

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED :: 12.02.2020

CORAM

THE HON'BLE DR.JUSTICE VINEET KOTHARI
AND

THE HON'BLE MR.JUSTICE R.SURESH KUMER

W.P.No.14238 of 2005

M/s.Steel Authority of India Ltd.,
Salem Steel Plant
Salem 636 013
Represented by its Deputy General Manager
Finance & Accounts,
K.Sivaguru.

...Petitioner

-vs-

- 1.The Union of India,
Represented by its Secretary
Ministry of Finance,
Department of Revenue
New Delhi 110 001.
2. The Government of India Mint
Ministry of Finance
Department of Economic Affairs
IDA Phase-II
Cherlapally, R.R.District
Hyderabad 500 051.
3. The Assistant Registrar,
Customs, Central Excise & Service Tax
Appellate Tribunal,
26, Haddows Road,
Chennai 600 006.
4. The Commissioner of Central Excise (Appeals)
1, Williams Road,
Trichy.
5. The Assistant Commissioner of Central
Excise, Salem I Division
No.2, Subramanya Nagar, Suramangalam
Salem 5

..Respondents

PRAYER:Petition under Article 226 of the Constitution of India, praying for issuance of a Writ of Certiorarified Mandamus to call for the records in Final Order No.800/2004 in Appeal No.E/1383/1997 dated 22.09.2004 on the file of the 3rd Respondent, confirming the order in Appeal no.96/97 (CBE), dated 18.03.1997 on the file of the 4th respondent, confirming the Order in Original Sl.no:178/95 dated 7.8.1995 on the file of the 5th respondent, quash the same and consequently direct the 5th respondent to grant the claim of refund of Rs.1,17,94,674/- paid on stainless steel coin blanks cleared by the petitioner during the period from 1.1.1994 to 17.05.1994.

For Petitioner : Ms.P.Jaya lakshmi
for Mr.R.Karthikeyan

For Respondents : Ms.Hema Muralikrishnan
Senior standing counsel

O R D E R
(By Dr.Vineet Kothari,J.)

This case presents a very piquant situation. The Assessee, which is Government of India undertaking has filed this Writ petition under Article 226 of Constitution of India aggrieved by the order dated 22.09.2004 made in Final Order No.800/2004 in Appeal No.E/1383/1997 of Customs, Central Excise & Service Tax Appellate Tribunal, whereby the learned Tribunal while upholding the order passed by the Adjudicating Authority upheld the rejection of refund of the Assessee for Excise duty on the ground of limitation under Section 11B of the Central Excise Act (in short 'Act').

2. The facts giving rise to filing of Writ Petition are as under:

(i) The Assessee Company under the orders from the Department of Economic Affairs, Government of India was placed with an order to supply 5250 Metric Tons of Stainless Steel Coin Blanks for 1 Re, 50 paise and 25 paise denominations. A part of the quantity viz., 2600 Metric Tons was procured from abroad and supplied by SAIL while the remaining quantity was manufactured and supplied indigenously by the Assessee's factory at Salem. The Department of Economic Affairs, purchasers of these coin blanks requested the Department of Revenue, Central Board of Excise and Customs (C.B.E.C.) Government of India to exempt the Assessee from the payment of Excise duty in respect of entire quantity of such Stainless Steel Coin Blanks supplied by the

Assessee Company. At the request of the Department of Economic Affairs, the Central Board of Excise and Customs (C.B.E.C.) granted Ad-hoc exemption vide its Ad-hoc Exemption Order No.11/11/94 dated 21.09.1994 on the said entire quantity of 2640 M.T. of Stainless Steel Coin Blanks supplied to the Department of Economic Affairs. The said exemption notification was clarified later on by CBEC vide order dated 30.06.1995 stating that the ad-hoc exemption order is applicable to the entire quantity of 2640 M.T. of Stainless Coin Blanks supplied to the Government of India by the Assessee Company. In other words, all the clearances made by the Assessee through indigenous source i.e., 2640 M.T. was exempted from levy of payment of Excise duty.

(ii) However, since the Assessee started supplying the Coin Blanks from January 1994 itself, but the exemption notification was issued by CBEC only after nine months from 21.09.1994, the Excise duty was paid initially by the Assessee on its own and which was not charged from the Department of Economic Affairs and later on in the month of November 1994, the Assessee made a claim for refund of the entire Excise duty between 01.01.1994 to 12.10.1994. The Assesseeing Authority however vide its order dated 7.08.1995 allowed only a part refund to the extent of Rs.84,70,749/- for the period from 18.05.1994 to 12.10.1994 but disallowed the remaining claim on the ground of limitation under Section 11B of the Act stating that the claim of refund was made beyond the period of six months limitation as envisaged under Section 11B of the Act. Subsequently, a Corrigendum to the order in original was issued on 14.09.95 stating that the refund amount is admitted only to the extent of Rs.51,49,421/- after adjusting the MODVAT Credit holding that the clearances of Coin Blanks is exempted from payment of Excise duty. Aggrieved by the same, the Assessee took the matter further to the Commissioner of Customs and Central Excise (Appeals) who rejected the Appeal vide order dated 18.03.1997 and the Second Appeal filed before the learned Tribunal also came to be dismissed by the Order dated 22.09.2004, which is impugned in the present Writ Petition filed by the Assessee Steel Authority of India.

2. The reasons given by the learned Tribunal for rejection of the said claim on the ground of limitation was after distinguishing the Judgment of Calcutta High Court in the case of Assistant Collector of Central Excise, Calcutta Vs. Bata Shoe Co. (P) Ltd., reported in (2004) 169 ELT 3 (Cal.) The observations in paragraph 12 of the Impugned Order of Tribunal are quoted below for ready reference.

"12 .The appellants have relied on a recent decision of the Calcutta High Court

in the case of Batta Shoe Co.(P) Ltd. (supra) Cotton fabrics, covered by the tariff item "friction cloth" was a raw material for the manufacture of shoes. Duty of excise was not leviable on it prior to 1.8.1960. A Notification dated 1.8.1960 issued by the department introduced levy on the item. Bata Shoe Co. started making payments of duty from the said date under protest. While so, they represented to Government of India, Ministry of Finance for exemption from payment of duty on the fabrics and ultimately, on 26.09.1963, the Central Board of Revenue informed them that no duty was payable on friction cloth. On the basis of the Board's letter dated 26.9.1963, the shoe company applied for refund of the duty paid on the fabric from 24.04.1962 to 17.6.1966. The original authority rejected the claim for refund of the duty paid for the period prior to 26.9.1963 and allowed refund for the subsequent period. The rejection of the refund claim for the period prior to 26.09.1963 was challenged by the company and, ultimately, the dispute reached the High Court. The question considered by the Court was whether the claim for the period prior to 26.9.1963 was barred by limitation under Rule 11 of the Central Excise Rules 1944. The High Court found that the Board's letter dated 26.9.1963 was in the nature of clarification of the prevailing law on the point and that the payment of duty by the assessee for the aforesaid period was not occasioned by their mistake or misconception. On the other hand, the Court held, the payment of duty was of a purely compulsive mode of recovery by the Revenue on the basis of misconception of the Revenue authorities, which was clarified by the Board in the aforesaid letter. On this basis, it was held that the limitation provisions of Rule 11 *ibid* had no application to refund claim. According to the present appellants, the ratio of the High Court's decision is in support of their plea that the limitation provisions of Section 11B are not applicable to the refund

claim in question. The Revenue, through ID.SDR, has rebutted this argument by correctly distinguishing the instant case from the Bata Shoe Company case. We also do not find any parallel between the two cases. In the Batta Shoe Company's case, the payment of duty was under protest right from the beginning, whereas in the instant case the duty was not paid under protest. Again, in the Batta Shoe Company's case, the Board's letter was held to be a clarification of the prevailing law, whereas in the instant case the ad-hoc exemption order issued by the Central Government under Section 5A(2) of the Central Excise Act operated in an entirely different way. The exemption order granted exemption from payment of duty in respect of coin blanks, which were otherwise eligible to duty of excise under the Central Excise Tariff. Further, in the Bata Shoe Company's case, as observed by the High Court, the department authorities themselves had accepted the fact Rule 11 of the Central Excise Rules was not applicable to the refund claim in that case. In the instant case, it has ever been the case of the Revenue that the appellants' claim for refund of duty paid during 1.1.94 to 17.05.94 is time-barred under Section 11B. The Revenue has never disengaged Section 11B. In the circumstances, the appellants get no aid from the High Court's judgment in the Bata Shoe Company case which has been correctly distinguished by Id.SDR. On the other hand, Ion Exchange (supra) relied on by the SDR firmly supports the Revenue's case. A claim for refund of customs duty, filed by the assessee on the basis of an ad-hoc exemption order, was the subject matter of that case. It was argued by the assessee that the cause of action for the claim refund had arisen only after the ad-hoc exemption order was issued and hence the time limit for the claim was to be computed from the date of issue of exemption order. The Tribunal found that there was no provision in the Customs Act for computing

the time limit as suggested by the assessee and accordingly, rejection of the refund claim was upheld. There was a claim for a period prior to 28.9.96. For reasons which we have already noted, the above view taken by the Tribunal in Ion Exchange (supra) must be followed in this case. We also note that the above view was followed by the Tribunal in the case of K.Viswanathan (supra) also.

13. It was argued by Ld.Counsel that, if the ad-hoc exemption order of the Central Govt. covering the goods already cleared on payment of duty was not given effect to, the assessee would be put to hardships which was not intended by the Govt. This argument was opposed by Ld. SDR by relying on the Supreme Court's decision in J.K.Spinning and Weaving Mills Ltd. And Another Vs. Union of India and Others- 1987 (32) ELT 234 (SC). She has referred to paragraphs 30 & 33 of the apex Court's Judgment. In the cited case, certain amendments to Rule 9 & 49 of the Central Excise Rules 1944 were considered by the Court. These amendments had been made with retrospective effect, which could become a potential weapon for the Revenue to raise demands of duty for past period up to 28/02/1944. It was argued by the assessee that, if the department reopened the past assessments for raising such demands, it would be harsh for them. This apprehension was rejected by their Lordships who observed that any such demand would be subject to time-bar provisions of Section 11A of the Act. Ld.SDR has argued that, just as a retrospective demand of duty is subject to limitation under Section 11A, a refund claim based on retrospective exemption should be subject to time-bar under Section 11B. We appreciate this argument and observe that J.K.Spinning & Weaving Mills (supra) is yet another assertion, by the apex Court, of the rule of strict construction and application of limitation provisions.

14. We have made a mention of the Modvat credit issue raised in this case. This issue has already been settled by this Bench as per Final Order No.1701/01 dated

28.9.2001 in Appeal No./1896/97-Md. reported in 2002 (139) ELT 415 (Tri.-Chennai) [Steel Authority of India Vs. Commissioner of Central Excise, Coimbatore], whereby denial of Modvat credit to the extent of Rs.85,91,276/- to the appellants was affirmed and the demand raised in corrigendum issued by the authorities was set aside.

15. In the result, the rejection of refund claim for the period 1.1.94 to 17.5.94 as time-barred and the sanction of refund for the period 18.5.94 to 12.10.94 are upheld. Any recovery of duty by way of adjustment against the refund so sanctioned shall be in terms of Final Order No.1701/01 ibid. Subject to this modification, the impugned order is affirmed and the appeal is rejected. "

3. Aggrieved by the same, the Assessee has preferred this Writ Petition before this Court.

4. The learned counsel for the petitioner Ms.P.Jaya Lakshmi submitted that the very purpose of exemption granted in the instant case by the Central Government itself through Exemption Order dated 21.09.1994 followed with its clarification on 30.06.1995 was frustrated by the Adjudicating Authority by denying the refund for the period from 01.01.1994 to 17.05.1994 merely on the ground of limitation under Section 11B of the Act. She submitted that Section 11B of the Act makes an exception for the excise duty paid under protest and no limitation then applying. She has drawn the attention to Second Proviso to 11B which clearly stipulates that limitation shall not apply to the duty or interest that has been paid 'under protest'.

5. The learned counsel for the petitioner urged that the ad-hoc or specific exemption is for whole of the quantity and the Assessee was not liable to pay any Excise duty on such clearances of 2640 M.Ts. made by the Assessee. The entire duty paid by the Assessee which was necessary for the clearances of the goods at that point of time on the said quantity deserves to be wholly refunded and the duty paid for the period prior to such Exemption Notification has to be refunded to the Assessee treating the same as paid 'under protest'. She urged that it should be treated only as a payment made 'under protest' and it has to be refunded by the Central Excise Department. By not

doing so, the exemption granted to the Asseessee was negatived by the Adjudicating Authority and the Assessee Company being a Government of India Undertaking had to litigate against the Excise Department before this Court.

6. Per contra, Ms.Hema Murualikrishnan learned counsel for the Revenue Department submitted that the Assessing authority was bound by the provisions of law under the limitation prescribed under Section 11B of the Act. Unless the payment is made specifically under protest, the Proviso would not apply and the Assessing authority was justified in refusing to the extent which is barred by limitation. She submitted that duty in question was paid by the Assessee at the time of clearance to the goods under the self assessment scheme which itself amounts to Assessment. Therefore, unless the Assessee could secure exemption from the authority viz., CBEC in not applying the limitation under Section 11B of the Act the action of the Assessing Authority cannot be faulted.

7. We have heard the learned counsels for both sides and perused the records.

8. The case arises in a peculiar circumstance inasmuch as the Assessee was granted exemption for specific quantity of Coin Blanks manufactured by it as per the order passed by the CBEC and to avoid cost of Manufacture of such Coin Blanks exceeding the value, the exemption under question was sought for by the Assessee with the customer viz., Department of Economic Affairs, which was finally granted only on 30.06.1995 after processing the claim for exemption. But to maintain time schedule for supply, the Assessee Company have not only imported major part of 5050 MTs of Coin Blanks but had to the start supply of the order right from January 1994, and since the law requires payment of duty at the time of clearance, therefore, the Assessee had no choice but to pay the Excise duty for the goods in question. But the fact that he did not charge the Excise duty from the Department of Economic Affairs is not disputed in the counter filed by the Respondent. The Duty was paid from the pocket of the Assessee which was sought to be refunded. The only plea raised by the Respondent is that the payment having not been made "under protest," the limitation prescribed under Section 11B would apply.

9.The Ad-hoc exemption was granted to the petitioner for specific quantity and for specific purpose. It was not a case for general exemption on the basis of which Assessee claimed the refund. The word 'Ad-hoc' is defined in Black's Law Dictionary and The Oxford English Dictionary as under:

Black's Law Dictionary

ad hoc - Formed for a particular purpose.

The Oxford English Dictionary

ad hoc - (a) For this purpose, to this end; for the particular purpose in hand or in view.

(b) attrib, or as adj. Devoted, appointed, etc., to or for some particular purpose.

(c) Hence (nonce-wds.): ad hoc v., to use ad hoc measures or contrivances, to improvise; so adhoc(k)ing Vbl.sb.; ad hoc-ery, the use of such measures; ad'hocism (also as one word), the use of ad hoc measures, esp. as a deliberate means of avoiding long-term policy; ad-hoc-ness, the nature of, or devotion to, ad hoc principles or practice.

10. The exemption in the present case was granted to the specific Assessee, in the specific facts and for specific quantity of the Coin Blanks manufactured and supplied by the Assessee. This was done for the purpose of maintaining the value of Coin Blanks itself. The payment of excise duty at the time of clearance of goods in anticipation of exemption right from the day one was therefore with the ardent hope of real and effective exemption and the refund of duty paid by the Assessee under compulsion for clearance of the goods. Such a payment even though not labelled by the Assessee to have been paid 'under protest', could very well be treated as payment made by the Assessee 'under protest' only as per the provisions of Section 11B of the Act paving the way for the rightful refund of excise duty in consonance with Article 265 of Constitution of India which does not permit the State to collect the tax or duty without authority of law.

11. While on the one hand the fixed quantity exemption from whole of the duty granted on 21.09.1994 in this case was consciously granted by the Central Government knowing that supplies have already been made in January 1994 the same was successfully defeated partially by the Assessing Authority taking a narrow and pedantic view of the limitation in the matter. It was open to the Assesseing Authority to seek a clarification from his higher authorities, as to whether the payment by the Assessee with regard to the clearance of these goods in question could be treated as payment 'under protest' or not as the assessee itself is a Government of India Undertaking, but instead of doing that, taking a shortcut pro-revenue approach, the Adjudicating Authority thought it better to adopt a negative approach of denying the refund on that ground,

pushing the Government of India Undertaking into the whirlpool of litigation, which resulted in severe loss of public time and money and time of the valuable time of the Courts.

12. The refund is for clearances of goods in question pertains to period from 1994 . Already 26 years have passed due to one mistake in the decision taken by the Assessing Authority. The intention of Ad-hoc exemption itself was a glaring fact available before the Assessing Authority. Particularly the clarification issued on 30.06.1995 makes it clear that exemption was applicable for the entire quantity of goods supplied but ignoring this fact, the Asseesing Authority passed an order denying the refund partially, invoking the technical plea of limitation ignoring the exemption under the Second Proviso of Section 11B of the Act, whereby no limitation would apply when payment of Duty is treated as payment made 'under protest'

13. It is this kind of negative attitude of the Revenue Authorities which results in the legal battle between the Government of India Public Sector Undertakings and the Revenue Departments. On the other hand, it causes anguish to this Court and is deprecable, to say the least. We are also also little bit surprised by the reasons assigned by the CESTAT in distinguishing the clear Judgment of Kolkatta High Court in the case of Assistant Collector of Central Excise, Calcutta Vs. Bata Shoe Co. (P) Ltd (supra). In that case, where the Cotton fabrics, covered by the tariff item "friction cloth" was a raw material for the manufacture of shoes under the Notification dated 1.8.1960 issued by the Department, the Government imposed the levy on the said item. Bata Shoe Co. started making payments of duty from the said date 'under protest'. While doing so, they represented to Government of India, Ministry of Finance for exemption from payment of duty on the fabrics and ultimately, on 26.09.1963, the Central Board of Revenue informed them that no duty was payable on 'friction cloth'. On the basis of the Board's letter dated 26.9.1963, the shoe company applied for refund of the duty paid on the fabric from 24.04.1962 to 17.6.1966. The original authority rejected the claim for refund of the duty paid for the period prior to 26.9.1963 and allowed refund for the subsequent period. The rejection of the refund claim for the period prior to 26.09.1963 was challenged by the company. The Calcutta High Court allowed the Writ Petition filed by the Assessee therein by holding that Board's letter dated 26.09.1963 was in the nature of clarification of the prevailing law on the point and that the payment of duty by the assessee for the aforesaid period was not occasioned by their mistake or misconception. On the other hand, the Court held that the payment of duty was of a purely compulsive mode of recovery

by the Revenue on the basis of misconception of the Revenue authorities, which was clarified by the Board in the aforesaid letter and therefore the Assessee was entitled for refund.

14. The said Judgment in our understanding, was on all fours with the facts of the present case. But the learned Tribunal preferred to follow only Tribunal's earlier view in the case of Ion Exchange (supra) instead of a High Court decision. The learned Tribunal, the highest Appellate forum under the Act chose to lean in favour of the Revenue just for the sake of it. The very hope of Assessee to get a fair justice apart from the typical pro-revenue approach of the Revenue Authorities was also belied by the learned Tribunal in the present case, totally ignoring the total ad-hoc exemption for the specific quantity including the purpose thereof and the payment thereof could be very well treated as payment made 'under protest' by the Assessee. The approach taken by the learned Tribunal was least expected. We need not say anything more on this.

15. We are therefore of the clear opinion that the present Writ Petition filed by Assessee Steel Authority of India Ltd., deserves to be allowed by setting aside the order passed by the learned Tribunal, as well as that of the authorities below Tribunal denying the refund to the Assessee.

16. Accordingly, the order dated 22.09.2004, passed by the Tribunal and those of Authorities below also are set aside. We direct the Assessing Authority to refund the entire eligible amount with interest according to law.

17. In the result, this Writ Petition is allowed. No order as to costs.

Sd/-

Assistant Registrar (C.S.IV)

/True Copy/

Sub Assistant Registrar

To

1. The Secretary,
Union of India,
Ministry of Finance,
Department of Revenue
New Delhi 110 001.

2. The Government of India Mint
Ministry of Finance
Department of Economic Affairs
IDA Phase-II
Cherlapally, R.R.District
Hyderabad 500 051.

3. The Assistant Registrar,
Customs, Central Excise & Service Tax
Appellate Tribunal,
26, Haddows Road,
Chennai 600 006.

4. The Commissioner of Central Excise (Appeals)
1, Williams Road,
Trichy.

5. The Assistant Commissioner of Central
Excise, Salem I Division
No.2, Subramanya Nagar, Suramangalam
Salem 5

+1cc to Mr.R.Karthikeyan, Advocate Sr.No.113161
+1cc to M/s.Hema Muralikrishnan, Advocate Sr.No.112901

AKM/12.02.2020 /12P-8C/

W.P.No.14238 of 2005

सत्यमेव जयते

WEB COPY