Nestle India Ltd. Vs. Cc

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Mumbai

Decided On : Jul-15-1997

Reported in : (1997)(72)LC594Tri(Mum.)bai

Judge : J Balasundaram, K D Shiben

Appellant : Nestle India Ltd.

Respondent : Cc

Judgement :

1. The issue for determination in this appeal which arises out of the order of the Collector of Customs (Appeals), Bombay is the eligibility or otherwise of "Double Drum Roller Dryer" imported by the appellants herein, who are manufacturers of Lactogen infant food and cereal products, to the benefit of concessional rate of auxiliary duty of 25% under Serial No. 11(xii) of Notification 189/86-Cus. dated 1.3.1986 which covers "goods falling under Heading 84.19 excluding machinery and equipment for food, other than milk..." The catalogue of the machine showed that the use thereof was not limited to the mere evaporation of water or solvents from given products but also in the case of certain nutritious substances, a ready cooking effect by which instant properties were obtained. The classification of the goods was confirmed by the lower authorities under Chapter Heading 8419.81 which is applicable to 'machinery, plant and equipment for making hot drinks or for cooking or for heating food'. The appellants came up in appeal before the Tribunal which vide final order No. 392/88-B2 dated 16.8.1988 held by a majority that the imported machine was classifiable under Heading No. 8419.39 as Dryer and the

majority held that the machine was a versatile machine, capable of being used in a variety of industries and can be used for drying not only food products but also products like glue, paints, etc. The appellant's claim for consequential refund was granted in respect of basic customs duty; however, as regards refund of differential auxiliary duty in terms of Notification 189/86 [at Serial No. 11(xii)] of the table annexed thereto it was rejected for the reason that the machine was for use in food industry. Hence this appeal.

2. The first contention of the learned Counsel is that since the assessee's appeal on classification under Chapter Heading 8419.39 attracting duty @ 50% + 25% : 15% (25% is the rate at which auxiliary duty is payable in terms of Notification 189/86) was allowed by the Tribunal vide its final order No. 392/88-B2 dated 16.8.1988, the Revenue was bound to sanction refund of the excess auxiliary duty paid by the appellants for clearance of the goods (auxiliary duty was paid @ 40% being the statutory rate) and the Department could not go into the merits of the eligibility of the imported goods to the benefit of the exemption under the Notification. In support of his contention he cites the judgment of the Apex Court in the case of Commissioner of Income Tax, Delhi, Rajasthan and New Delhi v. Rao Thakur Narayan Singh in which it has been held that the Income Tax Department cannot initiate reassessment proceedings again under Section 34 of the Income Tax Act, 1922 on the same subject matter covered by an order of the Appellant Tribunal even as a result of mistake, if such mistake was not rectified by the Department by pursuing proper remedy under Section 35. We are unable to accept this contention of the learned Counsel. In the case of the appellants the only dispute before the CEGAT in appeal No. C/358/87-B2 (which was disposed of by the earlier order dated 16.8.1988) was the correct classification of the Double Drum Roller Dryer imported by the appellants. The finding of the majority is that the machine is classifiable rightly under Heading 84.39 and not under Heading 8419.81 as decided by the lower authorities. This is clearly brought out from the operative portion of the order proposed by the Member (T) Shri I.J.Rao and which has been concurred with by the 3rd Member, Shri K.Prakash Anand, learned Member (T). The Tribunal was not called upon to go into the question of applicability of Notification No. 189/86 to the imported goods as this was never disputed by the importers before the Tribunal and the only prayer in their appeal

memorandum was that the goods fall for classification under Heading 8419.39 which was ultimately accepted by the Tribunal. Therefore, when the Tribunal allowed the appeal with consequential relief, it is to be understood that the classification claimed by the importers was accepted and cannot be understood to mean that their claim for concessional rate of auxiliary duty under Notification No. 189/86 was also accepted, particularly when the importers did not claim the benefit thereof either in the Bill of Entry or before the Assistant Collector or the Collector of Customs (Appeals) or the Tribunal which, therefore, had no occasion to go into this question. It is well settled that an exemption Notification benefit has to be claimed by an assessee/importer, and since the appellants herein had not claimed the benefit of Notification No. 189/86 at any earlier stage, the order dated 16.8.1988 of the Tribunal cannot be interpreted to hold that such benefit had also been extended by virtue of the appeal being allowed. The judgment of the Apex Court cited by the learned Counsel is distinguishable in that case, the Income Tax Officers assessed the assessee who was a holder of an impartible estate in 1942-1943. In April, 1945, a notice under Section 34 of the Income Tax Act of 1922 was issued to him on two items of income-forest income and interest income were not included in the original assessment. The assessee contested only the inclusion of forest income; however, the ITO made a revised assessment including both the incomes and the Income Tax Appellate Tribunal held that the ITO had no jurisdiction to initiate proceedings under Section 34 in respect of forest income on the ground that the ITO had knowledge that the assessee had such income when he made the original assessment.

Although the Tribunal only dealt with the question of forest income, by mistake or inadvertence, it set aside the order of reassessment of July, 1945 made by the ITO and restored the original order passed by him. No steps were taken by the Income Tax Department to rectify this mistake under Section 35 of the Income Tax Act or to get the matter referred to the High Court. In January 1950, the ITO initiated proceedings under Section 34 with respect to interest income and a revised assessment order was passed including interest income, which was confirmed by the Appellate Assistant Commissioner. On further appeal, the ITAT held that since the assessee had failed to disclose his interest income in the return filed by him in connection with the original assessment, the said income had escaped assessment and, therefore, provisions of Section 34(l)(a) were attracted. The High Court on reference concluded that the Tribunal was in error in setting aside the assessment of tax on interest income but without going into the correctness of the imposition of tax thereon, but that order had become final; the order did not invalidate the entire proceedings taken under Section 34 and, therefore, the ITO could not initiate proceedings afresh under Section 34. In the result, the High Court held that the provisions of Section 34(1) were not applicable in respect of assessment year 1942-1943 on 19.1.1950 when the notice under that provision was issued for the purpose of assessing the escaped interest income. The High Court answered the questions referred to under Section 68(1) in the negative. The Revenue went up in appeal to the Supreme Court which upheld the order of the High Court. The relevant paragraphs of the judgment of the Apex Court are reproduced herein: 5. The Appellate Tribunal in considering the validity of the notice under Section 34 of the Act only discussed the question of the escape of the syar income; it did not advert to the interest income at all. It came to the conclusion, having regard to the fact that the Income-tax Officer at the time he made the original assessment had knowledge of the existence of the syar income, that the Income-tax Officer did not come into possession of definite information within the meaning of Section 34 of the Act. Though the finding was arrived at on the basis of the syar income alone the Tribunal set aside the entire order of reassessment and restored the original order of assessment made by the Income-tax Officer under Section 23(3) of the Act. The legal effect of the order was that the reassessment of the entire income, including the syar income and interest income, was set aside on the ground that the Income-tax Officer did not come into possession of definite information leading to a "discovery" and, therefore, he could not initiate proceedings under Section 34 of the Act. It is true that the Tribunal had committed a mistake in setting aside the reassessment order in respect of the interest income also; but, so long as that order stands, it comprehends both the incomes.

6. The Income-tax Officer did not take any further proceedings by way of reference to the High Court on any question of law arising out of the order of the Tribunal; nor did he take any proceedings under Section 35 of the Act to have the order corrected on the ground of mistake. With the result the order has become final.

7. The question, therefore, is not whether the order of the Tribunal in so far as it related to the interest income was made by inadvertence or under a mistake, but whether the Income-tax Officer could initiate proceedings over again under Section 34 of the Act in derogation of the finding given by the Tribunal that the Income-tax Officer did not "discover" that the income had escaped assessment.

8. The Income-tax Act is a self-contained one. It creates a hierarchy of Tribunals with original, appellate and revisional jurisdictions. Section 31 gives, inter alia, right of appeal against some orders of the Income-tax Officer to the Appellate Assistant Commissioner; Section 33 provides for a further appeal to the Income-tax Appellate Tribunal; and Sub-section (6) of Section 33 says that save as provided in Section 66 orders passed by the Appellate Tribunal on appeal shall be final. Section 66 provides for reference to the High Court on a question of law; and Section 66A provides for appeals in certain cases to the Supreme Court. It is clear from the said provisions that the order of the Tribunal made within its jurisdiction, subject to the provisions of Section 66 of the Act, is final. Therefore, the decision of the Tribunal in respect of the subject-matter under appeal before it is final and cannot be reopened by the assessee or the department.

9. The Judicial Committee in Commissioner of Income-tax v. Khemchand Ramdas succinctly stated the legal position thus: But it is not true that after a final assessment under those Sections (Sections 23 and 29) has been made, the Income-tax Officer can go on making fresh computations and issuing fresh notices of demand to the end of all time....But when once a final assessment is arrived at, it cannot in their Lordship's opinion be reopened except in the circumstances detailed in Sections 34 and 35 of the Act...and within the time limited by those Sections.

In their Lordship's opinion the provisions of the two Section are exhaustive, and prescribe the only circumstances in which and the only time within which such fresh assessments can be made and fresh notices of demand can be issued.

The Judicial Committee again in Commissioner of Income-Tax v. Tribune Trust, Lahore, after noticing the relevant sections of the Act, reaffirmed the same position and held that assessments once made would be valid and effective until they were set aside in the manner prescribed by the Act and that, if not so set aside, they were final. If so, it follows that the order of the Tribunal on the said question, namely, that the whole order of reassessment under Section 34 of the Act was invalid as there was no "discovery" that the relevant income escaped assessment, had become final.

10. The only two sections that enable the Income-tax Officer to reopen final assessments are Sections 34 and 35. If the Appellate Tribunal committed a mistake under Section 35 it can be rectified within four years from the date of the order. In the present case it was a clear case of mistake, for the Tribunal set aside the order of reassessment in respect of the interest income, though its validity to that extent was not disputed. But for one reason or other the revenue did not resort to the obvious remedy and allowed the mistake to remain uncorrected. In these circumstances, can Section 34 of the Act be resorted to? Learned Counsel for the revenue says that Section 34(I)(a), as amended in 1948, confers such a power on the Income-Tax Officer. The material part of Section 34, before amendment, read: (I) If in consequence of definite information which has come into his possession the Income-tax Officer discovers that income, profits or gains chargeable to income-tax have escaped assessment in any year....

If the Income-Tax Officer has reason to believe that by reason of the omission or failure on the part of an assessee...to disclose fully and truly all material facts necessary for his assessment for that year, income, profits or gains chargeable to income-tax have escaped assessment for that year...he may in cases falling under Clause (a) at any time ... serve on the assessee...a notice...

It is said that the words "has reason to believe that by reason of the omission or failure on the part of an assessee to disclose fully and truly all material facts necessary for his assessment for that year, income, profits or gains chargeable to income-tax have escaped assessment" are more comprehensive than the words "the Income-tax Officer discovers that income, etc., have escaped assessment in any year", and, therefore, though there was a finding by the Tribunal that the Income-tax Officer did not "discover" that there was escape of assessment, the Income-tax Officer under the amended Section 34 can initiate proceedings in spite of that finding. We cannot accept this argument. It could not have been the intention of the legislature by amending the section to enable the Income-tax Officer to reopen final decisions made against the revenue in respect of questions that directly arose for decision in earlier proceedings.

The Tribunal held in the earlier proceedings that the Income-tax Officer knew all the facts at the time he made the original assessment in regard to the income he later on sought to tax. The said finding necessarily implies that the Income-Tax Officer had no reason to believe that because of the assessee's failure to disclose the facts income has escaped assessment. The earlier finding is comprehensive enough to negative "any such reason" on the part of the Income-Tax Officer. That finding is binding on him. He could not on the same facts reopen the proceedings on the ground that he had new information. If he did so, it would be a clear attempt to circumvent the said order, which had become final. We are not concerned in this appeal with a case where the Income-tax Officer got new information which he did not have at the time when the Tribunal made the order. The finding of the Tribunal is, therefore, binding on the Income-Tax Officer and he cannot, in the circumstances of the case, reopen the assessment and initiate proceedings over again. If that was not the legal position, we would be placing an unrestricted power of review in the hands on an Income-Tax Officer to go behind the findings given by a hierarchy of Tribunals and even those of the High Court and the Supreme Court with his changing moods.

3. In para 10 set out above, the Apex Court has held that it could not have been the intention of the legislature by amending Section 34 to enable the ITO to reopen final decisions made against the Revenue in respect of questions that directly arose for decision in earlier proceedings. In the appeal before us, earlier decision of the Tribunal was in respect of classification of the imported goods and the question of eligibility to the benefit of Notification 189/86 never directly arose for decision in the endorsed proceedings. The consequential relief to which the appellants were entitled as a result of the Tribunal's final order dated 16.8.1988 was refund of excess 20% of basic duty paid i.e. duty was paid @ 70% in accordance with assessment by the Department under Chapter Heading 8419.81 while the rate of duty payable in accordance with the assessment under 8419.39

(which was upheld by the Tribunal) was 50%. The consequential relief granted by the Tribunal did not extend to refund of 15% auxiliary duty allegedly paid in excess of the rate prescribed in Notification 189/86 for goods falling under Heading 84.19. Learned DR is correct in pointing out that there is a difference between assessment under the Income Tax Act where all the assessments are done under the provisions of one enactment and the Customs law wherein it is the basic duty of customs that is prescribed in the Customs Act, while auxiliary duty is prescribed under the Finance Act (even though, there is only one order of assessment by the Customs authorities). Therefore, we hold that the appellants were not automatically entitled to refund of auxiliary duty stated to have been paid by them in excess.

4. Turning to the merits of the claim for exemption, we find that Serial No. 11(xii) of the Notification 189/86 covers goods falling under Heading No. 84.19 of the first Schedule to the Customs Tariff Act, 1975 (excluding machinery and equipment for food...). The imported goods are used by the appellants in processing food, baby food, etc., as seen from the catalogue. The function of the machine is principally to produce instant foods. Therefore, it is covered by the exclusion clause contained in Serial No. 11(xii) of the Notification. The argument of the learned Counsel that the finding of the Tribunal in its earlier order is that the machine is not for making hot drinks or for cooking or heating food is not correct-as seen from the Tribunal's order, the machine is not exclusively made for making hot drinks or for cooking or for heating food and is a versatile machine used primarily for the purpose of drying various products like milk, butter milk, various kinds of glue, paints, baby foods, etc. From para 2 of the order recorded by Shri I.J. Rao, Learned Member (T), it is abundantly clear that the classification of the goods has been held to be under Heading 8419.39 by applying Chapter Note 7 to Chapter 34 which reads as under: A machine which is used for more than one purpose is for the purposes of classification, to be treated as if its principal purpose were its sole purpose.

Therefore, the Tribunal did not hold that the imported item was not at all a machine for making hot drinks or for cooking or for heating food.

Since the imparted machine is capable of being used for processing food and is in fact used by the appellants for such purpose (for drying and cooking of instant food and cereral products), it is not covered by Notification 189/86 and it is excluded from the coverage of Serial No.11(xii) of the Notification which covers goods falling under Chapter Heading 84.19 viz. "machinery, plant or laboratory equipment, whether or not electrically heated, for the treatment of materials by a process involving a change of temperature such as heating, cooking, roasting, distilling, rectifying, sterilising, pasteurising, steaming, drying, evaporating, vaporising, condensing or cooling other than machinery or plant of a kind used for domestic purposes, instantaneous or storage water heaters, non-electric", excluding machinery and equipment for food.