REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 3380 OF 2010

Hindustan Coca Cola Beverage (P) Ltd. ... Appellant

Versus

Union of India and others ... Respondents

WITH

CIVIL APPEAL NO. 3381 OF 2010,
CIVIL APPEAL NO. 3383 OF 2010,
CIVIL APPEAL NO. 3384 OF 2010,
CIVIL APPEAL NO. 3385 OF 2010,
CIVIL APPEAL No. 3386 OF 2010,
CIVIL APPEAL NO. 3387 OF 2010,
CIVIL APPEAL NO. 3388 OF 2010 and
CIVIL APPEAL NO. 3389-3392 OF 2010

J U D G M E N T

Dipak Misra, J.

The present appeals, by special leave, have been preferred against the judgment and order dated 24th June, 2009 passed by the Division Bench of the High Court of

Gauhati in Writ Appeal No. 435 of 2006 and other connected appeals whereby it has affirmed the common judgment and order dated 21.09.2006 passed by the learned Single Judge in a batch of writ petitions. For the sake of clarity and convenience we shall advert to the facts in Civil Appeal No. 3380 of 2010 and at the relevant time we shall refer to quantum involved in other appeals.

2. The facts, in a nutshell, are that with a view to provide necessary impetus to the development of industries in the north-eastern region a new Industrial Policy Resolution was notified by the Government of India on 24.12.1997. In pursuance of the said policy, a Notification was issued on 8.7.1999 and thereafter further Notifications were issued on 29.06.2001 and 23.12.2002. Pursuant to the said Notifications, certain benefits were availed of by the assessees. At that juncture, The Finance Act, 2003 (for brevity "the Act") was brought into force and by virtue of Section 153 of the Act certain Notifications were amended with retrospective effect from 08.07.1999, i.e. the date of original Notification which we have mentioned hereinabove.

3. After the amendment came into force, the Assistant Commissioner, Central Excise, Jorhat referred to the amendment and the notifications and eventually passed the following order on 3.6.2003:-

> "In consideration of the above the entire refund amount sanctioned with effect from 8.7.99 is required to be reviewed in terms of the provision of the Eighth Schedule of the Finance Act, 2003 which on being re-assessed, it appears that an amount of Rs.2.20,18.124.00 is required to be recovered from the said unit being the refund granted earlier which have become not eligible by virtue of the Clause 145 of the Finance Bill, 2003. Details of duty paid month wise, refund sanctioned and amount required to be realized are furnished in Annexure-1 to the Order enclosed.
>
> Now in terms of the provision of Finance Act, 2003 M/s. Hindustan Coca Cola Beverages Pvt. Ltd., P.O. R.R.L., Jorhat is hereby required to make payment of the said amount of Rs.2,20,18,124.00 within a period of 30 (thirty) days with effect from 13th May, 2003. Failure to comply with this Order with the specified date an interest @ 15% p.a. shall be payable from the date immediately after the expiry of the said period of thirty days till the payment is made."

4. Being aggrieved by the aforesaid order, the appellant preferred a writ petition before the High Court. The validity of Notification No. 65/03 dated 06.08.2003 and certain other

notifications including the original notification No. 33/99 dated 3.7.99 were called in question. Before the High Court, the constitutional validity of the amendment of the Finance Act was also called in question. In the course of hearing, the challenge to the validity was abandoned. It was contended in the writ petition that without affording an opportunity of hearing to the appellant and without issuance of the notice, the Assistant Commissioner had passed an order of recovery which was absolutely impermissible.

5. The High Court did not address to the retrospective application of the provision as the assail to the same was abandoned. It also did not address to the impact of non-issuance of notice prior to passing an order of recovery. It adverted to the merits of the case, that is, whether the recovery could have been directed by the Assistant Commissioner or not and repelling the proponements advanced by the assessee accepted the stand of the revenue.

6. Mr. S.K. Bagaria, learned senior counsel appearing for the appellant very fairly stated that the assessee had correctly abandoned the challenge pertaining to the constitutional validity of the provision. Learned senior

counsel submitted that an order of recovery could not have been straightaway passed without issuing notice to the appellant as that violates the principles of natural justice. The learned senior counsel further contended that the High Court has dwelled upon the merits of the case on an erroneous footing inasmuch as the assessee-appellant had totally utilized the CENVAT Credit and not taken the refund of the same. It is further urged that in view of the amendment made by the Finance Act, it was not payable and consequently not recoverable.

7. Mr. Mukul Rohtagi, learned Attorney General appearing for the Union of India submitted that as the time schedule is fixed under Section 153 (4) for recovery is thirty days, by implication, the principle of issue of any show cause notice is not attracted. To support the said submission, he has drawn strength from the decision in ***R.C. Tobacco (P) Ltd. v. Union of India***[1]***,*** especially paragraph 41 of the said pronouncement. Additionally, it is submitted by him that *post facto* hearing may be thought of after the amount is deposited and the sphere of hearing may be limited with regard to payability or the refund of the sum.

[1] (2005) 7 SCC 725

8. To appreciate the controversy from a proper perspective it is seemly to reproduce Section 153 of the Act which reads as under:

> "**Section 153. Amendment of notifications issued under Section 5A of the Central Excise Act for certain period.**
>
> (1) The notification of the Government of India in the erstwhile Ministry of Finance (Department of Revenue), Nos. G.S.R. 508 (E), dated the 8th July, 1999 and G.S.R. 509 (E), dated the 8th July, 1999, issued under sub-section (1) of Section 5A of the Central Excise Act read with sub-section (3) of Section 3 of the Additional Duties of Excise (Goods) of Special Importance) Act, 1957 (58 of 1957) and sub-section (3) of Section 3 of the Additional Duties of Excise (Textiles and Textile Articles) Act, 1978 (40 of 1978) by the Central Government shall stand amended and shall be deemed to have been amended in the manner as specified in the Eighth Schedule, on and from the 8th day of July, 1999 to the 22nd day of December, 2002 (both days inclusive) retrospectively, and accordingly notwithstanding anything contained in any judgment, decree or order of any court, tribunal or other authority, any action taken or anything done or purported to have been taken or done under the said notifications, shall be deemed to be and always to have been, for all purposes, as validly and effectively taken or done as if the notifications as amended by this sub-section had been in force at all material times.
>
> (2) For the purposes of sub-section(1), the Central Government shall have and shall be deemed to have the power to amend the

notifications referred to in the said sub-section with retrospective effect as if the Central Government had the power to amend the said notifications under sub-section (1) of Section 5A of the Central Excise Act read with sub-section (3) of Section 3 of the Additional Duties of Excise (Goods of Special Importance) Act, 1957 (58 of 1957) and sub-section (3) of Section 3 of the Additional Duties of Excise (Textiles and Textile Articles) Act, 1978 (40 of 1978), retrospectively at all material times.

(3) Notwithstanding the cessation of the amendment under sub-section (1) of the 22nd day of December, 2002, no suit or other proceedings shall be maintained or continued in any court, tribunal or other authority for any action taken or anything done or omitted to be done, in respect of any goods under the said notifications, and no enforcement shall be made by any court, tribunal or other authority of any decree or order relating to such action taken or anything done or omitted to be done as if the amendment made by sub-section (1) had been in force at all material times.

(4) Notwithstanding the cessation of the amendment under sub-section (1) on the 22nd day of December, 2002, recovery shall be made of all amounts of duty or interest or other charges which have not been collected or, as the case may be, which have been refunded but which would have been collected, or, as the case may be, which would not have been refunded if the provisions of this section had been in force at all material times, within a period of thirty days from the day on which the Finance Bill, 2003 receives the assent of the President, and in the event of non-payment of duty or interest or other charges so recoverable, interest at the rate of fifteen 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 the notifications referred to in sub-section (1) had not been amended retrospectively by that sub-section."

As the provision contained under Section 153(1) would reveal the effect of the amendment has to be understood in the backdrop of the EIGHTH SCHEDULE. THE EIGHTH SCHEDULE reads as follows:

"[See Section 153(1)]

Sl.No.	Notification No. and date	Amendment	Date of effect of amendment
(1)	(2)	(3)	(4)
1.	G.S.R. 508(E) dated the 8th July, 1999 -- Central Excise, dated the 8th July, 1999)	In the said notification, in paragraph 2, in clause (b), the following proviso shall be inserted, namely:- Provided that such refund shall not exceed the amount of duty paid less the amount of the CENVAT credit availed of, in	8th July, 1999

		respect of the duty paid in the inputs used in or in relation to the manufacture of goods cleared under this notification.”	
2.	G.S.R. 509 (E), dated the 8th July, 1999 {33/1999-Central Excise, dated the 8th July, 1999}	In the said notification, in paragraph 2, in clause (b), the following proviso shall be inserted, namely:- “Provided that such refund shall not exceed the amount of duty paid less the amount of the CENVAT credit availed of, in respect of the duty paid on the inputes used in or in relation to the manufacture of goods cleared under this notification.”	8th July, 1999

9. The first submission, as we find centres round the issue whether whether the appellant-assessee was entitled to be given notice to show cause before proceeding for recovery in view of the language employed under Section 153(4) of the

Act. In ***R.C. Tobacco (P) Ltd.*** (supra) the court interpreting Section 153(4) has observed as follows:-

> "In the present case Section 153(4) specifically and expressly allows amounts to be recovered within a period of thirty days from the day Finance Bill, 2003 received the assent of the President. It cannot but be held therefore that the period of six months provided under Section 11-A would not apply."

In the said case while dealing with the question of notice prior the recovery the court ruled:-

> "On the question of notice prior to the recovery irrespective of Section 11-A, it is contended by the petitioners relying on the decision of this Court in East India Commercial Co. Ltd. v. Collector of Customs4 SCR at p. 361 that whether a statute provides for notice or not, it was incumbent upon the respondents to issue notice to the petitioners disclosing the circumstance under which proceedings are sought to be initiated against them and that any proceedings taken without such notice would be against the principles of natural justice. Assuming that the principles were applicable to the case before us, in fact notices of personal hearing were served on the petitioners by the Assistant Collector for a personal hearing before the Assistant Collector passed the orders by which the petitioners were held liable to repay the refunds made and to pay the excise on the goods cleared for the subsequent periods."

Relying on the same it is submitted by Mr. Rohatagi that as the computation and the recovery are to be made within a time frame of thirty days, issue of a show cause notice cannot be read into such a provision. In essence, the submission is

that the principles of natural justice have been kept at bay by implication. Per contra, Mr. Bagaria has submitted that in the above-referred decision notices have already been given and, therefore, issuance of notice is a must. Ordinarily we would have adverted to said submission advanced at the bar but we find, the assessee had not demonstrably argued this ground and addressed the lis on merits before the High Court and, therefore, we are not inclined to interpret whether the concept of natural justice would be read into the said provision or not. The said question is left open.

10. The next submission pertains to the issue whether the High Court was justified addressing the lis on merits when series of factual aspects are involved. We are disposed to think that the High Court should not have entered into the factual score to decline the relief to the appellants. We are obliged to say so as Mr. Bagaria, learned senior counsel has contended that it can only be adjudicated upon with reference to the documents on record. The documents mean the transactions, quantum of CENVAT availed of, the amount that was taken as refund by paying from the P.L.A. and further not availing refund of CENVAT credit at any point of time.

Needless to emphasise, the said aspect are in the realm of facts which could not have been adjudged or adjudicated by the High Court under Article 226 of the Constitution as the order of recovery was challenged on the ground that no notice was issued to the appellant and that it was not liable to pay in the obtaining factual matrix.

11. Be it stated, there is no cavil over the fact that an appeal lies under Section 35 of the Central Excise Act, 1944 to the Commissioner (Appeals) who can address both the issues relating to facts and law keeping in view the applicability of the relevant notifications. It is borne out from the record that the assessee-appellant had furnished a bank guarantee amounting to Rs.2,20,18,124/- for obtaining an order of stay. In our considered opinion it would not be appropriate to give an opportunity to the appellant to prefer statutory appeals and allow it to enjoy the benefit of stay of recovery on the basis of a bank guarantee. Therefore, we would direct the assessee to deposit Rs.2.5 crores before the adjudicating authority within six weeks and after the said deposit is made and the receipt obtained, the appeal would be entertained within the said period. On an appeal being filed, the

Commissioner (Appeals) shall deal with the matter on merits. Learned Attorney General very fairly stated that the Revenue would not raise the issue of limitation as the period spent before the High Court and this Court and the time granted for depositing of the amount would stand excluded for the purpose of preferring the appeal.

12. At this juncture, it is apposite to mention here that the bank guarantees furnished by the other appellants in respect of their respective appeals. They are as under:

CIVIL APPEAL NO.	NAME OF ASSESSEE	AMOUNT(Rs.)
C.A. No. 3381/10	Assam Roofing	16,62,336/-
C.A. No. 3383/10	Ozone Pharmaceuticals	1,01,20,672/-
C.A. No. 3384/10	Ozone Ayurvedics	1,01,20,672/-
C.A. No. 3385/10	Herbo Foundation	39,81,566/-
C.A. No. 3386/10	Belle Herbals	4,44,740/-
C.A. No. 3387/10	Eminent Healthcare	22,01,868/-
C.A. No. 3388/10	Tread & Patels	42,44,456/-
C.A.Nos.3389/92/10	Godres Sara Lee	36,51,495/- 19,12,132/-

Considering the amount in question in various appeals it is directed that in case the bank guarantees furnished by the

assessees have been encashed no deposit shall be made. If the bank guarantees have not yet been encashed the amount as mentioned hereinabove plus rupees five lakhs shall be deposited within the stipulated time frame of six weeks. As we have directed for deposition of the amount, it is directed that after deposit of the said amount, the bank guarantees furnished in favour of the jurisdictional Commissioner shall be returned to the assessee-appellants.

13. In the result, the appeals stand allowed in part. The judgment and orders of the High Court in writ petitions and writ appeals are set aside and the assessee/appellants are directed to prefer appeals with the conditions precedent as imposed hereinabove. The appeals shall be disposed of within a period of three months from the date of its presentation after giving opportunity of hearing to the parties. Needless to clarify, we have not expressed any opinion whatsoever on the merits of the case. There will be no order as to costs.

.....J.
[Dipak Misra]

.....J.
[Abhay Manohar Sapre]

New Delhi;
September 04, 2014