(1987) 12 BOM CK 0014

Bombay High Court

Case No: Writ Petition No. 679/79

Associated Bearing Co. Ltd., Bombay	APPELLANT
Vs	
Union of India and others	RESPONDENT

Date of Decision: Dec. 3, 1987

Acts Referred:

- Central Excise Rules, 1944 - Rule 11
- Central Excises and Salt Act, 1944 - Section 11B

Citation: (1988) 15 ECC 436 : (1988) 33 ELT 285

Hon'ble Judges: Shah, J; M.L. Pendse, J; B.G. Kolse Patil, J

Bench: Full Bench

Judgement

1. This petition is placed before me in accordance with the direction of the learned Chief Justice in view of the difference between Mr. Justice Shah and Mr. Justice Kolse-Patil on the question whether the Excise authorities are liable to refund excess excise duty collected without authority of law or whether the claim can be refused on the doctrine of unjust enrichment. Rule 15 of Chapter XVII of the Bombay High Court Appellate Side Rules, 1960 provides that in case of difference of opinion between the Judges composing the Division Court, the point of difference shall be decided in accordance with the procedure laid down in Section 98 of the Code of Civil Procedure, 1908.

2. Only few facts are required to be set out to appreciate the claim made by the petitioners in the petition filed under Article 226 of the Constitution of India on March 2, 1979. The petitioners are a Company incorporated under the Provisions of the Companies Act, 1956 and manufacture ball and roller bearings and textile machinery components. The ball and roller bearings, all sorts are classifiable under the Central Excise Tariff Item No. 49 which was introduced in Schedule I to the Central Excises and Salt Act, 1944 (hereinafter referred to as the "Act") on May 28,

1971. The petitioners also manufacture textile machinery components of two types : (a) Centering Sleeve Inserts, and (b) Top Rollers. According to the petitioners, Centering Sleeve Inserts and Top Rollers are different and distinct from the ball bearings. The petitioners claim that the components are liable to payment of excise duty under Tariff Item No. 68 which is a residuary item and this residuary item was inserted in the Schedule with effect from March 1, 1975. The Excise authorities had recovered duty on the components under Tariff Item No. 49 for the period commencing from August 1, 1972 and ending with September 30, 1975. The duty was paid by the petitioners under protest. Because of certain trade notices and orders passed by the authorities, the Department did not charge duty on the components between the period commencing from October 1, 1975 to December 10, 1978. The duty was again levied and recovered with effect from December 11, 1978 onwards and paid by the petitioners under protest upto March 30, 1979 when the petitioners secured interim orders from this Court in the present petition and payment of duty was deferred on furnishing of Bank guarantees.

3. The petitioners had adopted proceedings before the Excise authorities claiming that the duty levied and recovered by the authorities under Tariff Item No. 49 was not legal and valid and those proceedings ultimately ended by an order passed by the Central Government on October 12, 1978 holding that the petitioners are liable to pay the duty. The petitioners sought the following prayers in the petition :

(a) The order dated October 12, 1978 be set aside;

(b) The Tariff advices No. 28/78 and the Trade Notice No. 114/78 be set aside, and

(c) Demand Notice dated March 26, 1979 be set aside.

The petitioners then as a part of prayer sought the relief of refund in the following terms :

"The respondents be compelled to refund to the petitioners the sum of Rs. 35,45,749.21 for the period 1-8-1972 to 30-9-1975 as per the Refund Applications filed by the petitioners and further compelling them to forbear from claiming any amount or amounts from the petitioners on the basis that the textile machinery components are excisable under Tariff Item No. 49 and also to refund the duty paid by the petitioners under Tariff Item No. 49 for the period 11-12-1978 onwards."

4. Before the Division Bench, it was contended on behalf of the Department that in view of the Circular dated August 7, 1984 issued by the Central Board of Excise and Customs, the levy of duty on the components would be only under Tariff Item No. 68 and not under Tariff Item No. 49. It was not disputed that Tariff Item No. 68 was inserted in the Schedule with effect from March 1, 1975. It was also not disputed that the duty was paid by the petitioners under Tariff Item No. 49 between August 1, 1972 and September 13, 1975 under protest. The recovery of duty from the petitioners between December 11, 1978 till March 30, 1979 was also under protest.

In view of this, Rule 11 entitles the petitioners to secure refund of duty recovered without any authority of law. The relief sought by the petitioners was resisted on behalf of the Revenue only on the ground that grant of refund would amount to unjust enrichment by the petitioners as the duty levied and recovered from the petitioners had already been passed over to the customers by the petitioners and the refund granted would not ensure for the benefit of the customers. Mr. Justice Shah delivered judgment between December 15 and December 19, 1986 and concluded that the doctrine of unjust enrichment has no application and it is well-settled by the decisions of the various Division Benches of this Court that the Revenue is liable to refund the duty recovered without any authority of law and cannot retain the same by taking shield behind the doctrine of unjust enrichment.

At the conclusion of the judgment delivered by Mr. Justice Shah, Mr. Justice Kolse-Patil announced that he is differing and would deliver judgment on a later date after perusing the copy of the judgment of Mr. Justice Shah. At that stage, the counsel on behalf of the petitioners submitted that the petitioners would not press their demand for refund in the petition, but will pursue their refund application with the Department as the claims of the petitioners are squarely covered by Rule 11 of the Central Excises Rules. Mr. Justice Shah though earlier had granted relief in terms of prayer (a)(i), (a)(ii) and (b), in a latter portion of the judgment restricted relief only to prayers (a)(i), and (a)(ii) in view of the application made by the petitioners. The final order passed by Mr. Justice Shah was the grant of prayers (a)(i) and (a)(iii) only and the petitioners were allow to withdraw prayer (b) with liberty to pursue their claim for refund before the competent authorities.

5. Mr. Justice Kolse-Patil delivered his judgment six months after the decision delivered by Mr. Justice Shah by judgment dated June 16, 1987. The learned Judge dismissed the petition and discharged the rule. The learned Judge held that in view of Section 11(b) of the Act and Rule 11, normally the petitioners would have been entitled to seek refund of the duty paid under protest but in spite of the statutory provisions the claim was refused on the ground of doctrine of unjust enrichment. Mr. Justice Kolse-Patil felt that the decision of the Division Bench reported in 1979 (4) ELT (478) : 79 Bom LR 37 M/s. Ogale Glass Works Ltd. v. The Union of India, holds goods and the subsequent decisions of the Division Bench taking the contrary view are not binding. The learned Judge felt that the subsequent decisions unfortunately did not follow the salutory principle that the decision of the Division Bench of this Court given earlier is binding and, therefore, the subsequent decisions could be ignored.

6. It is not disputed before me that the petitioners are entitled to refund in view of the statutory provisions of Section 11B and Rule 11 of the Central Excise Rules and it is no longer the claim of the Revenue that the components manufactured by the petitioners are liable to levy of duty under Tariff Item No. 49. On behalf of the Department, Mr. Sethna contended that the view taken by Mr. Justice Kolse-Patil is

in accordance with the decision of the Supreme Court in the case of State of Madhya Pradesh Vs. Vyankatlal and Another, . Mr. Sethna did not dispute that several other decisions of the Division Bench of this Court had consistently taken the view that the theory of unjust enrichment has no place when duty has been recovered by the Department without any authority of lay. In my judgment, the view taken by Mr. Justice Kolse-Patil is clearly erroneous and cannot be sustained in view of large number of decisions consistently taken by both the Division Benches and the Single Judges of this Court rejecting the plea of unjust enrichment propounded by the Department. It is not necessary to refer to this long line of decisions and it would be suffice if reference is made to the latest decision of Division Bench of this Court reported in Assistant Collector of Central Excise, Kalyan Division and another Vs. Dipsi Chemicals Pvt. Ltd. and another, R. Parthasarathy, Asstt. Collector, Central Excise Kalyan Division and another v. Dipsi Chemicals Private Ltd. and another. In this decision, the Division Bench exhaustively considered all the earlier decisions and observed that the court cannot refuse to direct the Government to refund the amounts, which the Government had collected without the authority of law on the basis of doctrine of unjust enrichment. The Division Bench also examined the different view taken by Mr. Justice Kolse-Patil and pointed out the infirmity in the judgment. Mr. Sethna submitted that the Department has no further arguments to advance than those submitted before the Division Bench in the decision reported in Assistant Collector of Central Excise, Kalyan Division and another Vs. Dipsi Chemicals Pvt. Ltd. and another, . I have closely perused the decision and with respect I am in entire agreement with the view taken by the Division Bench. It is not necessary to consider the question of the binding nature of the decision of the Division Bench in view of the decision of the Supreme Court reported in 70 Bom LR 73 Tribhovandas Purshottamdas Thakkar v. Ratilal Motilal Patel and the decision of the Division Bench of this Court in the case of Panjumal Massomal Advani v. Harpal Singh Abnashi Singh reported in 76 Bom LR729. Both these decisions were considered in the case of Dipsi Chemicals (Supra) and the principles applicable in respect of binding nature of the decisions were set out. It is not necessary to refer to them in this judgment. In my judgment, the view taken by Mr. Justice Kolse-Patil is entirely incorrect and is clearly contrary to large number of decisions of the Division Benches and of Single Judges of this Court. Indeed, the difference was not called for in face of this line of decisions. I am in respectful agreement with the view taken by Mr. Justice Shah.

7. Mr. Sethna then submitted that latter part of prayer (b) made in the petition for refund was given up or withdrawn by the petitioners before Mr. Justice Shah and Mr. Justice Kolse-Patil and, therefore, the petitioners would not be entitled to get order of refund in pursuance of the writ of this Court. It is not possible to accept this submission because though the application to withdraw prayer (b) was granted by Mr. Justice Shah, the other learned Judge did not grant that prayer but dismissed the petition including the relief sought in prayer (b). As the prayer (b) was not allowed to be withdrawn by the Bench, it is futile to claim that refund should not be granted by

writ or direction of this Court. It is undoubtedly true that under Rule 11, the petitioners are entitled to recover back the duty which was paid under protest and the Excise authorities are bound to refund the same. I enquired from Mr. Sethna as to what is difference in granting refund in pursuance of the writ of this Court and in granting refund in accordance with Rule 11 of the Central Excise Rules and the learned counsel had no answer. In my judgment, as the Division Bench of Mr. Justice Shah and Mr. Justice Kolse-Patil did not grant the application to withdraw prayer (b), it is desirable that the relief in terms of prayer (b) is also granted in addition to relief in terms of prayers (a)(i) and (a)(ii) and accordingly I would pass the final order.

8. Mr. Sethna then submitted that even if the order of refund is granted, the petitioners should be directed to furnish Bank Guarantee to ensure that in case the Department approaches the Supreme Court and succeeds, then the petitioners would refund the amount. In my judgment, it is impossible to accede to the submission. It is no longer in dispute that the duty was recovered without any authority of law and it would be most inequitable to direct the petitioners to furnish Bank guarantee merely because the Revenue may consider to approach the Supreme Court. Mr. Desai, learned counsel appearing on behalf of the petitioners, submits that the Department should be directed to make the refund within a stipulated period and, in my judgment, the request is proper and the Department should refund the amount within a period of three months from the date of the decision.

9. Accordingly, I will make the rule absolute in terms of prayer (a)(i) and (a)(ii) and part of prayer (b) commencing from the words "and compelling them to refund" till the end of the prayer. I will direct the respondents to make the refund within a period of three months from the date of the order.

10. The papers now be placed before the Division Bench for passing the final orders. Cost of hearing before me to be determined by the Divisional Bench