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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Jul-12-1984

Reported in : (1985)(19)ELT129TriDel

Appellant : Collector of Central Excise

Respondent : Chennai Bottling Company

Judgement :

1. This is an application together with cross objections under Section 35G of the Central Excises and Salt Act, 1944 (hereinafter referred to as the Act) for reference to the High Court of certain questions, said to be question of law, arising out of the Order No. SB(T) A. 514/82-A dated 9-8-1983 of the 'A' Bench of this Tribunal.

2. In the application, itself, the questions of law have not been formulated. Subsequently, on 18-4-1984, an application for replacement of Annexure II to the Reference Application was made. The replaced Annexure contained the following questions said to be questions of law : (i) Whether the Tribunal has right to confirming the order-in-appeal without giving any ruling on the applicability of Section 11-B to the facts of this instant case, when the Appellate Collector has set aside the order-in-original solely on the ground that only Section 11-B and not the then Rule 11 applies to the facts of this case (ii) Whether Section 11-B which came into effect from 17-11-80 can be applied retrospectively for the payments made since 5-2-73, when the old Rule 11 (prior to 6-8-77) was in force for the relevant period (iii) Whether the protest made in general terms in the absence of

specific reason/grievance can be recognised as a valid protest for the purpose of saving limitation to claim refund (iv) Whether the protest made on one score i.e. valuation purpose, can be said to apply for the classification purpose also, in spite of the fact that at the material time the respondent did not pay duty under protest specifically with regard to the classification dispute (v) Whether the interpretation placed by the Tribunal on the words '... reserving our rights of claim for the excess amount of duty paid by us in any manner' appearing in the respondent's letter dt.

14-34973 as covering the classification dispute also, is tenable in law? (vi) The respondent's letter dt. 14-3-73 is a continuation of their earlier letter dated 2-2-73 explaining the mode of protest i.e.

affixing separate seals for the duty paid under protest. To appreciate the true nature of protest, the Tribunal ought to have read both the letters in conjunction. Whether the order passed by the Tribunal without considering the contents of the letter dated 2-2-73 is correct in law (vii) The respondent vide their letter dt. 14-3-73 has informed the Superintendent in charge about the mode or manner of exercising their protest with regard to disputed freight charges included in the assessable value. The manner for exercising protest has nothing to do with the purpose for which such protest is made. Whether the order passed by the Tribunal by mis-construing the meaning of the term 'for the excess duty paid by us in any manner to cover any other purpose for which the protest was not made, is tenable in law? (viii) Whether a right accrued to claim refund for the payments made since 5-2-73 to 16-6-77, a part claim made on a particular date for the later period amounts to implied waiver of the other part relating to the earlier period It is only questions (i) to (iv) that have been pressed by Shri Mahesh Kumar for the Applicant and not questions (v) to (viii).

3. In the cross-objections, Respondent, while convassing against any Reference being made, appears to have erroneously assumed that the Applicant required a Reference to the Supreme Court and accordingly suggested in the alternative, the reference of what is alleged to be a question of law, to the Supreme Court.

(a) The Respondent manufactures aerated water assessable to duty at all material times under Item No. 1-D of the First Schedule to the Act, @ 20% ad valorem

during the financial year 1973-74 and @ 20% ad valorem plus 50% thereof as auxiliary excise duty during financial years 1974-75 and 1975-76; (b) (i) on or about 18-8-1977, the Respondent filed a claim of refund of Rs. 10,77,987.70 claimed to be the amount of central excise duty paid in excess during the period between 18-3-1976 and 16-6-1977; (ii) the contention in the refund application was that the goods in question were classifiable under Item 1-D(2) of the First Schedule to the Act rather than under 1-D(1)(a) thereof; (iii) agreeing with the aforesaid contention, it was, ultimately, held on 26th September, 1980 by the Government of India, in Revision, that the Respondent was entitled to the refund of duties paid in excess upto a period of one year prior to the date of filing the application for refund; (iv) accordingly, the refund payable in terms of the order of the Government of India was, in fact, paid to the Respondent; (c) the Respondent thereafter applied on 23-12-80 for refund of Rs. 13,96,582.23 for the period between 5-2-1973 and 17-3-1976. In the course of the application for refund the Respondent relied upon the aforesaid order of the Govt. of India dated 26-9-1980 and submitted that the Respondent was entitled to refund pursuant thereto since the payment of duty during the period in question was under protest; (i) the claim related to a period when the old Rule 11 of the Central Excise Rules was in operative force; (ii) in terms of the said Rule, a refund of duties erroneously paid was barred unless the claim was preferred within three months from the date of payment of such duty; (iii) there was nothing in the said Rule to save the claim from the afore-said bar of limitation on the ground of payment under protest;and accordingly rejected the claim; (e) in Appeal, however, the refund prayed for was allowed on the ground that- (i) it was Section 11-Bof the Act enacted w.e.f. 17-11-1980 that was applicable to the instant application made on 23-12-1980 rather than Rule 11, as it read at the time the duty was paid; (ii) in terms of the aforesaid section, the claim for refund is not barred by limitation where it was paid under protest; (f) the Government of India issued a notice to show cause dated 18-9-1982 under Section 36(2) of the Act, as it stood then, requiring the Respondent to show cause as to why the order of the Appellate Collector of Central Excise should not be set aside and the order in original of the Assistant Collector of Central Excise be restored; (g) on transfer of the aforesaid proceedings in terms of Section 35P of the Act, as it now reads, the Tribunal, after hearing the matter as an

Appeal, quashed the notice to show cause as unsustainable in law and upheld the order of the Appellate Collector aforesaid; (h) the instant Reference Application by the Collector of Central Excise, Madras is in consequence of the aforesaid order of the Tribunal.

5. In the Reference Application it was argued by Shri Mahesh Kumar, learned representative of the Applicant, inter alia, that- (a) while it is true that in terms of the order of this Tribunal in Reference Application No. 34/83-D, arising out of the Tribunal's Order No. 429D/83 [Union Carbide {India) v. Collector of Customs, Calcutta] that an applicafion for reference under Section 35G of the Act is not maintainable, unless the case (and not the order slmpliciter) involved the determination of any question having relation to the rate of duty or to the value of goods for the purpose of assessment, this is not one such case, since in adjudicating the application for refund in question, no issues relating to rate of duty or value for purposes of assessment arises.

They are not issues which the various forums are invited to decide in the course of the disposal of the application for refund or fall, necessarily, for determination. Accordingly, an application for a reference is not ruled out in terms of the provision in Section 35G of the Act; (b) once the Government of India decided that the goods of the Respondent are assessable to duty under Item 1-D(2), rather than l-D(1) (a), no question of determination of rate of duty survives to be decided in the instant proceedings for refund; (c) accordingly, questions (i) to (iv) proposed by the Collector of Central Excise arise on the order of the Tribunal in appeal and require to be referred to the High Court.

6. Shri Daya Sagar, learned Consultant for the Respondent, in his reply, relied strongly on the aforesaid order of the Tribunal in the case of Union Carbide (India) Limited v. Collector of Customs, Calcutta and (a) the instant proceedings for refund did involve the determination of a question having a relation to the rate of duty of excise in that- (i) during the material time i.e. 5-2-1973 to 17-3-1976, Item 1-D of the First Schedule to the Act prescribed the levy of duty at 20% ad valorem upon aerated waters in the manufacture whether or not flavoured; (ii) however, by virtue of the Notification No. 30/72, dated 17th March, 1972 the effective rate of

duty was reduced to 10% ad valorem provided that no blended flavouring concentrates in any form are used in the manufacture of aerated waters in question; (iii) the reference to the said Notification becomes necessary for the adjudication of the refund application to ascertain the effective rate of duty, notwithstanding that it had been catogorically held by the Government of India, in the earlier proceedings aforesaid, that the aerated waters manufactured by the Respondent did not contain blended flavouring concentrates; (iv) alternatively, a determination of the question of limitation has also a relation to the determination of the rate of duty; (v) accordingly, the proceedings in relation to refund did involve the determination of a question having a relation to rate of duty of excise and consequently, in terms of Section 35G of the Act and the decision of the Tribunal in the Union Carbide case aforesaid, no Reference Application lies.

(a) the question of classification of the Respondent products had been finally settled by the Government of India. It was decided that the goods in question did not contain any blended flavouring concentrates and accordingly assessable under Item 1-D(2) of the First Schedule to the Act, as it read at the material time, namely, 18-3-76 to 16-6-1977; (b) for the period relevant to the instant application for refund, Item 1-D in the First Schedule to the Act read slightly differently.

Nevertheless, the basic duty of 20% ad valorem, leviable during that period in terms of the First Schedule to the Act, was reduced to 10%, provided that blended flavouring concentrates had not been used in the manufacture of the goods.

8. The questions which require our consideration in regard to maintainability of the application for Reference, in the light of our judgment in the case of Union Carbide v. Collector of Customs, Calcutta, (a) (i) In the application for refund, was the adjudicating authority required to determine the rate of duty applicable to the aerated waters in question as an issue in the case? (ii) When once it had been categorically held that the goods in question did not contain blended flavouring concentrates, does the proceeding for refund require any further determination of any question having a relation to the rate of duty (b) Assuming that a reference to the Notification to ascertain the effective rate of duty may become necessary in the adjudication of the claim of refund, does it straightaway mean and imply that it was

a case requiring the determination of a question relating to duty, notwithstanding that there was no question whatsoever of the applicability or the construction of the Notification to the goods in question (c) Does a mere determination of the question of limitation imply a determination of the rate of duty, although the case for refund did neither raise nor involve any such question? e. (a) (i) All that appears to have been stated in the application for refund was, as already stated, that the Government of India had decided in the Respondent's favour that their products did not contain blended flavouring concentrates, implying, thereby, that their product was assessable as such. There was nothing in the application indicating the applicable rate of duty or inviting the determination of a question in relation thereto. It is assumed that the applicable rate of duty was not in doubt or dispute once it had been held categorically that the products did not contain blended flavourihg concentrates. There was no reference to Notification No. 30/72 at all.

(ii) Nor was any question having a relation to the rate of duty required or arise to be determined in the proceedings pursuant to the application for refund. There was no necessity for construing the relevant item in the First Schedule to the Act or any Notification issued thereunder to ascertain its scope or meaning or effect or applicability to the Respondent's products since their classification was settled beyond controversy and did not survive for further determination or re-determination.

(b) (i) The Notification in question No. 32/72 prescribes a lesser rate of duty than the one provided in the First Schedule to the Act on the fulfilment of a condition prescribed therein. The condition was the aerated waters, in question, should not have been manufactured using blended flavouring concentrates in any form. That this condition was fulfilled in the case of the Respondent's products in their own case earlier had been established by the order of the Government of India dated 26-9-1980. It did not any longer survive for consideration in the course of the proceedings relating to the instant application for refund. Con- sequently, the Respondent became eligible, in terms of the order of the Govt. of India, itself, to a lesser rate of duty than that specified in the First Schedule to the Act. Once the fulfilment of the condition specified in the said Notification had been established,

the applicability of the Notification does not require to be determined as an issue in the course of the proceedings for refund. Nor was the construction of the aforesaid Notification with a view to ascertain its scope and effect repuired to be determined as a question having a relation to the rate of duty so that Section 35G of the Act is rendered inapplicable. In fact, the applicable rate of duty did not require to be determined at all since there was no question in relation to it on the facts of this case.

(ii) Again, what exactly is the rate of duty of excise in relation to which any question may have to be determined? It is Section 3 of the Act that speaks of it as the rates set forth in the First Schedule to the Act. Such rate may be reduced or exempted altogether in terms of a Notification under Rule 8 of the Central Excise Rules, 1944. Unless, therefore, any question of the applicability or construction of competing entries in the First Schedule or a notification of exemption arises and requires to be determined, there cannot be a determination of a question having a relation to the rate of duty of excise.

(iii) The case will not be one in which an order, relating to the determination of any question having a relation to the rate of duty, was made, just because, in appeal, it was heard by a Special Bench of this Tribunal.

(iv) Nor does the mere determination of a question of limitation imply the determination of the rate of duty as contended for the Respondent. It is not difficult to conceive of cases which do involve a question of limitation but still do not require that the rate of duty or any qustion in relation to it should be also determined.

(v) In the premises, it is to be held, in the facts and circumstances of this case, that no question having a relation to the rate of duty was either required to be determined or determined as an issue and consequently a Reference Application in the instant case is not ruled out in terms of Section 35G of the Act.

10. Taking up the first four questions that are sought to be referred seriatim, however, it would appear that- (a) (i) the first question impugnes the decision of the Tribunal in so far as the Tribunal had not, affirmatively, ruled on the

applicability of Section 11B, in the facts and circumstances of the case. The second question puts in issue the applicability of Section 11B (which became effective on 17-11-80) to an application for refund of payments made since 5-2-1973, when Rule 11 (which did not provide for any saving in a case of payment under protest) was in operative force; (ii) these are questions which had been concluded by at least two judgments of the Supreme Court and do not consequently require to be referred [CIT v. Jalakhabai Trust-66 ITR 619 (S.C.)]. In the first of the said decisions, in (1964) 5 SCR 836 at pp 847-848 (C. Beepathumma and Ors. v. V.S. Kadambolithaya and Ors.), on a question as to whether the limitation prescribed under the Act of 1877 was applicable in a suit for redemption of an usufructuary mortgage executed much prior to the enactment thereof, it was held that the law of limitation is a procedural law and the provisions existing on the date of the suit apply undoubtedly. Again in A.I.R. 1964 S.C. 1256 (Memmon Abdul Karim Haji Tayab, Central Cutlery Stores, Veraval v. Dy. Custodian-General, New Delhi and Ors.), it had been observed at p. 1258, that- "It is well settled that procedural amendments to a Jaw apply, in the absence of anything to the contrary, retrospectively in the sense that they apply to all actions after the date they come into force even though the actions may have begun earlier or the claim on which the actions may be based may be of an anterior date." (iii) indisputably, Section 11B prescribed for a period of limitation and its inapplicability in the case of a protest is also procedural in nature. And there is nothing in it to indicate that it is not to apply retrospectively i.e. to any application for refund made subsequent to its enactment, notwithstanding that a right for refund accrued anterior to its enactment. The proposition is so elementary that it hardly called for a decision by the Tribunal or for a reference to the High Court; (b) (i) the third and the fourth questions relate to the nature of the protest that would, in terms of the proviso to Section 11B, save the claim for refund from the bar of limitation prescribed therein.

Whether the protest could be in general terms or has to be for specific reason and if a protest, may be in regard to valuation, can be said to apply in the case of classification are the questions raised; (ii) from the order of the Tribunal in the Appeal by the applicant consequent upon transfer of the proceedings in relation to show cause notice issued by the Central Government, it would appear that two

letters dated 2-2-1973 and 14-3-1973 were relied upon by the Respondent to constitute protest. The second of the said letters categorically reserved Respondent's rights "of claim for the excess amount of duty paid by us in any manner". Construing the aforesaid letter the Tribunal held that it was clearly a protest with regard to the classification aspect in the case; (iii) construction of a document is always a question of law and accordingly questions 3 and 4 appear to arise from the order of the Tribunal for a reference.

11. The cross-objections filed for the Respondent do not propose any question of law to be referred to the High Court. On the contrary it would appear that Respondent desires reference of an alleged question of law to the Supreme Court. Such a cross-objection cannot maintain.

12. In the premises the Application for Reference is allowed in respect of the following questions :- (i) Whether, in the facts and circumstances of the case, the letters dated 2-2-1973 and 14-3-1973 can be construed to be a protest in terms of Section 11B of the Central Excises and Salt Act, 1944 (ii) Whether, in the facts and circumstances of the case, the protest, if any, related to the question of valuation only or could cover rate of duty as well 13. The aforesaid questions of law arising out of order of the Tribunal dated 9-8-1983 are referred to the Hon'ble High Court of Judicature at Madras as questions of law for its considered opinion.

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