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Collector of Central Excise Vs. Plastic Converters

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Nov-27-1997

Reported in : (1998)(98)ELT434TriDel

Appellant : Collector of Central Excise

Respondent : Plastic Converters

Judgement :
1. This Reference Application is filed by the department on the ground that the following question of law arises with reference to the Final Order No. 522/97-D in Appeal No. E/4419/89-D/:- " Whether the refund claim can be granted without finalisation of classification dispute and also without following proper procedure laid down under Section 35 of the Act." 2. Heard Shri Satnam Singh, ld. SDR who represented the department.

None appeared on behalf of the respondents.

3. Shri Satnam Singh reiterated the grounds taken by the department to refer the matter.

4. The department has submitted in the reference application that the view taken by the Supreme Court in the case of Elson Machine Pvt, Ltd. 1988 (38) E.L.T. 571 (S.C.) is in different context and the same is not applicable in terms of Section 11B of the Act. Further, it was submitted that the remedies have been made available to the assessee to challenge any decision passed by Assistant Commissioner

before Commissioner (Appeals) within a specified time limit. According to the department the assessee has not filed any such appeal under Section 35 of CESA, 1944.

5. It is settled position now that either the department can issue a notice under Section 11A even in respect of classification which was approved earlier and similarly an assessee also can for re-classification by filing a refund under Section 11B of the Act. In view of the settled position we do not feel that this is a point of law to be referred to the High Court.

6. Further, as envisaged in Section 35G of the Act, it is clear that reference lies only with reference to the matter not being order relating among other things to the determination of any question having a relation to the rate of duty of excise or to the value of goods for the purpose of assessment. Since rate of duty is involved in the instant case, even on that score also reference does not lie. In view of this position the reference application filed by the department is hereby rejected.

7. While agreeing with my brother that the reference application stands rejected, I wish to make some observations in the manner in which the applicant Collector has made this reference. In the statement of facts, the following paragraph occurs :- "I find that the said order of the Hon'ble Tribunal is not proper, legal and correct for the following reasons :" It would appear that the ld. Collector has not understood the relevant provisions of the Act at all. First of all it is not for the Collector to sit in judgment as to the propriety, legality and correctness of the Tribunal's order. That authority is available with the Collector only when he or she is examining an order passed by an equivalent authority, namely, the Collector (Appeals). There also, the judgment is not left to the Collector but to the Appellate Tribunal before whom the Executive Collector is empowered to file an application under that provision namely Section 35B. If it is the belief of the Collector that there is an apparent error in the order of the Tribunal, the law provides for an application to be made for the rectification thereof.

Section 35G covers an entirely different area. Where on perusal of an order of the Tribunal it would appear that a substantial question of law arises out that order, there only can a reference be made to the jurisdictional High Court. Where the

question of law has already been settled by a High Court or by Supreme Court, there also such a reference cannot be made. These distinctions made in the Act should be understood by every senior officer. It is to be hoped that the Collectors would exercise greater discretion in making applications under Section 35G.

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