

(2002) 04 BOM CK 0008
In the Bombay High Court
Case No : Writ Petition No. 94 of 1991

Wipro Limited and Another		APPELLANT
	Vs	
Union of India (UOI) and Another		RESPONDENT

Date of Decision : 05-04-2002

Acts Referred:

Central Excise Rules, 1954 — Rule 57K, 57P
Central Excises and Salt Act, 1944 — Section 11B(1)

Citation : (2002) 5 BomCR 107

Hon'ble Judges : N.H. Patil, J;B.H. Marlapalle, J

Bench : Division Bench

Advocate : P.M. Shah, A, for the Appellant; R.G. Deo, S.C., for the Respondent

Final Decision : Dismissed

Judgement

B.H. Marlapalle, J.—The petitioner No. 1 is a public limited company incorporated under the Companies Act, 1956 and is engaged, inter alia, in the manufacture of Vegetable Products and Toilet Soaps. The petitioner No. 2 is a share-holder of petitioner No. 1 company. The factory manufacturing Vanaspati is located at Amalner in Jalgaon district. Vanaspati being manufactured by petitioner No. 1 was subjected to various processes and raw material used was raw vegetable oils like groundnut oil, etc. The Government of India thought it appropriate to encourage such manufacturers to use other raw oils like cotton seed oil, ricebran oil, solvent rapeseed oil, etc; which are popularly known as minor raw oils. The Government thought it appropriate to formulate a scheme to encourage use of alternative raw oils instead of groundnut oil or soyabean oil which involved a heavy outflow of financial liabilities required for import of these oils.

2. Vanaspati so manufactured is excisable under sub-heading No. 1504.00 in Heading No. 15.04 of Chapter 15 of the Schedule to the Central Excise Tariff Act, 1985 and such excise duty was being paid by the petitioner No. 4 assessee at an effective rate of Rs. 1,900/- per tonne. With effect from 1-3-1987 respondent No. 1 inserted Rules 57-K to 57-P in the Central Excise Rules, 1954, (the Rules

for short) framed under the Central Excise and Salt Act, 1944, (the Act for short) and under a new section in Chapter V titled as "section AAA". The notification dated 1-3-1987 bearing No. 27 of 1987 came to be issued by exercising powers under Rule 57-K by the Central Government and certain fixed vegetable oils as inputs and the vegetable products were declared as eligible for credit of money, if used in the manufacture of Vanaspati and other vegetable products. These oils were (i) Ricebran oil, (ii) Mahua oil, (iii) Watermelon seed oil, (iv) Solvent extracted cotton seed oil, (v) Solvent extracted mustard oil, (vi) Solvent extracted rapeseed oil, (vii) Solvent extracted sunflower oil, (viii) Solvent extracted safflower oil and (ix) Palm oil.

3. The conditions mentioned for the benefit of this credit of money were:

"(a) The credit could be taken only in respect of the quantity of oil subjected to hydrogenation on or after 1-3-1987 for the manufacture of the final products;

(b) The credit taken during any calender month could be utilised for payment of duty on the final products only after the commencement of the succeeding month, and

(c) The amount of credit utilised for payment of duty on any individual clearance of the final products could not exceed Rs. 1000/- per tonne of the vegetable products cleared; the excess credit, if any available in the account could not be refunded to the manufacturer or adjusted or utilised for payment of duty on any other excisable goods under any circumstances."

4. The petitioner No. 1 opted to take the benefit of Notification No. 27 of 1987 for the manufacture of Vanaspati as it became more economically viable to use such minor raw oils as compared to the use of conventional oils. The scheme framed under Rule 57-K and pronounced vide Notification No. 27/87 operated as an incentive to Vanaspati manufacturers to use such minor raw oils and the assessee switched over its inputs from the better quality and more economical cotton seed oil, etc; to the minor raw oils like ricebran oil, etc; and started availing the amount of credit.

5. The petitioner No. 1 company utilised the credit of money benefit for the period from 1-3-1987 to 30-6-1989 on the basis of minor raw oils which were subjected to hydrogenation. During this period, the company utilised part of the credit towards payment of duty. This Notification No. 27/87 dated 1-3-1987 was rescinded by the Government of India vide Notification No. 39/89 dated 25-8-1989 and the same was effective from 25-8-1989. As a result thereof, the credit of money scheme stood withdrawn from 25-8-1989 and automatically Notification No. 27/87 stood rescinded/withdrawn. The company could not avail the credit of money scheme once Notification No. 27/87 was withdrawn.

The petitioner No. 1 filed Writ Petition No. 2411 of 1989 before this Court. By the interim order dated 9-10-1989 the revenue was restrained from disallowing balance credit as on 25-8-1989. This petition has been finally allowed by our

judgment dated 26-9-2001.

6. For the first time on 11-1-1990 the company made a claim for refund before the Assistant Collector of Central Excise at Jalgaon. It was stated that in view of the scheme framed vide Notification No. 27/87 credit of money earned by it worked out to Rs. 12,10,43,639.75 ps. on the basis of gross input quantity used in the manufacture of Vanaspati. As against the said amount it had taken the credit of Rs. 10,83,93,452.75 ps. It further claimed that the company was entitled for refund of Rs. 1,26,50,107/- as per the statement enclosed therewith. The refund was requested by giving credit to the extent of Rs. 1,26,50,187/- in RG-23-B return so that the enhanced credit could be utilised in future. By letter dated 2nd July, 1990 the Superintendent, Central Excise and Customs, Jalgaon, informed the Assessee that the refund application was required to be submitted in the prescribed form as per the provisions of section 116 of the Act and moreover, Notification No. 27/87 was no more in existence. The Assessee, therefore, submitted a fresh claim for refund on 25-7-1990 and submitted it to respondent No. 2. This claim came to be turned down by the Assistant Collector, Central Excise and Customs vide letter dated 5-10-1990 on the following grounds:

"Since the provision of Notification No. 27/87 dated 1-3-1987 is no more in existence as on today, the question of entertaining any correspondence on this subject as indicated by you in your above referred letter does not arise. In view of this position, the correspondence attached alongwith your letter referred to above has been filed in this office as no more action is necessary."

7. The Assistant Collector of Central Excise has filed the first affidavit in reply on or about 22-8-1991, second on or about 5-7-1993 and third one by way of additional reply on or about on 5-7-1993 though it appears to have been verified on 27-3-1992. The revenue has opposed the petition and stated that (a) as soon as Notification No. 27/87 was withdrawn by Notification No. 39/89 issued on 25-8-1989, credit of money scheme ceased to exist from 25-8-1989 and therefore, such a credit could not be utilised any time thereafter, (b) the claim was available on the quantity of material that was subjected for the hydrogenation process and not on the total quantity of raw oil which was put in the process of manufacturing Vanaspati right from the first stage, (c) the Assessee had voluntarily opted to claim benefits of Notification No. 27/87 and had submitted returns under Rule 57-O of the Rules and no representation was made for almost two years and for the first time, refund claim was raised after the scheme was withdrawn with effect from 25-8-1989, (d) any claim made for refund must satisfy the requirements of section 11-B of the Act and if the claim is made beyond limitation it cannot be entertained by the revenue, (e) the language of Rule 57-K was clear and the Government was within its rights to stipulate that the benefits of scheme will be applicable only in respect of quantity of material subjected to hydrogenation process on a particular day and the benefits could not be made available after Notification No. 27/87 was withdrawn.

In any case, the benefits claimed by the Assessee were never claimed till the claim for refund was submitted on 11-1-1990.

8. Section 11-B(1) of the Central Excise and Salt Act, 1944, read thus:

"11-B. Claim for refund of duty.---(1) Any person claiming refund of any duty of excise may make an application for refund of such duty to the Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise before the expiry of six months from the relevant date in such form and manner as may be prescribed and the application shall be accompanied by such documentary or other evidence (including the documents referred to in section 12-A) as the applicant may, furnish to establish that the amount of duty of excise in relation to which such refund is claimed was collected from or paid by him and the incidence of such duty had not been passed on by him to any other person.

Provided that where an application for refund has been made before the commencement of the Central Excise and Customs Laws (Amendment) Act, 1991, such application shall be deemed to have been made under the sub-section as amended by the said Act and the same shall be dealt with in accordance with the provisions of sub-section (2) substituted by the Act.

Provided further that the limitation of six months shall not apply where any duty has been paid under protest."

9. Rules 57-K to 57-P of the Rules as introduced read thus:

"57-K. Applicability and extent for credit The Central Government may, by notification in the Official Gazette, specify---

(a) the finished excisable goods (hereinafter referred to as "final products") and the raw materials used in the manufacture of such final products (hereinafter referred to as "inputs"); to which alone the provisions of this section shall apply; and

(b) the rates at which the credit of money is to be given for use of such inputs in the manufacture of final products.

(2) When a notification has been so issued under sub-rule (1), credit at rates specified therein may be allowed for use of such inputs in the manufacture of such final products and the credits so allowed may be utilised for payment of duty on the final products, subject to the provisions in this section and the conditions, if any, stipulated in the said notification.

57-L. Credit not to be allowed if final products are exempt---

No credit of money on the inputs used in the manufacture of the final products shall be allowed if the final products are exempt from the whole of the duty of excise leviable thereon or is chargeable to nil rate of duty.

57-M. Credit not to be denied or varied in certain circumstances---

(1) Credit of money in respect of any inputs shall not be denied or varied on the ground that part of the inputs is contained in any waste, refuse or by-product arising during the manufacture of the final products, whether or not such waste, refuse or by-product is exempted from the whole of the duty of excise leviable thereon or is chargeable to nil rate of duty or is not specified as final products; and

(2) Credit of money allowed in respect of any inputs shall not be denied or varied on the ground that any intermediate product has come into existence during the course of manufacture of the final products and that such intermediate product are for the time being exempted from the whole of the duty of excise leviable thereon or is chargeable to nil rate of duty;

Provided that such intermediate products are used within the factory of production in the manufacture of final products on which duty of excise is leviable whether in whole or in part.

57-N. Manner of utilisation of the credit---

(1) Credit of money allowed in respect of any inputs may be utilised towards payment of duty of excise on the final products in or in relation to the manufacture of such inputs are intended to be used in accordance with the provisions of declaration filed under Rule 570.

Provided that the credit in respect of inputs used in the final products cleared for export under bond shall be allowed to be utilised towards the payment of duty of excise on similar final products cleared for home consumption on payment of duty.

(2) No part of the credit allowed shall be utilised save as provided in sub-rule (1).

570. Procedure to be observed by the manufacture---

(1) Every manufacture intending to take credit under this section shall file a declaration with the Assistant Collector of Central Excise having jurisdiction over this factory, indicating the description of the final products manufactured in his factory and the inputs intended to be used in each of the said final products and other such information as the said Assistant Collector of Central Excise may require and obtain a dated acknowledgment of the said declaration.

(2) A manufacturer who has filed a declaration in the sub-rule (1) may, after obtaining the acknowledgment aforesaid, take credit of money on the inputs.

Provided that no credit shall be taken unless the inputs are manufactured in the factory of manufacture of the final product or are received in the factory under a proper invoice or despatch note indicating the name and address of the supplier of the inputs.

Provided further that the manufacturer shall ensure that the supplier is normally manufacturing or trading in such inputs and the name and address shown on the

invoices are correct.

(3) A manufacturer of the final product shall maintain an account in Form RG 23-B Parts I and II.

(4) A manufacturer of the final products shall, on demand by the proper officer, submit the invoices under which the inputs have been received.

57-P. Disallowance of credit if---

(a) the credit on inputs has been taken wrongly; or

(b) inputs in respect of which credit has been taken are not used in the manufacture of the final products for which such goods have been declared under Rule 57-O.

The credit so taken may be disallowed by the proper officer and the amount of disallowed shall be adjusted in the credit account or the account-current maintained by the manufacturer under Rule 9 or sub-rule (1) of Rule 175-G, or if such adjustments are not possible for any reason, by cash recovery from the manufacturer of the final products;

Provided that such manufacturer may make such adjustments on his own in the credit account or account-current maintained by him under intimation to the proper officer."

10. Notification No. 27/87 dated 1-3-1987 issued in exercise of powers conferred by Rule 57-K of the Rules, reads thus:

"CREDIT OF MONEY, RULE 57-K 27/87-CE-DT 1-3-1987

The Central Government has specified fixed vegetable oils for manufacture vegetable products falling under S.H/1504.00 and the rate at which credit may be taken under Rule 57-K.

In exercise of the powers conferred by Rule 57-K of the Central Excise Rules, 1954, the Central Government hereby specifies---

(i) the inputs, namely, fixed vegetable oils of the description in column (2) of the table hereto annexed and used in the manufacture of the final products, namely; vegetable products falling under sub-heading No. 1504.00 of the Schedule of the Central Excise Tariff Act, 1985 (5 of 1986); and

(ii) the rates in the corresponding entry in column (3) of the said table as the rate at which credit may be granted for use of such inputs in the manufacture of the said final products.

For the purposes of section AAA of Chapter V of the said Rules and stipulates that the grant of credit and utilisation thereof, shall, in addition to the provisions of the said section, be subject to the following conditions, namely;

(i) the credit shall be taken only in respect of the quantity of oil subjected to

hydrogenation on or after the 1st day of March, 1987, for the manufacture of the said final products and the credit shall be taken only on the date on which the oil has been so hydrogenated;

(ii) the credit taken during any calendar month shall be utilised for payment of duty on the said final products only after the commencement of the succeeding month;

(iii) the quantity of credit utilised for payment of duty on any individual clearance of the said final products shall not exceed rupees one thousand per tonne of vegetable products cleared and the excess credit, if any, available in the credit account shall not be refunded to the manufacturer or adjusted against or utilised for payment of duty on any excisable goods under any other circumstances; and

(iv) where the description in column (2) of the table specifies solvent extracted variety of the oil, the manufacturer shall within 5 months from the date of taking credit, or such extended period as the Assistant Collector of Central Excise may allow in this behalf, produce a certificate from an officer not below the rank of Deputy Director in the Directorate of Vanaspathi. Vegetable oils and fats in the Ministry of Food and Civil Supplies of the Government of India to the effect that the said oil has been manufactured by the solvent extraction method.

Explanation.---In this notification "vegetable product" means any vegetable oil or fat which, whether by itself or in the admixture with any other substance has by hydrogenation or by any other process, been hardened for human consumption."

11. The term "Vanaspathi" means "hydrogenated vegetable oil meant for consumption" and it is required to conform to the requirements that it shall be prepared by hydrogenation of one or more of the following vegetable oils as stipulated in the order i.e. Vegetable Oil Products (Standard of Quality) Order, 1975. There is no dispute that the manufacturing process of Vanaspathi involves two main stages namely; (a) pre-refining and (b) post-refining. In the first stage of pre-refining, the following stages are involved:

(i) resuming.

(ii) Alkali refining.

(iii) Bleaching.

(iv) Hydrogenation.

Whereas, in the second stage of manufacturing Vanaspathi i.e. post-refining, the following stages are involved:

(i) Deodorization.

(ii) Fortification with vitamins.

(iii) Packing and refrigeration.

(iv) Coloration of Vanaspati.

12. Shri P.M. Shah, learned Senior Advocate for the Assessee, invited our attention to the impugned communication dated 5-10-1999 turning down the refund claim on the ground that the scheme under Notification No. 27/87 was withdrawn and did not exist when the claim was made and therefore, the claim was untenable. It is submitted that the said ground mentioned by the Assistant Collector in the impugned communication is illegal and on that ground alone the petition is required to be allowed. In this connection reliance has been placed on a Constitution Bench judgment of the Apex Court in the case of Mohinder Singh Gill and Another Vs. The Chief Election Commissioner, New Delhi and Others, , wherein it was held:

"Where a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. Otherwise, an order bad in the beginning may, by the time it comes to Court on account of a challenge, get validated by additional grounds."

Elaborating his arguments, the learned Senior Advocate for the petitioners submitted that the impugned order has to be read as it is and the reasoning cannot be supplemented by the three affidavits filed by the revenue and these additional grounds cannot be considered in support of the said impugned decision.

13. In Writ Petition No. 2411 of 1989 we have held that the benefit of credit on money accrued to the assessee could be utilised even after the scheme was withdrawn and that too under the provisions of Rule 57-O which lays down the procedure for claiming the benefit. It is abundantly clear that the credit could be utilised subsequently after submitting the declarations. The manufacturer claiming the credit on money claim was required to file a declaration with the Assistant Collector of Central Excise intimating the description of the final product manufactured and the inputs intended to be used and each of the said final products and such other information. It is further provided that no credit could be taken unless the inputs are manufactured in the factory of manufacturer or received in the factory under a proper invoice indicating the name and address of the supplier of inputs. The credit so earned in a particular month could be claimed only in the subsequent month.

Shri P.M. Shah is right in relying on the Division Bench judgment of the Gujarat High Court in the case of Dipak Vegetable oil Industries Ltd. Vs. Union of India, , in support of his contentions. In that case, the revenue had rejected the claim on the ground that it was submitted after 25-8-1989 on which date the Notification No. 27/87 was withdrawn. This contention was rejected by the Gujarat High Court by holding that even after Notification No. 27/87 came to be rescinded, credit of money which was earned by the manufacturers of Vanaspati could be utilised by them in terms of Rules. This view was followed in the case of Akola Oil

Industries Limited v. Union of India, decided by a Division Bench of this Court in Writ Petition No. 2662 of 1989. We have, therefore, no doubt in recording our observations that the reason given by the Assistant Commissioner of Central Excise, while turning down the claim of the Assessee for refund is unsustainable. However, that by itself shall not be the ground to allow the petition. It is, therefore, necessary for us to consider the claim of the petitioners on its own merits especially when the petition is pending before us for the last 11 years or so.

14. In fact, the ground on which the petitioners claim has been rejected has not been supported in the affidavit in reply or additional affidavit in reply subsequently filed by the revenue. In the returns filed by the revenue, a plea is taken that once Notification No. 27/87 was rescinded, the Assessee could not earn credit of money. There can be no dispute over this proposition. The revenue while rejecting the claim made by the petitioners has not considered the said claim in its proper perspective and the provisions of the Act as well as the scheme of Rules 57-K to 57-O. We, therefore, deem it appropriate to deal with the claim of Assessee on merits independently.

15. There is no dispute that as soon as Notification No. 27/87 was issued the petitioners switched over to the use of minor raw oils which were listed under the said notification or to the schedule attached thereto and started claiming the benefits of credit of money. It went on filing returns under Rule 57-O and also claimed adjustment of the credit accrued to it while despatching finished goods. Till Notification No. 27/87 was rescinded no grievance was raised in regard to the claim available to the petitioners under Notification No. 27/87. A plea has been taken for the first time in the representation dated 11-1-1990 that the credit of money ought to have been extended to it on the total inputs of raw material processed from the first stage of manufacturing i.e. resuming and the credit on money was erroneously given to it only on the basis of quantity of oil subjected to the process of hydrogenation alone. This resulted in loss to the petitioners to the tune of Rs. 1,26,50,187/-.

16. Section 11-B of the Act stipulates that any person claiming refund of excise duty may make an application for refund of such duty to the Assistant Commissioner of Central Excise or the Deputy Commissioner of Central Excise before expiry of six months from the relevant date in such form and manner as may be prescribed. It also states that the limitation of six months shall not apply where any duty has been paid under protest. Admittedly, there is no other provision in the Act for submitting a representation for refund of duty and therefore, the petitioners application dated 11-1-1990 ought to be considered as an application u/s 11-B of the Act.

17. Notification No. 27/87 was rescinded by Notification No. 39/89 issued on 25-8-1989 and credit earned by the Assessee till 25-8-1989 could have been utilised in the next month i.e. in September, 1989. The claim for refund could be filed by the Assessee within the limitation prescribed u/s 11-B of the Act.

of the Act with reference to 1st September, 1989. If it is so considered, it is obvious that the claim for the benefits utilised till the month of June, 1989, was time-barred. Such an application, therefore, could be considered only in respect of the claim that could be made in the month of August, 1989, onwards. We are fortified in this view by a Division Bench judgment of the Gujarat High Court in the case of present petitioner company itself reported in Wipro Ltd. Vs. Union of India, . In the eye of law, undoubtedly, the representation dated 11-1-1990 could have been considered by the revenue for refund in respect of claims available only in August, 1989 onwards and in this case only for the month of September 1989.

18. Let us examine the second ground on which the petitioners claim rests, namely; that the credit ought to be given on the quantity of material subjected to first process of manufacturing Vanaspati and not on the quantity of oil subjected to the operation of hydrogenation. The benefits contemplated under the scheme framed vide Notification No. 27/87 was by invoking the powers under Rule 57-K and it was for specific purpose. The scheme is required to be read as it is and it will not be permissible to add or import any words therein. The following two conditions in the scheme are very specific as are stated in Notification No. 27/87.

(a) Credit shall be taken only in respect of quantity of oil subject to hydrogenation on or after 1-3-1987.

(b) Credit shall be taken only on the date on which oil has been so hydrogenated.

We have elaborately dealt with the second condition and held that the credit earned as on 25-8-1989 could be used or claimed any time after 1-9-1989 but subject to the conditions prescribed in Rule 57-O. So far as the first condition is concerned, the language used is clear and does not suffer from any ambiguities.

19. Prior to formulating the scheme under Notification No. 27/87, the Government of India had granted certain concessions to Vanaspati manufacturers vide Notification No. 115/86 dated 1-3-1986. It was called as "Money Credit Scheme". Explanation (3) of the said notification reads thus:

"The percentage of cotton seed oil or specified minor oils used in the manufacture of vegetable product shall be calculated with reference to the weight of such oils and the total weight of the mixture of oils immediately before such mixture is subject to the process of hydrogenation for conversion into the said vegetable product."

The reference to the total weight of mixture of oils was specific and said quantity to be taken into consideration was the quantity of oils immediately before such mixture was subjected to the processes of hydrogenation and not any earlier processes. Condition No. 1 Notification No. 27/87 ought to be read in the background and in consonance with earlier Notification No. 115 of 1986 so as to read the clear intentions of the Government of India while granting concessions.

In the petitioners case 1996 (64) ECR 1 31 , the Central Excise and Gold Control Appellate Tribunal (CEGAT), Western Regional Bench, Mumbai, was called upon to decide the very same issues and on comparing the Money Credit Scheme with the MODAVAT, the Tribunal held that the quantity of oil envisaged for the benefit of credit under the scheme of Notification No. 27/87 meant the quantity of oil subjected to the process of hydrogenation alone and not the total quantity of oil subjected to utilised or processed in the very first stage of manufacturing operation of Vanaspati (vegetable product). The language of Rule 57-M supports this view and therefore, the contentions raised by the Assessee that the language of Rule 57-M contemplated the total quantity of oil used for manufacturing of Vanaspati right from the first stage cannot be accepted to be correct. The interpretation so given does not defeat or contradict the purpose behind announcing the concession.

20. There is no dispute that by the time the hydrogenation stage in the manufacturing of vanaspati is reached there would be loss of some quantity in the raw material as compared to the very first stage and this may be by way of impurities which are in some cases utilised for manufacture of soaps, etc. Even after the hydrogenation process is carried out, there may be some loss in the quantity but this loss is taken into consideration and the scheme stipulates that the quantity proceed for hydrogenation is entitled for benefit under Notification No. 27/87 and not the quantity of oil which came out of process of hydrogenation. The assessee submitted returns under Rule 57-O and intimated the quantities but at no point of time the Assessee ever raised a contention that it was entitled for claiming the benefit of credit on the total quantity of raw material proceed right from the first page of manufacturing vanaspati and such a contention was raised for the first time in the representation dated 11-1-1990. Needless to mention that the returns so submitted are meant for verification by the revenue and the revenue had extended the benefit of Notification No. 27/87 on the actual quantity of material subjected to hydrogenation process after 1-3-1987 and till 25-8-1989.

21. For the reasons stated hereinabove, the refund claim made by the Assessee vide its representation dated 11-1-990 suffers on both the counts namely; limitation as well as on merits in view of the specific language set-out in Notification No. 27/87. Hence, in the facts and circumstances of this case, the claim made is devoid of merits.

Resultantly, the petition is hereby dismissed. Rule is discharged with no order as to costs.