IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 16.12.2019

CORAM

THE HON'BLE DR.JUSTICE VINEET KOTHARI
AND
THE HON'BLE MR.JUSTICE R.SURESH KUMAR

Writ Appeal No.1593 of 2017

M/s.Chemplast Sanmar Limited
No.9, Cathedral Road
Chennai 600 086, Rep.by Secretary ... Appellant

-Vs-

State of Tamil Nadu
represented by Secretary to Government
Prohibition and Excise (III) Department
Secretariat, Chennai - 600 005. ... Respondent

For Appellant : Mr.Anand Sashidharan

For Respondent : Mrs.A.Srijayanthi
Special Government Pleader

Prayer : Appeal under Clause 15 of the Letters Patent to set aside the order of this Court dated 10.02.2017 made in W.P.No.18035 of 2001 and allow the appeal by calling for the records of the respondent culminating with the G.O.Ms.No.166 dated 23.7.2001 and quash the same and direct the respondent to refund the sum of Rs.30,28,260/- being the gallonage fee collected by the respondent on Methanol imported from other countries and had crossed the customs frontier during 1981 to 1984 together with interest at 12% per annum.

Petition filed under Article 226 of The Constitution of India, praying for the issuance of a Writ of Certiorarified Mandamus to call for the records from the respondent culminating with the G.O.Ms.No.166 dated 23.7.2001 and quash the same and direct the respondent to refund the sum of Rs.30,28,260/- being the gallonage fee collected by the respondent on Methanol imported from other countries and had crossed the Customs frontier during 1981 to 1984 together with interest at 12% per annum.

J U D G M E N T

(Judgment of the Court was delivered by DR.VINEET KOTHARI, J.)

The appellant Assessee M/s.Chemplast Sanmar Limited, Chennai has filed this intra Court appeal aggrieved by the order of the learned Single Judge dated 10.02.2017, dismissing the writ petition and refusing the refund of the gallonage fees or administrative fees imposed on the Assessee under Rule 5 of the Tamil Nadu Denatured Spirit Methyl Alcohol and Varnish (French Polish) Rules, 1959 (hereinafter referred to as the '1959 Rules').

2. The relevant operative portion of the order of the learned Single Judge is quoted below for ready reference.

> "24. In the earliest order dated 16.02.1988, the State Government raised a presumption that the petitioner must have included the gallonage fee paid by them in the price of the product. Though the said order was set aside by this Court in W.P.No.3025 of 1988, yet the petitioner did not plead either in the subsequent representation or in the affidavit filed in support of the writ petition that they had not passed on the burden to their customers. This aspect has been emphasized in Mafatlal Industries Case (supra). The burden is on the petitioner to show to the Court via pleadings that they had not included the gallonage fee paid by them to the Government in the sale price of the product. In the absence of this specific pleading, it will not be incorrect to infer that the petitioner has passed on the burden of the gallonage fee paid by them to their customers thereby disentitling them to refund.
>
> 25. Though this Court is in agreement with the contention of Mr.Vijay Narayanan, learned Senior Counsel for the petitioner that the State Government cannot levy tax or excessive fee, be it gallonage fee or administrative fee, on Methanol, in the light of the Supreme Court having confirmed the levy of 50

paise per bulk litre in South Indian Sugar Mills Association case, this Court cannot take a different view and hold that 50 paise per bulk litre is excessive.

26. In the result, this writ petition stands dismissed. No costs."

3. The learned Single Judge has quoted the history of the earlier litigation launched by the appellant Assessee seeking the refund of Rs.30,28,260/- levied on it for the import of Methyl Alcohol through canalising agency who had imported the said restricted goods from out of India to Bombay / Kandla Port. The State of Tamil Nadu had levied the aforesaid gallonage fees in question on the appellant under Rule 5 of the aforesaid Rules, 1959. The said Rule 5 of the Tamil Nadu Denatured Spirit Methyl Alcohol and Varnish (French Polish) Rules, 1959 reads as under:-

"5. Import

(i) "No denatured spirit / methylated spirit / methyl alcohol or varnish shall be imported except by persons or institutions who hold licences under these rules to deal in or use denatured spirit / methylated spirit / methyl alcohol or varnish, or by the distillers in the State for dealing in denatured spirit / methylated spirit and methyl alcohol. Denatured spirit imported from other States by and with the previous permission of the Commissioner should be fully denatured as laid down in Clause (c) in sub-rule (1) of rule 2. If spirit proposed to be imported is not sufficiently denatured it must either be denatured afresh at the expense of the importer or he must pay duty at the full tariff rate as for portable spirit ".

The import shall in every case be covered by an import permit in form D.I.P. prescribed under these rules and granted by the Commissioner of Prohibition and Excise on payment of an annual fee of Rs.1,500/- (Rupees one thousand five hundred only). Bonafide travellers may, however, bring into the State without an import permit denatured spirit up to maximum of one litre for domestic purposes. Officers of Government may, for Government purposes, import any quantity of denatured spirit or varnish under an import permit issued by the Commissioner of Prohibition and Excise free of any fee.

"Provided that the distilleries in the State need not take out a licence for the import of methanol and wood-naphtha to be used as denaturants in the manufacture of methylated spirit subject to the condition that the import is made under a permit subject to the condition that the import is made under a permit and the quantity so imported is produced immediately before the officer-in-charge of the distillery for safe custody. (G.O. Ms. No. 1208, Home (P. & E.) dated 14th May, 1979)

Exception :- It shall not be necessary for the military units in this state to obtain permits for import of denatured spirit / methylated spirit / methyl alcohol. (G.O. Ms. No. 214, Home, dated 3rd February, 1970)

(ii)Before the permit for import of denatured spirit / methylated spirit / methyl alcohol or varnish is issued under sub-rule (1) the importer shall pay import permit fee at the rate fixed by the Government from time to time.(This has been proposed as provided for in the Tamil Nadu Rectified spirit Rules,2000).

Provided that the Government may notification issued whether prospectively or retrospectively make the exemption or reduction in the rate of gallonage fee payable by the person or class of persons. (G.O. Ms. No. 28, (P. & E.), dated 12th May, 1981). (iii) In the case of preparations or commodities containing a high percentage of denatured spirit / methylated spirit / methyl alcohol imported or proposed to be imported, the Commissioner, may after getting a sample of such preparation or commodity analysed, levy a gallonage fee at the rates specified in sub-rule (ii) of this rule on the spirit contents of the preparation before any such preparation is allowed to be imported. The requirements of this rule relating to import of denatured spirit / methylated spirit / methyl alcohol or varnish shall be complied within regard to the import of any such preparation or commodity. The importer need not, however, take out a licence under these rules for possession or sale of such commodities in the State. "

4. Learned counsel for the appellant Assessee submitted that the State has not provided any data or details of the expense incurred by it to to justify the said levy of fees on the

appellant Assessee at the time of import of Methyl Alcohol for the period 1981 to 1984 till now and that at one point of time, the State justified the said levy in the name of 'tax', for which the appellant Assessee undertook the said chain of litigation in this Court earlier and remand after remand, the State Government had changed its stand, while refusing the refund of the said sum of Rs.30,28,260/- to the petitioner. He further submitted that the State had granted the exemption from payment of the said fees in favour of M/s.Southern Synthetics Limited, Trichy Distilleries and Chemicals Limited and Shasun Chemicals (Madras) Limited. But, that was sought to be distinguished by the State in its order dated 17.06.1997, as quoted in paragraph 8 of the order of the learned Single Judge. He further submitted that without distinguishing the same and furnishing the details thereto, the levy of fees in question which has embedded in it, the concept of quid pro quo on the part of the State, the same cannot be justified and in the absence of the same, the State was bound to make the refund of the fees levied in question and the impugned order of the learned Single Judge to the extent of refusing the same, deserves to be interfered with. He further submitted that upholding the levy of 50 paise per bulk litre as not excessive in terms of the judgment of this Court in South India Sugar Mills Association's case reported in 2015 (13) S.C.C.748 was not justified and therefore the present writ appeal deserves to be allowed.

5. Per contra, the learned Counsel for the State justified the order of the learned Single Judge and drew the attention of this Court towards the Rules, 1959 and the contentions raised on behalf of the State earlier also was that the said fees was levied for giving the Import Permit to the appellant Assessee to import the said Methyl Alcohol within the State of Tamil Nadu and the State had to incur expenditure to regulate and check the diversion of the said Methyl Alcohol for illicit purposes and for conversion of potable alcohol and to defray the said expenses, the levy of gallonage fees under Rule 5 was justified.

6. We have heard the learned counsel on either side and have given our thoughtful consideration to the Rules and the pleadings of the parties. Admittedly, never at any point of time, the appellant has laid any valid challenge to the validity of Rule 5 of the 1959 Rules. We even do not see any good reason for laying any such challege to the said Rule as well. The levy of the fees under Rule 5 is to issue an Import Permit in the concerned prescribed Form 'DIP' to the importer to import the said restricted commodity viz., Methyl Alcohol, Denatured Spirit etc., Admittedly, the appellant Assessee has imported these

goods by purchasing the same from the canalizing agent viz., Rashtriya Fertilizers and Chemicals Limited.

7. The definition of "import" as given in Section 3(7) of the Tamil Nadu Prohibition Act, 1973, which is quoted below, is also wide enough to cover the present import made by the appellant Assessee into the State of Tamil Nadu.

> "3 (7) " import " means-
>
> (a) to bring into any local area to which this Act applies from any other local area in the '[State of Tamil Nadu] to which this Act has not been extended, or (b) to bring into the '[State of Tamil Nadu], otherwise than across a customs frontier as defined by the Central Government ;

Thus, the word 'import' includes not only the import from any other local areas in the State of Tamil Nadu, to which the said 1937 Act has not been extended, but also the import from outside the country across the customs frontier and being brought into the State of Tamil Nadu.

8. There is no dispute that the import of Methyl Alcohol in the present case by the Assessee is covered by the aforesaid definition as well as by Rule 5 of the 1959 Rules framed under the enabling powers conferred under this Act. So long as Rule 5 stands on the Statute Book, without a valid and successful challenge, we cannot appreciate any effort on the part of the importer like the present Assessee to claim a refund of the fees charged for giving import permit to the importer. The legal position with regard to charging of fees also is now well settled. The Assessee or the person upon whom such levy of fees is made cannot demand any mathematical equation of the expenditure incurred by the State to justify the denominator of quid pro quo for levy of such fees. The very fact that the distinction between 'tax' and 'fees' lies along the lines of quid pro quo, whereas any levy of tax does not require it to be there as the revenue of tax goes to the general coffers of the State Treasury, but the fees levied is based on the concept of quid pro quo and has to be spent spent by the State for a particular purpose. But, that distinction does not let it open to the challenge on the ground of bringing in the mathematical justification much less equation with the levy to the expenditure incurred.

9. The whole claim of refund of fees by the Assessee in the present case appears to be absolutely misconceived right from the begining. As we observed above, unless Rule 5 can be challenged successfully on valid grounds for which we neither find any record of such challenge before us any such challenge was rightly laid by the Assessee before the Court and therefore we do not see any good ground to find fault with the levy of gallonage fees under Rule 5 in the present case. The claim of the refund of fees paid by the Assessee to import Methyl Alcohol in question is absolutely misconceived. We do not even see the justification of relating the concept of unjust enrichment to the demand of refund of the fees in the present case. The event of levy of the fees is for the issuance of import permit itself and nothing beyond that. Therefore, the concept of unjust enrichment as to whether the incidence of the levy of fees suffered by the appellant has been passed on further or not, is absolutely irrelevant to the levy of the fees in the present case.

10. Therefore, we do not find any merit in the contention raised on behalf of the Assessee that the State has been changing its stand from time to time in such case of refund claimed by the Assessee initially to have claimed as levy of 'tax' and later on as 'fees'. We do not find any such stand or difference of stand taken by the State. The levy in the present case is admittely in accordance to Rule 5 of the 1959 Rules and the question of refund of the same does not arise.

11. We do not find any merit in the present Writ Appeal and the same is accordingly dismissed. No costs.

Sd/-
Assistant Registrar(CS VIII)

//True Copy//

Sub Assistant Registrar

To
The Secretary to Government
Prohibition and Excise (III) Department
Secretariat, Chennai - 600 005.

+1cc to Mr.Anand Sashidharan, Advocate Sr.104433
+1cc to the Government Pleader Sr.105300

W.A.No.1593 of 2017

gj[co]
srg 03/02/2020