

UNION OF INDIA AND ORS.

v.

BARMALT (INDIA) LTD., GURGAON

FEBRUARY 18, 1997

[B.P. JEEVAN REDDY AND S.B. MAJMUDAR, JJ.]

Excise—Central Excises and Salt Act 1944—Exemption Notification No. 55 of 1975 dated 1st March 1975—Malt and malt products—Finding of High Court to the effect that benefit of exemption available to the assessee, as Malt and Malt Products fall within the expression 'Food Products'.

Excise—Unjust Enrichment—Refund of Excess duty paid—Respondent, one of the producers of malt and malt extracts—Respondent seeking certain specific directions instead of disposal in terms of Mafatlal Industries case—Suggestions put forth by Respondent, held not feasible—On peculiar facts of the case, Respondent directed to refund to State the amount of refund received by it excepting the specified amount already returned earlier to a purchaser—Also, since the purchaser had taken proforma credit of duty paid by it on purchase of the products, direction issued to reverse the credit entry and pay it over to State.

Respondent is one of the three major producers of malt and malt extract in the country. The purchase of malt and malt extracts is by certain specified industries only - (A) industries engaged in the manufacture of beverages like Bournvita, Horlicks Etc. and (b) breweries and distilleries engaged in manufacture of Indian made foreign liquors.

One of the purchasers of category (a), HMM Limited like the other purchasers, took proforma credit of the duty paid by it on the purchase of malt/malt extract in terms of Notification No. 201 of 1979, which was in force at the relevant time. The purchasers of category (b) were however not entitled to and did not avail of any proforma credit from the respondent.

The Assistant Collector took the view that malt and malt extract produced could not be treated as food products and therefore the benefit of notification No. 55 of 1975 was not available. On the writ petition preferred, the High Court accepted the case of the Respondent and held.

A that the benefit of the said exemption notification could be availed of. The High Court thus held that the Respondent was entitled to refund of excess duty paid, on the basis of unjust enrichment.

B Pursuant to the judgment of the High Court, Revenue was under an obligation to refund the duty collected to Respondent Barmalt. Subsequently, notices were issued to the purchasers including HMM Limited calling upon them to reverse the proforma credit taken by them and pay the purchasers like HMM Limited. This put them in peril as in addition to the duty already paid by them while purchasing the produce, they were now once again asked to pay the same duty over again to the State on the ground that the State had refunded the duty to Barmalt, the Respondent and other two producers pursuant to the High Court Judgment.

C On the demand raised against it, HMM Limited, disputed the same on several grounds including on limitation and the Tribunal accepted its Claim only on the ground of limitation. Hence these appeals.

D A solution to the problem was envisaged by the counsel for the Respondents. It was suggested that Barmalt, the Respondent would pay over the entire amount received by it by way of refund to HMM Limited and other similar purchasers who have availed of proforma credit and that the purchasers would then pay or adjust the amount to the Revenue. It was thus contended that on completion of these two steps, neither the Revenue nor the purchaser would stand to lose and that there would be no question of unjust enrichment.

E Though this Court felt that the solution put forth by the Respondent sounded attractive, it found that there were difficulties in the way of implementation of the same.

F Disposing of the appeals, this Court

G HELD : 1.1. The suggestion put forth by the counsel for the Respondents would not be feasible, nor would it be possible to work out a formula in the present case, in view of the fact that no appeals had been preferred against the other two producers who had also taken refunds and because of the fact that the other two producers and all the purchases were not before this Court. [130-G]

H 1.2. In view of the admitted fact that the respondent had passed on

the burden of duty to its purchasers, the respondent should refund to the State the amount received by it by way of refund (pursuant to the judgment of the High Court) except the sum of Rupees Eight Lakhs, which was admittedly received by HMM Limited from the respondent. HMM Limited is directed to reverse the credit taken by it to the extent of Rupees Eight Lakhs. [130-H, 131-A]

Mafatlal-Industries v. Union of India, (1996) 9 Scale 457, referred to.

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 960 of 1986 Etc.

From the Judgment and Order dated 11.7.85 of the Delhi High Court in C.W.P. No. 36 of 1981.

R. Mohan, D.A. Dave, Harish N. Salve, V.K. Verma, Ms. Kamakshi, S. Mehlwal C.V.S. Rao, P. Parmeshwaran, N.K. Bajpai, V. Lakshmi Kumaran, B.B. Sawhney, Mohd. Jamal Nasir, Ms. Indra Sawhney, R.N. Karanjawala, (Ms. Ruby Ahuja) for Ms. M. Karanjawala, P.H. Parekh and K.J. John for the appearing parties.

The Judgment of the Court was delivered by

B.P. JEEVAN REDDY, J. Civil Appeal No. 960 of 1986 :

In this appeal preferred against the judgment of the Delhi High Court, two questions arise, viz., whether the malt and malt extract produced by the respondent, Barmalt (India) Private Limited (Barmalt), falls within the expression "food product" in Exemption Notification No. 55 of 1975 dated March 1, 1975 and whether the respondent is entitled to refund of the excess duty paid by him pending the decision of the High Court. The Assistant Collector took the view that malt and malt extract cannot be treated as food products and, therefore, not entitled to the benefit of the said Notification. On a writ petition being filed, the Delhi High Court upheld the respondent's plea and also held that it is entitled to the benefit to the said Exemption Notification. On the second issue, the Delhi High Court has overruled the Revenue's plea based on the theory of unjust enrichment. When this appeal came up from hearing on an earlier date, we held that the High Court was right in saying that malt and malt extract to qualify as food products and, therefore, the respondent has been rightly held entitled to the benefit of the aforesaid Notification. But then

A the question arose about the respondent's right to refund. On this aspect, we posted the matter for further hearing because of the peculiar situation arising in this matter, to which we shall now advert.

B Consequent upon the decision of the High, Sri Harish Salve, learned counsel for the respondent says, the respondent, Barmalt, became entitled to refund of Rs. 2,67,00,983.16p. which was the amount of duty paid by it. Pursuant to the impugned judgment of the High Court it is stated, an amount of Rs. 2,41,53,497.92p. has been refunded to it. The balance amount of Rs. 25,47,485.24p. is still refundable to it. On these facts, in the ordinary course, we would have disposed of the matter in terms of *Mafatalal Industries v. Union of India*, [1996] 9 SCALE 457 and the format order, which we have devised pursuant to the said judgment but Sri Harish Salve brought to our notice certain facts on the basis of which he asks for certain specific directions. The facts stated by him are the following :

D The respondent, Barmalt, is one of the three major producers of malt and malt extract in the country. The other two Malt Company of India Limited and A.K. Malt (Private) Limited. The malt and malt extract produced by these units is purchased by certain specified industries only. The industries purchasing malt and malt extract fall under two categories, (i) industries engaged in the manufacture of beverages, like Bournvita and Horlicks etc. and (ii) the breweries and distilleries engaged in manufacturing Indian Made Foreign Liquors. One of the category (i) industries is H.M.M. Limited, now known as Smith Kline Beecham Consumer Health Care Limited, respondent in the connected appeal, Like other purchasers in category (i), H.M.M. Limited took proforma credit of the duty paid by it on the purchase of malt/malt extract in terms of Notification No. 201 of 1979, which was in force at the relevant time. Other purchasers in category (i) also did the same. (So far as category (ii) purchasers, i.e., distilleries and breweries are concerned, Sri Salve says that they were not entitled to and did not avail of any proforma credit for the duty paid by them when they purchased malt/malt extract from the respondent or the other two units, as the case may be.) But when the Delhi High Court, under the judgment impugned herein, that no duty was payable on the clearance/removal of malt and malt extract by virtue of Exemption Notification No. 55 of 1975, the Revenue was obliged to refund the duty collected back to barmalt. Having done that, the Revenue served notices upon the purchasers of malt and malt extract (H.M.M. Limited and others)

calling upon them to reverse the proforma credit taken by them and pay or adjust the duty payable accordingly. This put the purchasers like H.M.M. Limited in peril. They had already paid the duty (to Barmalt and other two produces) while purchasing the malt/malt extract and now they were being asked to pay the same duty over again to the State on the ground that the State has refunded the duty to Barmalt (and the other two producers) pursuant to the Judgment of the High Court. When this demand was raised against H.M.M. Limited, it disputed the same on several grounds including limitation and the Tribunal appears to have accepted its claim only on the ground of limitation. (As already stated, there are other purchasers, like H.M.M. Limited falling in the first category mentioned above.)

Sri Salve suggests that this problem can be solved in the following manner : Barmalt will pay over the entire duty to H.M.M. Limited and other similar purchasers (who have availed of the proforma credit). There are only three purchasers in the first category. As a matter of fact, out of the sum of Rs. 2,41,53,497.92p., Barmalt has already refunded an amount of Rs. 1,28,87,580.34p. to H.M.M. Limited and other similar purchases. (The payment to H.M.M. Limited is stated to be in the sum of Rupees eight lakhs.) Barmalt will pay over that rest of the amount (received by them by way of refund) to the respective purchasers. Even the amount of Rs. 25,47,485.24p. will also be paid over to the respective purchasers as soon as it is received from the Revenue. In this manner, Barmalt would have paid over the entire amount received by them by way of refund to their purchasers in which case no question of unjust enrichment would arise in the case of Barmalt. So far as purchasers are concerned, they would also not stand to lose in any manner. They would get the money from Barmalt and would then pay over/adjust the amount to Revenue. If these two steps are completed, neither the Revenue stands to lose nor would the purchasers stand to lose and Barmalt would also not be unjustly enriched. The solution suggested by Sri Salve sounded attractive when suggested and accordingly notices were directed to the other two producers of malt and malt extract, viz., Malt Company of India Limited and A.K. Malt (Private) Limited - and then we discovered the several difficulties in the way of accepting the suggestion of Sri Salve. they are : (a) While the Revenue has filed the appeal against the decision of the Delhi High Court in favour of Barmalt (against the order impugned herein), no appeals have been preferred by the Revenue against similar orders in favour of other two

A producers aforesaid. Those two producers have taken the refund and the orders in their favour are said to have become final. Their counsel stated that they are not willing to abide by or implement the said suggestion - or formula, if we can call it one - and that there is no reason why they should pay over the amounts which they have received by way of refund when the orders of refund in their favour have become final. (b) The purchasers like B H.M.M. Limited have not purchased exclusively from Barmalt. They have purchased from all the three producers. The other purchasers are not before us. Only the H.M.M. Limited is before us. It is the respondent in connected appeal, viz., Civil Appeal Nos. 3387- 88 of 1992. An undertaking has been filed on behalf of H.M.M. Limited stating that they are agreeable C to the said formula provided the formula is applied uniformly to other two producers viz., Malt Company of India Limited and A.K. Malt (Private) Limited also. Sri Lakshmi Kumaran, learned counsel for the H.M.M. Limited, no doubt stated that if this formula is applied and implemented D uniformly, H.M.M. Limited would be prepared to reverse the proforma credit equal to the amount received by them from the said three producers notwithstanding the fact that H.M.M. Limited has already succeeded before the Tribunal on the ground of limitation. Counsel stated that though according to law, H.M.M. Limited is not obliged to reverse the credit by E virtue of the decision of the Tribunal in their favour, they are yet prepared to reverse the credit if the formula suggested by Sri Salve is applied uniformly in case of all the purchasers of malt and malt extract. Besides F the purchasers in category (i), there are a large number of purchasers in category (ii), who are also not before us.

Faced with these difficulties, it was suggested by Sri Lakshmi G Kumaran and by Sri Salve that if the other two producers, (Malt Company of India Limited and A.K. Malt (Private) Limited) refuse to abide by the said formula, this Court should, in the interest of justice, invoke its powers under Article 142 of the Constitution direct them to abide by and implement the said formula, we have considered the said suggestion but we think that it would not be feasible or possible to work out the said formula in G the facts and circumstance brought to our notice. Neither the other two producers are before us nor are all the purchasers before us. It would be an endless and a highly complicated exercise which we do not think advisable to undertake. In the circumstances, we have no alternative but to dispose of the appeal as they stand. So far as Civil Appeal No. 960 of 1986 H (Barmalt) is concerned, we direct - in view of the admitted fact that it has

passed on the burden of duty to its purchasers - that Barmalt should refund to the State the amount received by them by way of refund (pursuant to the impugned judgment of the Delhi High Court *except* a sum of Rupees eight lakhs. In view of the fact that H.M.M. Limited is now before us and it has admittedly received the said sum of Rupees eight lakhs from Barmalt, the H.M.M. Limited is directed to reverse the credit taken by it to the extent of Rs. 8,00,000 (Rupees eight lakhs only) and pay it over to the State.

Civil Appeal No. 960 of 1986 is allowed in the above terms. No order as to costs.

C.A. Nos. 2447/89, 3387-88/92 and 9947/95 :

No separate arguments were addressed in these appeals in view of the debate regarding the formula suggested in Civil Appeal No. 960 of 1986. List these appeals accordingly for disposal on merits next week.

R.D.

Appeals partly allowed.