*** IN THE HIGH COURT OF DELHI AT NEW DELHI**

% Judgment reserved on: 13th October, 2015
Judgment delivered on: 16th February, 2016

\+ **WP(C) 2885/2015 & CM No.5176/2015 (stay)**

MANGALAM ORGANICS LIMITED .... Petitioner

versus

UNION OF INDIA …. Respondent

Advocates who appeared in this case:

For the Petitioner : Mr Prashant Bhushan and Mr Rohit Kumar Singh, Advocates.
For the Respondent : Mr Kirtiman Singh and Ms Prerna Shah Deo, Advocate.

CORAM:-
HON'BLE MR JUSTICE BADAR DURREZ AHMED
HON'BLE MR JUSTICE SANJEEV SACHDEVA

JUDGEMENT

SANJEEV SACHDEVA, J

1. The petitioner has filed the present petition seeking quashing of the decision of the respondent communicated by letter dated 30.09.2014 to the effect that Notification under Section 11C of the Central Excise Act, 1944 (hereinafter referred to as 'the Act') cannot be issued for extending the benefit of not requiring to pay the Central Excise Duty to the units manufacturing rosin and turpentine without aid of power, except for the purpose of using electricity to pump, for

lifting up water for condensation to the overhead tank, for the period from 27.05.1994 to 28.02.2006 and for a writ of mandamus for directing the respondent to issue a Notification under Section 11C of the Act extending the benefit of not requiring the Central Excise Duty for the units manufacturing rosin and turpentine without the aid of power, except for the purpose of using electricity to pump, for lifting up water to overhead tanks; for the period from 27.05.1994 to 28.02.2006.

2. As per the petitioner, there are two methods of manufacturing rosin and turpentine from Oleo Pine Resin. One method is the vacuum chemical treatment process which uses power in almost all the processes and the second method is the 'Bhatti process' which is entirely manual except for the use of power to operate the pump for lifting up water to the storage tank for the purpose of condensation.

3. It is contended that the number of units adopting the first method is around 10 whereas majority of the units (i.e., about 300) are using the latter method and confining the use of power only for lifting of water to overhead tanks for condensation of turpentine vapours collected as liquid turpentine in tanks.

4. It is contended that rosin and turpentine oil manufactured without the aid of power were exempted from Central Excise Duty

vide Notification No.179/77-CE dated 18.06.1977. The Tax Research Unit, Department of Revenue, Ministry of Finance, Government of India vide its letter dated 16.01.1978, in the context of Notification No.179/77-CE had clarified that if use of power is limited to drawing water into the cooling tank through which turpentine vapours condensation coils pass, the manufacture could not be said to be with the aid of power and, therefore, all units using the Bhatti process became entitled for exemption for excise duty.

5. The Notification dated 18.06.1977 was rescinded by Notification No.180/86 – CE dated 01.03.1986 and superseded by another Notification No.167/86 – CE dated 01.03.1986 under which units manufacturing rosin and turpentine without use of power continued to be exempted.

6. By circular No.38/38/94 – **CX** dated 27.05.1994, all circulars/instructions/tariff advises issued prior to March 1986 were withdrawn. It is contended by the petitioner that despite withdrawal of the earlier circulars/instructions/tariff advises, all manufacturers using Bhatti process, including the respondents, remained under the impression that the clarification of 1978 was still in operation. As no excise duty was levied on any of the Bhatti units till 2003/2004, when for the first time show cause notices were issued to two units one being the petitioner's unit.

7. It is contended that thereafter by Notification No.21/2006 – CE dated 01.03.2006, the Notification dated 01.03.1986 granting exemption from excise duty to those units manufacturing without the aid of power was also rescinded.

8. The dispute pertains to the period from 27.05.1994 to 28.02.2006. It may be noted that by circular dated 27.05.1994, all previous circulars issued prior to March 1986 had been withdrawn and by Notification dated 01.03.2006, the exemption was completely withdrawn.

9. As per the petitioner, the petitioner as well as the respondents were under the impression that no excise duty had to be levied on all Bhatti units during the said period. Various show cause notices had been issued to the petitioner demanding duty on the clearances made during the said period.

10. On representations made by the trade organizations, survey and resurvey were conducted in respect of the contentions of the manufacturer organizations that excise duty should not be levied during the said period. Consequent upon the survey and resurvey, the Finance Ministry by its letter dated 30.09.2014 communicated to the Excise Commissioner that requests of All India Manufacturers Organization for reconsideration of the issue and to extend the benefit

of Section 11C had been examined and the case was not found fit for issuance of 11C Notification. In this premise, the petitioners have filed the present petition seeking quashing of the decision communicated by the letter dated 30.09.2014 that the case has not been found fit for issuance of Notification under Section 11C and, further, for a mandamus for directing the respondents to issue the Notification under Section 11C of the Central Excise Act, 1944 for extending the benefits of not recovering the Central Excise Duty from the units manufacturing rosin and turpentine without the aid of power, except for the purpose of using electricity to pump water to overhead tank, for the period from 27.05.1994 to 28.02.2006.

11. Section 11C of the Act reads as under:-

> "11C. Power not to recover duty of excise not levied or short-levied as a result of general practice. –
>
> (1) Notwithstanding anything contained in this Act, if the Central Government is satisfied-
>
> (a) that a practice was, or is, generally prevalent regarding levy of duty of excise (including non-levy thereof) on any excisable goods; and
>
> (b) that such goods were, or are, liable-

(i) to duty of excise, in cases where according to the said practice the duty was not, or is not being, levied, or

(ii) to a higher amount of duty of excise than what was, or is being, levied, according to the said practice, then, the Central Government may, by notification in the Official Gazette, direct that the whole of the duty of excise payable on such goods, or, as the case may be, the duty of excise in excess of that payable on such goods, but for the said practice, shall not be required to be paid in respect of the goods on which the duty of excise was not, or is not being, levied, or was, or is being, short- levied, in accordance with the said practice.]

(2) Where any notification under sub- section (1) in respect of any goods has been issued, the whole of the duty of excise paid on such goods or, as the case may be, the duty of excise paid in excess of that payable on such goods, which would not have been paid if the said notification had been in force, shall be dealt with in accordance with the provisions of sub- section (2) of section 11B:

Provided that the person claiming the refund of such duty or, as the case may be, excess duty, makes an application in this behalf to the Assistant Collector of Central Excise, in the form referred to in sub-section (1) of section 11B, before the expiry

> of six months from the date of issue of the said notification."

12. A reading of Section 11C shows that the Central Government is empowered not to recover duty of excise where a practice was generally prevalent regarding levy of duty including non-levy thereof and where according to the said practice the duty was not levied or is not being levied or short levied. However, it is only in a case where the Central Government is satisfied that a practice was, or is, generally prevalent that the Central Government by notification may direct that whole of the duty of excise payable on such goods, or, as the case may be, the duty of excise in excess of that payable on such goods, but for such practice, shall not be required to be paid in respect of the goods on which the duty of excise is not or was not being levied or was, or is being, short levied in accordance with the said practice.

13. We may note that the petitioners in the writ petition themselves have mentioned that show cause notices were issued to the petitioners as well as to one M/s Gurukripa Resins Pvt. Ltd., Nagpur.

14. M/s Gurukripa Resins Pvt. Ltd. had challenged the show cause notice but the Deputy Commissioner as well as the Commissioner (appeals) held against M/s Gurukripa Resins Pvt. Ltd. The Custom Excise & Service Tax Appellate Tribunal (hereinafter referred to as

the Tribunal) by its judgment dated 14.01.2004 allowed the appeal by M/s Gurukripa Resins Pvt. Ltd..

15. The Tribunal held that the clarification letter dated 16.01.1978 was binding on the Department and on Commissioners (appeals). It further held that in the process of manufacture no power is used and the fact that water is pumped up to the overhead tanks does not amount to manufacture with the aid of power, hence, M/s Gurukripa Resins Pvt. Ltd. was entitled to the benefit of the exemption.

16. The petitioners likewise had challenged the show cause notices issued to the petitioners. The Commissioner, Central Excise, Raigad following the judgment of the Tribunal in M/s Gurukripa Resins Pvt. Ltd. held that it would be incorrect to hold that the circular dated 27.05.1994 had withdrawn the clarification issued vide letter dated 16.01.1978 and, therefore, the clarification continue to hold. The Commissioner, Central Excise, Raigad, accordingly, directed the dropping of the proceedings of the show cause notices issued to the petitioners. The Department filed an appeal against the order of the Commissioner dropping of show cause notices in the case of the petitioner before the Tribunal.

17. Meanwhile, as the Department had filed an appeal against the decision of the Tribunal in M/s Gurukripa Resins Pvt. Ltd. before the

Supreme Court, the Tribunal kept the appeal of the Department in the petitioner's case pending to await the decision of the Supreme Court in M/s Gurukripa Resins Pvt. Ltd..

18. The Supreme Court by its judgment dated 11.07.2011 in the case of ***M/s Gurukripa Resins Pvt. Ltd., (2011) 13 SCC 180)***, held that the process of lifting of water into cooling tank was integrally connected with the manufacture of its goods and, hence, if power is used for lifting of water, the exemption would not be available. The Supreme Court further held that the circular of 1978 was not applicable since the same stood withdrawn in 1994.

19. In view of the decision of the Supreme Court, the Tribunal upheld the show cause notices in the case of the Petitioner, however, held that the Department could not go beyond the limitation period of one year to recover the excise duty. Both the Department as well as the petitioners have challenged the said decision of the Tribunal before the High Court of Judicature at Bombay and it is submitted that the appeals are pending.

20. The above narration of facts clearly establish that the Supreme Court in identical circumstances in the case of M/s Gurukripa Resins Pvt. Ltd. has already held that the benefit of Notification would not be available. Accordingly, the petitioner cannot claim the said relief in

these proceedings. The categorical finding in the case of M/s Gurukripa Resins Pvt. Ltd. (supra) is that the use of pump for lifting water would amount to manufacturing with the aid of power and the clarification of 1978 was deemed to have been withdrawn from 27.05.1994 and, thus, the units using pump for lifting water would not be entitled to exemption from the period 27.05.1994 to 28.02.2006.

21. In view of the findings returned by the Supreme Court in the case of M/s Gurukripa Resins Pvt. Ltd., which manufacturing unit was admittedly identically situated as that of the petitioner's unit, the petitioner cannot, thus, seek the benefit of quashing of the decision communicated by the Ministry of Finance by letter dated 30.09.2014.

22. Furthermore, as is evident from reading of Section 11C of the Act, the said Section grants a discretionary power to the Government to issue or not to issue such a notification. The said provision does not mandate the Government to issue such a notification. The said provision only empowers the Government to issue such a notification. It is not obligatory on the Government to issue such a notification in all circumstances. In facts and circumstances, the Government may or may not issue such a notification even though the Government may be satisfied that a notification is required to be issued.

23. It is stated in the counter affidavit that the policy of the Government is not to issue a notification under Section 11C when it benefits only a few assessees. The policy, as stated, is that when a large section of trade is affected and relief is proposed to be given, notification under Section 11C is issued. When only a few assessees would benefit then the notification is not issued. Discretion of the Government is justifiably used only when larger public interest is involved otherwise the decision would appear to favour a selected few. It is further contended in the counter affidavit that issuance of such a notification would lead to overriding the decision of the Supreme Court in M/s Gurukripa Resins Pvt. Ltd., which was one of the parties involved.

24. The decision of the Central Government has been taken on the basis of the survey and resurvey conduced. It is contended that a notification, if issued under Section 11C, would benefit only two units, the petitioner and M/s Gurukripa Resins Pvt. Ltd.

25. As noticed above, the power under Section 11C is discretionary and it is not mandatory for the Government to issue a notification under Section 11C under all circumstances. As emerges from the counter affidavit, the policy of the Government is to issue such a notification only if it benefits a large section of the trade and not if it benefits only a few assessees. As per the respondent, only two

manufacturers would be affected by such a notification. The Government has taken a decision not to issue such a notification as it would benefit only two assessees and would also amount to overriding the decision of the Supreme Court in the case of one of such assessees. We do not find any fault with such a view and decision of the Government. We are further of view that discretion is granted to the Government to issue or not to issue such a notification and the discretion has been exercised after conducting survey and resurvey and on a justifiable ground, the said decision, in our view, does not require any interference.

26. In view of the above, the decision of the Government not to issue a notification under Section 11C cannot be faulted and, further, no mandamus can be issued to the respondent to issue such a notification.

27. In view of the above, we find no merit in the petition. The petition is accordingly dismissed leaving the parties to bear their own costs.

SANJEEV SACHDEVA, J

BADAR DURREZ AHMED, J

February 16, 2016
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