

(1995) 07 BOM CK 0073

Bombay High Court

Case No: Excise Reference No. 1 of 1995

Bharat Bijlee Ltd.

APPELLANT

Vs

Collector of Central Excise,
BombayRESPONDENT

Date of Decision: July 5, 1995**Acts Referred:**

- Central Excises and Salt Act, 1944 - Section 11A
- Constitution of India, 1950 - Article 226, 35G

Citation: (1995) 4 BomCR 519 : (1995) 60 ECR 602 : (1996) 83 ELT 496 : (1996) 1 MhLj 357**Hon'ble Judges:** S.H. Kapadia, J; M.L. Pendse, J**Bench:** Division Bench**Advocate:** Shri A.M. Setalwad, instructed by M/s. Malvi Ranchhoddas and Co, for the Appellant; Shri R.V. Desai and Sh. H.V. Mehta, for the Respondent

Judgement

M.L. Pendse, C.J.

The Customs, Excise and Gold (Control) appellate Tribunal, West Regional Bench, Bombay has made this reference in exercise of powers u/s 35G(1) of the Central Excises and Salt Act, 1944 for expressing opinion on the question set out in the reference. The facts which gave rise to this reference are as follows :-

M/s. Devidayal Electronics and Wires Ltd. are the manufacturers of paper covered copper strips. The said copper strips were liable for payment of excise duty and the Excise Authorities had classified the copper strips for payment of excise duty under Tariff Item No. 68. Item No. 68 is a residuary item and applicable to manufacture of all commodities which are not covered by any other tariff item. M/s. Bharat Bijlee Ltd. are the manufacturers of transformers and in the process of manufacture, requires paper covered copper strips. The copper strips were purchased from M/s. Devidayal and at the time of sale, M/s. Devidayal had paid the requisite excise duty. M/s. Bharat Bijlee Ltd. were availing proforma credit facility in accordance with Rule

56A of Central Excise Rules, 1944 in respect of paper covered copper strips received from M/s. Devidayal. The Credit was secured for a period commencing from year 1975 till year 1985.

2. A Single Judge of this Court by judgment reported in [Shakti Insulated Wires Pvt. Limited and another Vs. Union of India and others](#), held that the paper covered copper strips were liable to pay excise duty under Tariff Item No. 26 and the claim of the Department that the duty is payable under residuary Tariff Item No. 68 is not correct. The decision of the Single Judge delivered on October 3, 1981 was upheld by Division Bench of this Court on August 27, 1982 in Appeal No. 326 of 1982. The Department moved the Supreme Court and Civil Appeal No. 6816 of 1983 in pending hearing in that Court.

M/s. Devidayal Electronics filed Writ Petition No. 1899 of 1983 under Article 226 of the Constitution in this Court claiming that recovery of excise duty in respect of manufacture of paper covered copper strips under Tariff Item No. 68 was illegal. M/s. Devidayal also sought a direction directing the Department to dispose of the finalisation of the classification list dated December 11, 1981 and grant refund as claimed in applications dated March 27, 1982, March 7, 1983, March 26, 1983 and August 8, 1983. The petition was disposed of by learned Single Judge by order dated August 22, 1983 in view of the earlier decision reported in [Shakti Insulated Wires Pvt. Limited and another Vs. Union of India and others](#). The Department challenged the correctness of the order by filing SLP No. 12853 of 1984 before the Supreme court of India, but by order dated March 7, 1994 the same was dismissed, with the result that the Department was liable to refund the amount sought by M/s. Devidayal.

3. On July 11, 1984, the Superintendent of Central Excise, Range II, Division IV, Bombay served show cause notice calling upon M/s. Bharat Bijlee Ltd. to explain why the proforma credit of Rs. 9,80,327.19 availed of in respect of paper covered copper strips received from M/s. Devidayal should not be withdrawn in terms of Rule 56A(2) and why the amount of duty should not be recovered. The show cause notice recites that M/s. Bharat Bijlee Ltd. availed of proforma credit on the basis that the paper covered copper strips received from M/s. Devidayal had paid duty under Tariff Item No. 68. The show cause notice then recites that the Bombay High court held that the copper strips were classifiable under Tariff Item No. 26A and the Department was directed to refund the differential duty paid under Tariff Item No. 68 and Tariff Item, No. 26A to M/s. Devidayal. The show-cause notice calls upon M/s. Bharat Bijlee Ltd. to explain why the proforma credit received should not be withdrawn.

M/s. Bharat Bijlee Ltd. filed reply dated August 2, 1984 inter alia claiming that it is not permissible to serve show cause notice demanding back the credit secured by ignoring limitation of six months from the date of availing of such credit. The Assistant Collector of Central Excise by order dated November 19, 1984 rejected the

contentions and directed that the proforma credit should be recovered under the provisions of Rule 56(2) and M/s. Bharat Bijlee Ltd. should pay the same within ten days from the date of receipt of the order. M/s. Bharat Bijlee Ltd. challenged the order by filing appeal before the Collector, Central Excise (Appeals) and the appeal was allowed by order dated March 8, 1985. The Appellate Authority held that the proforma credit under Rule 56A was made available because of the error or misconstruction of the applicability of the tariff item by the Excise Authority and consequently the recovery is not permissible after period of six months.

4. The order of the Appellate Authority was challenged by the Department by filing Appeal No. 137 of 1985 before the Customs, Excise and Gold (Control) Appellate Tribunal. The appeal was placed for hearing before a Bench consisting Shri K. S. Dilipsinhji and Shri K. Gopal Hegde. The two Members differed and Shri K. S. Dilipsinhji held that the demand issued by the Assistant Collector of Central Excise was time barred and the order passed by the Appellate Authority is correct. The learned Member relied upon provisions of Section 11A of Central Excises Act in support of the conclusion. Shri K. Gopal Hegde on the other hand found that Section 11A is not attracted in cases where proforma credit is availed of under Rule 56A. Shri Hegde held that sub-rule (5) of Rule 56A provides for period of limitation for withdrawing of the proforma credit and the limitation is six months from the date the credit has been allowed on account of an error, omission or misconstruction on the part of the Excise Officer. The longer period of five years is prescribed if the credit has been secured on account of wilful mis-statement, collusion or suppression of facts on the part of the manufacturer or the assessee. It is not in dispute that longer period of five years is not applicable to the facts of the present case. Shri Hegde further held that the period of six months would commence only from the date when the Department is directed to refund the differential duty payable under Tariff Item No. 68 and Tariff Item No. 26A to M/s. Devidayal. Shri Hegde came to the conclusion that the show cause notice was issued within six months from the date of direction to make refund to M/s. Devidayal and the order of Assistant Collector cannot be faulted.

In view of the difference of opinion between the two members, the appeal was placed for disposal before Shri S. D. Jha, Vice President of the Tribunal and Shri Jha by order dated September 25, 1986 concurred with the view taken by Shri K. Gopal Hegde. In accordance with the provisions of Section 129C(5), appeal was then allowed and the order of the Assistant Collector of Central Excise directing M/s. Bharat Bijlee Ltd. to pay the amount of Rs. 9,80,327.19 was upheld.

5. M/s. Bharat Bijlee Ltd. then sought reference in accordance with the provisions of Section 35G(1) and Appellate Tribunal by order dated March 29, 1988 referred the following question of law to this Court :-

"Whether on the facts and in the circumstances of the case, the provisions of Section 11A of the Central Excises and Salt Act, 1944 are applicable to the recovery

contemplated in the 5th proviso to sub-rule (2) of Rule 56A."

6. Shri Setalwad, learned counsel appearing on behalf of M/s. Bharat Bijlee Ltd. submitted that the question of law referred by the Tribunal is not accurate because though the provisions of Section 11A of the Central Excises and Salt Act are not strictly applicable, the recovery is barred by limitation because of sub-rule (5) of Rule 56A of Central Excise Rules. The learned counsel appearing for the Department referred to order dated November 15, 1994 passed by Assistant Collector, Central Excise sanctioning the refund of duty of Rs. 19,80,725/- in favour of the Consumer Welfare Fund. Shri Desai, learned counsel appearing on behalf of the Department, submitted that the refund claim made by M/s. Devidayal could not be sanctioned in their favour as M/s. Devidayal failed to establish that the excess duty paid was not collected from the buyer and consequently the Assistant Collector had credited that amount of refund to the Consumer Welfare Fund. It is not necessary in the present proceeding to examine that order and the reference is made thereto only to complete the record.

Section 11A(1) of the Central Excises Act reads as follows :-

"11A(1) When any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded, a Central Excise Officer may, within six months from the relevant date, serve notice on the person chargeable with the duty which has not been levied or paid or which has been short-levied or short-paid or to whom the refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice."

Shri Desai submitted that as M/s. Bharat Bijlee Ltd. has secured credit of proforma under Rule 56A of the Central Excise Rules and the conditions for attracting provisions of Section 11A are not available. The provisions of Section 11A are attracted when any duty of excise has not been levied or has been short-levied or short paid or erroneously refunded and any of such contingency is not in existence in cases of giving proforma credit under Rule 56A(2). Shri Setalwad at one stage submitted that strictly Section 11A may not be attracted as regards the dispute between M/s. Bharat Bijlee Ltd. and the Department, but it is possible that ultimately the provisions of the Section 11A may be attracted in some other incidental dispute. In our judgment, for the controversy arising out of the undisputed facts of this case, it is not necessary to examine whether provisions of Section 11A are attracted and it is suffice if the view taken by Shri K. Gopal Hedge and Shri S. D. Jha that the provisions of sub-rule (5) of Rule 56A are applicable and therefore the order of recovery is accurate is examined.

7. Rule 56A deals with special procedure for movement of duty paid materials or component parts for use in the manufacture of finished excisable goods. Sub-rule (2) of Rule 56A, as far as relevant, reads as follows :-

"56A(2) The Collector may, on application made in this behalf and subject to the conditions mentioned in sub-rule (3)..... permit a manufacturer of any excisable goods specified under sub-rule (1) to receive material or component parts or finished products on which the duty of excise has been paid, in his factory for the manufacture of these goods..... and allow a credit of the duty already paid on such material.....".

The credit of duty already paid in respect of material manufactured and brought to the factory for further manufacture is known as proforma credit. It is not in dispute that M/s. Bharat Bijlee Ltd. was entitled to receive proforma credit as excise duty was paid by M/s. Devidayal on copper strips which were purchased by M/s. Bharat Bijlee Ltd. The proviso to sub-rule (2) of Rule 56A and on which strong reliance is placed on behalf of the Department reads as follows :-

"(Provided also) that if the duty paid on such material or component parts (of which credit has been allowed under this sub-rule) be varied subsequently due to any reason resulting in payment of refund to, or recovery of more duty from, the manufacturer or importer, as the case may be, of such material or component parts, the credit allowed shall be varied accordingly by adjustment in the credit account maintained under sub-rule (3) or in the account-current maintained under sub-rule (1) of Rule 9 or Rule 173G(1), or, if such adjustment be not possible for any reason, by cash recovery from or, as the case may be, refund to the manufacturer availing of the procedure contained in this Rule".

Shri Desai on behalf of the Department submitted that this proviso does not prescribe for any limitation for adjustment in the credit account or for cash recovery when the duty paid by M/s. Devidayal is varied subsequently in view of the decision of the Bombay High Court resulting in payment of refund to M/s. Devidayal. The submission is not correct because the submission overlooks the provision of sub-rule (5) of Rule 56A. Sub-rule (5) of Rule 56A reads as follows :-

"56A(5)(i) When credit has been allowed under sub-rule (2) on account of an error, omission or mis-construction on the part of an officer, the proper officer may, within six months from the date of such credit, serve notice on the manufacturer or the assessee to whom such credit has been allowed, requiring him, to show cause why he should not be disallowed to utilize such credit or why the amount equivalent to such credit should not be recovered from him if the credit has already been utilized :

Provided that where a credit has been allowed under sub-rule (2) on account of wilful mis-statement, collusion or suppression of facts on the part of the manufacturer or the assessee, the provisions of clause (i) shall have effect as if for the words "six months" the words "five years" were substituted.

(ii) The Assistant Collector, after considering the representation, if any, made by the manufacturer or the assessee on whom notice is served under clause (i), shall determine the amount of such credit to be disallowed (not being in excess of the

amount specified in the show cause notice) and thereon such manufacture or assessee shall pay the amount equivalent to the credit disallowed, if the credit has been utilised, or shall not utilise the credit thus disallowed".

The bare perusal of sub-rule (5) makes it clear that it is squarely applicable in cases where credit has been allowed under sub-rule (2) of Rule 56A. This sub-rule inter alia provides that the officer can serve show-cause notice within six months from the date of granting such credit to explain why same should not be disallowed or why the amount equivalent to credit should not be recovered, if the credit has been allowed on account of error, omission or mis-construction. Indeed, the show-cause notice has been served by the Superintendent, Central Excise on M/s. Bharat Bijlee Ltd. in exercise of powers conferred under sub-rule (5) of Rule 56A. Sub-rule (2) due to error, omission or mis-construction on the part of an officer. Shri Desai submitted that the limitation is attracted provided the credit was allowed on account of error, omission or mis-construction on the part of officer and there is no error, omission or mis-construction on the part of officer while granting credit. The submission is not correct. The officer granted credit under sub-rule (2) of Rule 56A to M/s. Bharat Bijlee Ltd. on mis-construction or error in classifying copper strips under Tariff Item No. 68 instead of Tariff Item No. 26A. The error or mis-construction of tariff item led to the Excise Authorities granting credit under sub-rule (2) of rule 56A to M/s. Bharat Bijlee Ltd. The error or mis-construction or error was corrected. It is therefore futile to suggest that the proforma credit granted to M/s. Bharat Bijlee Ltd. under sub-rule (2) of Rule 56A was not on account of error or mis-construction on the part of the officer. In our judgment, the limitation prescribed under sub-rule (5) of Rule 56A is clearly applicable to the facts of the case and we concur with the finding recorded by Shri K. Gopal Hegde and Shri S. D. Jha on the applicability of sub-rule (5) to the facts of the case.

8. Shri Desai then submitted that the decision of the Tribunal that the period of limitation of six months would commence to run from the date of order of refund in favour of M/s. Devidayal cannot be faulted. The Assistant Collector by order dated March 20, 1984 had ordered refund of Rs. 89,899.96 for the period commencing from August 1983 to January 16, 1984 in favour of M/s. Devidayal. Shri Desai submitted that the conclusion of Shri K. Gopal Hegde and which is approved by Shri S. D. Jha that the show cause notice dated July 11, 1984 was served within period of six months from the date of the order of Assistant Collector and therefore was within period of limitation, cannot be challenged. The submission is devoid of any merit. Sub-rule (5) of Rule 56A clearly provides the date from which limitation would commence to run and it is not permissible to overlook the clearcut provision and suggest that the period of limitation would commence to run from the date of order granting refund to M/s. Devidayal. Sub-rule (5) in unmistakable terms sets out that the proper officer may within six months from the date of "such credit", serve notice on the manufacturer to whom such credit has been allowed. The words "date of such credit" clearly refer to the credit allowed under sub-rule (2) and the show cause

notice can be served only within six months from the date of grant of such credit. In the face of such clearcut, provision, it is impossible to accede to the submission that period of limitation of six months commenced to run from the date of order directing refund to M/s. Devidayal. Shri Desai submitted that the proviso to sub-rule (2) of Rule 56A sets out that the right to recover accrues only when the duty paid by M/s. Devidayal was subsequently adjusted and resulted in payment of refund to M/s. Devidayal. It was urged that proviso to sub-rule (2) does not prescribe for limitation and it is not permissible to read such limitation by reference to sub-rule (5). It is impossible to accede to the submission. The proviso cannot be read in isolation and must be read subject to the limitation prescribed under sub-rule (5) of Rule 56.

9. Shri Setalwad submitted that the right to adjust the credit account or to make cash recovery from M/s. Bharat Bijlee Ltd. can be availed of under the proviso to sub-rule (2) of Rule 56A only when the variation in respect of payment of duty has resulted into payment of refund. Shri Setalwad submits that as the refund was not paid to M/s. Devidayal but on the other hand, it was credited to consumer Welfare Fund, the Department cannot avail of the powers conferred under proviso to sub-rule (2). It is not necessary to examine the contention in depth in view of the finding that the show-cause notice dated July 11, 1984 was barred by law of limitation prescribed under sub-rule (5) of Rule 56A of Central Excise Rules.

10. The decision on the reference in respect of the question referred is as follows :

"On the facts and in the circumstances of the case, the provisions of sub-rule (5) of Rule 56A of Central Excise Rules, 1944 are applicable to the recovery contemplated in the proviso to sub-rule (2) of rule 56A and not section 11A of the Central Excises and Salt Act, 1944."

In the circumstances of the case, there will be no order as to costs.