**Collector of Central Excise Vs. Shiv Kumar Ashok Kumar**

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**Court** : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

**Decided On :** Jul-15-1986

**Reported in** : (1986)(9)ECC181

**Appellant** : Collector of Central Excise

**Respondent** : Shiv Kumar Ashok Kumar

**Judgement** :

1. Both the appeals were heard together since they relate to the same respondent and the facts were inter-connected. On 19-1-77, a show cause notice was issued to the respondents, M/s. Shiv Kumar Ashok Kumar to the ' effect that duty had been short levied as mentioned in the annexure A to the notice and calling upon them to show cause why the short levied duty was not to be collected. The short levy was said to have arisen due to non-payment of duty on the proofed cloth, water proofing having been done by solution heated with steam. The respondents replied denying liability. The period of the alleged short levy was 19-1-76 to 22-11-76. On adjudication, the Assistant Collector of Central Excise, Divn. IV confirmed the demand raised under the show cause notice so far as it related to the period subsequent to 19-1-76 but. withdraw the demand in respect of the balance. On appeal, the Appellate Collector under his order dated 14-5-79 set aside the order of the Assistant Collector. Subsequently the Govt. issued a notice dated 2-5-1980 under Section 36(2) of the Central Excises and Salt Act, mentioning that they were tentatively of the view that the order-in-appeal was not legal, proper and correct. They proposed thereunder to set aside the order of the Appellate Collector and to

pass such other order as may be deemed fit. It is the proceedings so initiated that are now before us, on transfer, as Appeal No. 1138/80.

2. On 15-6-77, the Assistant Collector of Central Excise, Divh. IV issued a show cause notice to the respondents M/s. Shiv Kumar Ashok Kumar and three others. It was mentioned that M/s. Shiv Kumar Ashok Kumar had removed cotton fabrics processed by them from their premises without filing classification and price lists for such products and without determining and paying the proper central excise duty thereon and without cover of valid transport documents and without accountal of the same in the statutory records. Certain quantities of goods had also been seized. Under the said notice the respondents and the three others were called upon to show cause why duty should not be recovered' in respect of the goods so recovered, the goods confiscated and penalty also levied. On receipt of replies and after due process the Deputy, Collector of Central Excise- Bombay, under his order dated 27-1-79, confiscated the canvas cloth seized and directed duty to be recovered thereon and levied a penalty of Rs. 5,000/-. In respect of confiscated goods which had been already released he appropriated a sum of Rs. 10,000/- out of the security deposit towards the value of the goods. He dropped the charges against the other three persons on whom also notice ;had been served. On appeal by the respondents, the said order was set aside by the Appellate Collector of Central Excise, Bombay by order dated 10-10-79. On 21-8-80, the Central Govt. issued notice under Section 36(2) of the Central Excises and Salt Act as they were tentatively of the view that the appellate order was not proper, legal and correct Under the said notice, they proposed to set aside the order of the Appellate Collector and pass such order as deemed fit thereafter. It is the proceedings so initiated under the said notice that are now before us, on transfer, as appeal No. 1059/80-D.3. We have heard Shri V. Lakshmikumaran, Advocate for the respondents.

On behalf of the Department, submissions were made by Mrs. Dolly Saxena, SDR, Mrs. Vijay Zutshi, SDR and Shri K.C. Sachar, JDR.4. In their replies to the notices under Section 36(2) of the Act, the respondents had raised a contention that the notices were barred by time. It was on this preliminary point that we have heard submissions in the first instance. It is on the said point that we are recording this

order, having made it clear to the parties that depending on the nature of the order that may be passed on this preliminary question of limitation further proceedings will be directed thereafter.

5. It will be convenient to take up appeal No. 1138/80-D in the first instance as that relates to the first show cause notice (dated 19-1-77) and the review notice (dated 2-5-80). After considering the legal submissions with reference to the said notice we may apply the principles deducible therefrom with reference to the facts in the other appeal.

6. The contention of Shri Lakshmikumaran is that the show cause notice dated 2-5-80 is governed by the provisions of proviso 3 to Section 36(2) of the Central Excises and Salt Act, as it then stood, and if the said provisions are applied the show cause notice will have to be discharged as barred by time. The provisions of Section 36(2) as it then stood are extracted below for convenience "36(2) : The Central Govt. may, of its own motion or otherwise, call for and examine, the record of any proceeding in which any decision or order has been passed under Section 35 or Section 35A of this-Act for the purpose of satisfying itself as to the correctness legality or propriety of such decision or order and may pass such order thereon as it thinks fit: Provided that no decision or order shall' be varied so as to prejudicially affect any person unless such person is given a reasonable opportunity of making a representation and, if he so desires, of being heard in his defence: Provided further that no proceedings shall be commenced under this sub-section in respect of any decision or order (whether such decision or order has been passed before or after the coming into force of this sub- section) after the expiration of a period of one year from the date of such decision or order.

Provided also that where the Central Government is of opinion that any duty of excise has not been levied or has been short-levied or erroneously refunded, no order levying or enhancing the duty, or no order requiring payment of the duty so refunded, shall be made under this section unless the person affected by the proposed order is given notice to show cause against it within the time limit specified in Section 11 A." 7. On the other hand, the contention for the Department is that the proper provision applicable to the facts would be the second proviso to

Section 36(2) of the Act and hence the show cause notice had been issued within time.

8. Shri Lakshmikumaran points out that under the notice dated 19-1-77 an amount of Rs. 19588,245.51p was sought to be recovered from the respondents as duty short levied. He therefore contends that the Appellate order having set aside the above demand (for part of the amount confirmed by the Assistant Collector), the subject matter of the review show cause notice dated 2-5-80 was also the short levy (as confirmed by the Assistant Collector) and hence it is the third proviso that will be applicable. On the other hand, the contention' of Shri Sachar is that the Appellate Collector set aside the order of the Assistant Collector on the sole basis that the Assistant Collector had no jurisdiction to pass the order he did and that, therefore; the Appellate Collector did not at all go into the question of short levy or otherwise. He therefore contends that in so far as the order of the Appellate Collector did not go into the correctness of the demand for short levied duty, the provisions of proviso 3 were not attracted. In addition, he submitted that the provisions of proviso 3 will be attracted only in instances-when, under the notice issued by the Govt.

(under Section 36(2) of the Act), any further duty than had been demanded under the original notice itself was to be demanded as short levy. In substance, his contention was that proviso 3 will be attracted only when a demand for duty is raised under the review notice though no such demand was raised under the original notice or a demand for further duty is raised under the review notice in excess of what had been demanded under the original notice itself.

9. In appreciating this contention for the Department a few more facts are relevant. In 1964, the Collector of Central Excise, Bombay had in March of that year passed an order in the case of Niranjan Lal Dalmia that no duty was leviable on the canvas cloth manufactured by them since no power was used in the process of the said manufacture. The respondents M/s. Shiv Kumar Ashok Kumar claimed that they are the successors in interest of M/s. Niranjan Lal Dalmia and that their process of manufacture of canvas cloth is the same as of the predecessor. They had, therefore, claimed that in view of the order of the Collector passed in March,

1964, the demand of short levy as raised in the notice dated 19-1-77 could not be enforced. The Appellate Collector had accepted this argument and had held that, in view of the said order of the Collector earlier, the Assistant Collector (who passed the order on 19-5-77) had not acted within his jurisdiction. It is for this reason that Shri Sachar had contended that the order in appeal (proposed to be set aside under the review show cause notice) did not deal with the question of short levy at all and hence proviso 3 was not attracted. In support of this contention, he relied on the decision of the Allahabad High Court in the case of Triveni Sheet.

Glass Works Ltd. 1983 ELT 711 (Allahabad). He relied specially on the observations in. par as 30 and 32 of the said judgment.

10. The Appellate order in the cited case (sought to be set aside by notice under Section 36(2) of the Act) was dated 14-10-77. Under the said order the Appellate Collector had set aside an order of the proper officer modifying the price list No. 1/77 filed by the assessee. Thus, it is clear that the order in original in that matter related to a price list and, therefore, did not by itself raise any demand for duty.

Therefore, the order in appeal also did not go into any question of any demand for payment of any specified amount, either by way of duty not levied or short levied. No doubt, as pointed out in the judgment of Allahabad High Court, the result of the Appellate order was that the assessee would have become entitled to the refund of duty already paid, such payment having been in compliance with the order on the price list. In the circumstances, Shri Lakshmikumaran contends that the order of the Appellate Collector did not relate to any demand for payment of duty (not levied or short levied) and it was for this reason that, in the said case, the Allahabad High Court held that the review show cause notice (issued for setting aside the Appellate order dated 14-10-77) was governed by: the 2nd proviso to Section 36(2) and not the 3rd proviso. He, therefore, submits that reliance on the said judgment for the issue in the case before us is not justified. On a consideration of the submissions of both sides, we are satisfied that the proceedings before us would be governed by the 3rd proviso to Section 36(2) and not the 2nd proviso. We have already noted that the show cause notice dated 19-

1-77 was specifically to demand a specified amount on the ground that it had been short levied during the period 19-1-76 to 22-11-76.

The order of the Assistant Collector was to confirm that demand in part, setting aside the demand in respect of the balance on the ground of limitation. The effect of the order of the Appellate Collector dated 14-5-79 was to set aside the demand confirmed by the Assistant Collector. Therefore, it cannot be said that the order of the Appellate Collector did not deal with the demand for short levy or the enforceability of the demand. May be the demand was set aside on the ground that the Assistant Collector had no jurisdiction to confirm the demand in view of the earlier order of the Collector passed in \%k. It would not mean that the Appellate Collector, under his order, did not deal with the demand for short levy or the quantum thereof or the enforceability thereof. As noticed earlier, the situation in the Thiveni Sheet Glass Works case was different since neither under the order in original nor under the order in appeal was any dispute gone into with reference to any demand for payment of duty for any particular period or for any particular amount. This had been made clear in para 30 of the judgment where the High Court had observed that the order dated 111-10-77 did not contain any direction for refunding any amount to the petitioner. They observed that the effect of the order of the Appellate Collector was merely to set aside the order of the Assistant Collector purporting to modify the price list No. 1/79 though, as a consequence of the Appellate order, it may have been necessary for the proper officer to reconsider the assessments already made and, as a consequence of said reconsideration, amounts already paid may become refundable to the assessee. At the end of paragraph 32, they again pointed out that if the order passed by the Central Govt.

results in restoring the order made by the proper officer it may become necessary to initiate proceedings thereafter for recovery of duties, if any, short levied and it is only at that stage that the question whether there had been short levy or not would arise for consideration.

Therefore in paragraph 33 they leave that question open.

11. When Shri Sachar was making his submissions, it was enquired of him whether the demand for the short levy would not become enforceable if, in pursuance of the review show cause notice, 'the order of the Appellate Collector is set aside and the order of the Assistant Collector is restored. In response, Shri Sachar pointed out that under the review notice the Central Govt., while indicating that it proposed to set aside the order of the Appellate Collector, did not further indicate that it proposed to restore the order of the Assistant Collector. He, therefore, contended that it would not necessarily follow that the purport of the review show cause notice was to revive the demand for short levy following the setting aside of the Appellate Collector's order. It is no doubt true that in the review show cause notice there is no reference to any proposal to restore the order of the Assistant Collector following the setting aside of the Appellate Collector's order.. But it will be noted that the Govt. had further mentioned in the review show cause notice that "Govt. are further tentatively of the view that the benefit of the notification is available to fabric manufactured by a process without the use of the steam or power. The notification does not refer to any particular stage or part of the manufacturing process. The assessee have themselves admitted that they use steam for heating the chemical solution which is used for waterproofing the fabrics. It would therefore appear that the process could be said to be one with the aid of steam." 12. It is, therefore, clear that the Govt. did propose, following the setting aside of the Appellate Collector's order, to restore the order of the Assistant Collector on the basis that the claim for exemption put forward by the respondents was not justified and hence they were liable to pay normal duty and, therefore, the amount quantified by the Assistant Collector was payable as short levied duty. In the circumstances, the mere fact that the Govt. did not in so many words express that they proposed to restore the order of the Assistant Collector would not take the review notice outside the purview of the 3rd proviso.

13. The other contention of Shri Sachar, as earlier mentioned, was that the 3rd proviso will be attracted only in cases where duty in excess of the duty demanded under the original show cause notice was to be demanded under the review show cause, notice. Shri Sachar is not in a position to cite any authority of a decided case in support of such a contention. It appears to us that the contention so stated would be legally untenable, the purport of a proceeding under Section 36 is to set

aside the decision or order passed under Section 35 or Section 35A, on the ground that the same was not correct, legal or proper. In cases of adjudication following a notice raising a demand of duty not levied or short levied, it would not be open to the adjudicating authority to pass an order finally to confirm any demand in excess of the amount already mentioned in the show cause notice. Hence it is not clear to us how in proposing to review the correctness of any order passed in any such proceeding the Central Govt. could, at the stage of review, seek to burden the assessee with a liability larger than even that mentioned in the original Show cause notice itself and therefore enlarge the enquiry itself beyond the scope thereof before the lower authorities.

14. In this connection Shri Sachar relied upon certain other provisions of the Central Excises and Salt Act as also the Customs Act to support his arguments that such an enlargement is permissible in law.

15. The provisions he has referred to in this connection are Sections 35 and 35A of the Central Excises & Salt Act and Section 131 of the Customs Act, as they then stood. He pointed out that under the proviso to Section 35(1) of the Central Excises and Salt Act there is an embargo against the order-in-appeal subjecting the appellant to any greater confiscation or penalty than has been adjudged in the original order but that there is no such embargo in the matter of duty. He referred to Section 128 of the Customs Act (as it stood) and points out that under the 2nd proviso to Section 128(2) provision has been made for such enhancement in respect of duty. He, therefore, submitted that even under Section 35 we should read the provisions in such a way that it should be held that there was no embargo in respect of enhancement of the duty element also under the Appellate order. He submitted that in view of such provisions in the Customs Act as well as the Central Excises and Salt Act, whereunder an appellate authority is empowered to demand larger duty than even imposed by the original order, there is no reason to presume that such a power would not have been contemplated in proceedings under Section-36(2) of the Central Excises & Salt Act in the manner suggested by him. Shri Lakshmikumaran contends that such an interpretation of the provisions of Section 36 would not be proper.

16. We are unable to accept the contention of Shri Sachar that in proceedings under Section 36 of the Central Excises and Salt Act, the reviewing authority is not prevented from demanding a" larger duty than was imposed under the order in original. We may take note of the fact that as far as penalty is concerned the original show cause notice normally does not indicate any amount therefore. Hence if penalty is enhanced under the Appellate order it would not amount to exceeding the terms of the show cause notice itself. Even in respect of confiscation it may be noted that the provision in the proviso to Section 35(1) speaks of enhancement of the quantum of confiscation above what had been, adjudged in the order in original and not in excess of what had been indicated in the show cause notice that preceded the adjudication.

In the circumstances we are unable to accept the contention of Shri Sachar that the provisions of Section 36(2) contemplated a case wherein the Central Govt. could demand, under the said notice, any duty in excess of what had been originally demanded under the original show cause notice.

17. Another argument submitted by Shri Sachar in this connection was that the object underlying the Central Excises and Salt Act is collection of revenue by way of excise duty and that levy of penalties or fines were only secondary objectives. He contended that, viewed in that background, it would be anomolous to hold that a larger period of limitation is prescribed with reference to proceedings involving levy of penalty or fine but a lesser period with reference to payment of duty. But we may note that such an argument had in fact been considered by the Delhi High Court in its judgment in the Associated Cement Co.

case 1981 ELT 421 and rejected. This is to be found in paragraph 9 of the judgment in the following words: ' "A sufficiently long period of limitation for the issue of notice required by the first proviso is provided in the second proviso, probably because the opinion of the Central Govt. that the Appellate order is either not correct or legal or proper is not so pro-judicial to the person to be affected by the proposed order as should be the order which would be proposed by the Central Govt.

under the 3rd proviso. This is the reason why the shorter limitation is provided for under the 3rd proviso for reviewing the Appellate order because the Central Govt. is of the opinion that the appellate order has resulted in a non-levy or short-levy of duty. Short-levy or non-levy of duty result in great prejudice to the revenue and revision of that order on that ground would also result in great prejudice to the assessee. Since a finding of short-levy and non-levy and the order passed on such a finding is of comparatively greater importance both to the revenue and the assessee, it is expected that the revenue would be prompt to initiate action by way of revision under the 3rd proviso and the assessee should also be relieved of the risk of such revision after a comparative short period of 6 months." 18. Shri Sachar further relied upon Misc. order. No. 4/86-A dated 14-1-86 of this Tribunal in Appeal No. E/1070/80 (Collector of Central Excise, Bangalore v. Mizar Govind Annappa Pai & Sons). He pointed out that the said order has drawn attention to the fact that the provisions of proviso 3 to Section 36(2) make no reference to the date of order-in-original as the relevant date for the purpose of limitation with reference to the review show cause notice and this would also indicate that it was the actual demand for duty that will be ^relevant and not the order in appeal. But here again we may note that this aspect had also been considered by the Delhi High Court in its judgment cited supra (in para 12) and the High Court had held that the period of 6 months for the purpose of the application of the 3rd proviso to Section 36(2) would be from the date of the Appellate order. We may note in this connection that a similar argument had in fact been raised on behalf of the Deptt. in the case of Steel Rolling Mills of Hindustan (P) Ltd. (1984 ECR 1527) but had been rejected by the Tribunal. The Tribunal did so by following the decision of the Delhi High Court 19. When Shri Lakshmikumaran cited the above decision it was enquired of him whether the review show cause notice in question could not be held to be within time with reference to the extended period of 5 years mentioned in Section 11 A. He submitted that such an argument will have to be rejected for the reasons mentioned in the judgment of this Tribunal in the case of Military Dairy Farm v. Collector of Central Excise, Pune (1985 Vol. 19 ELT 148) and that, in any event, this question would be academic in the circumstances of the present" case since the Assistant Collector himself in his order had vacated the demand except for the shorter period of six months on the ground that the facts necessary to invoke the

larger period of limitation are not established.

20. Therefore, on a careful consideration of the submissions of both side we are of the opinion that in so far as the review show cause notice dated 2-5-80 related to the legality of the order of the Appellate Collector with reference to his setting aside the confirmation of the demand of duty short levied by the Assistant Collector, the said show cause notice was barred by limitation in view of proviso 3 to Section 36(2) of the Central Excises & Salt Act.

21. Now we have to find how far the same considerations would apply with reference to the review show cause notice dated 21-8-80. The relevant original show cause notice was dated 15-6-77. Thereunder duty was demanded in respect of certain clearances made on 27-11-76 and it was further proposed to confiscate the goods seized and also levy penalties. The question is whether even if the review show cause notice is to be held to have become barred by time with reference to the demand for non-levy, the same result would follow with reference to that portion of the review show cause notice which proposed to. set aside the orders of the Appellate Collector under which the confiscation and levy of penalty had also been set aside. The order in appeal was dated 10-10-79. The review show cause notice dated 21-8-80 had, therefore, been issued after 6 months from the date of order in appeal but within one year from' the date of the said order. So far as penalty and confiscation of goods are concerned, orders relevant thereto would fall within the second proviso to Section 36(2) and not the 3rd proviso. The period of limitation prescribed under the second proviso was one year. Hence it will have to be seen whether the show cause notice will have to be held to be within time at least so far as that part of the order which dealt with the correctness of the levy of penalty or confiscation of goods. That is to say, whether the review show cause notice will have to be held to be within time at any rate with reference to the portion of the Appellate Collector's order that dealt with the correctness of the order of the Assistant Collector in ordering confiscation and imposing penalty. Shri Lakshmikumaran fairly conceded that the judgment of the Supreme Court in the case of Sewpujanrai Indrasanarai Ltd. v. Collector of Customs and Ors. (1983 ELT 1305 SC) would be relevant in this connection, and that if that decision is applied the show cause notice, in so far as it related to the correctness of the order

of the Appellate Collector in setting aside the order of confiscation and levy of penalty, cannot be said to be out of time. No doubt he claimed that he would seek to distinguish the decision but we are not convinced with such an argument 22. Accordingly we hold that so far as A.No. 1138/80-D is concerned, the review show cause notice concerned (dated 2-5-80) will have to be discharged as barred by limitation but that so far as appeal No.1059/80- D is concerned, the show cause notice (dated 21-8-80) will have f$ be held to be hit by the, bar of limitation only with reference to the portion relating to the demand for duty but that the show cause notice cannot be held to be barred by limitation with reference to other portions.

23. Accordingly we order that appeal No. 1138/80-D be dismissed but that appeal No. 1059/80-D be posted for hearing on merits with reference to the part dealing with confiscation and levy of penalty.

24. I have perused the order proposed by learned Brother Raghavachari.

I feel, however, that we do not have to discuss and record a finding on the question whether the Central Government could, in a notice under Section 36(2) of the Act, demand an amount of duty higher than that set out in the original show cause notice issued by the lower authorities.

That does not appear to be necessary for disposal of the present matters. As has been lucidly set out in the proposed order, the review notice dated 2-5-1980 is even otherwise hit by limitation and has to be discharged. The notice dated 21-8-80 is also hit. by limitation in so far as it pertains to demand for duty but is not so in relation to the other aspects.

25. Subject to these observations, I agree that the appeals be disposed off in the manner mentioned in para 23.