

Collector of Central Excise Vs. S.G. Glass Works (P) Ltd.

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Jun-10-1987

Reported in : (1987)(13)ECC307

Appellant : Collector of Central Excise

Respondent : S.G. Glass Works (P) Ltd.

Judgement :

1. These proceedings arise out of notice F. No. 198/17-5/13/81-CX.V dated 3.3.1981 issued by the Central Government in exercise of its powers under Section 36(2) of the Central Excises and Salt Act, 1944 (the "Act" for short) to M/s: S.G. Glass Works (P) Ltd., Chandrapur, calling upon the latter to show cause by order-in-appeal No. 591/80, dated 8.9.1980 passed by the Central Board of Excise and Customs should not be set aside, restoring the order No. C.Ex/Review/1/80, dated 21.2.1980 passed by the Collector of Central Excise, Nagpur, denying them the benefit of Central Excise notification No. 265/77, dated 3.8.1977.

2. The respondent is a manufacturer of glassware falling under item No.23A of the First Schedule to the Central Excises and Salt Act, 1944 ("GET" for short). Notification No. 265/77, dated 3.8.1977 issued by the Central Government under Central Excise Rule 8(1) exempted, glass the glassware, falling under item No. 23A, GET and manufactured by a unit by mouth blowing or hand or foot pressing, from the excise duty leviable thereon. However, the exemption was made inapplicable if such a unit manufactured also glass, and glassware by a process other than that of mouth blowing or hand/foot pressing.

3. The respondent was paying duty on .glassware falling under Item Nos.

23A(3) and 23A(4) at tariff rates i.e. 15% and 30% respectively. Due to late receipt of notifications 265 and 266 of 1977 dated 2.8.1977, they continued to pay duty at the said tariff rates till 24.8.1977. On receipt of these notifications, they started paying duty at 12% and 24% respectively as specified in notification No. 226/77 for semi-automatic units. On 27.8.1977, the respondent submitted a revised classification list No. 86/77 effective from 3.8.1977 to the Assistant Collector claiming full exemption from duty under notification No. 265/77 on the ground that the products manufactured by them were by mouth blowing and hand or foot pressing. The Assistant Collector approved the classification list and granted consequential refund amounting to Rs. 1,50,195.04 on 23.3.1978 which was the duty paid during the period 3.8.1977 to 27.10.1977. Two show cause notices were thereafter issued to the respondent one dated 21.8.1978 and another dated 23.8.1978. By the former, the respondent was called upon to show cause as to why the amount of Rs. 1,50,195.04 erroneously refunded to them should not be recovered under Rule 10 of the Central Excise Rules. By the latter notice, the respondent was called upon to show cause why the classification list No. 86/77 effective from 3.8.1977 should not be modified as mentioned in the notice. In reply, the respondent submitted that, as required by notification No. 265/77, the process of manufacture was mouth blowing/manual processing. After the glass article is given a shape by mouth blowing, it was taken to a second mould. Here, compressed air was let in by release of a lever by hand.

The compressed air served to expand the hollow of the glass article and bring it to the size and shape of the mould. The release of the compressed air into the mould was not by a mechanical device but by a hand-operated lever. It was further contended that the respondent's unit was not a semi-automatic unit as defined in notification No.266/77 dated 3.8.1977 and set that notification was not applicable to the unit. The Collector in his adjudication order of 9.1.1980 rejected these contentions. He held that use of compressed air disqualified the unit from the benefit of notification No. 265/77. He also held that the unit was a semi-automatic ("a unit in which the molten glass is transferred manually from (a) furnace to moulds or (b) one mould to another for final shape and its removal from the mould)

and hence eligible to the benefit of the notification. It was on the basis of these findings that the Collector had (a) ordered S.G. Glass Works to pay back Rs. 1,50,195.04 under Rule 10 which duty amount had been erroneously refunded to them and (b) directed that the classification list No. 86/77 effective from 3.8.1977 be modified such that the goods would be assessable under notification No. 266/77, dated 3.8.1977.

4. In appeal, the Board held in its order-in-appeal dated 8.9.1980 that the mere fact that the respondent was using compressed air at the final stage of hand pressing could not debar the respondent from the benefit of the notification when the process of manufacture was based on hand or foot pressing, when, as per the show cause notice leading to the Collector's order, it was evident that the final shape was given by hand and foot pressing. It was on this basis that the Board had set aside the Collector's order.

5. The basis on which the Central Government came to its tentative view that the Board's order-in-appeal was not correct, legal and proper was set out in para 2 of the show cause notice dated 3.3.1981. It reads as follows :- "2. It has come to the notice of the Government that in the unit of M/s. S. G. Glass Works Pvt. Ltd., Molten Glass is removed from the tank furnace manually with the help of rods and is placed in the first mould which is operated by hand pressing machine and the semi-shaped article is removed to a second mould which is connected with a compressor by means of a pipe and air from the compressor is blown in this mould which is pressed by hand press simultaneously to get the final article, i.e., Glass Jar. This use of compressed air falls within the ambit of paragraph 2 of Notification No. 265/77, dated 3.8.1977 because it is a process other than mouth blown. Thus, from the records of the case, the Government is tentatively of the view that the aforesaid order is not correct, legal or proper." 6. The respondent denied the allegations and questioned the Central Government's competence to review under Section 36(2) the order-in-appeal passed by the Board.

7. We have heard Shri A. S. Sundera Rajan, S.D.R. for the appellant and Shri Palshikar, Advocate for the respondents.

8. When this matter was taken up for hearing on 14.10.1986, Shri Raj Hans, Departmental Representative, made submissions in support of the Government's review notice. Thereafter, Shri A. S. Sundera Rajan, D.R. with the permission of the Bench, submitted that no appeal lay against the order-in-review passed by the Collector and hence, the order of the Board on such an appeal- was void in law and ought to be set aside on that ground. At the instance of the Bench, the D.R. reduced his submissions into writing by an application dated 4.11.1986. At the resumed hearing on 23.3.1987, the Bench heard both sides on these submissions.

9. It is submitted on behalf of the Revenue that, though the Collector has not referred to the source of the power under which he passed the order dated 9.1.1980, he appears to have exercised powers under Section 35A(2) of the Act. In terms of Section 35(1) of the Act, no appeal lay against an order passed under Section 35A. Therefore, the Board could not have, in the present instance, exercised its appellate powers and passed the impugned order-in-appeal. The remedy against the Collector's order was only a revision under Section 36 of the Act. In response to a query from the Bench, it was submitted by Shri Sundera Rajan that the mention of Rule 10 in the show cause notice dated 21.8.1978 was incorrect since the Collector had no power under this rule but this would not make any difference to the order since the Collector had powers under Section 35A(2) and non-mention of this provision was not fatal to the order.

10. In reply, the counsel for the respondents submitted that the show cause notice dated 21.8.1978 was issued by the A.C. under Rule 10 in terms of which he alone could adjudicate. If it was meant to be a review notice, the Collector could have invoked Section 35A(2). The second show cause notice dated 23.8.1978 (unfortunately not made available to us by either side) was under Section 35A by the Collector's order is titled "Order-in-Original". Therefore, Board correctly entertained the appeal against the Collector's order.

Government's show cause notice did not put forth the ground now being urged by the D.R. and no new ground could be permitted at this stage.

The counsel also submitted that 'if the Board's order-in-appeal were to be set aside now on the above ground, the respondent could go in appeal against the

Collector's order and the delay in filing the appeal would be condonable. The respondent should not be placed in this position at this stage.

11. In view of the importance of the submissions of the D.R. Shri Sundera Rajan, we propose to take them up first. If the Collector's order dated 9.1.1980 is indeed an order passed in exercise of his powers under Section 35A(2), it would follow that no appeal lay against the said order to the Board under Section 35 because of the specific exclusion of orders passed under Item* 35A from the purview of appeals under Section 35. Unfortunately, as we have noted, the show cause notice dated 23.8.1978 which, according to the counsel for the respondent, was issued under Section 35A, is not before us, both sides stating that they do not have a copy of the same. But it is significant to note that the Collector has numbered his order as "Order No.C.Ex/Revision/1/1980", despite the title "Order-in-Original" given to the Collector's order. This inference also gains support from the fact that the Collector has passed another purported "Order-in-original" (numbered as 2/Glass-Review/80) dated 5.1.1981 though it was, in fact, an order under Section 35A(2), as seen from the Tribunal's order No.0.444/85-0, dated 6.12.1985 in Excise Appeal No. 1700/81-D filed by the same assessee who is the present respondent. There is yet another piece of evidence. In his letter dated 28.1.1981 to the Additional Secretary to the Government proposing review under Section 36(2) of the Board's order dated 8.9.1980 (copy available on record), the Collector says that the A.C. issued a notice for revision of the classification earlier approved by him (the A.C.) and this which was answerable to the A.C. but since the matter involved in both the show cause notices was the same, they were disposed of by the Collector by a common order. The departmental representative's contention is also that the Collector's order is under Section 35A(2). If this be so, it is incumbent on the Collector under Section 35A to, "of his own motion or otherwise, call for and examine the record of any proceeding in which any decision or order has been passed under this Act or the rules made thereunder by a Central Excise officer subordinate to him (not being a decision or order, passed on appeal under Section 35) for the purpose of satisfying himself as to the correctness, legality or propriety of such decision or order...." (emphasis added). Sub-section (b) of Section 35A(3) speaks of "where ... the Collector ... is of opinion that any duty of excise ... has been erroneously refunded, ... 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." All these circumstantially point to the statutory requirement, though implied, that the notice contemplated in Section 35A has to be issued by the Collector himself. Even without going so far as that, it may be noted that in the present case, the show cause notice dated 21.8.1978, a copy of which is on record, has been issued by the Assistant Collector at the instance of the Collector, though the notice was directed to show cause to the Collector. The notice no doubt cites Rule 10, but, if the Collector was acting under Section 35A(2), the erroneous citation of the rule would not have the effect of vitiating the proceedings. The second show cause notice proposing revision of the classification list approved by the A.C. was also issued by the A.C. as seen from para 5 of the Collector's letter dated 28.1.1981 to the Additional Secretary to the Government of India. There is nothing to show whether or not this notice was also issued at the instance of the Collector since it was the Collector, and the Collector alone, who under Section 35A(2) could have formed the tentative view that the A.C.'s order was not legal, proper or correct. But even if it was, as seen again from the said letter, this notice was made answerable to the Assistant Collector and not the Collector who alone was competent to adjudicate on review proceedings under Section 35A(2). May be the A.C. could have proceeded to adjudicate upon this matter himself in exercise of his own powers but the Collector chose to take upon himself the adjudication of the proceedings initiated by this notice also. The Collector's order passed on the conclusion of the proceedings initiated by a defective show cause notice cannot be sustained. In this view of the matter, the Collector's order has to be set aside as invalid and we order accordingly. In consequence, the impugned order-in-appeal has also to be, and is, set aside. The Section 36(2) notice issued by the Central Government also gets, in consequence, discharged.