SUPREME COURT OF INDIA

Union of India & Ors.

Vs.

Maharaja Shree Umaid Mills

C.A.No.5634 of 2008

(Anil R.Dave and Dipak Misra,JJ.)

17.12.2013

JUDGMENT

Anil R. Dave, J.

1. Leave granted in SLP (C) No 28055 of 2008 and SLP (C) No. 938 of 2010.

2. As a common question of law is involved in all these appeals, at the request of the learned counsel appearing for the parties, all the appeals were heard together and they are decided by this common judgment.

3. The issue involved in all these appeals is with regard to the liability to pay interest under the provisions of Section 112 of the Finance Act, 2000 (hereinafter referred to as 'the 2000 Act'), which pertains to liability of the assessee to pay interest under the Central Excise Rules, 1944 (hereinafter referred to as 'the Rules'). The facts of Civil Appeal No.5634 of 2008 (Union of India and others vs. Maharaja Shree Umaid Mills) are taken into consideration for better understanding of the issue involved in all these appeals.

4. All these appeals have been filed by the Union of India against the respondents under the Central Excise Act, 1944. The respondent-assessee, Maharaja Shree Umaid Mills, whose case is being considered, is a manufacturer of yarn and fabrics, which are covered under Chapters 52, 54 & 55 of the Schedule to the Central Excise Tariff Act, 1985. In the process of the manufacture of yarn and fabrics, the respondent-assessee uses High Speed Diesel Oil (hereinafter to as the 'HSD Oil') as fuel for generation of electricity i.e. power,

with which manufacturing unit of the respondent is operated.

5. As the HSD oil is being used as an input in the process of generation of electricity so as to manufacture the final produce i.e. yarn and fabrics, the respondent was claiming the MODVAT credit of the duty paid on the HSD oil used as an input under the provisions of Rules 57A and 57B of the Rules.

6. The Central Government issued a Notification on 16th March, 1995 whereby MODVAT credit of the duty paid on the HSD Oil as an input, had been withdrawn. It is not in dispute that the MODVAT credit of the duty paid on the use of the HSD Oil was available in the past but the same had been withdrawn by the said Notification issued in 1995. Subsequently, the office of the Commissioner of the Central Excise had also issued a Trade Notice on 7.4.1997 to the effect that no MODVAT Credit in respect of the duty paid on the HSD oil used as an input would be available under Rule 57A and 57B of the Rules.

7. What is relevant here is that the respondent as well as other assessees-respondents, whose cases are being decided by this common judgment, had availed the MODVAT credit of the duty paid on the HSD Oil, which was used as an input even though it was not permissible in view of the aforestated Notification followed by the Trade Notice. So it is not in dispute that though MODVAT credit was not to be availed in respect of the duty paid on the HSD oil used as an input, all the assessees who are respondents, had availed the MODVAT credit.

8. In the aforestated circumstances, show cause notices had been issued to all the respondents calling upon them as to why the MODVAT credit availed by them during the period for which they were not entitled to such a credit, should not be withdrawn and why interest at the rate of 24% p.a. be not charged on the amount of credit already availed by them.

9. It is pertinent to note that in the meantime Section 112 of the 2000 Act had been enacted and by virtue of which, interest at the rate of 24% p.a. had to be paid on the MODVAT credit wrongfully availed by the respondents in respect of the duty paid on the HSD Oil used as an input for a particular period. Similarly, Rule 57 (I) of the Rules also enables the Revenue to recover interest on the amount of MODVAT credit wrongfully availed by the assessee.

10. The case of the Revenue is that by virtue of the provisions of Section 112 of the 2000 Act, interest becomes payable on such wrongfully availed MODVAT credit after 30 days from the date on which the 2000 Act received the assent of the President. On the other hand, according to the respondents, the amount of interest becomes payable only after determination of the amount through an adjudication order or an order-in-original after

issuance of a show cause notice to the concerned assessee and if the amount of the MODVAT credit availed is not repaid within 30 days from the date of the order.

11. In the case of Maharaja Shree Umaid Mills, the Assistant Commissioner, Central Excise, Jodhpur, vide an order dated 27.05.2002, called upon the said assessee to pay interest at the rate of 24% p.a. with effect from 30 days from the date on which the 2000 Act had received the assent of the President.

12. Being aggrieved by the order passed by the Assistant Commissioner, an appeal had been filed before the Commissioner (Appeals), Central Excise, Jodhpur, which had been dismissed and therefore, the assessee had filed an appeal before the Customs, Excise & Service Tax Appellate Tribunal, New Delhi (hereinafter referred to as 'the CESTAT'). The said appeal had also been dismissed by the CESTAT and therefore, the assessee was constrained to approach the High Court of Rajasthan by way of Central Excise Appeal No. 3 of 2003, which has been allowed by the impugned order and therefore, the Revenue has filed the present appeal.

13. Similarly, in all other cases, the assessees had succeeded before the High Court in their respective cases and therefore, the Revenue has filed the present appeals before this Court. So as to understand and appreciate the issue, it would be pertinent to look at the provisions of Section 112 of the 2000 Act and Rule 57 (I) of the Rules, which have been reproduced hereinbelow:

> "112. Validation of the denial of credit of duty paid on high speed diesel oil. - (1) Notwithstanding anything contained in any rule of the Central Excise Rules, 1944, no credit of any duty paid on high speed diesel oil at any time during the period commencing on and from the 16th day of March, 1995 and ending with the day, the Finance Act, 2000 receives the assent of the President, shall be deemed to be admissible.
>
> (2) Any action taken or anything done or purported to have been taken or done at any time during the said period under the Central Excise Act or any rules made thereunder to deny the credit of any duty in respect of high speed diesel oil, and also to disallow such credit to be utilized for payment of any kind of duty on any excisable goods shall be deemed to be, and to always have been, for all purposes, as validly and effectively taken or done, as if the provisions of sub-section (1) had been in force at all material times and, accordingly, notwithstanding anything contained in any judgment, decree or order of any court, tribunal or other authority,-
>
> (a) No suit or other proceedings shall be maintained or continued in any court, tribunal or other authority for allowing the credit of the duty paid on high speed diesel oil and no enforcement shall be made by any court, tribunal or other authority of any decree or order allowing such credit of duty as if the provisions of

sub-section (1) had been in force at all material times;

(b) Recovery shall be made of all the credit of duty, which have been taken or utilized but which would not have been allowed to be taken or utilized, if the provisions of subsection (1) had been in force at all material times, within a period of thirty days from the date on which the Finance Act, 2000 receives the assent of the President and in the event of non-payment of such credit of duty within this period, in addition to the amount of credit of such duty recoverable, interest at the rate of twenty four per cent. Per annum shall be payable, from the date immediately after the expiry of the said period of thirty days till the date of payment.

Explanation. - For the removal of doubts, it is hereby declared that no act or omission on the part of any person shall be punishable as an offence which would not have been so punishable if this section had not come into force."

Rule 57 (I) Recovery of credit wrongly availed of or utilized 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 filing the return as required to be submitted in terms of sub rule (8) of rule 57G, and where no such return as aforesaid is filed, within six months from the last date on which such return is to be filed under the said rule, serve notice on the manufacturer or the assessee who has taken such credit requiring him to show cause why he should not be disallowed such credit and where the credit has already been utilized, why the amount equivalent to such credit should not be recovered from him.

(ii) Where a manufacturer has taken the credit by reason of fraud, willful misstatement, collusion, or suppression of facts, or contravention of any of the provisions of the Acts or the rules made there under with intent to evade payment of duty, the provisions of clause (i) shall have effect as if for the words "six months", the words 'five years' were substituted.

(iii) 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 had been utilized, or shall not utilized the credit thus disallowed.

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

(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 Commissioner of Central Excise, pay the duty leviable on such inputs within three months from the date of receipt of the notice of demand.

(3) Where a manufacturer or an assessee fails to pay the amount determined under sub rule (1) or sub rule (2) within three months from the date of receipt of demand notice, he shall pay, in addition to the amount so determined, interest at such rate, as may be fixed, by the Central Board of Excise and Customs under Section 11 AA of the Act, from the date immediately after the expiry of the said period of three months till the date of payment.

(4) Where the credit of duty paid on inputs has been taken wrongly by reason of fraud, willful misstatement, collusion or suppression of facts, or contravention of any of the provisions of the Act or the rules made there under with intent to evade payment of duty, the person who is liable to pay the amount equivalent to the credit disallowed as determined under clause (iii) of sub rule (1) shall also be liable to pay a penalty equal to the credit so disallowed.

Explanation I : where the credit disallowed is reduced by the Commissioner of Central Excise (Appeals), the Appellate Tribunal or, as the case may be, a court of law, the penalty shall be payable on such reduced amount of credit disallowed.

Explanation II : where the credit disallowed is increased or further increased by the Commissioner of Central Excise (Appeals), the Appellate Tribunal or, as the case may be, a court of law, the penalty shall be payable on such increase or further increased, amount of credit disallowed.

(5) Notwithstanding anything contained in clause (iii) of sub rule (1) or sub rule (3), where the credit of duty paid on inputs has been taken wrongly on account of fraud, willful mis-statement, collusion or suppression of facts, or contravention of any of the provisions of the Act or the rules made there under with intent to evade payment of duty, the person who is liable to pay the amount equivalent to the credit disallowed as determined under clause (iii) of sub rule (1) shall also be liable to pay interest at such rates as may be fixed by the Board under Section 11 AA of the Act from the first day of the month succeeding the month in which the credit was wrongly taken, till the date of payment of such amount.

Explanation I : for the removal of doubts, it is hereby declared that the provisions of this sub rule shall not applied to cases where the credit disallowed became payable before the 23rd day of July, 1996.

Explanation II : where the credit disallowed is reduced by the Commissioner of Central Excise (Appeal), the Appellate Tribunal or, as the case may be, a court of law, the interest shall be payable on such reduced amount of credit disallowed.

Explanation III: where the credit disallowed is increased by the Commissioner of Central Excise (Appeal), the Appellate Tribunal or, as the case may be, a court of

law, the interest shall be payable on such increased or further increased, amount of credit disallowed."

14. The learned counsel appearing for the revenue had submitted that by virtue of the provisions of Section 112 of the 2000 Act, one has to ignore the provisions of Rule 57 (I) of the Rules, as Section 112 of the 2000 Act had been enacted as a one- time measure to see that all those who had wrongly availed the MODVAT credit on the duty paid on the HSD oil used as an input in their factories repay the amount wrongfully retained by them immediately. The learned counsel had discussed various provisions whereby the position with regard to the admissibility of the MODVAT credit on duty paid on the HSD oil used as an input had been changed from time to time in the past till the litigation which had been finally decided by this court. As there is no dispute with regard to the non-admissibility of the MODVAT credit on the HSD oil used as an input for the period commencing from 16.03.1995 till the date the 2000 Act received the President's assent, we need not discuss the relevant rules and notifications in pursuance of which the MODVAT credit in respect of the duty paid on the HSD oil as an input was not admissible.

15. The learned counsel had submitted that the provisions of Section 112 (2)(b) of the 2000 Act clearly enables the Revenue not only to recover the entire MODVAT credit which had been wrongly availed by the concerned assessees within 30 days from the date on which the 2000 Act had received assent of the President but in the event of non-payment of the amount within the said period, it enables the Revenue to recover interest at the rate of 24% per annum from the date immediately after expiry of the said period of 30 days till the date of payment of the amount by the concerned assessee.

16. It had been further submitted by the learned counsel for the Revenue that the provisions of Section 112 of the 2000 Act are merely declaratory in nature. In fact MODVAT credit on the use of the HSD oil as an input was not permissible by virtue of Notifications issued in 1995. In spite of the fact that the MODVAT credit was not available on the HSD oil, several assessees were claiming credit on the HSD oil as an input and therefore, by virtue of Section 112 of the 2000 Act it was declared that no MODVAT credit would be available on the HSD oil, used as an input. He had, therefore, submitted that in fact there was no retrospective increase in the liability of the assessees by virtue of Section 112 of the 2000 Act.

17. According to the learned counsel, the a fore stated provisions, in an unambiguous language, authorizes the Revenue to recover interest at the rate of 24% p.a. without any reference to any show cause notice or any other condition and therefore, as per his submission, the assessee was bound to pay interest as demanded by the Assistant Commissioner, Central Excise by the order dated 27.05.2002 and the High Court was in error in setting aside the orders whereby the amount of interest was sought to be recovered from the respondents.

18. The learned counsel had relied upon judgments which restrained the manufacturers from claiming the MODVAT credit on use of the HSD Oil as an input for the period commencing from 16.03.1995 till the date the 2000 Act received the President's assent. Among other judgments, the learned counsel appearing for the Revenue had mainly relied upon the judgment delivered in the case of *Sangam Spinners Limited v. Union of India & Ors*[1].

19. On the other hand, the learned counsel appearing for the respondents had supported the reasons given by the High Court while quashing and setting aside the orders passed by the CESTAT whereby imposition of interest at the rate of 24% p.a. on the amount of the MODVAT credit availed on the use of the HSD oil as an input, for the period referred to hereinabove, was upheld.

20. The learned counsel had submitted that Section 112 of the 2000 Act cannot be read in isolation, but it must be read with the provisions of Rule 57 (I) of the Rules. According to them, in any case, before demanding interest from any assessee, first of all the final liability, i.e. the amount payable has to be ascertained and only upon ascertainment of the amount payable, interest can be calculated and demanded on the said amount.

21. It had also been submitted by the learned counsel appearing for the respondents that by virtue of the retrospective effect, liability of the respondents had been increased not only by not permitting to avail MODVAT credit on use of the HSD oil as an input for the period referred to hereinabove but also by imposition of interest @ 24% p.a. on the amount of the MODVAT credit availed on the HSD oil used as an input with effect from 30 days from the date on which the President had given assent to Section 112 of the 2000 Act. The learned counsel had relied upon several judgments including the judgments delivered in the cases of State of *Rajasthan & Ors. vs. Ghasilal* [2], and *Harshad Shantilal Mehta vs. Custodian and Ors*[3], to substantiate their submissions to the effect that till the amount of tax is determined, no interest can be levied on the amount of tax.

22. Thus, the learned counsel appearing for the respondents had prayed that the appeals should be dismissed for the sound reasons recorded by the High Court in the impugned judgment.

23. Upon perusal of the impugned judgment and the judgments referred to by the learned counsel appearing for both sides, we are of the view that the impugned judgment deserves to be quashed and set aside for the reasons recorded hereinafter.

24. Upon perusal of the impugned judgment as well as the provisions of Section 112 of the 2000 Act, one might have an impression that the Revenue has become harsh in

imposing interest at the rate of 24% p.a. on the amount of MODVAT credit availed on the HSD oil used as an input without any adjudication of the amount payable or without even issuance of a show cause notice. In fact if we look at the provisions of Section 112 of the 2000 Act along with other notifications which had been issued earlier in 1995 and 1994, whereby a ailment of MODVAT credit on the HSD oil used as fuel in generation of electricity had been ordered to be discontinued, we would feel that the first impression that one would gather upon perusal of Section 112 of the 2000 Act would not be correct.

25. It is necessary to look at the background and the circumstances in which Section 112 of the 2000 Act had been enacted. By virtue of the Notifications issued on 01.03.1994 and 16.03.1995 issued under Rule 57A of the Rules, the Central Government had specifically declared that MODVAT credit on the HSD oil used as an input would not be available as the said item had been specifically excluded from the list of eligible exempted inputs. In spite of the said fact, several assessees were claiming MODVAT credit in respect of the HSD oil used as an input and therefore, Section 112 of the 2000 Act had to be enacted. Thus, it is clear that the said Section had been enacted so as to see that no one claims MODVAT credit in respect of the HSD Oil used as an input and those who had wrongfully availed MODVAT credit in respect of the HSD oil used as an input and those who had claimed the credit wrongfully, return the said amount within 30 days from the date the President gives assent to the 2000 Act. This clearly denotes that by virtue of the provisions of Section 112 of the 2000 Act, MODVAT credit availed on the HSD oil used as an input had not been withdrawn for the first time but it was declared that if anybody had availed MODVAT credit on the HSD oil used as an input, will have to return it within 30 days and in case the amount being not refunded within 30 days, the amount of the MODVAT credit wrongfully availed by the concerned assessee had to be returned with interest at the rate of 24% p.a.

26. The a fore stated factual aspect would clarify that Section 112 of the 2000 Act is in fact not having any retrospective effect but it only enables the Government to get back the wrongly availed MODVAT credit on the HSD oil used as an input.

27. A somewhat similar issue had arisen before this Court in the case of Sangam Spinners Limited (supra) and after considering earlier Notifications issued by the Government; it had been held that Section 112 of the 2000 Act did not take away any right of any assessee with retrospective effect. This court held in the said case that the HSD oil had been specifically excluded from the list of eligible inputs with effect from 16th March, 1995 and therefore, no assessee had any vested right to avail benefit of MODVAT credit on the HSD oil used as an input and therefore, if any benefit, which had been wrongly availed by any manufacturer, the benefit wrongfully availed had to be returned.

28. It is also pertinent to note that the validity of Section 112 of the 2000 Act had not been challenged in the petitions filed by the respondents and therefore, we need not go into the legality of the said Section.

29. In the aforestated circumstances, in our opinion, there was no issue with regard to any adjudication because the respondents had availed MODVAT credit on the HSD oil used as an input though it was not permissible. Once it is certain that the MODVAT credit had been wrongly availed by the respondents, in our opinion, the Revenue cannot be blamed, if the amount wrongly availed by way of MODVAT credit by the respondents is recovered with interest thereon. It is also pertinent to note that the Revenue had given 30 days' time to return the said amount to the respondents who had wrongly availed MODVAT credit on the HSD oil used as an input. If anyone who had repaid the amount wrongly availed within 30 days from the date on which Section 112 of the 2000 Act got the President's assent, that assessee had not to pay any interest on the amount of duty availed by him wrongly. But those who had availed the MODVAT credit on the HSD oil used as an input and did not return the said amount even within 30 days from the date on which the President had given assent to the enactment of Section 112 of the 2000 Act, had to return the amount wrongfully retained by them with interest at the rate of 24% p.a. In our opinion, such a course, adopted by the Revenue for recovery of the amount which was legitimately claimed by the Revenue, cannot be said to be bad in law.

30. In the circumstances and for the reasons recorded hereinabove, we are of the view that the High Court committed an error by not considering the aforestated factors and therefore, we quash and set aside the impugned judgment by allowing these appeals with no order as to costs. The stay granted is vacated.

Judgment referred

[1] *2011 (11) SCC 0408*

[2] *1965 (2) SCR 0805*

[3] *1998 (5) SCC 0001*