

(1992) 01 GUJ CK 0014

In the Gujarat High Court

Case No : Special Civil Application No. 4221 of 1991

Wipro Ltd.

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 22-01-1992

Acts Referred:

Central Excise Rules, 1944 — Rule 57F
Central Excises and Salt Act, 1944 — Section 11A

Citation : (1993) 42 ECC 303 : (1992) 60 ELT 370 : (1992) 2 GLR 840

Hon'ble Judges : A.P. Ravani, J;A.N. Divecha, J

Bench : Division Bench

Advocate : Trivedi, Gupta and Dave, for the Appellant; P.M. Raval, Addl. A.G., for the Respondent

Judgement

Ravani, J.—Petitioner No. 1 is a public limited company and petitioner No. 2 is an employee and shareholder thereof, Petitioner company is engaged in the manufacture of vegetable products and toilet soaps. The present petitioner is concerned with vegetable products only. On November 8, 1990, the petitioner company claimed refund of an amount of Rs. 18,61,844/- (Rupees Eighteen lacs sixtyone thousand eight hundred and fortyfour only) for short credit availed of by it for the period commencing from March 1, 1987 to August 24, 1989. The Assistant Collector of Central Excise issued a show cause notice dated March 8, 1991 calling upon the petitioner company to show cause, inter alia, as to why the refund claim be not rejected both on merits and on the ground of limitation. The petitioner replied to the show cause notice on April 3, 1991. After hearing the parties, the Assistant Collector has rejected the refund claim as per his order dated April 30, 1991, produced at Annexure F to the petition. The petitioner has challenged the legality and validity of the aforesaid order. In substance the petitioner has prayed for quashing and setting aside the aforesaid order and also prayed for direction commanding the respondents to permit the petitioner to take and utilise the short taken credit under Notification No. 27/87 dated March 1, 1987.

2. The petitioner company is engaged in the manufacture of vegetable oil. The Government introduced money credit benefit scheme by introducing Section AAA and inserted Rules 57K to 57P in the Central Excise Rules with effect from March 1, 1987. Rules 57K empowers the Government to issue notification permitting the money credit to be taken by the manufacturer if the manufacturer uses certain raw materials in the manufacture of final products. The said money credit benefit would be available to manufacturers subject to the provisions of Rules 57K to 57P contained in Section AAA and the conditions if any that may be mentioned in the relevant notification. Under this provision, the Government issued Notification No. 27/87 and specified certain fixed vegetable oil as input and Vanaspati falling under sub-heading No. 1504.00 as final product. The notification also provided the rates at which the money credit would be available in case the specified raw-materials were used in the manufacture of final product. The conditions mentioned in the notification are as follows :-

(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 other excisable goods under any circumstance;

(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 Asstt. 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 Vanaspati, 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; and

(v) the credit shall be taken only in respect of indigenous inputs and the manufacturer shall produce such documents as may be required by the Assistant Collector of Central Excise in this regard.

3. It may be noted that the aforesaid conditions are in addition to the provisions of Section AAA of Chapter 5 of the Central Excise Rules, 1944. The aforesaid notification was withdrawn by Notification No. 39/89 dated August 25, 1989. However, it was again reintroduced by Notification 45/89 dated October 11, 1989.

4. It appears that in respect of the raw oils or the inputs used for the

manufacture of final product, the petitioner did not avail of the credit for the gross quantity which was put into the process of hydrogenation. According to the petitioner it availed of the money credit in respect of the raw oils after deduction of the process loss. But, the petitioner availed of money credit even in respect of the quantity of raw-oils which was lost during the process from October 1989 onwards. In this fashion the petitioner availed of credit for Rs. 11,24,024.50 ps. for the period commencing from October 1989 to September 1990. The Superintendent Central Excise, Bhavnagar issued three different show cause notices dated January 25, 1990, May 21, 1990 and October 5, 1990 and the petitioner was called upon to show cause as to why the demand should not be confirmed u/s 11A of the Central Excises & Salt Act, 1944. The Assistant Collector, Central Excise, Bhavnagar after hearing the petitioner came to the conclusion that having regard to the conditions mentioned in the notification and having regard to the provisions of Rule 57F of the Central Excise Rules, 1944, all the three show case notices were required to be dropped and withdrawn. This order was passed on December 31, 1990.

5. The petitioner preferred a claim of Rs. 18,61,844/- for the period commencing from March 1987 to August 24, 1989. Thus after a period of about 14 months for the alleged short credit taken, the claim was preferred by the petitioner. The department issued show case notice dated March 8, 1991 and called upon the petitioner to show cause as to why the claim should not be rejected both on merits and on the ground of limitation. The petitioner submitted reply on April 3, 1991. After adjudication of the claims, the Assistant Collector, Central Excise, Bhavnagar, rejected the claim as per its order dated April 30, 1991. It is this order which is under challenge in this petition.

6. The Assistant Collector has rejected the claim inter alia on the ground that as per the notification the credit shall be taken only on the date on which the oil has been so hydrogenated. According to him the credit was to be taken by the petitioner himself and that too only on the date on which the oil was subjected to hydrogenation. At a later stage and that too after recession of Notification No. 27/87 vide Notification No. 29/89 dated August 25, 1989, i.e. after completion of hydrogenation, it could not be availed of. The Assistant Collector also held that necessary certificate of V.O.P.P. Controller was not produced and that there was no question of mistake of law inasmuch as the credit was to be taken by the party itself and the party knew the actual quantum of the raw material used and the credit to be taken. The Assistant Collector also held that the refund claim was filed beyond the statutory period of six months as provided u/s 11B of the Act. As observed by him, it was filed after 14 months of last hydrogenation and after a period of three years from the date of first hydrogenation. Therefore, he held that the claim was time-barred as provided u/s 11B of the Act and therefore also it was liable to be rejected.

7. Admittedly the claim has been preferred on November 8, 1990 in respect of the period commencing from March 1, 1987 to August 24, 1989. Thus there is no

dispute with regard to the fact that the claim is preferred after a period of about 14 months from the date of expiry of the prescribed period of limitation. The Assistant Collector has rejected the claim on the ground that the refund claim can be made within a period of six months as provided u/s 11B of the Act. In view of the decision of the Supreme Court in the case of Collector of Central Excise, Chandigarh Vs. Doaba Co-operative Sugar Mills Ltd., Jalandhar, , the Excise Officers performing duties under the provisions of the Act are bound by the provisions of the Act. In this decision the Supreme Court has referred to its earlier decision in the case of Miles India Ltd. v. The Assistant Collector of Customs, reported in 1987 (30) E.L.T. 641. The Officers exercising powers under the provisions of the Act and the Rules framed thereunder cannot ignore the provisions of the Act and the Rules. They are the creatures of the statute. They are bound by the provisions of the statute. It may also be noted that in case of short levy, short payment, or non-levy or non-payment, or erroneous refund of excise duty also the Department cannot make recovery of the amount of excise duty beyond the prescribed period of limitation. in the case of Doaba Co-operative Sugar Mills (supra), the Department sought to recover duty after the prescribed period of limitation. In that connection the Supreme Court inter alia observed as follows :

"In making claims for refund before the departmental authority, an assessee is bound within four corners of the Statute and the period of limitation prescribed in the Central Excise Act and the Rules framed thereunder must be adhered to. The authorities functioning under the Act are bound by the provisions of the Act. If the proceedings are taken under the Act by the department, the provisions of limitation prescribed in the Act will prevail."

In view of the aforesaid law laid down by the Supreme Court it cannot be said that the order passed by the Assistant Collector rejecting the claim on the ground of limitation is in any way unjust or unlawful so as to call for interference in exercise of the powers under Article 226/227 of the Constitution of India.

8. Learned counsel for the petitioner submitted that the provisions of Section 11B of the Act would not be applicable to the cases of short-credit availed of by a manufacturer. The submission cannot be accepted. When a manufacturer avails of short-credit then what happens in practice is that the manufacturer pays more amount of duty of excise to the revenue than what he would have paid had he availed of the credit to the extent of maximum permissible limit. Thus in reality it would be a case of payment of excess amount of duty. In such cases the period of limitation would start to run from the date of payment of duty. It is only u/s 11B of the Act that a manufacturer can claim refund of the amount of such alleged excess payment of duty. Assuming for a moment that the provisions of Section 11B of the Act are not applicable to the cases of short-credit availed of by a manufacturer, then no other provision of the Act or the Rules is pointed out under which the claim for refund of the amount or for availing of the credit later on can be filed. In such a situation such claim will not be maintainable at all as

there is no provision in the Act or the Rules. Instead of taking such an extreme view it would be reasonable to adopt the view which provides some remedy to a manufacturer. Therefore, in our opinion the provisions of Section 11B of the Act would be applicable even in cases where a manufacturer has availed of short credit and has not availed of the full credit to the extent to which he is entitled to.

9. It may also be noted that there is no provision in the Rules governing MODVAT credit for varying the credit once taken, i.e., if a short-credit is taken by an assessee there is no specific provision enabling the assessee to claim the differential credit subsequently. But having regard to the overall scheme of the Act and the Rules it would be proper to hold that if the assessee is eligible to avail of the credit and for whatever reason he has taken short-credit, then if the assessee claims the differential credit subsequently and if he proves his eligibility then he may be entitled to claim the same, provided he claims the same within the period of limitation and provided further that he satisfies all the relevant conditions. By necessary implication the limitation period of six months as provided u/s 11B of the Act has got to be read as limitation prescribed for claiming such differential credit. We are told that such is the view taken by CEGAT also in the case of 1991 (33) ECR 329 . If that be so, we believe that the view taken by CEGAT is just and proper and is in accordance with the general scheme of the Act and the Rules and the scheme of MODVAT. Therefore the contention that the provisions of Section 11B of the Act will not apply has no substance and the same is rejected. The contention that for the cases falling u/s AAA in Chapter 5 of the Rules which contain Rule 57K to Rule 57P no period of limitation applies is not correct. The view taken by CEGAT in the aforesaid decision appears to be just and proper and in accord with the overall scheme of the Act and the Rules.

10. Even on merits the decision of the Assistant Collector appears to be just and proper. The manufacturer is required to take the credit as per the terms and conditions of the notification and the provisions of the relevant rules. As provided under the notification the credit is required to be taken on the same day and it cannot be taken afterwards. If the credit is permitted to be taken afterwards it would not be possible for the department to verify the claim. Notification No. 27/87 dated March 1, 1987, issued under Rules 57K inter alia provides that the credits so allowed may be utilised for payment of duty on the final products,"subject to the provisions of this section and the conditions, if any, stipulated in the said notification." In view of this provision made in the notification, one is required to take into consideration the provisions of the entire section and all the rules relating to MODVAT. Rule 57N provides for manner of utilisation of the credit. Rule 57-O provides for procedure to be observed by the manufacturer who intends to take credit. Rule 57-O(3) inter alia provides for maintenance of accounts in the prescribed form. Rule 57-O(4) provides for submission of monthly return to the Superintendent of Central Excise. Rules 57-O(5) provides for submission of invoice under which the inputs have been received to the proper officer. Rule 57P provides for disallowance of credit in

certain cases. All these aspects are required to be fulfilled and, if need be, at the proper stage the officer should be in a position to verify the same. If the claims after the prescribed period of limitation are entertained it would be impossible for the department to verify as to whether the provisions of the rules and other conditions have been complied with or not.

11. In this connection reference may be made to a decision of the Supreme Court in the case of Indian Aluminium Company Limited Vs. Thane Municipal Corporation, In that case the Company failed to fill in the prescribed form declaring that the goods imported within the municipal limits shall not be used for any other purpose for sale or otherwise. Since such declaration was not made the octroi authorities could not verify as to whether the raw material imported was utilised in the industrial undertaking without selling or disposing of otherwise. The Company later on realised that it had not filed such declaration and, therefore, contended that on the basis of the record and the financial accounts and other documents it could be shown that the goods imported were used in the industrial undertaking without selling or disposing of otherwise. On this basis the Company claimed refund of the alleged excess payment of octroi duty. The Supreme Court held that the incentive was sought to be given to such entrepreneurs who utilise the raw materials in the industrial undertaking without selling or disposing of otherwise. In order to see that the object is fulfilled, verification at the relevant time by the octroi authorities becomes very much necessary before concession can be given. In absence of declaration having been filed at the relevant time the Company could not claim such concession. The same reasoning and logic would be applicable to the facts of this case also. If the credit available is not taken on the same day and the differential credit is claimed after the prescribed period of limitation it would not be possible for the appropriate officer to verify as to whether the conditions of Notification No. 27 of 1987 dated March 1, 1987 are complied with or not, and as to whether other relevant provisions of the Act and the Rules are also complied with or not. Therefore, even on merits the view taken by the Assistant Collector is eminently just and proper and is not required to be interfered with in exercise of the powers under Article 226/227 of the Constitution of India.

12. There is no special provision regarding claiming of differential credit. In view of this position of law it cannot be said that the general provisions of Section 11B of the Act are excluded while considering the question of giving benefit of differential credit.

13. Learned counsel for the petitioner relied upon a decision of this High Court in the case of Dipak Vegetable oil Industries Ltd. Vs. Union of India, . It was a case which arose on account of a notification dated August 25, 1989 by which the Government withdrew its earlier notification. In that context the question arose : whether the right conferred by the rule was taken away on account of the recession of the earlier notification. The Division Bench of this Court held that the right already acquired was not taken away by the notification dated August 25,

1989. In our opinion this decision is not at all relevant and is not applicable to the facts of the case.

14. Learned counsel for the petitioner submitted that it was the duty of the department to grant credit if the petitioner had availed of the short-credit. In support of this contention reliance is placed on the decision of the Supreme Court in the case of Anchor Pressings (P) Ltd. Vs. Commissioner of Income Tax, U.P. and Others, . It was a case u/s 84 of the Income Tax Act, 1961 as it was on the statute book at the relevant time. It provided that Income Tax would not be payable by an assessee on so much of the profits and gains derived from any industrial undertaking to which the section applied as did not exceed 6 per cent per annum on the capital employed in such undertaking computed in the prescribed manner. It was contended that it was the obligation of the Income Tax Officer to grant relief by looking at the record. In that connection the Supreme Court observed that before the Income Tax Officer can grant relief there must be clear data on the assessment record sufficient to enable him to consider whether the relief should be granted. In absence of such material no fault can be found with the Income Tax Officer for not making order u/s 84 favouring the assessee. We are afraid, the aforesaid decision does not help the petitioner. In the instant case it was for the assessee to avail of the credit. If he commits the mistake in availing full credit, he could rectify the mistake within the prescribed period of limitation. For availing the credit all the necessary details would be within the knowledge of the assessee. In fact MODVAT credit scheme relies upon the assessee and puts implicit faith on assessee and allows him to take credit. Therefore, by very nature of things the decision rendered in relation to the provisions of Section 84 (as it was in force at the relevant time) and Section 154 of the Income Tax Act, 1961 would not apply to the powers and duties of an Excise Officer functioning under the appropriate provisions of the Central Excises & Salt Act, 1944. Moreover it is nowhere pointed out that it was brought to the notice of the Excise Officer concerned that all the relevant conditions for availing of the credit were fulfilled by the assessee and even so the Excise Officer refused to grant credit. Thus, in our opinion, on facts as well as in view of the different object and different provisions of the Income Tax Act, 1961 and that of the provisions of the Central Excises & Salt Act, 1944 the decision of the Supreme Court in the case of Anchor Pressings (P) Limited (supra) is of no help to the Petitioner.

15. No other contention is urged. In above view of the matter, both on the ground of limitation as well as on merits there is no substance in the petition. The petition is therefore required to be rejected.

16. In the result the petition is rejected. Rule discharged.