, the notice was not issued within six months. The Proviso to Section 11A of the Act grants an extended period of five years for the issue of such a notice where the short levy etc. of excise duty is by reason of fraud, collusion or any willful statement. No such conduct on the part of the petitioner is alleged much less proved, although the notice was issued u/s 11A of the Act. The learned Tribunal has taken the view that the demand has been raised by virtue of the enabling provision under Rule 196 and, therefore, Section 11A of the Act was not applicable. It has placed reliance on a judgment of the Hon"ble Supreme Court in J.K. Steel Ltd. Vs. Union of India (UOI), in which it was observed that if the exercise of a power can be traced to legitimate source, the fact that the same was purported to have been exercised under a different power does not vitiate the exercise of the power in question. This authority has patently been misapplied.

21. No doubt, Rule 196 enables the levy of excise duty, but Section 11A of the Act creates a rule of limitation and the excise authorities have to exercise their powers in cases where the excise duty has not been levied or paid or has been short levied or short paid or erroneously refunded within the period of limitation prescribed u/s 11A of the Act. The normal period is six months and the extended period would be available in cases of fraud, collusion, willful statement or suppression of facts. As stated above, there is not even a whisper of any such conduct on the part of the petitioner and, therefore, the extended period was not available, to the petitioner and the Writ Petition No. 915 of 1995 has to succeed on this point as well.

22. Learned counsel for the petitioner contended that cement clinker is not a marketable commodity and, therefore, no excise duty could be levied in respect thereof. This contention is not acceptable. The petitioner never put up such a case before the authorities below. Whether cement clinker is a marketable commodity is a question of fact that should have been agitated before the authorities below and for which requisite evidence should have been produced at the earlier stage of the proceedings. The commodity is mentioned as an excisable goods in the Excise Tariff and unless the contrary is established by cogent proof at the appropriate stages, such a contention cannot be entertained, for the first time, in writ jurisdiction and that too without any material having been placed on the record.

23. On behalf of the respondents, reliance is placed on a judgment of the Hon"ble Supreme Court in 1992 (61) ELT 3 (SC) which was followed by the Hon"ble Supreme Court in another case between the same parties reported in Oil and Natural Gas Commission Vs. Collector of Central Excise, . In the earlier case,

the Hon''ble Supreme Court had directed that the Government of India shall set up a Committee consisting representatives from the Ministry of Industry, the Bureau of Public Enterprises and the Ministry of Law, to monitor disputes between Ministry and Ministry of Government of India; Ministry and Public Sector Undertaking of the Government of India and Public Sector Undertakings in between themselves, to ensure that no litigation comes to Court or to a Tribunal without the matter having been first examined by the Committee and its clearance for litigation. Government may include a representative of the Ministry concerned in a specific case and one from the Ministry of Finance in the Committee. Senior Officers only should be nominated so that the Committee would function with status, control and discipline. The Hon''ble Supreme Court further directed that it shall be the obligation of every Court and every Tribunal where such a dispute is raised hereafter to demand a clearance from the Committee in case it has not been so pleaded and in the absence of the clearance, the proceedings would not be proceeded with.

24. In the subsequent judgment, the Hon''ble Supreme Court clarified that where an appeal or petition has to be filed to save the period of limitation, an application for clearance from the high power committee should be made within a month.

25. A reading of these judgments would show that the Hon''ble Supreme Court wanted that before a matter between the Union of India and a Public Sector Undertaking was taken to a court of law, there should be an attempt at an in-house settlement of the controversy and only when the High Power Committee cleared the dispute to be take to a Court, the matter should be lodged in a Court. There is nothing in these judgments to indicate that it was intended that the aforesaid directions would apply even where the dispute is between the Union of India and a State or a Corporation or Company owned by a State Government. Therefore, the petitioner cannot be asked to seek clearance from the High Power Committee which does not seem to have any representative from the State Government.

26. In respect of Writ Petition No. 915 of 1995, it was contended by the learned counsel for the respondent that in this case, the petitioner had preferred an appeal to the Central Excise and Gold (Control) Appellate Tribunal, New Delhi, and that against that order, the petitioner has an alternative remedy of seeking a reference to the High Court u/s 35G of the Act and that, therefore, this petition should be dismissed on the ground of alternative remedy.

27. It is true that the petitioner had that channel also open to it, but the question is whether in the circumstances of the present case, the petitioner should be directed to avail that long drawn procedure. As is evident, the same controversy has come to this Court in other writ petitions and they cannot be thrown out on the ground of alternative remedy, as none exists. The existence of an alternative remedy is not an absolute bar to the exercise of jurisdiction under Article 226 of the Constitution of India. When the same controversy has come to this Court for

other periods in the other writ petitions which are being disposed of by this order, it would be anomalous to throw out one writ petition on the ground of alternative remedy which in the circumstances of the present case and in the light of the facts, narrated above, cannot be deemed to be efficacious.

28. In view of the above discussions, the writ petitions are allowed with costs that I assess at Rs. in each writ petition. The notices issued u/s 11A of the Act and mentioned in the chart above, the Assistant Collector's orders dated 21st May, 1992, and 30th September, 1992, the order dated 12th August, 1988, passed by the Collector of Central Excise, the order dated 30th March, 1994, passed by the Assistant Collector, Central Excise, raising the demands, mentioned in the above chart, as well as the concerned appellate and revisional orders are hereby quashed.