CASE NO.:
Appeal (civil) 5866 of 1999

PETITIONER:
Sidheshwar Sahakari Sakhar Karkhana Ltd.

RESPONDENT:
Union of India and Ors.

DATE OF JUDGMENT: 23/02/2005

BENCH:
Ruma Pal & Arijit Pasayat & C.K. Thakker

JUDGMENT:
JUDGMENT

Thakker, J.

The present appeal is filed against the action of the respondents of not granting rebate in excise duty in accordance with the Notification No 132/82 issued by the Government of India on April 21, 1982. The case of the appellant is that it is a co-operative society registered under the Maharashtra Co-operative Societies Act, 1960. It is situated at Raghunath Nagar, Taluka Gangapur, District Aurangabad. The appellant is carrying on business of manufacturing sugar falling under Tariff Item No. 1(1) of the First Schedule (then stood) to the Central Excise and Salt Act, 1944, (hereinafter referred to as "the Act"). It is having a valid licence under the Act and the Central Excise Rules, 1944 (hereinafter referred to as "the Rules"). The Directors of the appellant are Indian nationals and citizens. According to the appellant-society, in exercise of the power conferred by sub-rule (i) of Rule 8 of the Rules read with Clause 50 (4) of the Finance Bill, 1982, the Central Government granted exemption to sugar from excise duty in certain cases. For that purpose, Notification No. 132/82 was issued on April 21, 1982 as "Incentive Scheme" for excess production of sugar in order to encourage sugar manufacturers and to produce optimum quantity of sugar during "lean crushing period" from May, 1982 to September, 1982. According to the appellant, under the said notification, the appellant-society was entitled to rebate in excise duty. The appellant, therefore, submitted a rebate claim for Rs. 19,96,516.17 ps. for the excess production of 66,717.33 quintals of sugar produced during 1st May, 1982 to 30th September, 1982. According to the appellant, it had produced 33,029 quintals of sugar in the year 1978-79. There was ‘nil’ production for two years thereafter, i.e. 1979-80 and 1980-81. As per the notification, average production of three years had to be taken into account for claiming benefit of excess quantity of sugar. Since sugar production of the appellant-society was 33,029 quintals in three years of 1978-79, 1979-80 and 1980-81, the average production was 11,009.67 quintals per year. Sugar production of the appellant-society for the year 1981-82 (from 1st May 1982 to 30th September, 1982) was 77,727 quintals. Hence, there was excess production of 66,717.33 quintals and on that basis, the appellant-society was entitled to rebate in excise duty.

The respondent-authority, however, considering the average production of the appellant-society as 33,029 quintals of sugar, allowed rebate claim on the remaining production, namely, 44,698.00 quintals and granted provisional rebate of Rs. 11,10,820.62 ps. The said action was illegal, contrary to law and not in consonance with notification. The appellant, therefore, submitted a claim on July 28, 1982 vide a communication to the Superintendent, Central Excise, Range II (Rural), Aurangabad with necessary details claiming for Rs. 19,96,516.17 ps. The Office of the Assistant Collector of Central Excise and Customs, Aurangabad, on the other hand, issued a notice dated June 30, 1983 to the appellant-society to show cause why the claim put forward by the appellant-society for Rs. 19,96,516.17 ps.

should not be restricted to the extent of Rs. 11,10,820.62 ps. by treating the provisional rebate as final. In the show cause notice, it was stated that the production of sugar by the appellant-society was 66,717.33 quintals for the year 1981-82. There was 'nil' production during 1979-80 and 1980-81. The appellant-society had actually produced 33,029 quintals sugar during May, 1979 to July, 1979. As per para 3 of Notification No. 132/82, the period or periods during which the factory had not produced sugar during the corresponding period of last three sugar years was required to be ignored while arriving at the average. Accordingly, the sugar quantity of 33,029 quintals could not be divided by three and considering the production of sugar during May, 1982 to September, 1982 as 77,727 quintals and deducting 33,029 quintals therefrom, the appellant was entitled to rebate on sugar production of 44,698 quintals. Provisional rebate of Rs. 11,10,820.62 ps. was, therefore, required to be made final.

The appellant-society, submitted its reply on July 26, 1983 inter alia stating therein that the refund claim made by the society for Rs. 19,96,516.17 ps. was proper and in consonance with the policy decision of the Government reflected in notification No. 132/82. It was stated by the society that interpretation by the Department of Clause 3 of the notification was totally erroneous, misconceived and unwarranted. The term 'average' was defined in the notification and average of three years as per the calculation of the society was 11,009.67 quintals, on that basis the claim of refund was made and the appellant-society was entitled to rebate.

The Assistant Collector of Central Excise and Customs, Aurangabad vide his order dated September 9, 1983 negatived the contention of the society holding that the wordings of Clause 3 of Notification No. 132/82 were "quite clear". The said clause specified as to how average production of sugar was to be worked out. He also observed that the said clause had to be read with Explanation (a) which defined "average production". Reading both together, it was clear that the production of sugar in each of the corresponding periods was necessary. Since, there was no production during two years, they were required to be ignored and the rebate claim of Rs. 11,009.67 ps. was legal and in accordance with the notification. He, therefore, rejected the application of the appellant-society.

Being aggrieved by the order in original, the appellant-society preferred an appeal before the Collector of Central Excise (Appeals), Bombay. The appellate authority observed that the Assistant Collector committed an error of law in interpreting the notification. According to the Collector, 33,029 quintals sugar were required to be averaged by dividing into three years and the average production of the appellant-society was to be counted. As the appellant calculated the excess production of sugar on correct basis and claimed rebate on such average production, the claim was well-founded and ought to have been accepted. He, therefore, allowed the appeal by setting aside the order of the Assistant Collector.

Against the said order, the Collector of Central Excise approached the Customs, Excise and Gold (Control) Appellate Tribunal, New Delhi ("CEGAT" for short). Before the CEGAT, it was argued by the Revenue that while working out average production, 'nil' production of two years, i.e. 1979-80 and 1980-81 was required to be ignored and the average production which was the production for one year of 1978-79 of 33,029 quintals was to be treated as average production and on that basis alone, the appellant-society was entitled to rebate claim in respect of excess production of sugar in the year 1981-82. The action of the Revenue to grant rebate on 44,698 quintals was, therefore, legal and proper. The finding recorded by the Assistant Collector could not have been reversed by the appellate authority and the appeal deserved to be allowed by setting aside the order of the Collector and restoring the order in original passed by the Assistant Collector.

The CEGAT considered the relevant clauses of the notification. It also considered the case law cited and upheld the contention of the Revenue that while calculating average production, the period in which there was 'nil'

production was required to be ignored and as rebate claim was granted by the authorities on proper consideration, the action of the Revenue could not be held illegal. It accordingly accepted the arguments of the Revenue and allowed the appeal.

Dissatisfied with the order of CEGAT, the appellant-society moved an application under Section 35G of the Act (as it then stood) to draw up a statement of case and refer it to High Court. The CEGAT, however, by an order dated August 26, 1986 dismissed the application as not maintainable inasmuch as, according to the CEGAT, such reference could be made for determination of any question having a relation to "the rate of duty of excise" or to "the value of goods for purposes of assessment". Since neither the question related to "the rate of duty of excise" nor to "the value of goods for purposes of assessment", the reference was not maintainable.

In the circumstances, the appellant filed a writ petition in the High Court of Bombay (Aurangabad Bench) by invoking Articles 226 and 227 of the Constitution. The Division Bench of the High Court by an order dated April 29, 1999 dismissed the petition and refused to refer the question to High Court under Section 35G of the Act observing that "writ petition was not maintainable". The Court proceeded to observe that in any event, it was not inclined to interfere with the order on merits under Article 226 of the Constitution as no prima facie question of law had arisen. It is this order which is under challenge in the present appeal.

We have heard the learned counsel for the parties.

The learned counsel for the appellant-society contended that the High Court was not right in dismissing the petition summarily. He submitted that when reference was not maintainable under Section 35G of the Act (as it then stood) and CEGAT dismissed the application as ‘not maintainable’, it was obligatory on the High Court to have entered into the merits of the matter and decided it. On merits, the counsel submitted that the action of the respondents was wholly illegal and inconsistent with the Notification No. 132/82. The view taken by the Revenue that ‘nil’ production for two years was required to be ignored was unwarranted and against several decisions on the point. The counsel also urged that the authorities totally overlooked the underlying object of issuance of the notification and in not extending the benefit to which the appellant-society was entitled. He, therefore, submitted that the appeal deserves to be allowed by interfering with the action of the Revenue and by directing it to grant benefit of the notification to the appellant-society.

Learned counsel for the respondents, on the other hand, supported the action of the authorities. He submitted that the order in original was proper and it was wrongly set aside by the appellate authority. CEGAT, therefore, allowed the appeal of the Revenue and no interference is called for. He also submitted that keeping in view the object behind more production of sugar, a notification had been issued. If the interpretation sought to be suggested by the appellant-society is accepted, the said object would be frustrated rather than fulfilled. He, therefore, submitted that the appellant has not made out any case for interference with the order of CEGAT and the appeal should be dismissed.

Having heard the learned counsel for the parties, in our opinion, no interference is called for.

So far as the first contention of the learned counsel for the appellant is concerned, he is right in contending that when the appellant was aggrieved by the order passed by the CEGAT, a remedy must be available to the society which was aggrieved by that order. Since Section 35G of the Act, as it then stood, did not apply, the CEGAT was right in dismissing the application. Once the application was dismissed by the CEGAT not on merits, but on the ground that it was not maintainable and no reference could be made to the

High Court in the light of the provisions then in force, the appellant-society was justified in invoking the writ jurisdiction of the High Court under Article 226/227 of the Constitution. The learned counsel for the appellant, therefore, was right that the High Court could not have disposed of the petition on the ground that it was "not maintainable". But it cannot be ignored that the High Court has also observed that it was not inclined to interfere even on merits as prima facie no question of law had arisen. The High Court, hence, dismissed the petition, discharged rule and vacated interim relief. We, therefore, thought it proper to consider the claim of the appellant-society on merits.

The Notification No. 132/82 on which reliance has been placed is on record. The relevant part of Notification reads thus:-

TO BE PUBLISHED IN PART II, SECTION 3, SUB SECTION (i) OF THE GAZETTE OF INDIA EXTRAORDINARY, DATED THE 21ST APRIL, 1982/1 VAISAKHA 1904 (SAKA).

GOVERNMENT OF INDIA

MINISTRY OF FINANCE

(DEPARTMENT OF REVENUE)

New Delhi, the 21st April, 1982

I Vaisakha, 1904 (Saka)

NOTIFICATION

(No. 132/82 - CENTRAL EXCISE)

G.S.R. (E) In exercise of the powers conferred by sub-rule (i) of rule 8 of the Central Excise Rules 1944, read with sub-clause (4) of clause 50 of the Finance Bill, 1982, which clause has, by virtue of the declaration made in the said Bill under the Provisional Collection of Taxes, Act, 1931 (16 of 1931), the force of Law, the Central Government hereby exempts sugar, described in column (1) of the Table below and falling under sub-item (1) of Item No. 1 of the First Schedule to the Central Excises and Salt Act, 1944 (1 of 1944), from so much of the duty of excise and special duty of excise leviable there on as is specified in the corresponding entry in columns (2) and (3) of the said Table :

TABLE

Description of Sugar	Duty of excise and special duty of excise.	
	Free sale Sugar	Levy sale Sugar.
(1)	(2)	(3)
	(Rupees per quintal)	
Sugar produced in a factory during the period commencing on the 1st day of May, 1982 and ending with the 30th day of September, 1982, which is in excess of the average production of the corresponding period of the preceding three sugar years.	40.0	24.50

Provided that the amount of exemption specified in column (2) or column (3) of the said Table shall not exceed the amount of duty of excise and special duty of excise payable on free sale sugar or Levy sugar, as the case may be :

EXPLANATION In this Notification -

(a) "Average production" in relation to sugar production in the period in a factory, means the average production during the corresponding period of each of the preceding three sugar years;

(b) "free sale sugar" means sugar other than levy sugar;

(c) "levy sugar" means sugar required by the Central Government to be sold under an order made under clause (f) of sub-section (2) of Section 3 of the Essential Commodities Act, 1955 (10 of 1955);

(d) "Sugar Year" means the period of twelve months commencing on the 1st day of October and ending with the 30th day of September next following.

(2) xxxxxxxxx xxxxxxxxxx xxxxxxxxx xxxxxxx

(3) Where during the period mentioned in column (1) of the said Table, production in any of the preceding three sugar years was nil, the average production shall be determined as under;

The average shall be the average of the corresponding periods among the preceding three sugar years in which the factory had actually produced and the period or periods in which it did not produce during the said three sugar years shall be ignored while arriving at the average.

(4) Nothing (contained in this notification) shall apply to a sugar factory where production during the period mentioned in column (1) of the said Table, during all the preceding three sugar years was nil.

Sd/-

(R. Deb)

Under Secretary to the Govt. of India

The notification was subsequently amended by another Notification No. 193/82 of June 11, 1982 and paragraph 4 was substituted. The substituted portion reads as under;

"4. Where production during May to September in all preceding three sugar years was nil, the entire production during May to September, 1982, will be entitled to the exemption under this notification."

The question for our consideration is-whether the action of the authorities in ignoring ‘nil’ production for two years in 1979-80 and 1980-81 by the appellant-society and granting rebate claim on the basis of average production of sugar of 33,029 quintals for the year 1978-79 was legal and in accordance with Clause 3 of the Notification No. 132/82?

The contention of the appellant-society is that while deciding average, production of three years, i.e. 1978-79, 1979-80 and 1980-81 must be considered and production of 33,029 quintals of sugar in the year 1978-79 must be divided by three years by holding that the average production of sugar by the appellant-society was 11,009.67 quintals per year.

We are unable to uphold the contention. To us, the language used in the notification and in particular Clause 3 thereof is clear, explicit and

unambiguous. It unequivocally states that the average shall be the average of corresponding periods among the preceding three years in which the factory had actually produced and the period or periods in which it did not produce during the said three years shall be ignored. The intention of issuance of the notification by the authority is thus abundantly clear and it is that if the factory does not produce sugar during the entire year or years, the said period should be ignored. It is, therefore, not open to the appellant-society to divide sugar production of one year alone, i.e. 1978-79 as of three years and claim rebate for the year 1981-82 on that basis.

The learned counsel no doubt invited the attention of the Court to two decisions on the point. In Etikoppaka Co-operative Agricultural Society Ltd. Represented by K.I.N. Raju and Ors. v. Union of India and Ors., (1979) 4 ELT J 533, rebate of excise duty on excess production was claimed by the society on the basis of a similar notification issued by the Government. It was contended that the period during which the factory did not work during the base period must also be counted and rebate incentive cannot be denied ignoring 'nil' production of the period during which there was no production in the factory. The High Court of Andhra Pradesh held that the society could claim such benefit. The benefit was accordingly granted. In Sakthi Sugar Ltd., Coimbatore v. Union of India and Ors., [1983] 12 ELT 484, a similar question came up for consideration before the High Court of Madras. It was held by a Single Judge that excess production rebate would be admissible even to 'nil' production in lean months. Relying on Etikoppaka Co-operative Agricultural Society Ltd., the Court held that the object of the notification was to provide an incentive to manufacturers of sugar so as to induce them to produce greater quantity of sugar particularly during lean period. It was, therefore, obvious that the benefit of rebate should be extended to a factory which did not produce any sugar at all during the lean months of the previous year or years. The Court ruled that it was manifest that the average production of preceding five years had to be worked out by dividing the total production during the lean months of any of the preceding five years by five even though there was no production of sugar during the said period. The Court also noted that a similar view was taken by that court earlier.

The learned counsel for the appellant also referred to a decision of this Court in Belapur Sugar & Allied Industries Ltd. v. Collector of Central Excise, Aurangabad, [1999] 4 SCC 103. In that case, this Court observed that while granting the benefit of rebate, concession or exemption, the object behind issuance of such notification must be taken into consideration and purposive construction must be adopted. It was further observed that if there are two possible interpretations, it is the interpretation which subserves the object and purpose should be accepted. According to the Court, since the objective of the notification was of conferring rebate in excise duty and an incentive was given to a factory for encouraging sugar production during the lean period, the said object should be kept in view by granting the benefit to the factory.

In our opinion, the argument on behalf of the Revenue is well-founded that the intention of the Government was to grant rebate to those sugar factories which had produced sugar in lean months of the previous year or years and not to grant such benefit to factory or factories which had not produced sugar at all during lean months of the previous year or years. The said intention is also clear if one reads Clause 3 of the notification closely and carefully. It is expressly stated that the average shall be the average of corresponding periods among the preceding three sugar years in which the factory had actually produced sugar and the period or periods in which it did not produce sugar during the said three years shall be ignored. It is, therefore, clear that if a factory does not produce sugar at all in the preceding year or years, it is not entitled to benefit of the notification as the said period cannot be counted and has to be ignored. It is an admitted fact that for two years, i.e. 1979-80 and 1980-81 there was no production of sugar by the appellant-society and hence, as per the

notification, the said period of two years had to be ignored. Production of one year of 1978-79 alone was, therefore, relevant and material and since the appellant had been granted rebate on that basis on additional production for the year 1981-82, the action cannot be held illegal or objectionable. In our view, the language of notification is clear. It has only one interpretation and the effect must be given to such language.

We are also of the view that grant of rebate, exemption or concession is in the nature of policy of the Government. Normally in such policy matters, a court of law will not interfere unless the policy is shown to be contrary to law, inconsistent with the provisions of the Constitution or otherwise arbitrary or unreasonable. Since, the policy decision as reflected in Clause 3 of Notification No. 132/82 cannot be said to be arbitrary, unreasonable or inconsistent with statutory provisions, a person claiming the protection under the said notification has to comply with the conditions laid down in the notification. As the appellant has been granted benefit of rebate in excise duty as per Clause 3 of the notification, the action cannot be held unlawful and the appellant-society has no reason to make grievance against the action of the Revenue.

For the foregoing reasons, in our opinion, the appeal deserves to be dismissed and is, accordingly dismissed, however, without any order as to costs.