

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

WRIT PETITION NO.1662 OF 2004

The Commissioner,
Central Excise and Customs,
N-5, Town Centre, CIDCO,
Aurangabad 431 003

..Petitioner

Vs.

1. M/s. India Containers Ltd.,
Plot No.B-10/2, MIDC, Waluj
Aurangabad, at and District
Aurangabad through its
Managing Director,
 2. Shri Alex Rodriguez,
Age-Major, Occ. Director
of respondent no.1
Company, r/o. Waluj
r/o. Waluj, Aurangabad
 3. Shri. A.M.Kulkarni,
Age-Major, Occ. Commercial
and HRD of respondent no.1
Company, r/o. Waluj,
Aurangabad
 4. V.D.Bindu,
Age-Major, Occ. Plant Manager,
of respondent no.1 Company
r/o. Waluj, Aurangabad
- ..Respondents

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Mr.D.S.Ladda, Advocate for petitioner

Mr.P.R.Patil, Advocate for respondent nos.1 to 4

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**CORAM : T.V. NALAWADE AND
SANGITRAO S. PATIL, JJ.**

JUDGMENT RESERVED ON: 8th June, 2017

JUDGMENT PRONOUNCED ON: 23rd June, 2017

JUDGMENT (*PER SANGITRAO S. PATIL, J.*)

The legality and correctness of the order dated 28.02.2003 in Appeal Nos.E/1369, 1370, 1371 and 1372 of 2000 passed by the Customs, Excise and Gold (Control) Appellate Tribunal, West Region, Bench at Mumbai ("the Tribunal", for short) has been challenged by this Writ Petition to the extent it quashed and set aside the order, by which the petitioner, i.e. the Commissioner, Central Excise and Customs, Aurangabad, disallowed MODVAT credit for Rs.23,87,575/- obtained by respondent no.1, imposed penalty of Rs.50,00,000/- on respondent no.1 and further imposed penalty of Rs.5,00,000/- Rs.1,00,000/- and Rs.50,000/- against respondent nos.2, 3 and 4, respectively.

2. Respondent no.1 is a company holding Central Excise registration certificate for the

manufacture of "oval tin cans for Colgate Tooth Powder" falling under Chapter 73, sub-heading no. 7310.00 of Central Excise Tariff Act, 1985 ("CETA", for short). Respondent no.2 is the Director, respondent no.3 is the Manager (Commercial and HRD) and respondent no.4 is the Plant Manager of respondent no.1.

3. The required thickness of tin plates for manufacturing oval tin cans ranges between 0.14 mm. and 0.24 mm. Respondent no.1 was getting the said tin cans painted from M/s.Divecha Glass Company being a job worker of respondent no.1. It was noticed that the tin plates were directly delivered at the job worker's end i.e. M/s.Divecha Glass Company for printing. The printed tin plates received from M/s.Divecha Glass Company were inspected to check their thickness, width and print quality whereon, it was noticed that the printed tin plates were of the thickness ranging between 0.18 mm. and 0.26 mm. (inclusive of

thickness of print i.e. 0.02 mm.). The tin plates having thickness over 0.26 mm. were not found to have been used for manufacturing oval tin cans. However, it was noticed that during the period 1993-94 to 1997-98, respondent no.1 received MODVAT credit on the tin plates having thickness above 0.26 mm., which, in fact, was not used for manufacturing oval tin cans. It was, therefore, alleged that respondent no.1 availed of MODVAT credit on the tin plates of having thickness more than 0.26 mm. and replaced them by tin plates of lower thickness purchased from local traders. Respondent no.1 - Company availed of irregular MODVAT credit of Rs.69,66,185/- during the period from 1993-94 to 1997-98. It was alleged that the modus-operandi of respondent nos.1 to 4 and their employees was to import the tin plates of thickness of more than 0.24 mm., to send them directly to the job worker for printing, to replace them at job worker's end and to receive

back the printed tin plates of lesser thickness than 0.26 mm.

4. The learned Counsel for the petitioner submits that the petitioner issued notice dated 05.09.1998 to the respondents calling upon them to show cause as to why the amount of Rs.69,66,185/- towards availment of inadmissible MODVAT credit, during the period from 1993-94 to 1994-98 should not be disallowed and recovered from them under Rule 57-I of the Central Excise Rules, 1944 ("the Rules", for short) read with the proviso to Section 11A (1) of the Central Excise Act, 1944 ("the Act", for short) after adjusting the amount of Rs.4,64,000/-, which was already paid by them, with interest under the proviso to Section 11 AB of the Act; and further why penalty should not be imposed upon them under Rules 57-I and 209 A of the Rules and Section 11AC of the Act for contravention of the Rules. The learned Counsel submits that after considering the replies filed

by the respondents and the statements of respondent nos.3 and 4 as well as that of other employees of respondent no.1, the petitioner, by passing a detail and reasoned order on 14.02.2000, rightly disallowed the MODVAT credit of Rs.38,38,569.34 and further imposed penalties of Rs.50,00,000/- on respondent no.1, and Rs.5,00,000/- on respondent no.2, Rs.1,00,000/- on respondent no.3 and Rs.50,000/- on respondent no.4.

5. The order passed by the petitioner was challenged before the Tribunal by filing the above numbered four separate appeals by respondent nos.1 to 4. The Tribunal, after hearing both sides, allowed partly the appeal filed by respondent no.1 and set aside the order of the petitioner disallowing MODVAT credit availed of by respondent no.1 to the extent of Rs.23,87,575/- and also imposing penalty of Rs.50,00,000/- on respondent no.1. The Tribunal further fully allowed the

appeals of respondent nos.2 to 4 and set aside the order of the petitioner directing them to pay penalties. The part of the order of the petitioner directing respondent no.1 to pay duty of Rs.14,50,994.34 on account of the MODVAT credit wrongly obtained, came to be confirmed.

6. The learned Counsel for the petitioner submits that the Tribunal erroneously set aside the part of order passed by the petitioner though it was evident from the statements of respondent nos.3 and 4 as well as other employees that the thickness of the tin plates used for manufacturing oval tin cans, was ranging between 0.14 mm. and 0.24 mm., while respondent no.1 availed of MODVAT credit on the tin plates having thickness of more than 0.26 mm. According to him, the Tribunal wrongly ignored the statements of respondent nos.3 and 4 and that of other employees. He submits that the Tribunal wrongly held that respondent no.1 was not required to pay penalty since Rule 173-Q of

the Rules was not applicable to the present case. He submits that wrong mention of the Rule would not come in the way of inflicting penalty under the relevant Rules applicable to the established facts. He further submits that the modus-operandi adopted by respondent no.1 in replacing the tin plates was the brain-child of respondent nos.2 to 4. They played fraud in order to enable respondent no.1 to claim MODVAT credit illegally. Therefore, the Tribunal was not correct in setting aside the order of the petitioner inflicting penalty on respondent nos.2 to 4. He, therefore, submits that the impugned part of the order of the Tribunal may be set aside and that of the Commissioner, may be restored.

7. On the other hand, the learned Counsel for the respondents submits that the Writ Petition is not maintainable since there was an efficacious alternate remedy available to the petitioner to challenge the order of the Tribunal. He submits

that the Tribunal has given specific reasons for setting aside the part of the order passed by the petitioner. The learned Counsel supports the reasons given in the impugned order and prays that the Writ Petition may be dismissed.

8. The learned Counsel for the petitioner submits that he has specifically mentioned in paragraph 10 of the Writ Petition that this High Court has held that the judgment of the Tribunal can be challenged by filing Writ Petition instead of availing circuitous route by making reference at the behest of the department. He has referred to a judgment of the Hon'ble Apex Court in **L. Chandrakumar Vs. Union of India and others, (1997)3 SCC 261**, wherein it has been held that the judgment of the Tribunal is subject to judicial review under Articles 226 and 227 of the Constitution of India. This legal position remained uncontroverted. In this view of the matter, we are not inclined to accept the

contention of the learned Counsel for the respondents that the Writ Petition is not maintainable for challenging the judgment of the Tribunal before the High Court. The Writ Petition is, thus, maintainable.

9. The MODVAT credit was introduced in the budget of the Central Government in the financial year 1986-87. A perusal of the MODVAT scheme shows that it is a system in which a manufacturer is entitled and allowed to take instant credit of the central excise duty paid on the inputs which are subsequently to be used by him for manufacture of finished products liable to excise duty. The said scheme avoids the payment of duties on earlier duties paid. It allows the manufacturer to obtain instant and complete reimbursement of the excise duty paid on the components and the raw materials. Under the said scheme, respondent no.1 is stated to have obtained MODVAT credit in respect of the material worth Rs.17,86,655/- as described in

Anx.'B-1', Rs.23,87,575/- on the material described in Anx.'B-2' and Rs.27,91,955/- on the material as described in Anx.'B-3' having total of Rs.69,66,185/-. According to the petitioner, respondent no.1 wrongly obtained the MODVAT credit of the said amount. Therefore, as per the show-cause notice dated 05.09.1998, the said amount was proposed to be disallowed and recovered from respondent no.1 on account of wrong availment of MODVAT credit.

10. As seen from the order passed by the petitioner, the petitioner himself did not confirm the demand for Rs.27,91,955/- in respect of the material described in Anx.'B-3' on the ground that the thickness of the tin plates was not mentioned in the record maintained by respondent no.1. The petitioner, however, disallowed the MODVAT credit in respect of the amounts mentioned in Anx.'B-1' and Anx.'B-2'.

11. The Tribunal firstly considered the question of limitation and specifically held that respondent no.1 never disclosed the vital information of specifications of the tin plates required for manufacture of oval tin cans, which led the department to believe that the credit has been availed correctly. The Tribunal further observed that no arguments had been advanced by the respondents regarding time barred nature of the demand made by the petitioner. These findings of the Tribunal have not been challenged by the respondents by filing any proceedings and have attained finality. Therefore, it would not be open for the respondents to challenge the demand made by the petitioner for refund of the MODVAT credit, on the ground that it is beyond the period of limitation. The petitioner has rightly held that the demand of refund of the MODVAT credit wrongly obtained during the period from 1993-94 to 1997-

98, is well within the limitation as contained in the proviso to Section 11A of the Act.

12. The Tribunal confirmed the order passed by the petitioner disallowing the MODVAT credit of Rs.17,86,655/- as described in Anx.'B-1'. After giving benefit of Rs.3,35,660/-, being the amount already paid on the invoice while clearing the tin plates, the amount of Rs.14,50,994/- was held to be due and payable from respondent no.1 out of the amount mentioned in Anx.'B-1'. This part of the order of the Tribunal has not been challenged by respondent no.1. It has got finality.

13. The petitioner had disallowed the MODVAT claim of Rs.23,87,575/- in respect of the material described in Anx.'B-2' and ordered recovery thereof from respondent no.1. However, the Tribunal set aside this part of the order on the ground that the description of the tin plates given in that annexure can also cover inputs (tin

sheets/tin plates) below 0.24 mm. in thickness. Therefore, in the absence of any independent finding that these inputs were found to be of thickness exceeding 0.24 mm., the demand made in respect of this amount is not sustainable. Anx.'B-2' shows thickness of tin plates in Column No.5, which is ranging between 0.30 mm. and 0.49 mm. and thinner. It is true that the description, as to thickness of tin plates as has been given in Column No.5, is somewhat ambiguous in the sense the word 'thinner' is suffixed to the specific thickness of the tin plates. However, for considering thickness of the tin plates described in Anx.'B-2', the petitioner has referred to the statements of Sanjay Kurkute, Store-Assistant; Pradeep Vaishnav, In-charge of Production Department; H.T.Mahajan, Ex. Commercial Officer, K.L.Santosh, In-charge of Raw Material Purchase and that of respondent nos.2 to 4, recorded by the petitioner under sub-Section (2) of Section 14 of

the Act. It is well settled that the statements of the persons recorded under the said provision, if not retracted subsequently, would be of binding nature and can be acted upon.

14. K.L.Santosh has stated that there was no documentary proof to show that the tin plates of thickness of 0.14 mm. and 0.24 mm. only were received vide bills of entry and invoices having description as 0.40 mm. and below. H.T.Mahajan deposed that tin plates were sold to M/s.K.P.Electricals, M/s.Shamwik Industries and M/s.Inamide Engineering, which were of more than 0.26 mm. thickness and were cleared from M/s.Divecha Glass Company. He deposed that the sale invoices were issued from respondent no.1. He admits that respondent no.1 availed of the MODVAT credit which was inadmissible as the tin plates were not received in the factory and the same were cleared from their job worker's end i.e. M/s.Divecha Glass Company.

15. Respondent no.4 deposed that they had prepared fake Goods Inspection Request (GR) for bare tin plates even when they had not received the tin plates in the factory physically. He further deposed that the tin plates were sold to M/s.Divecha Glass Company, M/s.Shamvik Containers Pvt. Ltd. and M/s. K.P.Electricals and delivery was effected from M/s.Divecha Glass Company. However, they availed the MODVAT credit on the total quantity received. He further deposed that respondent no.1 has availed and utilised the MODVAT credit on the tin plates which were not used for manufacture of oval tin cans.

16. K.L.Santosh, in his statement recorded on 06.01.1998, deposed that during the years 1994-95 and 1995-96, respondent no.1 received some bare tin plates of thickness of more than 0.24 mm., which were not used, but the MODVAT was irregularly availed of in the sum of Rs.7,69,270/-.

17. The above-named persons examined by the petitioner disclosed that the necessary record was not maintained and fake record was created in respect of the tin plates of which, MODVAT credit was obtained.

18. As per Rule 173-G, it was incumbent on the part of respondent no.1 to maintain accounts of production, manufacture, storage, delivery or disposal of goods including the material received for or consumed in the manufacture of excisable or other goods. The purpose of maintaining the accounts of raw material was obviously for checking of evasion of excise duty. Respondent no.1 was required to follow the procedure prescribed in the Rule for maintaining the accounts. However, as seen from the statements of the persons referred to above, respondent no.1 did not follow the prescribed procedure in maintaining the accounts. It was necessary for respondent no.1 to mention the correct description of the tin

plates purchased for manufacture of oval tin cans of which, MODVAT credit was proposed to be obtained or obtained.

19. The thickness of the tin plates seems to have been deliberately kept ambiguous in Anx.'B-2'. However, from Column No.5 of Anx.B-2', it is clear that the tin plates having thickness ranging from 0.30 mm. to 0.49 mm. also were purchased by respondent no.1. It was, therefore, necessary for respondent no.1 to specifically classify and state the quantity of the tin plates, which were having thickness below 0.24 mm. as well as above 0.24 mm. The petitioner has rightly held that respondent no.1 has deliberately suppressed the said information. If that be so, respondent no.1 cannot be allowed to take benefit of its own wrong and it will have to be held that the tin plates described in Anx.'B-2' were of thickness above 0.24 mm. and were not used by respondent no.1 for manufacturing oval tin cans.

20. The Tribunal has totally ignored the statements of the persons referred to above recorded by the petitioner under sub-section (2) of Section 14 of the Act, which have evidenciary value. The impugned order passed by the Tribunal is totally silent as to why the said statements were not accepted by the Tribunal. There is absolutely no reference of these statements in the impugned order passed by the Tribunal. The Tribunal has rejected the demand in the sum of Rs.23,87,575/- by giving a single-sentenced reason that the description as to thickness of the material described in Anx.'B-2', can also cover the tin plates below 0.24 mm. The petitioner has given sound reasons for disallowing the MODVAT credit in the sum of Rs.23,87,575/- in respect of the tin plates described in Anx.'B-2'. We are not inclined to subscribe to the single-sentenced reasoning of the Tribunal for rejecting the demand for the said amount. We, therefore, hold that

respondent no.1 is liable to repay the said amount since respondent no.1 has wrongly obtained the MODVAT credit in respect of the said amount.

21. The petitioner has inflicted penalty of Rs.50,00,000/- under Rule 173-Q of the Rules on respondent no.1. As per sub-rule (1) Clause (bb) of Rule 173-Q of the Rules, if any manufacturer, producer or licensee of warehouse takes credit of duty in respect of inputs used in the manufacture of final products wrongly or does not utilise the inputs in the manner provided for in the Rules or utilises the credit of duty in respect thereof in an irregular manner, then all such goods shall be liable to confiscation and the manufacturer, producer or the licensee of the warehouse shall be liable to a penalty not exceeding three times the value of the excisable goods in respect of which, such contravention has been committed or Rs.5,000/-, whichever is greater.

22. As discussed above, respondent no.1 has obtained MODVAT credit wrongly in the sum of Rs.14,50,994/- plus Rs.23,87,575/- having total of Rs.38,38,569/-. Consequently, in view of this Rule, respondent no.1 was liable to pay penalty as contemplated under this Rule. The Tribunal has set aside the order for payment of penalty merely on the ground that in the show-cause notice, the petitioner has proposed penalty under the provisions of Rule 57-I of the Rules read with proviso to Section 11A(1) of the Act and not under Rule 173-Q of the Rules.

23. The learned Counsel for the petitioner cited the judgment in the case of **J.K.Steel Ltd. Vs. Union of India, 1978(2) E.L.T. J 355(S.C.)**, wherein it has been held that if the exercise of a power can be traced to a 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. The learned

Counsel for the petitioner further cited the judgment in the case of **Collector of Central Excise, Calcutta Vs. Pradyumna Steel Ltd., (2003)9 SCC 234**, wherein it has been held that mere mention of a wrong provision of law when the power exercised is available even though under a different provision, is by itself not sufficient to invalidate the exercise of that power.

24. Thus, mention of wrong Rule in the demand notice would not be an impediment in the way of the petitioner in inflicting penalty under the correct Rule though the said Rule was not quoted in the demand/show-cause notice. From the contents of the show-cause notice, it is clear that respondent no.1 was made aware that it would be liable to pay penalty for obtaining MODVAT credit wrongly. Respondent no.1 has put forth its defence against the demand for penalty and has got an opportunity to contest that claim. As such, no prejudice can be said to have been caused to respondent no.1 because

of wrong mention of Rule in the show-cause notice under which, penalty was sought to be imposed on respondent no.1

25. As stated above, the total amount of Rs.38,38,569.34/- was wrongly availed of by respondent no.1 on account of MODVAT credit. Therefore, we are of the view that respondent no.1 should pay penalty at least to the extent of this sum, though not in the sum of Rs.50,00,000/- as has been ordered by the petitioner.

26. So far as the order of the petitioner passed against respondent nos.2 to 4 directing them to pay penalty in the sum of Rs.5,00,000/-, Rs.1,00,000/- and Rs.50,000/- respectively, is concerned, we subscribe to the findings of the Tribunal setting aside that part of the order. The Tribunal has observed that respondent nos.2 to 4 looked-after the affairs of respondent no.1 - Company in Aurangabad, while substitution of the

imported inputs is stated to have been done at Mumbai at the end of the job-worker M/s.Divecha Glass Company. We, therefore, do not think it fit to interfere with the order passed by the Tribunal setting aside the order passed by the petitioner directing respondent nos.2 to 4 to pay the penalty.

27. The Writ Petition is liable to be allowed partly. Respondent no.1 will have to be directed to repay the amount of Rs.38,38,569/- towards wrong availment of MODVAT credit with penalty in the equal sum i.e. Rs.38,38,569/-. The amount, if any, repaid by respondent no.1 would liable to be adjusted against the amount that has been directed to be repaid by this order. Respondent no.1 shall repay the said amount within three months from today, failing which it would be liable to pay interest on that amount at the rate of Rs.10% per annum.

28. In the result, we pass the following order:-

(i) The Writ Petition is partly allowed.

(ii) The impugned order passed by the Tribunal is partly quashed and set aside.

(iii) Respondent no.1 shall repay the amount of Rs.38,38,569/- towards the MODVAT credit wrongly availed of plus penalty of Rs.38,38,569/-, i.e. total amount of Rs.76,77,138/-, within a period of three months from today, failing which respondent no.1 shall pay it with interest at the rate of 10% per annum from the date of this order, till the repayment of the said amount.

(iv) The amount, if any, repaid by respondent no.1 earlier on account of MODVAT wrongly availed of, shall be adjusted towards repayment of the amount that has been directed to be repaid by this order.

(v) Rule is made partly absolute accordingly.

(vi) No costs.

[SANGITRAO S. PATIL, J.]

[T.V. NALAWADE, J.]

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