

THE HIGH COURT OF DELHI AT NEW DELHI

%

Judgment delivered on: 02.06.2016

+ **W.P. (C) 3889/2000 & CM APPL. 5967/2000**

M/S ESTER INDUSTRIES LTD.

..... Petitioner

versus

UNION OF INDIA AND ORS.

..... Respondents

Advocates who appeared in this case:

For the Petitioner : Mr. R. Santhanam with Mr. A. P. Sinha and Mr. Bharat Agarwal.

For the Respondents : Mr. Rahul Kaushik, Senior standing counsel with Mr. Anup Kr. Kesari.

CORAM:

JUSTICE S.MURALIDHAR

JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

1. The Petitioner has filed the present petition under Article 226 and 227 of the Constitution of India, *inter alia*, impugning a letter dated 13th July, 2000 issued by Superintendent of Central Excise, Khatima, calling upon the Petitioner to pay back a sum of Rs.1,69,91,809/-, stated to have been claimed as MODVAT credit under Rule 57A of the Central Excise Rules, 1944 (hereafter 'the Rules'), for the period 16th March, 1995 to 12th May, 2000. The Petitioner also challenges Section 112 of the Finance Act,

2000 as being *ultra vires* the Constitution of India.

2. The Petitioner is a public limited company engaged in the manufacture and sale of Polyester Chips, Polyester Films, Polyester Filament Yarn, etc. The dispute in the present case concerns the denial of MODVAT credit claimed by the Petitioner in respect of the excise duty paid on High Speed Diesel Oil (hereafter 'HSD') which was consumed by the Petitioner for generation of electricity used for the manufacture of excisable goods in its factory.

3. It is not in dispute that by virtue of Notification No. 5/98-C.E. (N.T.) dated 2nd March, 1998 issued by the Central Government, MODVAT Credit on excise duty paid on HSD was inadmissible. The disputes in the present case essentially concern the MODVAT credit which was claimed and allowed to the Assessee for the period 16th March, 1995 till 1st March, 1998. The Petitioner claims MODVAT Credit under Rule 57A of the Rules in respect of HSD consumed as fuel for generation of electricity used for the manufacture of excisable goods with effect from 1st March, 1994. According to the Petitioner, MODVAT Credit was available in respect of duties paid on 'inputs' used for the manufacture of excisable goods and, HSD was one such input in respect of which MODVAT credit was

available in terms of Notification No. 4/94-C.E. (N.T.) dated 1st March, 1994.

4. On 16th March, 1995, another Notification No. 11/95-C.E. (N.T.) came to be issued, by virtue of which, an explanation was introduced in Rule 57A of the Rules to define the scope of 'inputs' as used in Rule 57A(1) of the Rules. The said explanation read as under:-

“Explanation. - For the purposes of this rule, “inputs” includes;

- (a) inputs which are manufactured and used within the factory of production, in or in relation to, the manufacture of final products,
- (b) paints and packaging materials,
- (c) inputs used as fuel, and
- (d) inputs used for generation of electricity, used within the factory of production for manufacture of final products or for any other purpose,

but does not include -

- (i) machines, machinery, plant, equipment, apparatus, tools or appliances used for producing or processing of any goods or for bringing about any change in any substance in or in relation to the manufacture of final products;
- (ii) packaging materials in respect of which any exemption to the extent of the duty of excise payable on the value of the packaging materials is being availed of for packaging any final products;

(iii) packaging materials or containers, the cost of which is not included in the assessable value of the final products under section 4 of the Act.”

5. By virtue of the said Notification (No. 11/95-C.E.(N.T.) dated 16th March, 1995, Rule 57D of the Rules was also amended and the proviso to the said Rule was substituted with the following provisos:-

“Provided that such intermediate products are -

(a) used within the factory production in the manufacture of a final product (other than those cleared either to a unit in a Free Trade Zone, or to a hundred per cent Export-Oriented Unit or to a unit in an Electronic Hardware Technology Park or to a unit in Software Technology Parks) on which the duty of excise is leviable whether in whole or in part; and

(b) specified as inputs or as final products under a notification issued under rule 57 A :

Provided further that the credit of specified duty shall be allowed in respect of inputs which are used for generation of electricity, used within the factory of production for manufacture of final products or for any other purpose.”

6. On the same date - that is, 16th March, 1995- another notification being Notification No. 8/95-C.E. (N.T.) was issued which contained a Table describing the inputs and the final products in respect of which MODVAT credit was available. In the said Table 'inputs' were defined as under:-

“All goods falling within the Schedule to the Central Excise Tariff Act, 1985 (5 of 1986), other than the following, namely, -

(i) goods classifiable under any heading of Chapter 24 of the Schedule to the said Act;

(ii) goods classifiable under heading Nos. 36.05 or 37.06 of the Schedule to the said Act;

(iii) goods classifiable under sub-heading Nos. 2710.11, 2710.12, 2710.13 or 2710.19 (except Natural gasoline liquid) of the Schedule to the said Act;

(iv) high speed diesel oil classifiable under heading No. 27.10 of the Schedule to the said Act.”

7. Although, HSD was specifically excluded from the scope of inputs by the said Notification No. 8/95-C.E. (N.T.) dated 16th March, 1995, the Petitioner claimed that by virtue of the scope of inputs, as defined under Explanation to Rule 57A read with the proviso to Rule 57D, it would be entitled to MODVAT credit on the duty paid on HSD which was specifically used for generation of electricity which in turn was used to manufacture excisable goods. According to the Revenue, MODVAT credit was not available in respect of HSD, since the same was specifically excluded under the Notification No. 5/94-C.E.(N.T.) dated 1st March, 1994, which expressly excluded goods “*falling under heading or sub-heading*

Nos. 2710.11, 2710.12, 2710.13, 2710.19 (except Natural gasoline liquid), 2710.31, 36.05 or 37.06 of the Schedule to the said Act.”, and Notification No. 8/95-C.E. (N.T.) dated 16th March, 1995 issued thereafter, which also specifically excluded HSD classifiable under Heading No.27.10 of the Schedule to the Central Excise Tariff Act, 1985.

8. By a Notification dated 1st March, 1997, the provisos to Rule 57D were deleted. However, according to the Petitioner, it was still entitled to MODVAT credit on the duty paid on HSD by virtue of Rule 57B of the Rules, the relevant extract of which reads as under:-

“57-B. Eligibility of credit of duty on certain goods.-

(1) Notwithstanding anything contained in Rule 57A, the manufacturer of final products shall be allowed to take credit of the specified duty paid on the following goods, used in or in relation to the manufacture of the final products, whether directly or indirectly and whether contained in the final products or not, namely-

- (i) goods which are manufactured and used within the factory of production;
- (ii) paints;
- (iii) goods used as fuel;
- (iv) goods used for generation of electricity or steam, used for manufacture of final products or for any other purpose, within the factory of production;”

9. By a Corrigendum dated 10th March, 1997 (Corrigendum F. No. B-42/1/97-TRU), the word 'goods' wherever occurring in Rule 57B (1) was substituted by the term 'inputs'.

10. On 2nd March, 1998, the Central Government issued another Notification being Notification No. 5/98-C.E.(N.T.) whereby an Explanation was added to Rule 57B(1) of the Rules which reads as under:

“Explanation.-For the purposes of this sub-rule, it is hereby clarified that the term 'inputs' refers only to such inputs as may be specified in a notification issued under Rule 57A.”

11. Although it is not disputed that HSD was specifically excluded from the scope of inputs by virtue of Notification No. 5/94-C.E. (N.T.) dated 1st March, 1994 and Notification No. 8/95-C.E. (N.T.) dated 16th March, 1995, the Petitioner, nonetheless, claims that it was entitled to MODVAT credit on inputs by virtue of Explanation to Rule 57A of the Rules read with Rule 57D and 57B of the Rules. However, it is not disputed that duty paid on HSD would not be admissible as MODVAT credit with effect from 2nd March, 1998, since the Notification (Notification No.5/98-C.E.(N.T.) dated 2nd March, 1998) expressly clarified that the term 'inputs' would refer to

only such inputs as may be specified in a notification issued under Rule 57A of the Rules. Thus, admittedly the word 'inputs' as used in Rule 57B(1), no longer included inputs that were expressly excluded by Notification No.8/95-C.E. (N.T.) dated 16th March, 1995.

12. In view of the above, the dispute whether MODVAT credit was available on duties paid on HSD is limited to the period 1st March, 1994 to 1st March, 1998.

13. The Petitioner being aggrieved by the decisions, denying MODVAT credit on duties paid on HSD, unsuccessfully appealed before the Commissioner of Customs and Central Excise (Appeals) and, thereafter, carried the matter before the Customs, Excise and Gold (Control) Appellate Tribunal (hereafter 'the Tribunal'). By an order dated 4th December, 1998, the Tribunal set aside the orders passed by the authorities below and held that MODVAT credit was available in respect of duties paid by the Petitioner on HSD for the period 1st March, 1994 till 28th February, 1997. Similarly, by an order dated 5th February, 1999, the Tribunal allowed the Petitioner's appeal against order denying MODVAT credit in respect of period after 1st March, 1997.

14. Against the aforementioned orders dated 4th December, 1998 and 5th February, 1999 passed by the Tribunal, the Revenue filed applications for making a reference to the High Court. The Revenue also filed an appeal before the Supreme Court.

15. By an order dated 3rd January, 2001, the Supreme Court allowed the appeal (Civil Appeal No. 14/2001) filed by the Revenue and directed the Tribunal to refer the following two questions for consideration by the High Court:-

“(a) Whether HSD can be taken as input as mentioned in section 'AAA' of Central Excise Rules, 1944 and as defined under Rule 57 A of Central Excise Rules, 1944?

(b) Whether the modvat credit can be allowed on the High Speed Diesel Oil falling under Heading No. 27.10 of Central Excise Tariff Act, 1985, which cannot be taken as inputs and which is specifically excluded from the purview of the modvat under Rule 57A of Rules.?”

Pursuant to the order passed by the Supreme Court, reference was made to the High Court. On bifurcation of the State of Uttar Pradesh, one reference was transferred to Uttarakhand High Court while the other remained with the Allahabad High Court.

16. By a judgment dated 27th October, 2015, rendered in Central Excise

Reference No.8/2001, the Allahabad High Court answered the aforementioned questions in favour of the Petitioner. The Allahabad High Court held that "*Explanation to Rule 57A (Clause d), clearly takes within its ambit 'inputs' used for generating electricity which is used within the factory of production for manufacture of final products or for any other product.*" and since, it was not in dispute that HSD was used by the Petitioner for generating electricity and was used within the factory for the manufacture of final products, the benefit of MODVAT credit on duties paid on HSD would be available to the Petitioner. The reference before the Uttarakhand High Court was dismissed for non-prosecution.

17. In the meanwhile, the Parliament enacted Section 112 of the Finance Act, 2000 (hereafter 'the Act') which reads as under:-

“112. Validation of the denial of credit of duty paid on high speed diesel oil.-(1) Notwithstanding anything contained in any rule of the Central Excise Rules, 1944, no credit of any duty paid on high speed diesel oil at any time during the period commencing on and from the 16th day of March, 1995 and ending with the day, the Finance Act, 2000 receives the assent of the President, shall be deemed to be admissible.

(2) Any action taken or anything done or purported to have been taken or done at any time during the said period under the Central Excise Act or any rules made thereunder to deny the credit of any duty in respect of high speed diesel oil, and

also to disallow such credit to be utilised for payment of any kind of duty on any excisable goods shall be deemed to be, and to always have been, for all purposes, as validly and effectively taken or done, as if the provisions of sub-section (1) had been in force at all material times and, accordingly, notwithstanding anything contained in any judgment, decree or order of any court, tribunal or other authority-

(a) no suit or other proceedings shall be maintained or continued in any court, tribunal or other authority for allowing the credit of the duty paid on high speed diesel oil and no enforcement shall be made by any court, tribunal or other authority of any decree or order allowing such credit of duty as if the provisions of sub-section (1) had been in force at all material times;

(b) recovery shall be made of all the credit of duty, which have been taken or utilised but which would not have been allowed to be taken or utilised, if the provisions of sub-section (1) had been in force at all material times, within a period of thirty days from the date on which the Finance Act, 2000 receives the assent of the President and in the event of non-payment of such credit of duty within this period, in addition to the amount of credit of such duty recoverable, interest at the rate of twenty-four per cent per annum shall be payable, from the date immediately after the expiry of the said period of thirty days till the date of payment.

Explanation.-For the removal of doubts, it is hereby declared that no act or omission on the part of any person shall be punishable as an offence which would not have been so punishable if this section had not come into force.”

18. Mr. R. Santhanam, learned counsel appearing for the Petitioner

contended that the issue whether the Petitioner was entitled to MODVAT credit in respect of duties paid on HSD was settled in its favour by the Tribunal. The references to the High Courts have also been concluded in favour of the Petitioner; the questions referred to the Allahabad High Court were answered in favour of the Petitioner and the reference to the Uttarakhand High Court, at the instance of the Revenue, has been dismissed for non-prosecution by an order dated 29th May, 2007. He contended that the issue was also concluded in favour of the assessee by the decision of the Supreme Court in **CCE v. Associated Cement Companies Ltd.: 2003 (151) ELT 12 (SC)**.

19. Mr Santhanam further contended that unutilised MODVAT credit is a substantive right of an assessee, who has paid duty on the inputs, and the same could not be taken back by the Government. He contended that Section 112 of the Act was unreasonable inasmuch as it sought to take away a vested right with retrospective effect. He further contended that the said provision would not nullify final orders already passed by Courts or Tribunal. And since in the present case, the dispute has stood concluded in favour of the Petitioner, the MODVAT credit could not be denied by way of a retrospective provision.

20. Mr Santhanam also contended that the Petitioner could not be asked to pay back the MODVAT credit that was claimed and allowed to the Petitioner on the basis of a mere letter. A demand could be raised only pursuant to a valid order passed after issuing a show cause notice and affording the Petitioner a reasonable opportunity to be heard. He, thus, contended that the impugned letter dated 13th July, 2000 was liable to be set aside.

21. Mr Rahul Kaushik, learned senior standing counsel for the Revenue, countered the arguments advanced by Mr Santhanam, and contended that the issues raised were no longer *res integra* in view of the decisions of the Supreme Court in ***Sangam Spinners Limited v. Union of India and Ors.***: (2011) 11 SCC 408 and ***Union of India and Ors. v. Maharaja Shree Umaid Mills***: (2014) 13 SCC 783.

22. Mr Santhanam disputed the aforesaid contention and contended that neither in the case of ***Maharaja Shree Umaid Mills*** (*supra*) nor in ***Sangam Spinners Limited*** (*supra*) was the question as to the constitutional validity of Section 112 of the Act considered or decided.

23. In ***Sangam Spinners Limited*** (*supra*), the Supreme Court considered

the question whether appellants therein were entitled to credit for duty paid on HSD for the period commencing from 16th March, 1995 till 12th May, 2000 (the date on which the Finance Act, 2000 received the assent of the President).

24. The Supreme Court noticed the Notification No. 5/94-C.E. (N.T.) dated 1st March, 1994 and Notification No.8/95-C.E. (N.T.) dated 16th March, 1995 issued under Rule 57A of the Rules and held that the appellants were not entitled to credit for the duty paid on HSD. The relevant extract of the said judgment is as under:-

“It is to be remembered at this stage that although the aforesaid 2nd proviso in Rule 57D was brought in, but inputs like high speed diesel oil used for the purpose of generation of electricity was specifically excluded by another notification issued on the same date i.e. on 16-3-1995 to which we have already made a reference.

The contention of the Appellants in this regard was that by the insertion of the 2nd proviso in Rule 57D by Notification No. 11/95-CE (NT) dated 16th March, 1995 they became entitled for the credit of duty paid on high speed diesel oil which was used for generation of electricity.

But in our observation, high speed diesel oil for the purpose of generation of electricity was specifically excluded from the list of eligible inputs in Notification No. 5/94-CE(NT) dated 1st March, 1994 issued under Rule 57A also under

Notification No. 8/95-CE(NT) dated 16.3.1995 from the list of eligible inputs. Therefore on a conjoint reading of the aforesaid Notifications dated 1st March, 1994 and 16.3.1995 as also the amendment to Rule 57D, it is sufficiently indicated that the Appellants are not entitled to credit of duty paid in respect of high speed diesel oil which was used for the purpose of generation of electricity.

XXXX

XXXX

XXXX

XXXX

The intention regarding availment of the credit under MODVAT would be guided and governed by the aforesaid notifications which specifically excluded the benefit of availment of such credit as high speed diesel oil is specifically excluded from the list of eligible inputs as per the notification under Rule 57A of the Central Excise Rules, 1944. Since it was specifically excluded from the list of eligible inputs such credit though may otherwise be available would not have created a vested right.”

25. The Supreme Court further noticed that although the appellants were not entitled to claim MODVAT credit on the duties paid on HSD, the Tribunals had held otherwise and "*therefore, there was a necessity for the Finance Act to be brought in whereby a clarificatory explanation to the legal position was laid down*". The Supreme Court also rejected the contention of the appellants therein that Section 112 of the Act had the effect of taking away vested rights. The Supreme Court held as under:-

“In the case of *Tata Motors Ltd. v. State of Maharashtra* (2004) 5 SCC 783, this Court observed that retrospective

withdrawal of the benefit of set-off only for a particular period should be justified on some tangible and rational ground, when challenged on the ground of unconstitutionality. However, in the present case the ratio of *Tata Motors case* [supra] would not be applicable as the Appellants in this case never had a right with regard to availment of MODVAT credit. Hence, the contentions of the Appellants that their vested and accrued right cannot be taken away with retrospective effect cannot be held as just and proper.

XXXX

XXXX

XXXX

XXXX

So far the contention with regard to concept of MODVAT is concerned, the intention regarding availment of the credit under MODVAT would be guided and governed by the aforesaid notifications which specifically excluded the benefit of availment of such credit, as high speed diesel is specifically excluded from the list of eligible inputs as per the notification under Rule 57-A of the Central Excise Rules. Since it was specifically excluded, such credit though may be otherwise available, could not have created any vested right. In our considered opinion the intention of the legislature is clear from the beginning to exclude the benefit of such credit by excluding high speed diesel oil from the list of eligible inputs by making substantial exclusion thereof in the notifications referred to hereinbefore. The aforesaid position is also verified by the decision of this Court in *Commissioner of Central Excise, Hyderabad v. Associated Cement Companies Ltd.* 2005 180 ELT 3 (S.C.) and *Commissioner of Central Excise, Meerut v. Rama Vision* 2005 181 ELT 201.”

26. Mr Santhanam is correct when he contends that the constitutional validity of Section 112 of the Act was not challenged in *Sangam Spinners Limited* (supra). However, as noted above, the contention whether any

vested right was created in favour of the appellants was considered by the Supreme Court and the same was expressly rejected. The Supreme Court had further held that Section 112 of the Act was clarificatory and the appellants were not entitled to credit for duties paid on HSD by virtue of the express exclusion in notifications dated 1st March, 1994 and 16th March, 1995. Thus, the very basis on which the Petitioner advanced its contentions stands eroded.

27. In view of the above, the contention that the provisions of Section 112 of the Act are expropriatory must be rejected, as squarely covered by the decision of the Supreme Court in *Sangam Spinners Limited* (*supra*).

28. In *Maharaja Shree Umaid Mills* (*supra*), the Supreme Court examined the issue relating to the liability to pay interest under Section 112 of the Act. In that case, the Revenue contended that interest @ 24% was payable if the credit claimed was not refunded within a period of 30 days from the date Section 112 of the Act came into effect, that is, 12th May, 2000. The assessee, on the other hand, contended that the effect of Section 112 of the Act was to increase the liability of the assessee with retrospective effect by denying them MODVAT credit on the duties paid on HSD and also an imposition of 24% interest thereon. The assessee further

contended that no interest was payable till the amount payable had been ascertained and interest could only be payable from the date the said amount was demanded. In the aforesaid context, the Supreme Court held as under:-

“Upon perusal of the impugned judgment as well as the provisions of Section 112 of the 2000 Act, one might have an impression that the Revenue has become harsh in imposing interest at the rate of 24% p.a. on the amount of MODVAT credit availed on HSD oil used as an input without any adjudication of the amount payable or without even issuance of a show cause notice. In fact if we look at the provisions of Section 112 of the 2000 Act along with other notifications which had been issued earlier in 1995 and 1994, whereby availment of MODVAT credit on HSD oil used as fuel in generation of electricity had been ordered to be discontinued, we would feel that the first impression that one would gather upon perusal of Section 112 of the 2000 Act would not be correct.

It is necessary to look at the background and the circumstances in which Section 112 of the 2000 Act had been enacted. By virtue of the Notifications issued on 1-3-1994 and 16-3-1995 issued under Rule 57A of the Rules, the Central Government had specifically declared that MODVAT credit on HSD oil used as an input would not be available as the said item had been specifically excluded from the list of eligible exempted inputs. In spite of the said fact, several assesseees were claiming MODVAT credit in respect of HSD oil used as an input and therefore, Section 112 of the 2000 Act had to be enacted. Thus, it is clear that the said section had been enacted

so as to see that no one claims MODVAT credit in respect of HSD oil used as an input and those who had wrongfully availed MODVAT credit in respect of HSD oil used as an input and those who had claimed the credit wrongfully, return the said amount within 30 days from the date the President gives assent to the 2000 Act. This clearly denotes that by virtue of the provisions of Section 112 of the 2000 Act, MODVAT credit availed on HSD oil used as an input had not been withdrawn for the first time but it was declared that if anybody had availed MODVAT credit on HSD oil used as an input, will have to return it within 30 days and in case the amount being not refunded within 30 days, the amount of MODVAT credit wrongfully availed by the Assessee concerned had to be returned with interest at the rate of 24% p.a.

The aforesaid factual aspect would clarify that Section 112 of the 2000 Act is in fact not having any retrospective effect but it only enables the Government to get back the wrongly availed MODVAT credit on HSD oil used as an input.

A somewhat similar issue had arisen before this Court in the case of *Sangam Spinners Limited* (*supra*) and after considering earlier Notifications issued by the Government, it had been held that Section 112 of the 2000 Act did not take away any right of any Assessee with retrospective effect. This Court held in the said case that the HSD oil had been specifically excluded from the list of eligible inputs with effect from 16th March 1995, and therefore, no Assessee had any vested right to avail benefit of MODVAT credit on the HSD oil used as an input and therefore, if any benefit, which had been wrongly availed by any manufacturer, the benefit wrongfully availed had to be returned.”

29. The Petitioner's contention that a separate adjudication was required for raising a demand for recovery of MODVAT credit availed on HSD also cannot be accepted. The said issue was considered by the Supreme Court in *Maharaja Shree Umaid Mills (supra)* wherein the Court held as under:

“In the aforesaid circumstances, in our opinion, there was no issue with regard to any adjudication because the Respondents had availed MODVAT credit on the HSD oil used as an input though it was not permissible. Once it is certain that the MODVAT credit had been wrongly availed by the Respondents, in our opinion, the Revenue cannot be blamed, if the amount wrongly availed by way of MODVAT credit by the respondents is recovered with interest thereon. It is also pertinent to note that the Revenue had given 30 days' time to return the said amount to the Respondents who had wrongly availed MODVAT credit on the HSD oil used as an input. If anyone who had repaid the amount wrongly availed within 30 days from the date on which Section 112 of the 2000 Act got the President's assent, that Assessee had not to pay any interest on the amount of duty availed by him wrongly. But those who had availed the MODVAT credit on the HSD oil used as an input and did not return the said amount even within 30 days from the date on which the President had given assent to the enactment of Section 112 of the 2000 Act, had to return the amount wrongfully retained by them with interest at the rate of 24% p.a. In our opinion, such a course, adopted by the Revenue for recovery of the amount which was legitimately claimed by the Revenue, cannot be said to be bad in law.”

30. It is clear from the aforesaid decisions that Section 112 of the Act has been held to be clarificatory and it has been conclusively held that MODVAT credit on duties paid on HSD used as an input was not available. Consequently, assesseees who had claimed the same were liable to refund the credit wrongly taken.

31. In view of the above, we find no merit in the contentions advanced by the Petitioner. Accordingly, the petition is dismissed. The pending application also stands disposed of. The parties are left to bear their own costs.

VIBHU BAKHRU, J

S.MURALIDHAR, J

JUNE 02, 2016
RK