(1980) 06 BOM CK 0015

Bombay High Court

Case No: Special Civil Application No. 5106 of 1976

Maharashtra Vegetable Products Pvt. Ltd. and another		APPELLANT
	Vs	
Union of India and others		RESPONDENT

Date of Decision: June 21, 1980

Acts Referred:

- Central Excise Rules, 1944 - Rule 11
- Central Excises and Salt Act, 1944 - Section 3, 4

Citation: (1981) 8 ELT 468

Hon'ble Judges: R.S. Bhonsale, J; M.N. Chandurkar, J

Bench: Division Bench

Judgement

Chandurkar, J.

This is one more petition arising out of a claim for Excise Duty recovered by the Union of India on the price of vegetable oils manufactured by the petitioners, after taking into account the expenses of packaging, freight marketing and distribution expenses. Since a major part of the controversy involved in the petition is concluded by a decision of this Court which held that post-manufacturing expenses cannot be added to the price of the manufactured article for the purposes of determining Excise Duty chargeable in respect of the article, a detailed reference to the facts is not necessary.

2. Briefly it requires to be mentioned that the price of Vanaspati manufactured by the petitioners is regulated and controlled by the Union of India under the Vegetable Oil Products Control Order, 1947 and that the price at which the manufactured product was to be sold to the consumer was fixed by the Union of India. The break-up of the price so fixed is not available and therefore it is not possible to ascertain what were the different components of the price fixed by the Union of India for sale to consumers.

3. For the purpose of Excise Duty, admittedly, the cost of the tins which were used as containers for Vanaspati, the freight charges incurred by the producers and marketing and distribution expenses borne by the producers were added to the cost of the manufactured product, viz., Vanaspati. The cost of the containers, freight charges and marketing and distribution expenses would be post-manufacturing cost and in accordance with the earlier decision of this Court, could not have been included in the price of the manufactured product for the purpose of chargeability of Excise Duty. Consequent upon the decision of this Court in Union of India v. Mansingka Industries Private Limited, 1979 ELT 158 = 77 Bombay Law Reporter 663, in which it was held that the cost of freight and cost of containers could not be included in the price of the manufactured articles for the purposes of Excise Duty, the petitioners submitted a fresh price-list on 10th February, 1975 excluding the two components of packing and freight. The decision in Mansingka''s case was rendered on 6th September 1974. The petitioners claim that they learned about it in November 1974. On 26th November 1975 the petitioners filed a revision application claiming a refund of packing and freight charges basing their claim on the decision in Mansingka''s case. In that application, the petitioners did not ask for refund of the proportionate Excise Duty chargeable on marketing charges. This refund was granted.

4. Then came the decision of this Court in Indian Tobacco Company Limited v. Union of India and others, 1979 E LT 476, rendered on 15th December 1979. The Division Bench in that case held that marketing and distribution expenses would ordinarily be referable to selling activity and as such, for the purpose of section 4 of the Central Excises and Salt Act, 1944 (hereinafter referred to as the Salt Act) a deduction in respect thereof will have to be allowed from the manufacturers sale price. Consequent upon that decision, a refund application came to be made on 1st September 1976 claiming a refund of Excise Duty collected in excess on account of packing cost, freight and marketing and distribution of Vanaspati, for the period from 15th April, 1970 to 30th November, 1974 amounting to about Rs. 8.00 lacs and odd. An amount of Rs. 4,823/- was also claimed on account of Excise Duty collected on marketing and distribution expenses for the period from 1-1-74 to 4-1-75 for which refund in respect of other two components was already granted by the Excise authorities. Since the petitioner''s request went unheeded, they have filed this petition under Article 226 of the Constitution of India seeking a Writ direction or an order directing the Union of India to refund a sum of Rs. 8,90,320.81 on account of excess Excise Duty paid.

5. The claim of the petitioners in this petition is contested firstly on the ground that the Excise Duty has been rightly collected; secondly on the ground that the claim is barred by limitation prescribed under Rule 11 of the Excise Rules and thirdly on the ground that an adequate remedy in the form of a suit was available to the petitioners and therefore this Court should not exercise its extraordinary jurisdiction in favour of the petitioners because the petitioners have already recovered the

Excise Duty charged to them from the customers as a part of the sale price of the manufactured article.

6. We do not think it necessary to deal at any length with the first two contentions. Having regard to decide in Mansingka''s case, Indian Tobacco''s case and a large number of like decisions following these two cases, it is now too late to contend that the cost of containers, freight and marketing charges are not post-manufacturing expenses. Having regard to the long line of decisions, we must hold that the charges under these three heads could not have been taken into account for determining the chargeability to Excise Duty.

7. So far as the contention that the claim for refund is barred by Rule 11 of the Excise Rules, we may refer to a very recent decision of this Court in Associated Bearing Company Limited and another vs. Union of India, Special Civil Application No. 2118 of 1976 decided on 5th March 1980 - 1980 ELT 415, to which one of us was a party. The contention whether a claim for refund on the ground that certain items which were in the nature of post-manufacturing expenses were taken into account for the purposes of chargeability to Excise Duty falls within Rule 11 of the Excise Rules has been considered at length in that decision. And it has been held that levy in such a case being wholly without jurisdiction and outside the provisions of section 3 of the Act would not attract the bar of limitation prescribed by Rule 11. The contention that the claim for refund must be negatived in respect of a period in excess of one year must also stand rejected.

8. This takes us to the last argument advanced before us. It has been vehemently argued by Mr. Lokur appearing on behalf of the respondents that the petitioners must have passed on the burden, of what according to them was Excise Duty recovered, to the consumers and any order made for refund in exercise of jurisdiction under Article 226 of the Constitution would result in the unjust enrichment of the petitioners. The argument therefore is that this court should decline to exercise its jurisdiction as it will result in unjust enrichment of the petitioners. Another limb of the same argument was that an alternative remedy by way of a suit was open to the petitioners and the petitioners having chosen not to avail themselves of that alternative remedy, the extraordinary jurisdiction under Article 226 should not be exercised in their favour. In support of this argument heavy reliance was placed on certain observations made by Mukhi, J. in Ogale Glass Works Ltd. v. Union of India 1979 ELT 468 : 79 BomLR 37.

9. It is difficult for us to appreciate how the fact that suit for refund could have been filed by the petitioners can come in the way of the petitioners if they are otherwise entitled to the refund of the amount claimed by them. It is now well established that the existence of an alternative remedy is not an absolute bar to entertaining a petition under Article 226. It is difficult to hold that in a case where the constitutional validity of a levy like excise duty is in question and an action of Union of India almost amounts to recovery of a tax without authority of law, a suit can be said to be a

remedy which is equally expeditious, efficacious and adequate as proceedings under Article 226. We must bear in mind that in this case the claim is based on the constitutional invalidity of a part of the levy as determined by the Supreme Court and this Court in respect of post-manufacturing expenses. Facts in the present case are not in dispute. The basis of the claim of the petitioners was the declaration of the law made by Supreme Court from time to time as well as by this Court in similar claims for refund of Excise Duty said to have been wrongly recovered. Indeed on the authorities and the law which seem to be now well settled, the Excise Authorities have no jurisdiction to take into account anything in the nature of post-manufacturing expenses for the purpose of chargeability to Excise Duty. If this constitutional position is now well established, it is difficult to entertain the argument advanced on behalf of Union of India that a manufacturer of a citizen should be forced to take recourse to a long drawn out trial in the trial Court with the possibility of the decision of the trial Court being challenged in appeals when it is well-known that the proceedings commencing with the suit and the appeals in higher Court taken together take nothing less than ten or twelve years.

10. The argument on behalf of the Union of India almost comes to this that even though the constitutional position is well established the petitioners should have really gone to a Civil Court where, as it now transpires, when no substantial defence is available to the Union against the claim for refund, a decree would necessarily follow. What difference it makes to the Union of India as to whether a decree is made in a Civil Court or a direction is given by the High Court, if a direction for refund has necessarily to follow by giving effect to the earlier decision of this Court, it is difficult for us to comprehend. We must therefore reject the contention that the petitioners should have taken recourse to the ordinary procedure of filing a civil suit.

11. The contention that a direction issued by this Court under article 226 is likely to result in unjust enrichment of the petitioners, in our view, is required to be considered in two aspects. Firstly, a defence of unjust enrichment would not have been available to the Union in a civil suit. If the petitioners had filed a civil suit and if they establish that Excise Duty outside the Act has been recovered, the question as to whether they had passed on the burden to the consumers or not would not have been relevant at all for deciding the liability of the Union of India to refund the excess amount recovered. The moment excess amount is shown to have been recovered by the Union and a mistake of law which resulted in such payment by the petitioners is established, a decree for refund would have to follow irrespective of any consequence such as unjust enrichment. The second aspect is highlighted by the observations of Mukhi, J. on which heavy reliance has been placed by the learned counsel for respondents when it is contended that the High Court should not in such a case issue a direction for refund under Article 226 of the Constitution. It is now well-known that in Ogale Glass Works'' case a claim for refund of excess. Excise Duty was made by the manufacturer following the decision of the Mysore High Court that the value of packing charges and packing materials is not

chargeable to Excise Duty. The decision of the Mysore High Court was delivered on September 10, 1971. The representations made by the Ogale Glass Works to the Assistant Collector of Central Excise was on 18th December 1972. The refund claim by the Ogale Glass Works in the petition under Article 226 was the amount illegally collected from 1962 to 1972. Having held that the amount has been illegally collected, Mukhi J went on to consider the argument advanced on behalf of the Union in that case that justice did not lie on the side of the company and therefore the High Court should not, in its writ jurisdiction assist the company. Dealing with this contention, the learned judge referred to the well-known proposition that in order to enable the petitioner to obtain a relief from a Court in a writ petition, it was not sufficient that he should make out some statutory right or show that an order passed against him was illegal but he must, in addition, show that justice lies on his side and that by making an order, which is sought from the Court, the Court will be doing justice - a proposition which it is impossible to dispute. It is well established that it is not obligatory on the part of the High Court to interfere in every case under Article 226 and in each case, the High Court has to consider whether it should exercise its descretion in favour of the petitioner who approaches the High Court.
21st June, 1981

12. It is no doubt true that in Ogale Glass Works'' case the Division Bench declined to grant any relief in respect of amounts recovered prior to December 18, 1972. That was the date on which a representation was made in writing to the Assistant Collector of Central Excise on behalf of the petitioners in that case that no Excise Duty could be validly levied on packing charge. In the judgment of Deshpande J. he had observed that the counsel for the petitioners in that case was right in contending that the Supreme Court never considered the inexpediency and injustice pinpointed in D. Cawasji and Co. and Others Vs. State of Mysore and Another, as themselves being fatal to the claim for the refund, and it was pointed out that in Cawasji''s case, the Supreme Court had ultimately upheld the order of the High Court refusing to exercise its discretion on the ground of laches.

13. In the judgment of Mukhi J. the learned Judge seems to have reached a conclusion that the petitioners in that case were not entitled to a direction for a refund prior to December 18, 1972 having regard to the facts of that case because the learned Judge has clearly observed on page 55 of the report :

"In the petition before us, I am unable to persuade myself that justice lies on the side of the petitioners and that this Court will be doing justice in ordering the respondents to refund the amount of Rs. 12 lakhs to the petitioners when, to begin with, that money never came from the petitioners'' pocket."

It is argued on the above observations that unjust enrichment of the manufacturer was treated by the learned judge as sufficient ground to hold that the justice was not on the side of the petitioners in that case. Now we have carefully gone through

the decision in Cawasji''s case and we are unable to rend the decision in Cawasji''s case as an authority for the proposition that in every case, where the manufacturer who has paid the Excise Duty and has passed it on to the consumers and has recovered it, the claim to recover monies from the government should be rejected. We may point out that in paragraphs 11 and 12 of the decision in Cawasji''s case the Supreme Court has made it clear as to why they were referring to the aspect of inexpediency of making an order for refund after the whole or part of the monies have been expended by the State. This will be clear from the following observations :

"11. In the U.S.A., it is generally held that in the absence of a statute to the contrary, taxes voluntarily paid under a mistake of law with full knowledge of facts cannot be recovered back while taxes paid under a mistake of fact may ordinarily be recovered back (see Corpus Juris Secundum, Vol. 84, p. 637). Although Section 72 of the Contract Act has been held to cover cases of payment of money under a mistake of law, as the State stands in a peculiar position in respect of taxes paid to it, there are perhaps practical reasons for the law according a different treatment both in the matter of the heads under which they could be recovered and the period of limitation for the recovery.

12. The task of writing legislation to protect the interest of the nation is committed to Parliament and the legislatures of the States. We are referring to this aspect only to alert their attention to the present state of law."

These observations were intended to draw the attention of the Government to the state of the law to which the Supreme Court has referred in the earlier paragraph viz., that while in U.S.A. taxes paid voluntarily under the mistake of law with full knowledge cannot be recovered back, there is no such law in India. The observations in paragraphs 11 and 12 have to be read in the context of the earlier observations in paragraph 10 in which the Supreme Court clearly pointed out as follows :

"Nor is there any provision under which the Court could deny refund of tax even if the person who paid it has collected it from his customers and has no subsisting liability or intention to refund it to them, or, for any reason, it is impracticable to do so."

These observations clearly highlight the fact that the State is under an obligation to refund monies which have been recovered without authority of law.

14. A careful study of Cawasji'' case will also show that the relief to the petitioners in that case was declined not on the ground that it would result in unjust enrichment of the company. The claim in the writ petitions was for refund of educational cess for the period 1951-52 to 1965-66. It was however found that in the earlier writ petitions which culminated in the decision in D. Cawasji and Co. v. State of Mysore 1978 ELT 154 : AIR 1969 Mys 23, the company did pray for refund in each of the writ petitions and the High Court had allowed the prayer in some petitions and rejected

it in others holding that the company was at liberty to institute suits or other proceedings. The Supreme Court held that the company had not prayed in the earlier writ petition for refund of amounts paid by way of sales for the years 1951-52 to 1965-66 and they gave no reasons before the High Court in the writ petitions against the dismissal of which the appeal was filed, as to why they did not make a prayer for the refund of the amounts paid during the years in question. The main ground on which the dismissal of the writ petitions by the High Court was upheld in paragraph 18 of the Judgment of the Supreme Court is as follows :

"Avoiding multiplicity of unnecessary legal proceedings should be an aim of all courts. Therefore, the appellants could not be allowed to split up their claim for refund and file writ petitions on this piecemeal fashion. If the appellants could have, but did not, without any legal justification, claim refund of the amounts paid during the years in question, in the earlier writ petitions, we see no reason why the appellants should be allowed to claim the amounts by filing writ petitions again. In the circumstances of this case, having regard to the conduct of the appellants in not claiming these amounts in the earlier writ petitions without any justification, we do not think we would be justified in interfering with the discretion exercised by the High Court in dismissing the writ petitions which were filed only for the purpose of obtaining the refund and directing them to resort to the remedy of suits."

These observations will make it clear that the ground on which the Supreme Court was not inclined to interfere with the order of the High Court was that it was not proper to promote multiplicity of unnecessary legal proceedings. Cawasji''s case is, therefore, not an authority for the proposition that the claim for refund must necessarily be rejected on the ground that an order for refund is likely to result in unjust enrichment. It appears from the judgment of the Supreme Court that the fact that the appellants had not given any reasons as to why that claim was not made in the earlier writ petitions heavily weighed with the Supreme Court when they declined to interfere with the decision of the High Court. We are therefore unable to accept the contention advanced on behalf of the Union of India that the petitioners are not entitled to any refund as the levy has already been passed on to the consumer.

15. As already pointed out, the matter with regard to the nature of the Excise Duty and the components which have to be included in the price chargeable to Excise Duty had been decided by the Supreme Court and it was merely an application of that law which was called for in the writ petitions in question. An additional circumstances which appears on the facts of the present case is that the goods in question were sold at a controlled price the components of which are unknown. It is not therefore possible to say how much of the Excise Duty formed a part of the controlled price at which the goods were sold to the consumer. Even otherwise, it could therefore not be said that it is fully established that the petitioners have reimbursed themselves to the extent of the amount which they are now seeking to

recover. We may make it clear that this is only on additional ground on which we are not inclined to accept the argument that the claim of the petitioners should not be granted.

16. It was then sought to be contended by Mr. Lokur that a question as to whether the writ petitions had been diligently filed would involve a question of fact and that the diligence of the petitioners could be enquired into only if they come by way of a suit. Cawasji''s case makes it clear that for filing the writ petition to recover money paid under mistake of law, the starting point of limitation is from the date on which the judgment declaring as void the particular law under which the tax was paid was rendered as that would normally be the date on which the mistake becomes known to the party. The question with regard to the exclusion of post-manufacturing expenses as part of the price was decided by the Supreme Court by their decision dated 1-12-1972 in A.K. Roy and Another Vs. Voltas Limited, . The argument that was advanced before us was that the limitation should really commence from the decision of the Bombay High Court which was taken in appeal to the Supreme Court in the Voltas case. The decision of the High Court was given in August 1970. There are two reasons on which we should reject this contention. Firstly, it is unfortunate that even through the amount, refund of which is claimed by the petitioner, has now been held to have been recovered without authority of law, such an argument was advanced before us in spite of the clear dictum of the Supreme Court that the government should normally not raise a plea of bar of limitation. We may point out that in a recent decision of the Supreme Court in Madras Port Trust v. Hymanshu International, 1979 ELT 306, the inadvisability of government relying on technical pleas has been clearly pointed out in the following observations made by Bhagwati, J. :

"It is high time that governments and public authorities adopt the practice of not relying upon technical pleas for the purpose of defeating legitimate claims of citizens and do what is fair and just to the citizens. Of course, if a government or a public authority takes up a technical plea, the Court has to decide it and if the plea is well-founded, it has to be upheld by the Court, but what we feel is that such a plea should not ordinarily be taken up by a government or a public authority, unless of course the claim is not well-founded and by reason of delay in filing it, the evidence for the purpose of resisting such a claim has become available."

17. The second ground is that the law relating to the exclusion of the value of containers particularly came to be settled by the decision of this Court in Mansingka''s case which came in September 1974 and the law relating to marketing charges came to be settled in Indian Tobacco Company''s case which came in December 1975. The ratio of these two decisions is now sought to be invoked by the petitioners. These were the decisions material for deciding whether the petition has been filed within three years from the time when the mistake of law became known. There is no doubt that the petition is filed within three years from the time when the

decision in Mansingka''s case was reported. Apart from this, it is difficult to entertain such a submission from the department which, with open eyes, wants to ignore the decision of this Court and of the Supreme Court and is still persisting in the argument that Excise Duty has been properly recovered even though the three disputed components were taken into account for determining the price chargeable to Excise Duty. We are not, therefore, able to see any circumstance which would dissuade us from exercising our jurisdiction in favour of the petitioners especially when under the Constitution, recovery of every single rupee must be an authorised recovery. Any recovery which is unauthorised would be recovery without authority of law and therefore pleas raised on behalf of the authorities intended to justify their actions which are in gross violation of the law laid down by the Supreme Court and this High Court must be rejected. We must therefore hold that the petitioners will be entitled to a mandamus directing the authorities and the Union of India to refund the excess amounts recovered by them on account of inclusion of packing cost, freight and marketing and distribution expenses during the period from 15-4-1970 to 30-11-1974 and amounts recovered in excess during the period 11-12-1974 to 4-1-1975 by including marketing and distribution expenses as a part of the price chargeable to Excise Duty. The petitioners have no doubt made a claim for a total amount of Rs. 8,90,320.31. It will however be for them to satisfy the appropriate authorities about the exact quantum of the amount under the heads referred to above.

18. This petition is therefore allowed, Rule is made absolute but no order as to costs. This petition has been pending for the last four years and therefore the department will dispose of the claim within a period of four months.

19. Mr. Lokur applies for leave to appeal to the Supreme Court on the ground that similar matters are already pending in the Supreme Court. We have merely applied decisions of this Court and the Supreme Court and we do not think therefore that it would be proper to grant leave in this case. Application rejected.