
(2016) 08 AHC CK 0118

ALLAHABAD HIGH COURT

Case No: Civil Misc. Writ Tax Petition No. 1089 of 2001

M/s. Simbhaoli Sugar
Mills Ltd.

APPELLANT

Vs

State of U.P.

RESPONDENT

Date of Decision: Aug. 11, 2016

Acts Referred:

- Uttar Pradesh Excise Act, 1910 - Section 38 A

Citation: (2016) 10 ADJ 405

Hon'ble Judges: Sudhir Agarwal and Kaushal Jayendra Thaker, JJ.

Bench: Division Bench

Advocate: Neeraj Sharma, B.J. Agarwal and Nikhil Agarwal, Advocates, for the Petitioner;
C.S.C, Avinash Tripathi and U.S. Awasthi, Advocates, for the Respondents

Final Decision: Allowed

Judgement

1. Heard Sri. Nikhil Agarwal, learned counsel for petitioner and Sri. A.C. Tripathi, counsel for respondents.

2. Writ petition is directed against demand notice/order dated 05.10.2001 (annexure 3 to the writ petition) whereby Assistant Excise Commissioner, Simbhaoli Distillery, Ghaziabad has required petitioner to deposit penal interest of Rs. 9,25,508.81/- on account of transit fee for the Year 1979-80 to 1998-99 for the loss of excise duty of Rs. 8,65,557.50/-.

3. Brief facts giving rise to present dispute are as under:-

4. Petitioner M/s Simbhaoli Sugar Mills Ltd., a Company engaged in manufacture and sale of excisable goods, filed writ petition challenging cost of transit wastage duty on rectified spirit and IMFL. It was dismissed by Court and appeal preferred was also dismissed by Supreme Court on 29.03.1995. Assistant Excise Commissioner, Simbhaoli

Distillery, respondent 3, for the first time issued a demand notice dated 30.08.2001 demanding export duty on transit wastage to the tune of Rs. 8,87,648.50/- for the period 1979-80 to 1998-99. On 12.12.2001, respondent 3 rectified the amount to Rs. 8,65,557.50/-. The aforesaid amount was deposited on 12.09.2001. Thereafter impugned demand notice dated 05.10.2001 has been raised charging penal interest on the alleged delayed payment of excise duty.

5. It is contended before us is that liability to pay excise duty would arise only when a demand is raised and if it is not paid within three months from the date of demand, penal interest is payable. In the present case, for the first time, demand was raised on 30.08.2001 and within one month thereof petitioner deposited the amount, hence no penal interest would be paid. In this regard Section 38-A inserted by Section (2) of U.P. Act no. 7 of 1985 in U.P. Excise Act, 1910 (hereinafter referred to as "Act 1910") is relied.

6. The facts are not in dispute. The dispute revolves around interpretation of Section 38-A of Act 1910, which reads as under:-

"38-A. Interest on arrears of excise revenue - (1) Where any excise revenue has not been paid within three months from the date on which it becomes payable, interest at such rate not exceeding twenty-four percent per annum, as may be prescribed, shall be payable from the date such excise revenue becomes payable till the date of actual payment:

Provided that until a higher rate is prescribed, the rate of interest will be eighteen percent per annum;

Provided further that in respect of an excise revenue which became payable before the commencement of the Uttar Pradesh Excise (Amendment) Act, 1985 interest at the said rate shall be payable from the date of such commencement if the excise revenue is not paid within 3 months of the said date."

Explanation - Nothing in this sub-section shall be construed to affect the payment of interest under an agreement, the terms of an auction or, a decree of the Court, passed before the date of commencement of the Uttar Pradesh Excise (Amendment) Act, 1985 or which may be passed after the date of such commencement, in suits or proceedings filed before the said date.

(2) Provisions of Section 39 shall mutatis mutandis apply to realisation of such interest as they apply to realisation of excise revenue.

(emphasis added)

7. "Excise Revenue" under Section 3(1) has been defined as under:-

"excise revenue" means revenue derived or derivable from any duty, fee, tax, fine (other than a fine imposed by a Court of law), or confiscation imposed or ordered under the

provisions of this Act, or of any other law for the time being in force relating to liquor or intoxicating drugs;"

(emphasis added)

8. It shows that a duty, fee, tax, fine or confiscation imposed or ordered under the provisions of Act 1910 shall constitute "excise revenue" if it relates to liquor or intoxicating drugs. An excise duty will partake nature of "excise revenue" only when it is imposed or ordered under the provisions of Act 1910 or any other law for the time being in force. If it is not paid within three months from the date of imposition or order then interest is payable.

9. Further Section 38-A is attracted when excise revenue becomes payable. Vide Explanation; Section 38-A, term ""payable" has been defined as "Interest is payable where any excise revenue has not been paid within three months from the date on which it becomes payable."

10. The term ""becomes payable" used under Section 38-A has been considered in **M/s Mohan Meakin Limited v. State of U.P. and others, Writ (Tax) 809 of 2012** and it is held that "becomes payable" means "legally recoverable". Court said "excise revenue becomes payable when it is determined". Court relied on an earlier decision of Supreme Court in **New Delhi Municipal Committee v. Kalu Ram and another, 1976 (3) SCC 401** wherein Court construed the word ""payable" and held that it means "legally recoverable".

11. Further Rule 814 of Excise Manual dealing with allowances for loss of personal reads as under:-

"Rule 814. Allowance for loss in transit - An allowance up to 0.5 percent will be made for the actual loss in transit, by leakage, evaporation or other unavoidable cause, of spirit transported or exported under bond in wooden casks or metal vessels.

The allowance to be made under this rule will be determined by deducting from the quantity of spirit despatched from the distillery, the quantity received at the place of destination, both quantities being stated in terms of alcohol. The allowance will be calculated on the quantity contained in each wooden cask metal vessels comprised in a consignment. If the report of the officer by whom the consignment of spirit has been gauged and proved at its destination shows that the wastage has occurred above the limit allowable the person executing the bond shall be liable to pay duty on so much of the deficiency as in excess of the allowance. The rate of duty leviable shall be the highest rate of duty leviable on such spirit in this State.

When the wastage does not exceed the prescribed limit, no action need be taken by the Officer-in-charge of the Distillery or bonded warehouse, as the case may be, but when the wastage exceeds the allowable limit, the Officer-in-charge of the Distillery shall obtain the explanation of the Distillers or the person executing the bond and forward the same

together with a full report of the circumstances to the Assistant Excise Commissioner or the Deputy Excise Commissioner of the charge in which the Distillery is situated. The Assistant Excise Commissioner or the Deputy Excise Commissioner shall charge duty on excess wastage provided that when the total wastage in a consignment is within the allowable limit. Deputy/Assistant Excise Commissioner of the charge may write off the excess wastage in any particular wooden cask or metal vessel" (emphasis added)

12. Reading of the aforesaid provision makes it clear that permissible allowance for loss in transit has to be determined and calculated by competent authority so as to arrive at inference whether the transit wastage is within permissible limit. Further Excise Officials are supposed to charge duty which obviously can be done by giving a notice of demand.

13. It is not the case of respondents that any determination was made for the period 1979-80 to 1998-99 at any earlier point of time. On the contrary it has been said in counter affidavit, in para 3(iii) that after decision of Supreme Court in dismissing appeal on 28.03.95, Excise Authorities determined amount of excise duty payable on the excess transit wastage and raised demand by letter dated 30.08.2001.

14. In the written argument submitted by learned Standing Counsel, also it is not the case that excise duty on account of excess transit loss was ever earlier determined by competent authority. It is also not the case that it is such a computed item that on its own petitioner was liable to pay excise duty at a particular point of time, without demand or order.

15. On the contrary, it is explained that Rule 633 of U.P. Excise Rules, provides for export of foreign liquor manufactured at a distillery in Uttar Pradesh to any other place in India. Collector of exporting District grants pass to such export in Form PD-25. Consignment is checked and verified at the place of destination. Importer produces certificate to Collector of exporting District regarding quantity certified by the officer which reached destination. Thereafter wastage is determined consignment wise, duly certified and thereafter only Exporter is liable to pay excise duty on consignment wise which is summed and totaled year wise. It is said that determination of excise duty on wastage is done consignment-wise which on reaching destination is certified by Excise Officer posted in the distillery as well as the place where consignment is delivered. Rules 813 and 814 which require determination of wastage and payment of excise duty are also referred.

16. Liability to pay excise duty on excess transit wastage has not been disputed before us but the question is, whether there is any determination at any point of time earlier to 30.08.2001 making "excise revenue" payable by petitioner on any date prior to 30.08.2001. No such determination was made by Excise Authorities and communicated to petitioner nor has been placed before us nor pleaded in the counter affidavit nor even referred to in the written arguments.

17. In order to hold that "excise revenue" was payable by petitioner at any earlier point of time than 30.08.2001, it was incumbent upon respondents to show that as per U.P. Excise Rules, determination of excess transit wastage was made by competent authority and communicated to petitioner, so as to make him liable to pay prescribed excise duty thereon.

18. In the present case, counter affidavit is conspicuously silent on this aspect and the only letter by which such determination has been shown for the first time is dated 30.08.2001 and admittedly, within one month thereafter the demanded duty has been paid.

19. The extent of excess transit loss may result in creating a liability upon petitioner to pay excise duty but unless such duty is imposed or ordered by competent authority, after determination as required under Rules, it cannot be said that it is an "excise revenue" payable and, hence, liability of interest will not arise from a date prior thereto. It is for this reason, that respondents have not disclosed in the entire counter affidavit any date on which such "excise revenue" was payable for the period of almost ten years, for which cumulative interest has been charged for the entire period from 1979-80 to 1998-99.

20. For the first time, excise duty was ordered by order dated 30.08.2001 and since it has been paid within one month thereof, we do not find that the petitioner is liable to pay interest under Section 38-A of Act 1910. No such interest is attracted in the case in hand.

21. Writ petition is allowed. Impugned demand notice/order dated 05.10.2001 is hereby set aside.

22. However, before parting, we may observe that though Supreme Court dismissed appeal admittedly on 28.03.1995, still concerned excise authority took more than six years time in raising demand of excise duty. Had it been ordered earlier, State would not have lost benefit of amount of "excise revenue" which would have become payable earlier by petitioner.

23. Apparently here is a case of clear lack of negligence on the part of respondent 3 keeping the matter in hibernation for more than six years and thereafter determining excise duty only by order dated 30.08.2001. Therefore, we direct Principal Secretary, Excise, U.P. Government, to make appropriate inquiry in the matter and recover loss, if any, suffered by State from concerned officer responsible for such wrong, after holding inquiry in accordance with law.