**SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com**

**itc Ltd. Vs. Commissioner of Central Excise**

**itc Ltd. Vs. Commissioner of Central Excise**

**SooperKanoon Citation** : sooperkanoon.com/35692

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

**Decided On :** Jun-18-2004

**Reported in** : (2004)(170)ELT33TriDel

**Judge** : K Usha, S Kang, N T C.N.B.

**Appellant** : itc Ltd.

**Respondent** : Commissioner of Central Excise

**Judgement** :

1. In the above appeals at the instance of the assessees and Revenue common issues arise for consideration. We, therefore, proceed to dispose of the same under a common order.

2. These appeals at the instance of M/s. ITC, M/s. Master Tobacco Co.

and M/s. Crown Tobacco Co. are directed against Order-in-Original No.5/96, dated 30-8-96. The proceedings relate to show cause notice dated 21-10-1987 covering the period 1-11-79 to 28-2-85 Under the above-mentioned order the Commissioner had rejected the objection raised by the assessee that show cause notice issued was invalid on the ground that it has been issued prior to finalisation of the provisional assessment. Commissioner while ordering finalisation of the provisional assessment by the Assistant Commissioner of Central Excise directed the authority to intimate the Commissioner as and when the provisional assessment was finalized, so that the Commissioner can proceed with the

adjudication on the basis of show cause notice. He also observed that direction given to the Assistant Commissioner is only an interim direction in the course of adjudication proceedings in respect of show cause notice without prejudice to any further orders which the adjudicating authority may pass subsequently. The above direction given by the Commissioner is also under challenge in these appeals.

3. These appeals are filed by ITC challenging the orders passed by the Commissioner of Central Excise against Order No. 6/96, dated 13-9-96 in respect of proceedings initiated under show cause notices dated 10/11-8-83 and 8-10-84. The period involved is 1-7-80 to 31-3-82 and 1-4-82 to 30-6-83. In the impugned orders also the Commissioner rejected the contention of the assessee that show cause notices taken up for consideration are invalid on the ground that they had been issued prior to finalization of provisional assessment. In this case also the Commissioner had given direction similar to those contained in Order-in-Original No. 5/96, dated 30-8-96. These directions are also under challenge at the instance of the appellant in these appeals.

E/3610/2000: 4. This is an appeal filed by ITC against Order No. 8/99, dated 30-9-99 passed by the Commissioner of Central Excise, Delhi. While Appeal Nos.

E/1793 and 1794/96 challenging Order No. 6/96, dated 13-9-96 were pending consideration before the Tribunal, Commissioner, Delhi resumed adjudication of the show cause notice dated 11-8-83 and 8-10-84 relating to inclusion of notional interest and security deposits received from wholesale dealers to the price. He then passed Order No.8/99, dated 30-9-99 confirming a demand of Rs. 75.27 lakhs and directed the above amount to be adjusted against the sum of Rs. 1.10 crores already deposited by ITC in 1986 towards disputed excise duty. A penalty of Rs. 5 lakhs was also imposed under Rule 9(2). Thus, the Order No. 8/99 is as equel to Order No. 6/96, dated 13-9-96 which was already challenge in Appeal No. E/1793/96. If Order-in-Original No.6/96 cannot be sustained then, as a consequence, Order No. 8/99, dated 30-9-99 should also fail.

5. This appeal has been filed by ITC against Order No. 38/2000, dated 29-12-2000 passed by the Commissioner of Central Excise, Delhi. As mentioned earlier pursuant to the show cause notice dated 21-10-87 the Commissioner, Central

Excise, Delhi had passed Order No. 5/96, dated 30-8-96 holding that after finalisation of the provisional assessment by the Assistant Commissioner, the Commissioner can proceed to adjudicate the show cause notice. The above Order No. 5/96 is already under challenge in Appeals E/1795, 1791 and 1792/96. As per the direction in Order No. 5/96 the Deputy Commissioner of Central Excise finalised the assessment under order dated 22-9-2000 holding that ITC had paid Rs. 83 lakhs in excess of the amount due to the department.

Yet the Commissioner proceeded to adjudicate the show cause notice dated 21-10-87 raising a demand of Rs. 5,96,05,205/- or any higher amount as may be redetermined by the Jurisdictional Central Excise Commissioner in terms of the directions contained therein. Challenge against the above order is on the same ground as in Appeal No.E/1795/96, where the Order No. 5/96, dated 30-8-96 itself is sought to be set aside. Therefore, if Order No. 5/96 is held illegal, Order No.38/2000 will have no legs to stand.

6. These appeals are filed by Crown Tobacco Company and Masters Tobacco Company against Order No. 38/2000 of CCE, Delhi, dated 29-12-2000 on the same ground as in E/2760/2001-A, filed by ITC. E/1889/2002-A : 7. This appeal has been filed by the Revenue against Order No. 38/2000 of Commissioner of Central Excise, Delhi dated 29-12-2000 to the extent the Revenue is aggrieved by that order contending that additional consideration should be added to the value and not to the price and verification of quantification should have been done in consultation with the Departmental Officers. This appeal will also depend upon the legality of Order No. 5/96, dated 30-8-96.

8. This appeal is tiled by against Order dated 31-7-2002 passed by the Commissioner (Appeals) in an appeal filed by the Department against Order of Dy. Commissioner of Central Excise dated 22-9-2000. In the impugned order the Commissioner (Appeals) took the view that he has no jurisdiction to decide the issue raised in the appeal in view of the direction given by the Commissioner, Delhi in Order Nos. 5/96 and 6/96 dated 13-9-96. Under those orders the assessing authority could only finalise the pending provisional assessment and intimate the same to Commissioner, Delhi who would thereafter continue

adjudication of notices dated 10/11-8-83, 8-10-84 and 21-10-87. Appeal filed by the Department was partially allowed as above. The above order is challenged before us on the ground that show cause notices are bad in law and the direction given by Commissioner, Delhi in Order Nos. 5 and 6/96 were without jurisdiction.

9. In order to decide the above appeals the main issue to be considered is whether the contention raised by the assessees on the legality of the show cause notices issued during the pendency of the provisional assessments has to be accepted or not. It is also to be considered whether Commissioner of Central Excise, Delhi can retain with him the power to proceed with the show cause notice even after finalisation of the provisional assessments by the Jurisdictional Assistant Commissioner. In ITC Ltd. v. CCE, Delhi - 2002 (146) E.L.T. 336 South Zonal Bench, Chennai of this Tribunal has already spoken on these issues upholding the contention of the assessees. The learned Counsel for the appellant submitted that there are no reasons for us to take a different view. The learned DR on the other hand sought to support the orders impugned by the assessees.

10. In the appeal that come up for consideration before Chennai Bench the challenge was against Order No. 4/96, dated 12-8-96 passed by the Commissioner of Central Excise, Delhi pursuant to show cause notice dated 25-9-87 for the period 1-4-82 to 28-2-83. In the above order the Commissioner directed the Jurisdictional Assistant Commissioner to finalise the provisional assessment and to inform him of the same so that the Commissioner can continue to proceed with the adjudication on the show cause notice dated 25-9-87, The above direction was challenged as one issued without jurisdiction.

11. During the pendency of the above appeal, it was brought to the notice of the Tribunal that against another order-in-original finalising certain aspects of provisional assessment passed by Jurisdictional Assistant Commissioner was pending in appeal before Commissioner (Appeals), Bangalore and that some of the issues raised therein were identical to those covered by the show cause notice dated 25-9-87. The above appeal was later disposed of by the Commissioner (Appeals) under order dated 20-11-99 setting aside the order impugned before him and remanding the matter for fresh consideration by the original authority. The

proceedings remanded covered a period from 1-10-75 to 28-2-83 which would cover part of the period invoked in show cause notice dated 25-9-87. Therefore, request was made by the assessee to remand the proceedings before the Tribunal also to the original authority. The Revenue agreed to the above course of remand to the Assistant Commissioner for consideration of all issues raised in show cause notice dated 25-9-87 along with the de novo consideration of the provisional assessment as ordered by Commissioner (Appeals) in his order dated 20-11-99 except that portion of the show cause notice dated 25-9-87 relating to the imposition of penalty which aspect was required to be decided by the Commissioner, Delhi after the finalisation of provisional assessment by the Assistant Commissioner. According to the Revenue such reservation was necessary for two reasons. Firstly, the Jurisdictional Assistant Commissioner of Central Excise who will be required to finalise the provisional assessment would not have the jurisdiction to consider charges and allegations of suppression leading to penal liability and secondly, even if he has such a jurisdiction, the quantum of penalty leviable by him may not be commensurate to the expectations of Revenue. Therefore, he submitted that either the Commissioner of Central Excise, designated authority, at New Delhi or the Jurisdictional Commissioner of Central Excise, Bangalore should be allowed to proceed with consideration of those allegations leading to penal liability determination under law or the Revenue may be left free to invoke the powers available under Rule 6 of the Central Excise Rules so that finalisation of provisional assessment itself could be done by either of these Commissioners.

12. It was contended on behalf of the assessee that the show cause notice was issued without authority of law and it was also premature.

When the provisional assessment was pending finalisation under Rule 9(b) Revenue has no authority to issue a show cause notice demanding duty under Section 11A and proposing penal action. Reliance was placed on number of decisions of the Supreme Court, High Courts and the Tribunal in support of the above contention.

(i) UOI v. Godrej & Boyce Manufacturing Co. Pvt. Ltd. as in 1989 (44) E.L.T. 3 (Bom.) which was confirmed by the Supreme Court in SLP C. No. 12824/89 order dated 8-3-90.Serai Kella Glass Works Pvt. Ltd. v. CCE as in 1997 (91) E.L.T. 497 (S.C.) (iii) Nayek Paper Industries Pvt. Ltd. v. UOI as in 1991 (56) E.L.T. 31 (Cal.)Modi Rubber Ltd. v. CCE (vi) Tribunals Final order No. 386/93-A, dt. 29-7-93 in the case of CCE v. Ponds (India) Ltd. and Others in Appeal No. E/2344/92-A.13. Revenue further contended that while finalizing the provisional assessment it may come to the notice of the Revenue that certain aspects of valuation were suppressed by the noticee which would justify demand of duty under Section 11A along with imposition of penalty.

Therefore the Commissioner can proceed with show cause notice alleging suppression and proposing imposition of penalty even after finalization of the provisional assessment.

14. After hearing both sides the Tribunal set aside the show cause notice dated 25-9-87 and Order-in-Original No. 4/96 passed pursuant to the show cause notice. The jurisdictional Assistant Commissioner was directed to finalize provisional assessment expeditiously. It was also held that the Revenue shall be at liberty to examine the issue of any short-levy, non-levy and consequent penalty liability only after finalization of the assessment as per law. In coming to the above conclusion the Bench had applied the ratio of the judgment of the Hon'ble High Court of Bombay in Union of India v. Godrej & Boyce Mfg.

Co. Pvt. Ltd. which was confirmed by the Supreme Court in the order in SLP C. No. 12824/89 dated 8-3-90. In the above case it was held that since the show cause notice was based upon material which was the same as was concerned with the provisional assessment pending, the show cause notice was of dubious validity. It was further held that the relevant date for issue of such a show cause notice under Section 11A would be the date of adjustment of duty after final assessment. While confirming the above judgment the Apex Court observed as follows : "Nothing prevents petitioners from the utilising any material collected by them for the purpose of making the final assessment and that such material does not cease to be available to the assessing authority by reason alone of the

circumstances that that such material has been referred to and incorporated in the impugned notices." 15. Reference was also made to the decision of the Hon'ble Supreme Court in Serai Kella Glass Works Pvt. Ltd. v. CCE where it was held that no show cause notice under Section 11A of the Central Excise Act is required to be issued until the pending provisional assessments are finalized. If after final assessment it is found that there was duty short levied non levied or erroneously refunded, only then proceedings under Section 11A can be taken up after issuing a show cause notice. It was further clarified that where such a show cause notice is issued under Section 11A of the Central Excise Act after finalisation of the assessment the period of limitation will run from the date of adjustment of duty consequent to finalisation of assessment. Reliance was also placed on the decision of the Calcutta High Court in Nayek Paper Industries Pvt. Ltd. v. UOI where similar view was taken in respect of issue of show cause notice under Section HA before finalization of assessment. It was held therein that no penalty can be divorced from the demand of duty on the ground of short levy or non levy due to suppression or any other wilful intention on the part of the noticee before finalization of the provisional assessment. Reliance was also placed on the decision of the High Court of Madras in Ponds (India) Ltd. v. ACCE and decision of this Tribunal in Modi Rubber Ltd. v. CCE.16. Following the ratio of the above decision the Tribunal took the view that show cause notice dated 25-9-1987 has been issued prematurely and that it could not have been issued under law because it was not in dispute that the show cause notice had invoked the provisions of Section HA and the proviso thereof. Once notice could not have been issued for recovery of any short levy or non levy etc. even if such short levy or non levy was due to suppression or any wilful intention on the part of the noticee such penal liability could not be divorced from the demand of duty on this count. The show cause notice was; therefore set aside and it was held that the Order-in-Original No.4/96, dated 12-8-96 which was passed pursuant to the above show cause notice cannot survive. The Tribunal therefore held that the Revenue can use any material contained in the impugned notice as independent material to support the finalization of assessment, after making this material known to the appellants in writing and after considering their response thereto both in writing and on personal hearing.

17. It was on the basis of the above finding the Tribunal gave the following directions.

(b) The Jurisdictional Assistant Commissioner is directed to expeditiously address himself to the finalisation of the provisional assessments as already detailed above; (c) In view of the aforesaid judicial decisions, we find that the Revenue shall be at liberty to examine the issue of any short levy, non-levy and consequent penal liability only after the finalisation of the assessment, etc. as per law.

Civil Appeal No. 4166/2000 [2003 (154) E.L.T. 358 (S.C.)J filed by the Revenue against the decision of Chennai Bench was disposed of by the Hon'ble Supreme Court in the following manner :- "It is stated by the Counsel for the assessee that pursuant to the order of this Court dated 21-7-2000, the Excise authorities have, by their order dated 26-7-2001 finalised the provisional assessments.

We are told that the Respondent, ITC Ltd. had thereafter filed an Appeal to the Commissioner (Appeals) who has also disposed of the same by his appellate order dated 30-8-2002. We are informed that as per the direction contained therein, the final figures of the duty payable and paid by ITC were drawn up by the Excise Authorities and communicated to ITC. In these circumstances, the question of law raised in the Appeal does not survive for consideration and we accordingly express no opinion on the same.

18. We heard learned Counsel for the assessee and the learned DR. We are in full agreement with the well considered view taken by the Chennai Bench. No other binding decision has been brought to our notice by the Revenue which would persuade us to take a different view.

Therefore we have to consider the prayers in each appeal in the light of the ratio of the decision of Chennai Bench in ITC Ltd. v. CCE, Delhi.

19. As mentioned earlier challenge in Appeals E/1795, 1791 and 1792/96 at the instance of M/s. ITC, Master Tobacco and Crown Tobacco are directed against Order No. 5/96, dated 30-8-96. The above order was issued pursuant to show cause notice dated 21-10-87 covering the period 1-11-79 to 28-2-83. While the

above-mentioned appeals were pending consideration before the Tribunal as per direction contained in Order No. 5/96 the Deputy Commissioner of Central Excise finalized the assessment for the period 1-11-79 to 28-2-83. Under order dated 22-9-2000 the Deputy Commissioner held that ITC had paid Rs. 83 lakhs in excess of the amount due to the department as Central Excise duty.

Ignoring the above order the Commissioner of Central Excise, Delhi proceeded to adjudicate the show cause notice dated 21-10-87 in accordance with the direction contained in Order No. 5/96, and passed Order No. 38/2000, dated 29-12-2000. A demand of Rs. 5,96,05,205/- was raised or any higher amount as may be re-determined by the jurisdictional Commissioner in terms of the directions contained therein. The above order is under challenge in E/2760/2001-A, filed by ITC. The grounds raised are the same as in Appeal E/1795/96-NB(A) where Order No. 5/96 itself is under challenge. Appeal E/2761/2001-A and E/2762/2001-A are filed by Crown Tobacco Co. and Master Tobacco Company against the very same Order No. 38/2000. Challenge is on the same ground as mentioned above. E/189/2002-A is filed by the Revenue against Order No. 38/2000 to the extent Revenue is aggrieved by a part of that order.

20. Order No. 5/96 and show cause notice dated 21-10-87 were challenged on the same ground on which Order No. 4/96 was challenged before the Chennai Bench. We follow the ratio of the decision by Chennai Bench and set aside the show cause notice dated 21-10-87 and Order No. 5/96, dated 30-8-96. In the light of the above, Order No. 38/2000, dated 29-12-2000 passed by the Commissioner of Central Excise, Delhi has also to be set aside and we do so. The Jurisdictional Assistant Commissioner will finalise the provisional assessment expeditiously. The Revenue can utilise any material contained in the impugned notice as independent material to support the finalisation of assessment after making the material available to the assessee in writing and after considering their response thereto both in writing and on personal hearing. The revenue shall be at liberty to examine the issue of any short levy, non levy and consequent penal liability only after finalisation of the assessment as per law. Appeals E/1795/96, E/1791/96, E/1792/96, E/2760/2001, E/2761/2001 and E/2762/2001 are allowed as above and E/189/2002 stands dismissed.

21. E/1793/96 and E/1794/96 are filed by ITC. Challenge is against Order No. 6/96, dated 13-9-96 passed by Commissioner of Central Excise, Delhi pursuant to show cause notices dated 10/11-8-83 and 8-10-84 for the period 1-7-80 to 31-3-82 and 1-4-82 to 30-6-83. Challenge is on the same ground on which Order No. 4/96 was challenged before the Chennai Bench. While the above two appeals were pending consideration before the Tribunal, the ACCE, Division Fl Mumbai Commissionerate finalized the provisional assessment relating to ITC under Order dated 16-12-97.

Thereafter the Commissioner of Central Excise, Delhi resumed adjudication of the show cause notice dated 10/11-8-83 and 8-10-84 relating to inclusion of notional interest and security deposit received from wholesale dealers to the price. He passed Order No. 8/99, dated 30-9-99 confirming a demand of Rs. 75.27 lakhs and directed the above amount to be adjusted against the sum of Rs. 1.10 crores already deposited by ITC in 1986 towards disputed excise duty. A penalty of Rs. 5 lakhs was also imposed under Rule 9(2). It can therefore be seen that Order No. 8/99 was passed in accordance with the direction contained in Order No. 6/96. Following the ratio of the decision of Chennai Bench we hold that show cause notices dated 10/11-8-83 and 8-10-84 proposing imposition of penalty also cannot be sustained as they were issued before provisional assessments were finalized. We also set aside Order No. 6/96 passed on the basis of the above-mentioned show cause notices.

In the light of the above, we hold that Order No. 8/99 cannot be sustained as it was passed pursuant to the direction contained in Order No. 6/96. The Jurisdictional Assistant Commissioner will finalise the provisional assessment expeditiously. The Revenue can utilise any material contained in the impugned notice as independent material to support the finalisation of assessment after making the material available to the assessee in writing and after considering their response thereto both in writing and on personal hearing. The revenue shall be at liberty to examine the issue of any short levy, non levy and consequent penal liability only after finalisation of the assessment as per law. We allow Appeals E/1793/96, E/1794/96 and E/3610/2000 as above.

22. In Appeal No. E/3083/2002-A the challenge is against order dated 31-7-2002 passed by the Commissioner (Appeals) the above order is based on Order Nos. 5/96 and 6/96. Since we have set aside order Nos. 5/96 and 6/96, further orders on their basis cannot also survive. We, therefore, set aside order dated 31-7-2002 passed by the Commissioner (Appeals) and allow Appeal No. E/3083/2002-A.

**SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com**