

(1984) 12 BOM CK 0008

In the Bombay High Court

Case No : Writ Petition No. 1140 of 1981

Western Bengal Coal Fields Ltd.

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 07-12-1984

Acts Referred:

Central Excise Rules, 1944 — Rule 11, 173J

Central Excises and Salt Act, 1944 — Section 11A, 11B

Citation : (1989) 24 ECR 118 : (1989) 43 ELT 27

Hon'ble Judges : S.P. Bharucha, J

Bench : Single Bench

Judgement

1. The 1st petitioners manufacture phenol formaldehyde moulding power. By a notification dated 1st June 1971 partial exemption from excise duty was given to phenolic resins. During August and September 1974 the petitioners did not claim exemption. On 27th September 1974 the 1st petitioners filed a revised classification list claiming the benefit of the exemption and paid excise duty at the higher rate under protest.

2. On 16th April 1975 the 1st petitioners filed a refund claim for Rs. 43,837.32 for the duty paid at the higher rate between 1st August 1974 and 27th September 1974. On 9th September 1975 the Superintendent, Central Excise, returned the refund claim as the "same" is not admissible".

3. On 27th September 1976 the Assistant Collector of Central Excise passed an order in respect of the revised classification list filed by the petitioners and declined to grant the 1st petitioners the benefit of the exemption. The petitioners appealed. On 21st March 1977 the appeal was rejected. On 14th November 1977 the petitioners filed a revision application to the Central Government.

4. On 16th April 1981 Pendse J. decided a writ in petition in which he held, according to the petitioners, that the product manufactured by the 1st petitioners was entitled to the benefit of the exemption. Hence, on 27th August 1981, the petitioners filed this petition.

5. On 26th April 1982 the Central Government decided the 1st petitioner's revision application and held that the 1st petitioners were entitled to the exemption.

6. The 1st petitioners then took out a Notice of Motion in this writ petition for an order requiring the respondents to deposit in court the sum of Rs. 36,75,721.51 which they claimed in the petition was due to be refunded. On 10th December 1982 no order was made on the Notice of Motion. The petitioners were directed to file a refund application before excise authorities and the excise authorities were directed to dispose it of within two months. On 20th December 1982 the refund application was filed.

7. On 16th March 1983 the Assistant Collector passed an order upon the refund application. The order, by amendment, is impugned in the petition and is the subject-matter of the controversy before me. He refunded to the 1st petitioners only a sum of Rs. 24,36,065.44 in cash and Rs. 37,073.33 in terms of credit. The 1st petitioners dispute only the disallowance in the sum of Rs. 6,47,344.98.

8. On 29th September 1983 the 1st petitioners took out a Notice of a Motion requiring the respondent to deposit the sum of Rs. 6,47,344.98 in court. On 21st October 1983 the respondent were directed to so deposit that sum. By an order dated 9th December 1983 the petitioners were permitted to withdraw the sum deposited upon the furnishing of a bank guarantee, which they have done.

9. The amount of Rs. 6,47,344.98 whose disallowance is disputed by the 1st petitioners is made up of the amounts of (a) Rs. 43,837.32 (b) Rs. 45,477.01 and 50,667.46 and (c) Rs. 5,07,363.19.

10. The amount of Rs. 43,837.32 is the claim for excess duty paid in August and September 1974. In the Impugned order the Assistant Collector stated that there was no dispute prior to the filing of the classification list on 27th September 1974. Therefore, the claim for this amount was hit by limitation.

11. The Assistant Collector denied in the impugned order refund of excess duty paid in 1977 and 1978 to the extent of Rs. 45,477.01 and Rs. 50,667.46. He purported to adjust these amounts against claims in respect of the base quotas for the years.

12. The most substantial disallowance was of Rs. 5,07,363.19. In regard to this the Assistant Collector in the impugned order stated :

"Since the refund which is now being granted, is net profit to them as it amount as if not a Central Excise Duty and hence this amount cannot be deducted from assessable value rather it will form the part of the assessable value. Taking that into account the claim to the extent of Rs. 4,99,948.52 (Rs. four lakhs ninety nine thousand, nine hundred forty eight and ps. fifty two only) is not admissible and hence is rejected. The payment made through R.G. 23 amount is not refundable in cash and the same can only be restored to the R.G. 23 account. Since the total debit from the R.G. 23 account was Rs. 44,488/- (Rs. Forty four

thousand four hundred eighty eight only) and after deducting un fortuitous benefit to the total of Rs. 7,414.67Ps. (Rs. Seven thousand four hundred fourteen and ps. sixty-seven only) the net credit admissible in R.G. 23 account is only Rs. 37,073.33ps. (Rs. Thirty seven thousand seventy three and ps. thirty three only)."

13. In regard to the amount of Rs. 43,837.32 for the period August-September 1974 the petitioners had made a claim on 16th April 1975 which the Superintendent of Central Excise had returned on 9th September 1975 as being not admissible. It was a claim made under rule 11 read with rule 173J of the Central Excise Rules and was within time. In the affidavit in reply of N. G. Shetty to the petitioners' Notice of Motion it is stated that it could not be taken for granted that such a claim had been filed, and Mr. Sethna, learned Counsel for the respondents, pointed it out. To the affidavit in re-joinder, however, are annexed photostat copies of the claim and of the Superintendent of Excise's letter returning the claim. The refund application for the period August-September 1974 was, therefore, made and the amount of Rs. 43,837.32 was erroneously disallowed.

14. In regard to the amount of Rs. 45,477.01, it is averred in the petition that the Assistant Collector by his own order dated 2nd April 1982 had held that the claim pertaining to the period 1977-78 was not recoverable as it was time-barred. There is no affidavit in reply denying the averment. If a claim could not be recovered as being time-barred, it could not be set-off either as the Assistant Collector purported to do in the impugned order. In regard to the claim of the Excise authorities for the amount of Rs. 50,667.46 the petition alleges that an appeal was pending when the impugned order was made. There is no denial. An being pending, the adjustment in the impugned order was impermissible.

15. The denial of the refund of Rs. 5,07,363.19 is on rather strange grounds. The petitioner are quite right when they say that what say that what the Assistant Collector has done is to recover by adjustment what he alleges was short levied. The only procedure for the recovery of what has been short levied is that provided by Section 11A of the Act. There is no resort to the provisions of Section 11A. There is no determination that a sum of Rs. 5,07,363.19 has been short levied. Such a recovery or adjustment cannot be made.

16. I must state that Mr. Sethna, in the absence of any affidavit in reply, fairly made no submissions in regard to the amounts of Rs. 45,447.01 and Rs. 50,667.46 and Rs. 5,07,363.19.

17. What Mr. Sethna contended is that, since the issue as to whether or no excise duty should be refunded has been referred to a larger bench of the Supreme Court, no order for refund should be made until this issue is settled. The claim that was made of refund was of the order of Rs. 36,75,721.51. The Assistant Collector by the impugned order granted a refund of Rs. 24,36,065.44. The question now is whether the Assistant Collector should not

also have ordered refund of an amount of Rs. 6,47,344.98. In the circumstances, I do not see that this issue arises here.

18. Accordingly, the impugned order is quashed and set aside to the extent that it disallows refund in the sum of Rs. 6,47,344.98 and the respondents are directed to pay the sum to the petitioners. That sum was deposited in court and withdrawn by the 1st petitioners against a bank guarantee. The bank guarantee shall stand discharged after four weeks from today. The respondents shall pay to the petitioners the costs of the petition.

19. Rule accordingly.