Collector Of Central Excise, Jaipurc vs M/S Raghuvar (India) Ltd on 11 May, 2000

Equivalent citations: AIR 2000 SUPREME COURT 2027, 2000 (5) SCC 299, 2000 AIR SCW 1990, 2000 CLC 1462 (SC), (2000) 7 JT 99 (SC), 2000 (2) LRI 1002, 2000 (7) JT 99, 2000 (4) SCALE 732, 2000 (10) SRJ 438, (2000) 118 ELT 311, (2000) 90 ECR 414, (2001) 1 GUJ LR 877, (2000) 4 SCALE 732, (2000) 4 SUPREME 243

PETITIONER:
COLLECTOR OF CENTRAL EXCISE, JAIPURC

Vs.

RESPONDENT:
M/S RAGHUVAR (INDIA) LTD.

DATE OF JUDGMENT: 11/05/2000

BENCH:
G.B.Pattanaik, Doraiswamy, S.N.Variam

JUDGMENT:

Raju, J.

This Reference under Section 35H of the Central Excises and Salt Act 1944, (hereinafter referred to as `the Act) came to be directly made at the instance of the Revenue to this Court by the Customs, Excise and Gold (Control) Appellate Tribunal, North Regional Bench, on account of conflict of views expressed in the decisions of the High Court of Gujarat reported in Torrent Laboratories Pvt. Ltd. vs Union of India [1991 (55) ELT 25], and that of the Karnataka High Court reported in Thungabhadra Steel Products Ltd. vs Supdt. of Central Excise [1991(56) ELT 340].

The factual details necessary to understand and appreciate the disputes between parties may be noticed, before adverting to the area and nature of dispute. The respondent is a holder of licence in Form L-4 and a manufacturer of vegetable products falling under Chapter 15-04 of the Central Excise Tariff, at the relevant point of time. The respondent, admittedly, filed a declaration under Rule 57G of the Central Excises Rules, 1944, (hereinafter referred to as the Rules), on 10.3.1987 for adoption of MODVAT Credit in respect of certain inputs used by them in the manufacture of vegetable products and consequently became entitled to avail of the duty credit only on and after 10.3.87. But the fact is that the respondent availed of the credit facilities in question even from 1.3.87 and, therefore, the authorities were of the view that wrong credit had been availed of to the

tune of Rs.62,710.61 on the inputs received and utilised from 1.3.87 to 10.3.87. On being pointed out though they debited a credit of Rs.20,828.93 relating to furnace oil and filter cloth, not covered under the MODVAT Scheme, the balance of Rs.41,872.68, in respect of other outputs was not debited, in spite of the communication dated 10.8.87 and reminders dated 29.12.87 and 1.2.88 for the reversal of the credit, issued by the Range Officer.

As against the communication dated 1.2.88, the respondent filed an appeal before the Collector (appeals) who by his order dated 21.12.89 set aside the same and remitted the matter to the Assistant Collector, the competent Authority, for the purposes of Rule 57G. In the meantime, the Assistant Collector, Central Excise, Jaipur, issued a show cause notice as to why the sum of Rs.41,872.68 should not be recovered from the respondent under Section 11A of the Act read with Rule 57-I of the Rules. After considering the submissions of the respondent, the Assistant Collector by his order dated 3.8.90 directed the reversal of the credit of Rs.41,872.68 wrongly taken, in their RG-23A. The said Authority held that filing of a declaration being a statutory necessity and condition precedent to avail of credit under the scheme, the respondent was not eligible to take credit for the period prior to the filing of the declaration. As a matter of fact, the respondent did not appear to have contested the case on merit but only raised a plea of limitation that notice has not been issued within a period of six months, as envisaged under Section 11A. The plea based on limitation came to be also rejected on the ground that the Range Officer issued a letter dated 10.8.87 calling upon the respondent to debit the credit wrongly taken and this was well within the six months period. This was challenged on appeal and the Collector (appeals) by his order dated 12.12.91 rejected the appeal repelling the plea of limitation. The matter was further pursued before the Tribunal by way of an appeal, and by an order dated 3.2.94, it was held that the show cause notice issued by the Assistant Collector on 5.8.88 was beyond a period of six months and that even for demanding reversal of credit already taken, in exercise of Rule 57-I, the provisions of Section 11A would get attracted necessitating the raising of the demand within six months. Thereupon, the Revenue moved the application for Reference and that is how the reference came to be made to this Court.

Mr. T.L.V. Iyer, learned senior counsel for the Revenue, while placing strong reliance upon the decision reported in 1991 (55) ELT 25 (supra) and the relevant provisions of the MODVAT Scheme, contended that the provisions of Section 11A of the Act had no application whatsoever to the case on hand and that being a special provision with self contained machinery to enforce them, reference to a general provision like Section 11A of the Act is unwarranted and consequently, the orders of the Assistant Collector and the Collector (appeals) are quite in accordance with law and did not call for any interference in the hands of the Tribunal.

Per contra, Mr. C. Harishankar, learned counsel for the respondent, placed reliance upon a catena of decisions reported in 1991 (56) ELT 340 (supra); Advani Oerlikon Ltd. vs Assistant Collector of Central Excise [1993 (63) ELT 427 (Mad. High Court)]; Fabril Gasosa vs Union of India [1997 (96) ELT 241 (Bom. High Court)]; Collr. of C. Ex., Patna vs Tata Engineering & Locomotive Co. Ltd. [1999 (111) ELT 9 (Pat. High Court)]; J.K. Spinning & Weaving Mills Ltd. & Another vs Union of India & Others [1987 (32) ELT 234 (SC)] and Govt. of India vs Citedal Fine Pharmaceuticals Madras & Others Etc. Etc. [1989 (3) SCR 465]; and vehemently contended that the impugned proceedings

involve recovery and consequently a demand of an amount not paid, Section 11A of the Act would necessarily get attracted and, therefore, the view taken by the other High Courts, different from the one taken by the Gujarat High Court, would more accord with law and, therefore, the Reference may be answered against the Revenue. It was also submitted, once the credit taken has also been utilised by adjustment against payment of excise duty on articles manufactured, the question would always be one of recovery of duty or a demand for payment. In substance the plea of the learned counsel is that the stage for reversal of the credit was over with actual adjustment of the credit taken.

In the decision reported in Torrent Laboratories Pvt. Ltd. case (supra), a Division Bench of the Gujarat High Court while repelling a plea that Rule 57-I as it stood prior to amendment should be read in conjunction with Section 11A of the Act by reading the period of limitation in Section 11A into Rule 57-I by necessary implication, observed as that the provisions of the above Rule has to be in conformity with the provisions of Section 37 and not Section 11A since Section 11A was already in existence from 17.11.80 and Rule 57-I brought into force on 1.3.86 had its own special scheme and purpose underlying the same (b) it would be over simplification to say that Rule 57-I, as it stood prior to amendment is nothing but a provision with regard to recovery of duty as it is in the case of short payment, short levy of duty or under assessment, (c) that the Modvat Scheme has its own special and distinguishing features and Rule 57- I which is part of such special scheme stands on its own unlike even provisions of proforma credit contained in Rule 56A and (d) whenever a general provision is operation and knowing well its existence, a special provision is made, it has to be presumed that the law makers did not intend the general provision to apply to the special cases culled out.

In Thungabhadra Steel Products Ltd. case (supra), a learned Single Judge of the Karnataka High Court opined that the restriction of time limit for exercise of powers under Section 11A should govern the cases envisaged under Rule 57-I and, therefore, Rule 57-I, as it stood prior to its amendment, should receive the same interpretation as it should receive after its amendment with effect from 6.10.88, by assuming that the amendment introduced to the Rule indicated the intention of the legislature to amend the Rule to bring it in conformity with the spirit and scope of Section 11A. There is no rhyme or reasonable basis for such an assumption. The Division Bench of the Madras High Court, which decided the case in Advani Oerlikon Ltd. (supra), expressed the view that not withstanding the omission in Rule 57-I prior to its amendment, to provide for the issue of a notice, the obligation to issue such notice followed from the principles of natural justice as well as Section 11A of the Act and, therefore, the period of limitation in Section 11A will be attracted to exercise the power of demand for reversing the credit wrongly availed of or utilised under Modvat Scheme. There is no justification in law to equate the notice expected to be issued to satisfy the principles of natural justice with the one ordained by the statutory provision to be issued within a stipulated time for one or the other of the purposes specified in such a provision, and that in order to suffer a limitation on the very exercise of the power. A Division Bench of the Bombay High Court also held in the decision reported in Fabril Gasosas case (supra) that the power to frame rules since was derived from the Act itself and the rules owe their existence to the Act, as long as there is any provision in the Act, even if the rules are silent on that aspect of the matter, it will have to be presumed that the provisions in the Act will govern the interpretation of the rules and, therefore, the limitation in the Act will apply to cases of demand/recovery under Rule 57-J, as it stood prior to amendment,

particularly when there is nothing in Section 11A which renders it inapplicable to cases provided under the Modvat Scheme. This reasoning overlooks the position that the rule in question was not enacted either under Section 11A or to carry out the purposes of Section 11A but actually in exercise of the rule-making power under Section 37, particularly sub-section (2) (xvia). A Division Bench of the Patna High Court, in the decision reported in 1999 (111) ELT 9 (supra), while following the view expressed by the Madras, Karnataka and Bombay High Courts disagreed with the view of the Gujarat High Court and held that when the limitation is provided for in the parent Act, it need not be provided for in the subordinate legislation, viz., the rules, and therefore the limitation prescribed in Section 11A has to be read into Rule 57-I, unamended also. It was also observed therein that the maxim `Generalia specialibus non derogant applies only to same legislative instruments and not when one instrument is an Act of Parliament and the other Rule framed by the Central Government. This differentiation has no relevance for the application of the maxim noticed above and what is relevant would be the scope, extent and area of the operation of the relevant provisions, only.

The decision of this Court in J.K. Spinning & Weaving Mills Ltd case (supra) is not directly on point to the issue raised before us though may provide a clue to resolve the issue. That was a case wherein this Court was concerned with the question as to whether in case of a retrospective amendment creating liability to duty, the levy and collection could be made dehors the period of limitation stipulated in Section 11A, particularly in the absence of any non obstante clause to override Section 11A of the Act. This case really dealt with the question of limitation relating to the levy, demand and recovery of duty in respect of deemed removal of certain goods the moment they come into existence on production/manufacture introduced with retrospective effect and, therefore, really and in substance concerned the imposition and payment of excise duty. Since the Rules considered in that was only made by virtue of the rule-making power on 20.2.82 and the same was also, by a statutory provision brought into force with retrospective effect from 28.2.1944, the demand and recovery for the retrospective period would actually partake the character of an exercise for collecting duty not levied or not paid envisaged under Section 11A of the Act. The decision in 1989 (3) SCR 465 (supra) dealt with a question as to whether the mere absence of any period of limitation enables the authority concerned to exercise its powers at any point/length of time without any time limit whatsoever and it was held that even in the absence of any specific period of limitation, powers conferred have to be exercised and action thereof taken within a reasonable period. This decision cannot be of any help to the respondent in this case because, neither is there any challenge to Rule 57-I on such ground of absence of limitation nor the period involved could be held to be so unreasonable on the facts and circumstances of the case where factually an earlier notice has been issued within even by that time by the Department though not by the proper officer and this only necessitated a fresh action, the validity of which is sought to be challenged and despite all these, no unreasonable delay could at all be said to have resulted.

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

> Section 11A. Recovery of duties not levied or not paid or short-levied or short-paid or erroneously refunded.

- (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:

Provided that where any duty of excise has not been levied or paid or has been short-levied or short paid or erroneously refunded by reason of fraud, collusion or any wilful mis-statement or suppression of facts, or contravention of any of the provisions of this Act or of the rules made thereunder with intent to evade payment of duty, by such person or his agent, the provisions of this sub-section shall have effect, as if, for the words six months, the words five years were substituted.

Explanation.- Where the service of the notice is stayed by an order of a court, the period of such stay shall be excluded in computing the aforesaid period of six months or five years, as the case may be.

Rule 57-I, as it stood prior to amendment on 6.10.88, is as follows: Rule 57-I - Recovery of credit wrongly availed of or utilised in an irregular manner.

(1) If the credit of duty paid on inputs has been taken wrongly, the credit so taken may be disallowed by the proper officer and the amount so disallowed shall be adjusted in the credit account or the amount-current maintained by the manufacturer or if such adjustments are not possible for any reason, by cash recovery from the manufacturer of the said goods:

Provided that such manufacturer may make such adjustments on his own in the credit account or the account-current maintained by him under intimation to the proper officer.

(2) If any inputs in respect of which credit has been taken are not fully accounted for as having been disposed of in the manner specified in this section the manufacturer shall upon a written demand being made by the Assistant Collector of Central excise pay the duty leviable on such inputs within 10 days of the notice of demand.

After amendments effected on 6.10.88, the relevant portion of the Rule stands as follows:

Rule 57-I - Recovery of credit wrongly availed of or utilised in an irregular manner:

(1) (i) Where credit of duty paid on inputs has been taken on account of an error, omission or misconstruction, on the part of an officer or a manufacturer, or an assessee, the proper officer may, within six months from the date of such credit, serve notice on the manufacturer or the assessee who has taken such credit requiring him

to show cause why he should not be disallowed to such credit and where the credit has already been utilised, why the amount equivalent to such credit should not be recovered from him.

Provided that where such credit has been taken on account of wilful mis-statement, collusion or suppression of facts on the part of a manufacturer or an assessee, the provisions of this clause shall have effect as if for the words six months, the words five years were substituted.

(ii) The proper officer, 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 thereupon such manufacturer 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.

(2) If any inputs in respect of which credit has been taken are not fully accounted for as having been disposed of in the manner specified in this section the manufacturer shall upon a written demand being made by the Assistant Collector of Central Excise pay the duty leviable on such inputs within 10 days of the notice of demand.

The fact that the respondent-manufacturer did file the mandatorily required declaration under Rule 57G of the Rules only on 10.3.87 and not before and that, therefore, the respondent was not entitled to avail of the benefits under Modvat Scheme for the period between 1.3.87 and 10.3.87 is not at all in dispute before us. The only question is as to how to set right the wrong availment of duty made by the respondent and whether prior to 6.10.88 as Rule 57-I existed then, it has to be set right only by having recourse to Section 11A and by issue of any notice within a period of six months as envisaged under Section 11A of the Act. Similarly, there is no challenge before us that in the absence of any specific period of limitation provided for in Rule 57-I, the Rule is arbitrary or unconstitutional, on that account.

Any law or stipulation prescribing a period of limitation to do or not to do a thing after the expiry of period so stipulated has the consequence of creation and destruction of rights and, therefore, must be specifically enacted and prescribed therefor. It is not for the Courts to import any specific period of limitation by implication, where there is really none, though Courts may always hold when any such exercise of power had the effect of disturbing rights of a citizen that it should be exercised within a reasonable period. Section 11A is not an omnibus provision which provides any period of limitation for all or any and every kind of action to be taken under the Act or the Rules but will be attracted only to cases where any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded. The section also provides for an extended period on certain contingencies and situations. The situation on hand and the one which has to be dealt with under Rule 57-I, as it stood unamended, does not fall under any one of those contingencies provided for in Section 11A of the Act. Part AA of the Rules in which Rule 57-I is found included provides a special scheme for earning credit and adjustment of duty paid on excisable goods used as inputs in the manufacture of what is referred to as `final product, and thereby enable the manufacturer to utilise the credit so allowed towards payment of duty of excise leviable on the final products, in the manner

and subject to the terms and conditions stipulated therein. The manufacturer, in this case while removing the final product manufactured has adjusted against payment of excise duty on such final product a part or portion of the credit earned by him under the special scheme and what is sought to be really and in substance done is to inform the manufacturer that the adjustment he purported to have made was with an amount not legitimately or factually earned by or due to him. For this purpose, the irregularity and impropriety committed by the manufacturer in maintaining the accounts and the error in the calculation of the credit said to have been earned by him is pointed out, and the manufacturer is only directed to reverse the credit so wrongly and undeservedly made by readjustment and if need be, to recover the amount equivalent to such credit wrongly availed of and disallowed by the proper officer. The recovery of credit availed of and utilised in utter breach of the faith and mutual trust and confidence which is the raison detre for the proper and successful working of the Modvat scheme and that too in gross violation of the mandatory requirements necessarily to be fulfilled before ever claiming or availing of such benefits cannot be said to be the same as the demand for payment to be made under Section 11A of the Act of any excise duty not levied or paid or has been short-levied or short-paid. They fall into two distinct and different categories altogether with basic as well as substantial differences to distinguish them from each other. As a matter of fact, Rule 57-I envisages disallowance of the credit and consequential adjustment in the credit account or the amount-current maintained by the manufacturer and if only any such adjustments are not possible proceed to recover the amount equivalent to the credit illegally availed of. Consequently, the situation postulated to be dealt with under Rule 57-I cannot be said to involve a case of manufacture and removal of excisable goods without subjecting such goods to levy or payment of the various nature and category enumerated in Section 11A. Hence, Section 11A of the Act on its own terms will have no application or operation to cases covered under Rule 57-I of the Rules.

The above conclusion of ours is itself sufficient to answer the question in favour of the Revenue and against the manufacturer, even dehors the applicability or otherwise of the principle of construction - Generalia specialibus non derogant, since they do not operate on the same field or cover the same area, to be reconciled in order to avert any clash or inconsistency. That apart, even if it is to be assumed that they relate to one and the same nature of demand from the manufacturer of any amount due from him to the State, the provisions contained in Section 11A are general in nature and application and the Modvat scheme being a specific and special beneficial scheme, with self-contained procedure, manner and method for its implementation, providing for its own remedies to undo any mischief committed by the manufacturer in abuse thereof, the provisions of the said special scheme alone will govern such a situation and there is no scope for reading the stipulations contained in a general provision like Section 11A into the provision of the rules in question which alone will govern in its entirety the enforcement of the Modvat Scheme. The question as to the relative nature of the provisions general or special has to be determined, as observed earlier, with reference to the area and extent of their application either generally in all circumstances or specially in particular situations and not on the ground that one is a mere provision in the Act and the other is a provision in the Rule. We are not also concerned in this case with any challenge to the inconsistency of a rule with any statutory provision in the Act.

On going through very carefully the decisions of the Gujarat High Court on the one hand and those of the other High Courts noticed above, we are of the view that the Gujarat view is more reasonable and quite accord with the purpose, object, aim and successful implementation of the Modvat Scheme and the fallacy in the line of reasoning adopted by the other decisions lie in their assumption that the period of limitation prescribed in Section 11A of the Act has universal application to govern every act or course of action envisaged under the Act and the Rules, wherever there is no limitation stipulated to the contra. The restricted operation of the provisions contained in Section 11A is found inherently in-built due to the specification of the various categories of cases enumerated in the provision itself to be dealt with. The Scheme of Modvat, introduced for the first rime in 1986, did not consider it necessary either to have its own period of limitation in-built in the Rules nor has the enforcement of the scheme been made subject to Section 11A of the Act. The fact that even when an amendment was made on 6.10.88, it was prospective in nature and the amendment was not given any retrospective effect indicates the intention unmistakably that the subsequent amendment should have no impact on the construction to be placed on the provisions as it existed before such amendment. The further fact that the amendments to Rule 57-I had its own pattern of limitation and method of computation of such limitation also would militate against the manner of construction adopted by the decisions of the High Courts other than that of the Gujarat High Court.

The further submission of the learned counsel for the respondent that whatever may be right or otherwise of the proper officer to order for reversal of the credit earned before it was actually utilised or adjusted, on and after actual utilisation by adjustment, at any rate no question of the reversal of the credit would arise, proceeds upon a misconception of the fundamentals underlying the working of the Modvat Scheme and the powers of the Proper Officer to set right irregularities, if any, committed by the Manufacturer in availing of the same. The utilisation and adjustment depends upon proper and valid earning of the credit strictly in accordance with the terms and conditions of the Scheme and while making unilateral credit in the course of maintenance of the accounts in the prescribed form and manner, a gross illegality has been committed in crediting something to which a manufacturer was not legitimately entitled to, not only the Proper Officer has the right, power and authority to direct reversal of credit but on such direction, the extent and quantum of credit and consequent adjustment also would get necessarily and automatically readjusted making it obligatory under the Scheme for the manufacturer, as long as the credit account or the amount-current is maintained by the manufacturer under the Scheme, to reverse the credit and set right the accounts. Lawful earning of a credit is a sine qua non for proper and valid utilisation of the same and once the credit side gets diminished the very basis of adjustment disappears ipso facto. By adopting a defiant attitude in the matter, the manufacturer cannot take advantage of his misdeed to gain an advantage by contending that the action to be taken involve only a recovery of duty and, therefore, should be within the period of limitation provided under Section 11A of the Act. Even when the recovery is ordered, as a last resort, as envisaged under Rule 57-I, as observed earlier, it is only recovery of the money value equivalent to the unlawful credit availed of and adjusted under the Scheme and not the demand or recovery of any duty as such.

For all the reasons stated above, we are of the view that the provisions of Section 11A of the Central Excises and Salt Act, 1944, would have no application to any action taken under Rule 57-I of the

Central Excises and Salt Rules, 1944, prior to its amendment on 6.10.88, and Rule 57-I of the Rules are not in any manner subject to Section 11A of the Act. Hence, we approve of the view taken by the Gujarat High Court in the decision reported in 1991 (55) ELT 25 (supra) and further hold that the contra view expressed by the Madras, Karnataka, Bombay and Patna High Courts in the decisions noticed supra, does not lay down the correct position of law. The Reference is answered accordingly. No costs.