



GAHC010010802014

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THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : WP(C)/2875/2014

M/S CENTENARY DISTILLERIES P LTD.
BONDED WAREHOUSE, JUGAL BAZAR, 1ST FLOOR, GANESHGURI
CHARIALI, DISPUR, GHY-6, REPRESENTED BY THE MANAGING DIRECTOR

VERSUS

THE STATE OF ASSAM AND 2 ORS
REPRESENTED BY THE CHIEF SECRETARY TO THE GOVT. OF ASSAM,
DISPUR, GHY-6

2:THE SECRETARY TO THE GOVT. OF ASSAM
EXCISE DEPARTMENT
DISPUR
GHY-6

3:THE COMMISSIONER OF EXCISE
ASSAM
HOUSEFED COMPLEX
DISPUR
GHY-

For the Petitioner(s) : Mr. M. Saikia, Advocate

For the Respondent(s) : Mr. D. Gogoi, SC, Excise Department



**BEFORE
HONOURABLE MR. JUSTICE DEVASHIS BARUAH**

JUDGMENT AND ORDER (ORAL)

Date : 07-11-2023

1. The present writ petition has been filed by the Petitioner challenging the order dated 05.08.2009 issued by the Secretary to the Government of Assam, Excise Department whereby the provisions of Rule 7 of the Assam Bonded Warehouse Rules, 1965 regarding establishment charges which existed prior to the introduction of the availability fee was made operative w.e.f. 10.07.2009 in respect of such warehouses. The Petitioner had also sought for refund of the excess amount received from the Petitioner's unit pursuant to the order dated 05.08.2009.

2. The facts involved in the instant writ petition are that the Petitioner is a company incorporated under the provisions of the Companies Act, 1956. The Petitioner was in the business of Bonded Warehouse. At this stage, it is relevant to take note of that prior to 18.03.2005, Rule 7 of the Assam Bonded Warehouse Rules, 1965 (hereinafter referred to as "the Rules of 1965") read as follows:

"7. Appointment of staff and establishment :

The Commissioner of Excise shall appoint such Excise Officers and establishment as he thinks fit to the charge of the bonded warehouse. The licensee shall pay to the State Government at the end of each calendar month such establishment charges as may be determined from time to time by the Excise Commissioner. The cost of establishment shall include pay and allowances, if any, as well as leave salary and pension contribution."

3. From a perusal of the said Rule, it reveals that the Commissioner of Excise shall appoint such Excise Officers and establishment as he thinks fit to the charge of the Bonded Warehouse and the licensee was under an obligation to pay to the State Government at the end of each calendar month such establishment charges as may be determined from time to time by the Excise Commissioner. It was also mandated as per the said Rule that the cost of establishment shall include pay and allowances, if any, as well as leave salary and pension contribution.

4. Subsequent thereto, on 18.03.2005, the Rules of 1965 was amended by the Assam Bonded Warehouse (Amendment) Rules, 2005 (for short "the Amending Rules of 2005"). Various amendments were made to the Rules including Rule 7 of the Rules of 1965. The amended Rule 7 of the Rules of 1965 reads as follows:

"7. Appointment of staff and establishment :

The Commissioner of Excise, Assam shall appoint such Excise Officers and establishment as he thinks fit to be charge of the Bonded Warehouse. The licensee shall pay to the State Government an Availability fees @ Rs.7/- per case of 12 bottles of IMFL/Beer/Wine etc. of the size of maximum 750 ml at the end of each Calendar month by Treasury Challan for the services rendered by the Excise Staff posted or attached to the Bonded Warehouse.

5. From a perusal of the above quoted amended Rule 7, it reveals that the Commissioner of Excise, Assam shall appoint such Excise Officers and establishment as he thinks fit to the charge of the Bonded Warehouse and the licensee was under an obligation to pay to the State Government an Availability fee @ Rs.7/- per case of 12 bottles of IMFL/Beer/Wine etc. of the size of

maximum 750 ml at the end of each Calendar month by Treasury Challan for the services rendered by the Excise Staff posted or attached to the Bonded Warehouse. The term Availability Fee has also been defined in the Amending Rules of 2005 to mean that a fee payable for the service made available to the bonder/Bonded Warehouse by the officials of Excise Department.

6. The Petitioner continued to do his business of Bonded Warehouse. However, on 05.08.2009, the Secretary to the Government of Assam issued an order whereby the provisions of Rules of 1965 regarding establishment charges which existed prior to the introduction of the availability fee was made operative w.e.f. 10.07.2009 in respect of such warehouses. The said order (hereinafter referred to as the "impugned order") has been put to challenge before this Court by way of the instant writ petition.

7. The Petitioner thereupon could not survive in the business in view of the establishment charges and under such circumstances in the year 2013, the Petitioner had to surrender his license. Subsequent to the surrender of his license, the Petitioner came to learn from the detailed report submitted on 07.03.2013 by the Superintendent of Excise, Kamrup to the Commissioner of Excise, Kamrup, Assam about the impugned order and was advised that the impugned order was illegal as on the basis of an executive fait, the Amending Rules of 2005 could not have been made redundant. Under such circumstances, the Petitioner submitted a representation before the Commissioner of Excise, Assam seeking the refund of an amount of Rs.10,05,812/- which was paid in excess by the Petitioner on account of establishment charges. As the said representation remained unredressed, the Petitioner filed a writ petition before this Court which was registered and



numbered as WP(C) No.2985/2013.

8. This Court vide an order dated 06.03.2014 had disposed of the said writ petition. At this stage, it is relevant to take note of that in the said writ proceedings, the Respondent Excise Department had filed an affidavit stating inter alia that the Amending Rules of 2005 came into force on 18.03.2005 and the order dated 05.08.2009 superseded all notifications regarding excise duty and advance additional fee and ordered the withdrawal of availability fee payable by the Civil Bonded Warehouse. It was further mentioned that the provisions of Rule 7 of the Rules of 1965 in respect to establishment charges which existed prior to the introduction of the availability fee became operational w.e.f. 10.07.2009.

9. Be that as it may, during the course of the hearing in the said writ proceedings, it was submitted on behalf of the Excise Department that the representation so submitted by the Petitioner would be duly taken note of and in that view of the matter, this Court disposed of the said writ petition vide the order dated 06.03.2014 directing the Respondents to take on record the aforesaid representation submitted by the Petitioner on 22.02.2013 and dispose of the same taking note of all the attending facts and circumstances in accordance with law and also dealing with the aforesaid plea of the Petitioner as expeditiously as possible preferably within two months from that date.

10. Subsequent to the said order passed by this Court on 06.03.2014, the Joint Secretary to the Government of Assam, Excise Department disposed of the said representation holding inter alia that the Petitioner was not entitled to any refund on the ground that the representation filed by the Petitioner was not based on facts and also the demand for already paid charges under Rule 7

was not justified. Being aggrieved, the Petitioner therefore has approached this Court seeking the relief(s) as above mentioned.

11. This Court has duly heard the learned counsels for the parties and also perused the materials on record. From what have been mentioned hereinabove, it would be seen that Rule 7 of the Rules of 1965 was amended by the Amending Rules of 2005. The amendment which was brought into effect by the Amending Rules of 2005 and more particularly to Rule 7 of the Rules of 1965 had done away with the establishment charges and the obligation of the licensee was only limited to payment of an Availability fee @ Rs.7/- per case of 12 bottles of IMFL/Beer/Wine etc. of the size of maximum 750 ml at the end of each Calendar month by Treasury Challan for the services rendered by the Excise Staff posted or attached to the Bonded Warehouse. The definition of Availability fee as contained in the Amending Rules of 2005 further makes it clear that it is the fee payable for the service made available to the bonder/Bonded Warehouse by the officials of Excise Department. The pre-existing establishment charges as per the Rule 7 prior to the Amending Rules of 2005 was categorically done away with by the Amending Rules of 2005. Now the question arises as to whether the amendment to Rule 7 of the Amending Rules of 2005 could have been nullified by way of an order passed by the Secretary to the Government of Assam, Excise Department.

12. This Court at this stage finds it relevant to take note of Section 75 of the Assam Excise Act, 1910. Taking into account its relevance, the same is quoted hereinunder:

“75 Publication of rules and notifications :

All rules made and notifications issued under this Act shall be

published in the Official Gazette and, on such publication, shall have effect as if enacted in this Act.”

13. From a perusal of the above quoted Section, it would reveal that all Rules made and notifications issued under the Assam Excise Act, 1910 has to be published in the Official Gazette and on such publication, shall have effect as if enacted in the Assam Excise Act, 1910. In view of the said Section, the Amending Rules of 2005 has the effect of being statutory Rule more so, when a perusal of the Amending Rules of 2005 shows that the same has been done so in exercise of powers under Section 36 of the Assam Excise Act, 1910.

14. In the backdrop of the above, the question therefore arises as to whether by way of the impugned order, the said amended Rule 7 of the Rules of 1965 which was brought into effect by the Amending Rules of 2005 could have been nullified. The answer to the same is in the negative taking into account the well settled principles of law that by way of an executive instruction, a statutory Rule cannot be nullified. In this regard, this Court finds it relevant to take note of the judgment of the Supreme Court in the case of **K. Kuppusamy and Another Vs. State of Tamil Nadu and Others reported in (1998) 8 SCC 469**. Paragraph 3 of the said judgment is quoted herein below:

“3. The short point on which these appeals must succeed is that the Tribunal fell into an error in taking the view that since the Government had indicated its intention to amend the relevant rules, its action in proceeding on the assumption of such amendment could not be said to be irrational or arbitrary and, therefore, the consequential orders passed have to be upheld. We are afraid this line of approach cannot be countenanced. The relevant rules, it is admitted, were framed under the proviso to Article 309 of the Constitution. They are statutory rules. Statutory rules cannot be overridden by executive orders or executive practice. Merely because the Government had taken a

decision to amend the rules does not mean that the rule stood obliterated. Till the rule is amended, the rule applies. Even today the amendment has not been effected. As and when it is effected ordinarily it would be prospective in nature unless expressly or by necessary implication found to be retrospective. The Tribunal was, therefore, wrong in ignoring the rule.”

15. In that view of the matter, the impugned order dated 05.08.2009 could not have re-introduced the establishment charges which was done away with by Rule 7 of the Amending Rules of 2005. The impugned order was ultra vires Rule 7 of the Rules of 1965 as it stood post 18.03.2005 for which the impugned order dated 05.08.2009 is set aside and quashed.

16. The next question therefore arises as to whether the Petitioner is entitled to the refund of the establishment charges collected from the Petitioner on the basis of the impugned order. It is well settled by the judgment of the Supreme Court in the case of **Mafatlal Industries Ltd. and Others Vs. Union of India and Others reported in (1997) 5 SCC 536** that the claim for refund can only succeed if it is alleged and proved that the person from whom the tax was illegally collected has not passed on the burden of the duty to another person or other persons. These aspects of the matter as to whether the Petitioner has passed on the burden of the establishment charges upon the retailers and if not, how much the Petitioner is entitled to are questions of fact which can only be decided by the Respondent Authorities on the basis of the materials placed by the Petitioner before the Respondent Authorities.

17. In that view of the matter, the instant writ petition therefore stands disposed of with the following observations and directions:

(I) The impugned order dated 05.08.2009 by which the establishment charges were re-introduced runs contrary to Rule 7 of the Rules of 1965 post



18.03.2005 and as such the Respondent Authorities could not have collected the establishment charges from the Petitioner. The Respondent Authorities would have been entitled only to the availability fee as per Rule 7 of the Rules of 1965 post 18.03.2005.

(II) The question as to whether the Petitioner would be entitled to refund of the establishment charges, if so paid, is a question of fact which can only be decided by the Respondent Authorities. Under such circumstances, this Court grants liberty to the Petitioner to place the materials on record before the Commissioner of Excise by filing a representation as regards its entitlement to the refund of the establishment charges after deducting the requisite availability fee. The Commissioner of Excise shall on the basis of the said representation first take into account as to whether the Petitioner has passed on the said burden upon the retailers and if the Petitioner has passed on, then the Petitioner would not be entitled to any refund. However, if the Petitioner has not passed on the burden, the Commissioner of Excise shall on the basis of the materials placed before it shall decide the amount to which the Petitioner would be entitled to as refund.

(III) The said exercise would be carried out within a period of 4 (four) months from the date the Petitioner submits a representation before the Commissioner of Excise.

JUDGE

Comparing Assistant