

AustIn Engineering Co. Ltd. Vs. Union of India (Uoi)

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Court : Mumbai

Decided On : Jul-14-2003

Reported in : 2004(2)BomCR286; 2003(90)ECC785; 2003(157)ELT254(Bom)

Judge : V.C. Daga and ;J.P. Devadhar, JJ.

Acts : [Central Excise Act, 1944](#) - Sections 11B, 35, 35A and 35E(2)

Appeal No. : Writ Petition No. 1241 of 1990

Appellant : AustIn Engineering Co. Ltd.

Respondent : Union of India (Uoi)

Advocate for Def. : K.R. Chaudhari and ;S.V. Bharucha, Advs., i/b., ;T.C. Kaushik, Adv.

Advocate for Pet/Ap. : M. Sankhlecha, Adv., i/b., Mulla & Mulla & Craigie Blunt & Caroe

Disposition : Petition dismissed

Judgement :

J.P. Devadhar, J.

1. The short point raised in this petition is whether the Collector of Central Excise (Appeals) was justified in entertaining the appeal filed by the Revenue against the

refund of excise duty granted by the Assistant Collector of Excise to the Petitioners without passing an appealable order? In other words, the issue is, whether an appeal was maintainable under the Central Excise & Salt Act, 1944 against a communication issued by the Assistant Collector of Central Excise ?

2. The facts having a bearing on the subject matter of the petition are as follows:

The Petitioners are engaged in the manufacture of needle roller cages ('the said goods' for short) which are component parts of bearings. In the year 1977, the Petitioners filed classification list in respect of the said goods under Tariff Item 49 of the Excise Tariff which was accepted. Accordingly, the Petitioners continued to pay the excise duty on the said goods under Tariff Item 49 of the Excise Tariff. On 16th June, 1980, the Petitioners filed a revised classification list in respect of the said goods under Tariff Item 68 of the Excise Tariff and the said classification was accepted by the Excise Authorities on 8th July, 1980. On 7th August 1980 the Petitioners filed a refund application seeking refund of the differential duty amounting to Rs. 3,84,190/- paid in respect of the clearance of the said goods during the period from 17-6-1977 to 16-6-1980. By an order dated 18th July, 1981 the refund claim filed by the Petitioners was rejected on the ground that the Collector has reviewed the order of the Assistant Collector dated 8-7-1980 approving the classification under Tariff Item 68 of the Excise Tariff. Challenging the review order of the Collector, the Petitioners filed an appeal before CEGAT and the CEGAT by its order dated 14-3-1986 held that the goods manufactured by the Petitioners are classifiable under Tariff Item 68 and granted consequential reliefs to the Petitioners.

3. On 10th June, 1986 the Petitioners once again filed refund application seeking refund of the duty amount of Rs 3,84,190/- for the same period from 17-6-1977 to 16-6-1980 for which the refund was already rejected. By an order dated 12-12-1986 the refund claim of the Petitioners was allowed by the Assistant Collector by holding that in the light of the order of the Tribunal classifying the goods under Tariff Item 68 of the Excise Tariff the Petitioners were entitled to refund and accordingly issued a Cheque dated 12-12-1986 for Rs. 3,84,190.04 in the settlement of the refund claim filed by the Petitioners.

4. On 9-6-1987 notice under Section 11A of the Central Excise Act was issued by the Assistant collector of Central Excise stating therein that Rs. 3,84,190 was erroneously refunded and the Petitioners were called upon to show cause as to why the said refunded amount should not be recovered from the Petitioners. Thereafter, the Collector of Central Excise reviewed the refund order of the Assistant Collector dated 12-12-1986 and accordingly an appeal came to be filed before the Collector of Central Excise (Appeals) under Section 35E(4) of the Central Excise Act challenging the said order dated 12-12-1986. The Petitioners contended before the Collector (Appeals) that the appeal or the Revenue was not maintainable because, while granting refund no appealable order was passed and only against communication no appeal could be filed. By an order dated 9-1-1989 the Collector of Central Excise (Appeals) set aside the refund order passed by the Assistant Collector of Central Excise dated 12-12-1986 inter alia on the ground that the consequential relief granted by the CEGAT was not applicable for the period prior to the revised classification list filed by the Petitioners and in the present case since the amount refunded pertained to the period prior to the revised classification filed by the Petitioners the same was not covered by the decision of the Tribunal and hence recoverable from the Petitioners. Challenging the said order of the Collector (Appeals) the Petitioners have approached this Court by filing the present Writ Petition.

5. Mr. Sankhlecha learned Counsel appearing on behalf of the Petitioners submitted that the order passed by the Collector of Central Excise (Appeals) is without jurisdiction because there was no order passed by the Assistant Collector of Central Excise granting refund and there was only a communication forwarding the cheque to the Petitioners and, therefore, no appeal could be filed against such communication. In other words, the submission was that an appeal before the Collector of Central Excise (Appeals) lies only against an order/decision and not against a communication. He submitted that in the instant case, the refund was granted to the Petitioners pursuant to the order of the CEGAT dated 14th March, 1986 and, therefore, no appeal could be entertained by the Collector of Central Excise (Appeals) under Section 35E of the Central Excise Act. Mr. Sankhlecha submitted that the order of the Collector of Central Excise (Appeals) is also bad in law as it does not deal with the objection of the Petitioners regarding the powers of

the Collector of Central Excise to review a communication which is not an order. He also submitted that the refund of Rs. 3,84,190/- granted to the petitioners is proper because clearance of goods on payment of duty continued to be provisional till the final order of the CEGAT dated 14-3-1986. Accordingly, it was submitted that the impugned order passed by the Collector of Central Excise (Appeals) being without jurisdiction, is liable to be quashed and set aside.

6. We have carefully considered the submissions made on behalf of the Petitioners. On perusal of the refund order dated 12-12-1986 being (Exhibit B at page 63 of the petition), it is seen that the refund has been granted pursuant to the order of the Tribunal and on scrutiny it has been found that the amount claimed is refundable and accordingly the same was approved for payment. Thus, the reasons for allowing refund application are set out in the refund order. Therefore, it cannot be said that there is only a communication and not an order. But for the order dated 12-12-1986 contained in Part II the cheque as per particulars are set out in Part III would not have been issued. Therefore, we have no hesitation in holding that the refund granted was pursuant to the refund order dated 12-12-1986. Once it is held that the order passed on 12-12-1986 is a refund order, though not in the usual form, then no fault can be found with the Collector of Central Excise in reviewing the order of Assistant Collector of Central Excise and filing an appeal against the order of the Assistant Collector of Central Excise.

7. In the instant case, the order passed by the Tribunal granting consequential reliefs was applicable to the period subsequent to the revised classification list under Tariff Item 68 of the Central Excise Tariff filed by the Petitioners on 16-6-1980. The excise duty paid on the goods manufactured and cleared by the Petitioners for the period prior to 16-6-1980 under Tariff Item 49 of the Excise Tariff was pursuant to the approved classification list which was not touched by the Tribunal and, therefore, the Commissioner was justified in reviewing the order of the Assistant Collector and authorise, filing of an appeal. Once the duty is paid on approval of classification list, it can not be said that the duty paid is on provisional basis.

8. It is well established in law that the duty paid pursuant to the approved classification list is valid till a show cause notice is issued questioning the validity of the said classification and if ultimately, the goods are classified under some other Tariff Entry then the revised Tariff entry will be applicable from the date of issuing the show cause notice for revised classification. In the present case, the classification list filed by the Petitioners in the year 1977 under Tariff Item 49 was approved and the Petitioners continued to pay duty under Tariff Item 49 till 16-6-1980, when revised classification under Tariff Item 68 was filed and ultimately on 14-3-1986 the goods were held classifiable under Tariff Item 68. Under the circumstances, the Collector (Appeals) was justified in holding that the Assistant Collector was in error in granting refund for the period prior to 16-6-1980. The Appellate Collector has rightly held that the consequential relief granted by the Tribunal did not pertain to the period prior to 16-6-1980 and accordingly, refund of duty paid for the period from 17-6-1977 to 16-6-1980 was erroneous and the Petitioners are liable to return that amount to the revenue.

9. Apart from the above, in the present case, the Petitioners had filed refund claim on 7-8-1980 seeking refund of the duty paid on the goods cleared during 17-6-1977 to 16-6-1980 and the same was rejected by the Assistant Collector of Central Excise on 18-7-1981 and the said order had become final as the Petitioners had not filed any appeal against the order. Under the circumstances, the Petitioners could not have filed a second refund application, claiming refund of the duty for the same period i.e. 17-6-1977 to 16-6-1980 which was already rejected and the order of rejection had become final. Thus, in any view of the matter, it is clear that the refund granted was erroneous and the Collector of Central Excise (Appeals) was justified in setting aside the refund order passed by the Assistant Collector on 12-12-1986. Under the circumstances, we see no infirmity in the order of Collector of Central Excise (Appeals), which is impugned in the present petition.

10. Even assuming that the refund granted was pursuant to a communication, there is nothing in the statute which prevents the Revenue from challenging the communication, if the refund granted pursuant to such communication is found to be erroneous. This view of ours is supported by the decision of the Apex Court in the case of Commissioner of Customs & Central Excise v. M.P. Steel Corporation

reported in : 2003(154)ELT12(SC) . In that case the CEGAT had dismissed the appeal on the ground that the appeal was not maintainable because what was challenged was not an order but only a communication. The Apex Court set aside the said order of CEGAT and held that the appeal was maintainable against the order of Superintendent (considered by the assessee as Communication), however in the facts of that case, held maintainable before the Commissioner (Appeals) and not before CEGAT. Therefore, in the light of aforesaid decision of the Apex Court, the refund granted on 12-12-1986, even if construed as communication, the same could be reviewed by the Collector of Central Excise. In the facts of the present case, we have held that the communication dated 12-12-1986 is a reasoned order under the Act, which could be reviewed and appeal could be filed against that order before the Collector of Central Excise (Appeals) and in the present case the order passed by the Collector (Appeals) does not suffer from any infirmity. In the circumstances, the petition fails and the rule is discharged.

11. The Excise Authorities are at liberty to adjudicate upon the show cause notice dated 9-6-1987 issued under Section 11A of the Central Excise Act and recover the amount erroneously refunded with interest as is permissible in law.

12. In the facts and circumstances of the case, there will be no order as to costs.