Collector of Central Excise Vs. R.M.D.C. Press (P) Ltd.

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Mar-04-1987

Reported in : (1987)(14)ECC75

Appellant : Collector of Central Excise

Respondent : R.M.D.C. Press (P) Ltd.

Judgement :

1. The facts of this case, briefly, stated, are that M/s. R.M.D.C.Press Pvt. Ltd., Bombay (hereinafter referred to as "R.M.D.C." for brevity's sake) were engaged, at the material time, in the manufacture of Printed Cartons and were paying excise duty thereon under item No.68 of the First Schedule (hereinafter the 'CET') to the Central Excises and Salt Act, 1944 (hereinafter, the 'ACT'). However, it appears that they represented to the authorities that printed cartons were products of the printing industry and, as such, were eligible for exemption from duty in terms of Central Excise notification No. 122/75 which exempted inter alia "all products of the printing industry including newspapers and printed periodicals". The Assistant Collector rejected the representation of R.M.D.C. by an order dated 5.7.1978. By this order, he observed that he was not in a position to conclude that R.M.D.C.'s goods were identical to those manufactured by certain other parties in whose cases the appellate authority or the revision authority had found in the manufacturers' favour. He further held that the cartons were essentially meant for packing and any printing done thereon was only to indicate the contents and the brand. Printing did not change the identity of the cartons. Without the printing, the

manufacturers themselves would have accepted them as products of packing industry. On this reasoning, the Assistant Collector rejected the claim for duty exemption. In appeal, the Appellate Collector of Central Excise, Bombay, by his Order dated 25.9.1978, set aside the Assistant Collector's order and allowed the exemption basing his decision on the order-in-revision No. 2057 of 1977 dated 5.12.1977 passed by the Central Government in the case of Alli-Bhoy Sherafally & Company.

2. The Central Government, in exercise of its powers Under Section 36(2) of the Act, perused the records of the case with a view to satisfying itself whether the aforesaid order-in-appeal was proper, legal and correct. It appeared to the Central Government that the view taken in the Order-in-Revision (No. 2057/77) deserved reconsideration and could not, therefore, be considered as binding in all cases. The Government, therefore, called on R.M.D.C. to show cause why the order-in-appeal dated 25.9.1978 should not set aside and an Order should not be passed that the printed cartons manufactured by the assessee could not be held as products of the printing industry eligible for exemption under notification No. 55/75 dated 1.3.1975 as amended by notification No. 114/75 and 122/75 but were products of the packaging industry.

3. R.M.D.C. filed a Writ Petition (numbered as Civil Writ No. 1140 of 1980) before the Delhi High Court challenging inter alia the validity of the aforesaid show cause notice dated 6.9.1979. By an Order dated 29.8.1980, the High Court stayed further proceedings or steps in pursuance of the said show cause notice. By another Order dated 2.2.1982, the Court modified the Order of 29.8.1980 and directed that the proceedings may continue. However, the Court further directed that in the event of the review proceedings (going) against the petitioner, the respondents to the petition were restrained from taking any steps in pursuance of the final order that may be passed without obtaining the permission of the Court.

4. It is the proceedings initiated by the issue of the show cause notice dated 6.9.1979, that are, on transfer to this Tribunal Under Section 35P(2) of the Act, now before us to be disposed of as if it were an appeal before us. We are, therefore, treating this as an appeal filed before us by the Collector of Central

Excise, Bombay.

5. We have heard Shri Vineet Kumar, Senior Departmental Representative and Shri K.C. Sachar, J.D.R. for the appellant-Collector and Shri P.G.Gokhale and Shri A. Hidayatullah, Advocates for the respondents R.M.D.C.6. Since the respondents R.M.D.C. have vehemently contested the validity of the show cause notice on the ground that it is barred by limitation, we propose to first deal with this aspect of the matter.

7. Section 36(2) of the Act provides that the Central Government 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 the 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. The second proviso to this Sub-section provides that no proceedings shall be commenced under the Sub-section in respect of any decision or order after the expiration of a period of one year from the date of such decision or order.

8. In the present case, the date of the Order-in-Appeal Under Section 35 which is sought to be revised is 25.9.1978. The date of the show cause notice issued by the Central Government Under Section 36(2) of the Act is 6.9.1979 i.e. within the 1 year time limit. Hence the notice is not barred by the second proviso.

9. But, it is the contention of R.M.D.C. that the notice is barred by the third proviso to Section 36(2) of the Act which reads thus:- "Provided 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 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." Section 11A provides for a period of 6 months from the "relevant date" as defined in that Section for issue of notice of demand of duty and a longer period of 5 years in case involving fraud, collusion, wilful mis-statement or suppression of facts etc.

10. It is contended by the learned Departmental Representative for the Revenue that the original and the appellate Order of lower authorities did not pertain to any demand for duty; they not adjudicate on notices demanding duty from the respondent. The Assistant Collector's order was passed on the classification list dated 5.7.1978 filed by R.M.D.C. The Order-in-Appeal set aside that order and upheld R.M.D.C.'s claim. Thus there was no demand as such involved in these proceedings. The notice issued by the Government does not as such demand any duty. It related to the classification of the goods in dispute. Therefore, the 3rd proviso to Section 36(2) is not attracted at all. Reliance is placed in this connection on the Allahabad High Court's judgment in Triveni Sheet Glass Works Ltd. v. Union of India and Ors., 1983 ELT 711(A11.) It is further submitted that the other judgment having a bearing on the construction of Section 36(2) viz. that of the Delhi High Court in Association Cement Companies Ltd. v. Union of India 1981-ELT-421 (Del.) has no application to the instant case since no demand for duty is involved in the Government's show cause notice.

11. On the other hand, the Counsel for R.M.D.C. vehemently contends that the effect of the show cause notice, if the Revenue succeeds in these proceedings, would be demands for duty. R.M.D.C. claimed exemption from duty which the Assistant Collector denied. The Appellate Collector, however, reversed the Assistant Collector's order and upheld R.M.D.C.'s claim, the result being no levy of duty on the goods. When Government issued the notice the implication is that the order of no levy was not correct and that prima facie the goods were not eligible for exemption but were liable to be charged to duty. The initiation of proceedings Under Section 36(2) of the Act was not meant to be an academic exercise in determining the correct classification. It was with the purpose of levying duty, setting aside the appellate order of no levy.

12. The learned Counsel for R.M.D.C. submits that the Allahabad High Court judgment in the Triveni Sheet Glass Works case (supra) has no relevance to the facts of the instant case. The Triveni case was a writ petition for enforcing the refund of duty already ordered by the Appellate Collector, the department not having actually made the refund. The notice in that case was issued before the 3rd proviso to Section 36(2) of the Act came into force on 1.7.1978. The observations

of the Court on the validity of the notice was by way of obiter; no final opinion was expressed by the Court since the Court was granting relief by issue of a writ mandamus.

On the other hand, according to the learned Counsel, the Delhi High Court's judgment in the Associated Cement companies case (supra) is directly to the point. In that case no demands were involved, only a question of classification/exemption was in issue.

13. The Counsel for R.M.D.C. also referred to the decision of this Tribunal in the case of Collector of Central Excise v. Industrial Marketing Corporation, Bombay 1985 (22) ELT 950 wherein it was held that the 3rd proviso to Section 36(2) applied to that case involving a question of classification but the decision was based on a concession by the Counsel for the respondent in the case. Moreover, the said decision did not consider the judgment of the Delhi and Allahabad High Courts. Hence, it did not constitute a binding precedent.Collector of Central Excise Rajkot v. Simco Industries, Bhavnagar, 1985 (21) ELT 750 - was not applicable to the instant case.

14. In the present case, the Assistant Collector's order was no doubt on a classification list submitted by R.M.D.C. In the classification list, the respondent had claimed that the goods in dispute, were eligible for exemption from payment of excise duty in terms of Central Excise Notification No. 55/75 as amended. It was this claim that was disallowed by the Assistant Collector. In the meantime, according to the averments in the affidavit filed before the Delhi High Court in W.P. No. 1140 of 1980 on behalf of the petitioner, R.M.D.C. paid excise duty on the goods under Central Excise Rule 9B and executed a B13 bond.

On receipt of the Order-in-Appeal dated 25.9.78 in their favour, R.M.D.C. addressed two letters to the department, one dated 25.9.1978 addressed to the Assistant Collector requesting for issue of instructions to the Superintendent to take expeditious action on their claim for refund of the excise duty paid by them on printed cartons and release the B13 bond executed by them. A letter dated 27.9.1978 was addressed to the Superintendent also for release of the bond. Some exchange of letters took place. On 2.5.1979, the Superintendent wrote to

R.M.D.C. that the Appellate Collector's order had been referred by the Collector of Central Excise, Bombay to the Government of India for review. The Superintendent advised R.M.D.C. to clear printed cartons in the meanwhile on provisional basis by executing B13 bond till the Government of India's decision was received. Followed some further exchange of correspondence culminating in two show cause notices :-Date of Notice Period covered by the notice Amount of duty demanded9.7.1980 15.3.1978 - 31.12.1979 Rs. l2,46,827.9729.7.1980 1.1.1980 - 30.6.1980 Rs. 5,32,825.24 (A third notice was issued on 18.8.80 alleging contravention of Rule 174, and proposing penalty Under Rule 173Q. There is no demand for duty in this notice).

15. It must be noted in this context that the Appellate Collector had, after holding that there was no reason why the concession extended by the Government of India to M/s. Allibhoy Sharefally & Co.

(Order-in-revision No. 2057 of 1977 - (Supra) should not be extended to R.M.D.C., allowed the appeal with consequential relief, if any. The relief would have been - (b) withdrawal of demands for duty, if duty had not been paid by R.M.D.C.Whereas the Assistant Collector's Order had the effect of levying duty, that of the Appellate Collector had the effect of nullifying that levy or, in other words, directing no levy. In this background, the effect of adjudication of the Section 36(2) notice issued by the Government against R.M.D.C. would be to restore the levy, in other words, cancelling the order of non-levy. Though the review notice does not talk in terms of short-levy or non-levy the drift is quite clear. It is clearly not meant to pose and answer a question in the abstract: were printed cartons manufactured by R.M.D.C. liable to pay duty under item 68 CET or were they eligible for exemption in terms of notification 55/75? The object of the issue of, notice was, if ultimately the proceedings led to the conclusion that the goods were liable to pay duty, to set aside the order of the Appellate Collector extending the benefit of exemption "with consequential relief, if any." 16. In the Tribunal's decisions in the Industrial Marketing Corporation and Simco Industries cases (supra), it was no doubt held that where the review proceedings pertained to only classification lists and did not relate in terms to questions of short-levy, non-levy . or erroneous refunds, the review notices would not attract the limitation in the 3rd proviso to Section 36(2) of

the Act. But it has to be noted that in neither of these two decisions were the Delhi and Allahabad High Court's decisions noticed. We, therefore, propose to consider these judgments in this Order.

17. In the Associated Cement Companies case (supra), the Superintendent had directed the assessee to pay duty at Rs. 91/- per M.T. of pozzalon Cement. In appeal, the said demands were ordered to be withdrawn and the Superintendent was directed to charge duty at Rs. 82/- per M.T.Thereupon, the Central Government issued two notices on 12.11.1979 and 17.11.1979 Under Section 36(2) of the Act calling upon the assessee to show cause why the Appellate Collector's order should not be reviewed and set aside and the demands made by the Superintendent should not be restored. These notices were issued after the expiry of 6 months but within 1 year after the Order-in-Appeal. In its judgment, the Delhi High Court noted that the language of the impugned notices did not use the word (short-levy) found in the 3rd proviso. No reference to short levy or non-levy was made in the notices which said that the Central Government proposed to review the legality, correctness or propriety of the appellate orders. On the basis of the language of the notices, it was argued for the Union of India that the notices were given under the 2nd proviso and that the limitation in the 3rd proviso was not attracted. This contention was rejected by the Court. The Court observed inter alia as follows:- "While it is for the Central Government to choose its language in giving show cause notices under the first proviso to Section 36(2), the view of the Central Government has to be gathered not only from the language used in the show cause notices but also by reading the said language with the orders passed Under Section 35 or 35A which are sought to be reviewed by the orders proposed in the show cause notices. Once the notices are read with the orders passed Under Section 35 or 35A, it would be clear whether the notices are issued under the third proviso. The language of the impugned show cause notices in the present case purports to be under the substantive part of Section 36(2). It cannot, however, attract the application of the limitation prescribed under the second proviso because if the notices are read as a whole and particularly if they are read with orders passed by the Appellate Collector, it becomes quite clear that the revision sought by these notices is of appellate orders of short-levy. It may be that along with short-levy the appellate order would also be incorrect or illegal in the opinion

of the Central Government. This does not mean, however, that third proviso can be ignored and the notices can fall under the second proviso." 18. The result of reading the review notice issued by the Central Government in the light of the above observations of the High Court has been brought out in para 15 of this Order.

19. In the Triveni Sheet Glass Works case (supra), the Allahabad High court referred to the Delhi High Court judgment in the Associated Cement case (supra), and said that in the latter case, the question as to when an order passed under the Central Excise Act could be said to result in (non-levy) or short levy of duty was neither raised nor considered and that, therefore, the petitioner before the Allahabad High Court could not derive any assistance from the Delhi High Court's decision. The operative part of the Order-in-appeal in the Triveni case read:- "In view of the above consideration the order of the Assistant Collector is set aside and the appeal is allowed." The Court observed that the order did not contain any direction for refunding any amount to the petitioner. The. appellate order, said the Court, by itself did not result in any determination of the amount of duty payable in any particular month nor result in refund of any portion of the duty. Accordingly, the Order, if found to be wrong, could also not be said to have resulted either in erroneous refund or short levy of duty and no question of the Central Government passing any order for paying duty short-levied or erroneously refunded in a revision against the order Under Section 36 would arise.

20. But, in the present case, we have already noted that the Appellate Collector not only allowed the appeal but directed "consequential relief, if any" unlike the Order in appeal in the Triveni case which, in terms, did not direct any relief. As such, the decision of the Allahabad High Court has, in our opinion, no application to the facts of the present case.

21. The result, therefore, is that the show cause notice issued by the Central Government in the present case, having been issued after the expiry of six months from the date of the appellate order, is barred under the 3rd proviso to Section 36(2) of the Act. Consequently, the said notice is discharged and the appeal is dismissed.

Sd/- 22. I have perused with great care the order prepared by the Vice President, Shri G. Sankaran. But I regret that I am unable to concur with his conclusion as to the show cause notice in question being barred by time and liable to be discharged on that ground itself, without going into the merits of the issue. In my opinion the show cause notice had been issued in time, being governed by proviso 2 to Section 36(2) of the Central Excises and Salt Act as it then stood.

Hence it has become necessary for me to record a separate order.

23. The facts leading to the issue of the show cause notice by the Government have been set out in great detail in the order of the learned Vice President as also the arguments advanced on both sides on the question of limitation. It is, therefore, unnecessary for me to repeat the same.

24. The order dated 5.7.78 of the Assistant Collector (Order No.Classification/78/RMDC/12499) was on the claim for exemption by the respondents for benefit under notification No. 122/75-CE dated 5.5.1975 as amended, item 13 of the notification reading at the relevant time "All products of the printing industry including newspapers and printed periodicals". The Assistant Collector had held that the printed cartons manufactured by the respondents were products of the packaging industry and not products of the printing industry and hence were not entitled to the exemption claimed. It is this order which had been set aside by the Appellate Collector. The contention for the Government is that the notice issued by the Government for setting aside the order of the Appellate Collector was governed by the second proviso to Section 36(2) of the Central Excises and Salt Act and not the third proviso. The second proviso, at the relevant time, read "proviso 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." The 3rd proviso has been extracted in the order of the learned Vice President. The contention for the respondents is that the 3rd proviso is attracted. This is on the basis that if the show cause notice is allowed, and the order of the Appellate Collector is set aside, that would mean that the order of the Assistant Collector is

restored and that would mean that duty would be payable as the exemption claimed was being refused and hence there would be a demand for non-levied duty that would become enforceable. In effect the contention was that in the show cause notice the Government had expressed an opinion that duty has not been levied and that since the said non-levy was wrongful the Government proposed to set right the wrong and enforce the levy. It is in this connection that the learned Vice President has referred to the terms of the order of the Appellate Collector in which he had allowed consequential relief also.

25. But, in my opinion, the above argument is not acceptable in the light of the reasons given by the Allahabad High Court in the case of Triveni Sheet Glass Works Ltd. (1983 ELT 711) dealing with a similar contention. The assessee in that case had been filing various price lists (2/76 dated 17.1.1976; 7/76 dated 9.6.1976; 9/76 dated 20.12.1976; 1/77 dated 2.6.1977 and 1/78 dated 13.6.1978). In all of these the benefit claimed by the assessee was being consistently refused. In respect of the orders on the price list Nos. 2/76 and 7/76 the Appellate Collector passed an order on 20.5.1978 and in respect of the price list No. 9/76 he passed an order dated 1.8.1978. In the first of the said orders he stated "consequential relief is allowed" and in the second of the said orders he said "I also direct that the refund claim made on this account be accepted and the amount refunded to the appellants". In the appeal against the order on price list No. 1/77 the Appellate Collector had passed the order on 14.10.1977 (i.e.) much earlier than the abovesaid two appellate orders. In that order he held "in view of the above considerations the order of the Assistant Collector is set aside and the appeal is allowed." It was in respect of this last mentioned order of the Appellate Collector (dated 14th October, 1977) that the Government had issued a show cause notice Under Section 36 and it was this show cause notice that was the subject matter of the writ proceeding before the Allahabad High Court. The learned Vice President has pointed out that in the said Appellate Order dated 14.10.1977 there had been no direction for consequential relief following the order of the Appellate Collector but that in our present case the Appellate Collector has directed consequential relief and hence the decision of the Allahabad High Court would not apply to the facts of the present case. But it may be noted that there are various observations of the Allahabad High Court in dealing with the contentions raised before the said

Court which would make it clear that even if consequential relief had been ordered by the Appellate Collector in the said case the finding of Allahabad High Court on the question of limitation would have been the same.

26. Before the Allahabad High Court the assessee had claimed that the order-in-appeal dated 14.10.77 entailed a short levy of excise duty (vide observations of the High Court in paragraph 15). Construing the provisions of the 3rd proviso to Section 36(2) the High Court held (at the end of paragraph 19) "a plain reading of this provision shows that it has no application to cases where the Central Government is not required to form an opinion on the question as to whether or not there has been non-levy, short levy or erroneous refund of duty as a consequence whereof an order levying or enhancing the duty or requiring payment of duty erroneously refunded has to be made". Proceeding further they observed in para 20 as follows: "In the case before us, the Central Government has issued the impugned notice with a view to examine the correctness, legality and propriety of the order dated 14th October, 1977 passed by the Appellate Collector whereby he had set aside an order made Under Rule 173-C(2) by Assistant Collector, Central Excise modifying price list No. 1/77 submitted by the petitioner for his approval on 2nd June, 1977. The notice issued by the Central Government is not directed against any order of assessment made Under Rule 173-1, on the basis of the price list No. 1/77, as modified by the Assistant Collector. The question, that therefore, arises for consideration is whether while considering the legality, propriety or correctness of the order dated 14th October, 1977 passed by the Appellate Collector the Central Government is required to go into the question as to whether there has been any non-levy, short levy or erroneous refund of duty and whether it would be required to make an order levying, enhancing or requiring payment of an amount erroneously refunded to the petitioner." 27. Then, taking into consideration the observations of the Supreme Court in the case of Assistant Collector of Central Excise v. National Tobacco Co. (AIR 1972 SC 2563) the High Court observed in paragraph 22 that excise duty can be said to have been levied only when an assessment of duty in accordance with the provisions of the Act takes place. In paragraph 23 they then observed that mere determination of the goods in respect to which and rate at which duty on those goods is payable itself does not result in assessment of duty. Thereafter, the provisions of Rules 173B,

173G, 173-I were taken into consideration and it was observed, (at the end of paragraph 26) that "the duty payable is thus determined by the proper officer Under Rule 173-1 and at no stage prior to it." Thereafter the following observations occur in paragraph 27: In this view of the matter we are of opinion that a simpliciter order passed Under Rule 173C even though it provides a basis for eventually calculating and determining: the amount of duty payable by a manufacturer during a particular month neither results in assessment of duty nor to its being levied. Such an order by itself, therefore, cannot entail any question of short levy or erroneous refund of duty." 28. Thereafter the High Court took note of two other submissions of the assessee which, according to the assessee, made out that if the show cause notice issued by the Government was to be allowed it would result in a demand for duty short levied. The first of the said arguments is set out in paragraph 30 which reads as follows:- "learned Counsel for the petitioner argued that when in an appeal against an order made Under Rule 173C the Appellate Collector modifies the price list and as a consequence thereof directs the refund of excise duty paid by the assessee it results into levy of excise duty and if the Central Government in proceedings Under Section 36 of the Act comes to the conclusion that the order passed by the Appellate Collector is erroneous it necessarily implies that the Appellate Collector has determined duty payable by the assessee which is less than what is actually payable by him and in this sense it results into a short-levy and as such the further proviso added to Section 36 of the Act by Act 25 of-1978 comes into full play." It is in this connection that the order of the Appellate Collector was set out and it was taken note of that no consequential relief as by way of refund of duty had been granted under that order. It is this aspect of the matter that has been stressed in the order of the learned Vice President in our case. But I may note that dealing with this contention the High Court observed (at the end of paragraph 31) as follows: "but then the Appellate order by itself did not result in any determination of the amount of excise duty payable by the petitioner in any particular month and by itself does not result in refund of any portion of duty to the assessee. Accordingly, the order if found to be wrong, can also not be said to have resulted either in erroneous refund or short levy of duty and no question of the Central Government passing any order for paying a duty short levied or erroneously refunded in a revision against that order

Under Section 36 would arise." 29. The second argument was that since the assessee was paying duty in terms of the price approved in price list No. 1/77 the order of the Central Government, if it is to set aside the order of the Appellate Collector with reference to price list No. 1/77, would result in recovery of excise duty short levied. The Court rejected this submission and observed (in paragraph 32) as follows;- "As in the instant case the Central Government has merely given notice to the petitioner in respect of the appellate order dated 14th October, 1977 and not in respect of any order or assessment made Under Section 173-I and it has called for the record to examine the validity of the appellate order made in respect of a price list, it will be able to pass orders only regarding what should, for purposes of assessment of excise duty be considered to be the correct value of the article manufactured by the petitioner during the period in which price list No. 1/77 remained in force. It would neither make any order regarding, nor deal with the question as to whether any assessment has been wrongly made resulting in short-levy or duty. If the order passed by the Central Government results in restoring the order made by the proper officer, appropriate proceedings, in respect of excise duty that may, in the opinion of the relevant (Sic) have been short-levied will have to be initiated Under Section 11-A as inserted in the Central Excise Act by Act 25 of 1978 and it will be at that stage that the question whether or not there had been a short-levy and whether the petitioner can be made to pay the same will arise for consideration." 30. It is, therefore, clear that the Allahabad High Court held that when the order of the Assistant Collector, and the order-in-appeal by the Appellate Collector, related to a price list only (or a classification list as in the present case) the said order would not by itself lead to determination of any question of non-levy or short levy or wrong refund, though, when assessments are subsequently made in pursuance of such orders, a levy would result and any interference with the earlier orders may subsequently give rise to a question of non-levy or short levy. The mere fact that the appellate Collector, in passing his order, ordered, or did not order, consequential relief would not make any difference to this position in law. In the above circumstances I hold that in the present case the show cause notice issued by the Government would be governed by the second proviso to section 36(2) and not the third proviso.

31. Shri Hidayatullah contended that as between the Delhi High Court judgment and the Allahabad High Court judgment we should prefer the Delhi High Court judgment, though earlier in point of time and though the same had been considered by the Allahabad High Court in coming to a different conclusion. His submission was that the Delhi High Court ruled in favour of the third proviso even in case of a classification dispute. When it was pointed out to Shri Hidayatullah that the judgment of the Delhi High Court referred to a demand raised, his submission was that the demand is mentioned to have been raised by the Superintendent but that a Superintendent could not have raised a demand but only an Assistant Collector and hence the said case could really not have dealt with the case of a demand. I am unable to accept this contention since the judgment specifically refers to a demand.

32. Shri Hidayatullah further contended that the observations of the Allahabad High Court should be deemed to have been by way of obiter dicta. He contended that the proceedings before the Allahabad High Court were for issue of a writ of mandamus for directing the refund to be paid and the High Court issued such a writ and therefore the further observations should be deemed to have been by way of obiter only. His submission was that the relief prayed for by the assessee having been granted in the earlier portion of the judgment the observations in the subsequent portion would be by way of obiter. I am unable to accept this contention. The prayer in the writ petition appears to have been for two reliefs: (1) for issue of a writ of mandamus to direct the Department to make the refunds due in consequence of the orders of the Appellate Collector and (2) for the quashing of the show cause notice issued by the Central Government. The High Court held that so long as the order of the Appellate Collector was operative (and that would be till the Central Government disposed of the matter arising under the issue of the review notice) the appellants cannot be denied the benefit of refunds accruing due to them under the orders of the Appellate Collector and the Department was not justified in not making the refunds merely for the reason that a review notice has been issued.

That relief had been granted in paragraph 10. Under the subsequent paragraphs the other relief of the quashing of the review notice by the Government had been

taken up and it is in that connection that the various observations extracted earlier had been made. Thus these observations were relevant and necessary for a disposal of the relief prayed for from the High Court and they cannot, in the circumstances, be deemed to be merely obiter.

33. Shri Hidayatullah further wanted to distinguish the said case on the ground that the said case related to a price list and not a classification list as in the present case. It does not appear to me that the said circumstance makes for any difference.

34. Shri Hidayatullah further submitted that while the Delhi High Court had stated that not merely the notice but the order of the Appellate Collector should also be looked into, the Allahabad High Court had looked into the notice only and not the order of the Appellate Collector and hence the Delhi High Court judgment is to be preferred and followed. But I may note that in paragraph 31 of its judgment the Allahabad High Court took into consideration the order of the Appellate Collector also and observed that the Appellate order by itself did not result in any determination of the amount of excise duty payable in any particular month and it by itself did not result in refund of any portion of duty to the assessee. It was taking into consideration this also that the Allahabad High Court came to its conclusion that proviso 2 and not proviso 3 was attracted.

35. In view of the above discussion I am satisfied that in the present instance also the review notice issued by the Government cannot be said to have been issued beyond the period of limitation since the said notice was governed by proviso 2 under which the notice could be issued within one year from the date of the Appellate order. In the present instance the review notice having been issued within one year from the date of the appellate order, I am of opinion that notice has been issued within time.

36. Since I have held that the notice cannot be discharged as barred by time it is necessary to go into the merits of the issue. The respondents are manufacturers of printed cartons. According to them these printed cartons are products of the printing industry and are therefore entitled to exemption from payment of excise duty in terms of notification No. 122/75 dated 5.5.1975. Item 13 of the schedule to

notification has been extracted earlier. The view expressed in the review notice is that these printed cartons would be products of packaging industry and not printing industry.

37. Printed cartons ought to be distinguished from corrugated card board boxes or plain carton. Plain cartons are made of card board after the card board is duly cut to shape, bent and pasted. If they are manufactured in this manner they would admittedly not be products of the printing industry as no printing is involved. Similarly, the corrugated and board boxes are also normally prepared without printing.

What we are concerned with in the present case are printed cartons. The Government of India in the case of Allibhoy Sharufally & Co. (1978 ELT 3-145) held that printed cartons can be manufactured only by recognized printers like the appellants and not by ordinary manufacturers who manufacture cartons for packaging goods. It took into note the fact that cost on account of printing would account for 70% to 90% of the cost of the printed cartons. The Appellate Collector in the present instance relied on this decision in granting relief to the respondents.

But subsequently the Government of India set aside the ratio of the above decision in the case of Vijay Flexible Container Ltd. (1980 ELT 646) where it held that printed cartons would be products of packaging industry. It held that only those products where printing virtually constitutes a culmination process of manufacture for obtaining the end product that could be called the product of printing industry. It was held that judged by the said criterion the printed cartons could not be held to be a product of the printing industry. Five major functions of a package were described in paragraph 4.1 of that order and taking into consideration the said functions it was held that cartons would be legitimately products of packaging industry.

38. This Tribunal had followed the said order in the case of Card Board Box Manufacturing company (1984 Vol. 17 ELT 494). It was held in the case "in the case before us, admittedly, printing is but one of the activities carried on by the appellants. Products under scrutiny cannot be called "product of printing industry" because what is manufactured is a product of the packaging industry, viz. cartons

for purposes of packaging." As Shri Hidayatullah comments, this judgment therefore proceeds on the assumption that cartons, printed or otherwise, would be products of the packaging industry since they are to be used for purpose of packaging. There has been no discussion before arriving at this conclusion.

39. So far as the judgments of High Courts are concerned, the Department relies upon the judgment of the Andhra Pradesh High Court in the case of Golden Press (1985 ECR 1001) while Shri Hidayatullah relies upon the decision of the Karnataka High Court in the case of Rollatainers Ltd. (1984 Vol. 18 ELT 217). We may note that the decision of the Karnataka High Court is by a single judge while that of the Andhra Pradesh (which is later in point of time) is by a Division Bench. The decision of the Karnataka High Court has also been considered, but differed from, in the decision of the Andhra Pradesh High Court 40. As observed by both High Courts the meaning of the words "product of printing industry" will have to be with reference to the understanding of the same in the Trade in the absence of any statutory definition of the term. Both High Courts have in this connection referred to, and relied on, the judgment of the Supreme Court in the case of Dunlop India Ltd. (AIR 1977 SC 597). The following is the observation of the Supreme Court on this matter: "It is well established that in interpreting the meaning of words in a taxing statute, the acceptation of a particular word by the Trade and its popular meaning should commend itself to the authority....

It is clear that meanings given to articles in a fiscal statute must be as people in trade and commerce, conversant with the subject, generally treat and understand them in the usual course. But once an article is classified and put under a distinct entry, the basis of the classification is not open to question Technical and scientific tests offer guidance only within limits. Once the articles are in circulation and come to be described and known in common parlance, we then see no difficulty for statutory classification under a particular entry...." 41. Therefore, Shri Hidayatullah refers us to various technical books, most of which have been considered in the judgment of Karnataka High Court, and were also referred to in the judgment of the Andhra Pradesh High Court. The Printing Trades Directory published by the Printing Trade Journal in the U.K. Contains a section which reads "Print buyers guide to printers specialities - names of printers, with towns in which they are

located, arranged under classified heading denoting classes of work undertaken." In this section under the heading "Print buyers guide to printers specialities" the address of a large number of printers engaged in carton making is given. This would indicate that in the Trade the making of printed cartons is understood as a specialized work undertaken by printers. In the book "The Printing Industry" by Victor Strauss Section 1 of Chapter 11 deals with different kinds of printed products and their art and copy preparation. One of the headings therein relates to "package printing" and it is mentioned that package printing belongs to the class of printed products which are completely paid for by the final customer. In the book titled Printing Office Procedure published by the British Printing Industries Federation (2nd Edition - 1975) it is mentioned in page 16 that the federation has member firms engaged in book and magazine production, jobbing printing and binding, carton and stationery manufacture. This would also indicate that the Tade accepts the manufacture of printed cartons as an activity of printers. In the same book the following passage is found on page 13: "Although the typical printer handles a wide variety of work (he is said to be a 'general' or 'jobbing' printer) there is a trend towards specialisation. Some firms concentrate on books, and Ors. on periodicals, printed cartons and stationery, while some undertake service to the trade such as setting type for other printers to use." 42. The above extracts have been considered in the judgment of the Karnataka High Court and accepted as establishing that the manufacture of printed cartons is accepted in the Trade as an activity of the printing industry and hence printed cartons would be a product of the printing industry. These have been referred to in the judgment of the Andhra Pradesh High Court also but rejected as insufficient to come to the said conclusion. The Andhra Pradesh High Court held that the object of the notification in question was to encourage production and cheaper availability of certain products of daily use and it would be anomalous if ordinary cartons manufactured in the packaging industry were to be subject to Central Excise duty while printed cartons, which would be more expensive and intended for use in sophisticated packagings, is to be held exempt from payment of duty. But it appears to me that if the words "products of printing industry", construed as understood in Trade parlance would establish that printed cartons would be such products, the benefit of the exemption cannot be denied merely for the reason that the benefit would not

be available to plain cartons.

43. The test, as Shri Hidayatullah points out, would be whether a person who requires printed cartons would go to a printer or to a carton manufacturer. These printed cartons are made to order, to the specification of each customer, since the printing would be for the purpose of the said customer only and would not serve any general purpose. As observed by the Government of India in 1978 ELT J-145 the cost of printing accounts for more than 70% of the cost of a printed carton. It is not as if a person who requires printed cartons could purchase plain cartons and then have them printed. Any person who requires printed cartons for use in his business would necessarily be approaching a printer who would, obtain the raw-material for the cartons, have the cardboard cut, printed, folded and pasted, all in his own establishment. In the circumstances this fact itself would establish that printed cartons would be products manufactured by a printer and not by a person engaged in manufacture of plain cartons and therefore printed cartons would be a product of printing industry rather than packaging industry.

44. It may also be noted that even in the decision of the Andhra Pradesh High Court the contention that printed cartons would be a product of printing industry has not been ruled out as without basis.

The observations in that connection are as follows: "The most that can be said in favour of the petitioner is, may be two views are possible." That is to say, the High Court has held that the view that printed cartons are the products of printing industry is as much plausible as the view that they will be the products of packaging industry. Shri Hidayatullah contends that in that event the assessee would be entitled to that interpretation which is favourable to him and should be permitted to take advantage of that interpretation of the notification which would place on him the lesser burden in respect of duty. The law is well settled that if two interpretations are permissible of a taxing provision that which is favourable to the assessee should be accepted rather than that which favours the Revenue. No doubt what we are concerned with in the present instance is not a taxing provision but an exemption provision. Even so when two interpretations are permissible of the words in an exemption provision that which would favour the assessee should

be taken rather than that which rejects him the benefit of the exemption.

45. In the decision of the Government of India in the Vijay Flexible containers' case the Government had held that only those products where printing virtually constitutes a culminating process of manufacture for obtaining the end product could be called the product of a printing industry. This view had been rejected by the Karnataka High Court in paragraph 19 of its judgment. Shri Hidayatullah comments that if this view of the government is accepted as correct that would practically render the exemption notification nugatory. He submitted that even a book would cease to be exempt if this view is accepted as correct. His submission was that there can be no doubt that books would be products of the printing industry but that various processes such as binding, pasting of covers, jacketing etc. will have to be done after the printing of the forms is done and therefore, if the view of the Government of India as mentioned earlier is accepted even books would cease to be eligible for exemption under the notification. It appears to me that it would be unnecessary to consider this contention since the question whether a book would be the product of the printing industry or publishing industry may not be free from doubt and this question may therefore have to be reserved for resolution in any appropriate case where it may arise.

46. So far as the present respondents are concerned they are members of the Bombay Master Printers Association and have been registered as printers under the provisions of the Industries (Development and Regulation) Act, 1951. Manufacture of printed cartons, at the instance of the customers who require such cartons is said to be a substantial part of their business. In view of the discussion earlier I hold that printed cartons would be products of the printing industry. As earlier mentioned, the case of the printed cartons cannot be equated with the case of plain cartons or corrugated card board boxes. While the latter two may be products of packaging industry the former (printed cartons) would be products of printing industry.

47. I, therefore, hold that the order of the Appellate Collector granting the respondents the benefit of exemption under notification No. 122/75 dated 5.5.75 was proper. In that view I hold that the appeal is to be dismissed and the review

notice issued by the Government discharged. I, therefore, pass an order for dismissal of the appeal and discharge of the review notice dated 6th September, 1979.

Sd/- 48. I have given my very careful consideration to the facts of the case, the submissions made before us and the two orders proposed by Brother Sankaran and Brother Raghavachari.

49. As per the show cause notice issued by the Government of India Under Section 36(2) of the Central Excises and Salt Act, 1944, Government propose to set aside the Order-in-Appeal passed by the Appellate Collector which set aside the Assistant Collector's Order and allowed the appeal filed by the assessee on the ground that in view of the Government's Order in Revision No. 2057/77, the exemption under Notification No. 55/75 as amended by Notification No. 122/75 would be applicable to the goods manufactured by the assessee. In the show cause notice it is stated that Government propose to pass an order that the printed cartons manufactured by the assessee cannot be held as product of the printing industry eligible for exemption under Notification No.55/75-CE dated 1st March, 1975 and No. 122/75, but are products of packaging industry. The Appellate Collector whose orders are proposed to be reviewed had held that in view of the order of the Government of India in Revision No. 2057/75 dated 5th December, 1977 issued in the case of Allibhoy Sharafally and Co., the circumstances and the processes undertaken by the appellants being the same as in the Revision Application before the Government of India, the appeals were allowed, with consequential relief, if any.

"provided that where the Central Government is of the 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 limit specified in Section 11-A" 51. Now, it would be observed that the Order-in-Appeal is clearly an order holding that the assessee is eligible for exemption under certain Notifications and that no duty is leviable in respect of the goods in question. In fact, the matter

arose before the Assistant Collector as a result of representation of the respondent to the effect that their cartons were products of the printing industry and hence, exempt under Notification No. 122/75, and that their competitors also, who were manufacturing identical goods, were not paying duty. In the Order-in-Original it was held that the goods in question were not exempt under the Notifications cited and they were liable to duty. In the Order-in-Appeal, as just discussed, it was held that the impugned goods were eligible for the exemption claimed and not chargeable to duty. It is this order of the Appellate Collector which is sought by the Central Government to be reviewed Under Section 36 of the Act. The show cause notice issued by the Central Government states that Government propose to set aside the impugned Order-in-Appeal and pass an Order that the printed cartons manufactured by the assessee cannot be held as products of the printing industry, eligible for exemption under the relevant Notifications, but are products of packaging industry. In the words of the show cause notice itself Government has taken the tentative view that the Order of the Appellate Collector holding that the goods are exempt and not leviable to duty deserves reconsideration and the government propose to set aside the appeal and pass an order that the goods cannot be held as eligible for exemption but would be leviable to duty.

52. It is observed that the entire issue before the lower authorities was one whether duty was or was not leviable in respect of the impugned goods. The Appellate Collector had passed orders that no duty was leviable and directed "consequential relief" which would have had the effect of grant of refund duties which, in the light of the orders of the Appellate Collector, could be considered as erroneously collected.

Consequences of the order of the Appellate Collector are two fold: firstly, no levy of duty and secondly, grant of refund, which, according to the tentative view of the Central Government, would be erroneous. Since the Central Government is reviewing an order of this nature, it certainly is going into the question of why excise duty, as per the orders of the Appellate Collector, is not to be levied. The Central Government is also reviewing Appellate Collector's order granting refund on the grounds that such grant is considered erroneous.

Clearly, therefore, the third proviso to Section 36(2) of the Act is attracted.

53. This is not a case where the issue is related merely to determination of prices without raising any question directly of duty to be demanded or levied. It is perhaps an issue relating to classification of goods but relates not to the question of whether the goods fall under one or the other of the tariff entries but is directly related to the issue of leviability or otherwise of duty and the order regarding the consequential relief by way of grant of refund.

54. In the decision of the Delhi High Court in the case of Associated Cement Company Limited v. Union of India there is a point made the importance of which cannot be over emphasized and that relates to the reason why the third proviso provides for a shorter period of limitation. The observations of their Lordships on this point are reproduced below: "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 Government that the appellate order is either not correct or legal or proper is not so prejudicial to the person to be affected by the proposed order as should be the order which would be proposed by the Central Government under the third proviso. This is the reason why the shorter limitation is provided for under the third proviso for reviewing the appellate order because the Central Government is of the opinion that appellate order has resulted in a non-levy or short-levy of duty. Short-levy or non-levy of duty results 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 third proviso and the assessee should also be relieved of the risk of such revision after a comparative short period of six months." 55. I accordingly hold that the notice issued by the Central Government in this case is barred under third proviso to Section 36(2) of the Act.

I, therefore, don't go into the merits of the issue of classification and order that the notice be discharged and appeal dismissed.