

Collector of Central Excise Vs. E.i.D. Parry (India) Ltd.

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Nov-30-1988

Reported in : (1989)(21)LC49Tri(Delhi)

Appellant : Collector of Central Excise

Respondent : E.i.D. Parry (India) Ltd.

Judgement :

1. The Collector of Central Excise, Madras had filed an appeal being aggrieved from order-in-appeal No. 56/84(M)dated 28th April, 1984 passed by the Collector of Central Excise (Appeals) Madras. The said appeal was presented in the Registry on the 6th day of August, 1984 and was signed and verified by Sh K. Gopal Chari, Superintendent of Central Excise (Judicial) and was accompanied by an attested copy of authorisation in favour of the Assistant Collector, Central Excise (Judicial). The matter had come up for hearing before the Tribunal on merits at various occasions starting from 25th March, 1985, 13th June, 1985, 16th September, 1985, 10th December, 1985, 2nd May, 1986, 26th June, 1986, 27th June, 1986, 18th November, 1986, 12th December, 1986 and 8th April, 1987. On all these dates of hearing, the matter could not finally be disposed of for one or the other reason. The last matter had come up on 16th June, 1987 when it was observed that the appeal was signed by the Superintendent of Central Excise (Judicial) whereas the authorisation was in favour of the Assistant Collector.

After hearing both the sides, the Bench had dismissed the appeal vide Order No. 455/87-A dated 16th June, 1987. The operative part of the order is reproduced

below - "After hearing both sides briefly and on examination of the record, we find that the subject appeal of the Department has been signed and submitted by a Superintendent of Central Excise whereas the authorisation of the Collector of Central Excise, Madras to file the appeal against the impugned order-in-appeal was in favour of the Assistant Collector of Central Excise (Judicial), Madras.

Consequently, the appeal, having not been signed and filed by a duly authorised officer of the Collector, is not a competent appeal. We dismiss it as such." 2. Now the appellants being aggrieved from the order dated 16th June, 1987 have moved an application for the recalling/restoration of appeal.

Sh. S. Krishnamurthy, the learned Sr. Departmental Representative who had appeared on behalf of the appellants, had reiterated the contentions made in the application for recalling/restoration of the appeal. He had referred to the attested photostat copy of the authorisation in terms of provisions of Section 35-B(2) of the Central Excises and Salt Act, 1944 in favour of Superintendent of Central Excise (Judicial) Madras. He had produced the original file of the Collector and had shown the original authorisation dated 4th August, 1984 of the Collector which appeared on page 23 of the Collectorate's file. This file was shown to the learned advocate of the respondents.

Sh. Krishnamurthy, the learned Sr. Departmental Representative had argued that in view of the authorisation in favour of the Superintendent of Central Excise (Judicial), the appeal filed by the appellants was a competent appeal and the Bench should review/recall its earlier order dated 16th June, 1987.

3. Sh K. Narasimhan, the learned advocate who has appeared on behalf of the respondents, objects to the restoration/review of its earlier order. He has argued that there is no provision under the Central Excises and Salt Act, 1944 authorising the Tribunal to review the earlier order passed by it and as such, the application for review/recall should be dismissed. In support of his argument, he has referred to a judgment of the Tribunal in the case. of Collector of Central Excise, Calcutta v. Himalaya Laminators reported in [1987(29) ELT 230]. Shri S. Krishnamurthy, Departmental Representative has again pleaded for review/recall of the order passed by the Tribunal.

4. We have heard both the sides and have gone through the facts and circumstances of the case. We have also perused the Collector's file which was produced by the learned Sr. Departmental Representative in the open court and which was also seen by Sh. K. Narasimhan, the learned Advocate for the respondents. The authorisation dated 4th August, 1984 is signed by Sh. B.R. Reddy, Collector of Central Excise, Madras in favour of Superintendent of Central Excise (Judicial), Madras, who had signed and filed the authorisation, is reproduced below - "In terms of the provisions of Sub-section (2) of Section 35-B of the Central Excises and Salt Act, 1944, I, B.R. Reddy, Collector of Central Excise, Madras, direct the Superintendent of Central Excise (Judicial) Madras to file an appeal to the Customs, Excise & Gold Control Appellate Tribunal against the order-in-appeal No.56/84 (M) dated 28.4.1984 passed by the Collector of Central Excise (Appeals) Madras in the case of M/s. Eid Parry (I) Ltd., Ranipet".

5. A simple perusal of the authorisation will clearly show that it was in favour of Superintendent of Central Excise and the earlier authorisation attached alongwith the Memo of Appeal was in favour of Asstt. Collector of Central Excise (Judicial). Apparently, there appears to be a typographical error. The bona fide of the appellants should not be doubted specially when the original records have been produced in the open court and the genuineness of which has not been doubted by the respondents.

6. Now the question before us is whether the Tribunal is competent to recall its earlier order No. 455/87-A dated 16th June, 1987. In para No. 1 of this order, we have mentioned the earlier dates of hearing and on all the dates, neither the appellants nor the respondents, had brought to the notice of the Bench the defect in the authorisation under Sub-section (2) of Section 35-B of Central Excises and Salt Act, 1944. It was only on 16th June, 1987 when this material fact came to the notice of the Bench and the appeal was dismissed as not a competent appeal. Apparently, the Tribunal had come to a conclusion on the basis of the material available on record. Undoubtedly, the typographical error is a mistake. Sub-section (2) of Section 35-C authorises the Tribunal to rectify any mistake apparent from record. Sub-section (2) of Section 35-C is reproduced below - "The Appellate Tribunal may, at any time within four years from the date of the order, with a view

to rectifying any mistake apparent from the record, amend any order passed by it under Sub-section (1) and shall make such amendments if the mistake is brought to its notice by the Collector of Central Excise or the other party to the appeal: Provided that an amendment which has the effect of enhancing an assessment or reducing a refund or otherwise increasing the liability of the other party, shall not be made under this sub-section unless the Appellate Tribunal has given notice to him of its intention to do so and has allowed him a reasonable opportunity of being heard." The provisions of Section 35-C(2) are similar to provisions of Sub-section (2) of Section 254 of Income-tax Act, 1961. Sub-section (2) of Section 35C and Sub-section (2) of Section 254 will clearly show that para materia of the wording of both the sections is similar. The powers of the Tribunal in dealing with the appeals are expressed in the widest possible terms. The Supreme Court in the case of Hukam Chand Mills v. Commissioner of Income-tax (AIR1967 SC 455) has held as under - "The word 'thereon' of course, restricts the jurisdiction of the Tribunal to the subject matter of the appeal. The words "pass such orders as the Tribunal thinks fit" include all the powers (except possibly the power of enhancement which are conferred upon the Appellate Asstt. Commissioner by Section 31 of the Act. Consequently the Tribunal has authority under this section to direct the Appellate Assistant Commissioner or the Income-tax officer to hold a further enquiry and dispose of the case on the basis of such enquiry. Rule 12 of the Appellate Tribunal Rules, 1946 made under Section 5A (8) of the Act provides as follows - The appellant shall not except by leave of the Tribunal urge or be heard in support of any ground not set forth in the memorandum of appeal but the Tribunal in deciding the appeal shall not be confined to the grounds set forth in the memorandum of appeal or taken by leave of the Tribunal under this rule." "Even assuming that Rules 12 and 27 are not strictly applicable, we are of the opinion that the Tribunal has got sufficient power under Section 33(4) of the Act to entertain the arguments of the Deptt.

with regard to the application of paragraph 2 of the Taxation Laws order and remand the case to the Income-tax officer in the manner it has done. It is necessary to state that Rules 12 and 27 are not exhaustive of the powers of the Appellate Tribunal. The rules are merely procedural in character and do not in any way circumscribe or control the power of the Tribunal under Section 33(4) of the

Act. We are accordingly of the opinion that the Tribunal had jurisdiction to entertain the argument of the Deptt. in this case and to direct the Income-tax officer to find whether any depreciation was actually allowed under the Industrial Tax Rules and whether such depreciation should be taken into consideration for the purpose of computing the written down value." Bombay High Court in the case of *New India Life Insurance Company v. Commissioner of Income-tax* reported in (AIR 1958 Bombay 143) had held that the powers of Tribunal are similar to the power of an Appellate Court under Code of Civil Procedure. The Tribunal also enjoys inherent powers in view of the judgment of the Supreme Court in the case of *Income-tax Officer, Cannanore v. M.K. Mohammed Kunhi* (AIR 1969 SC 430).

Extract from the same is reproduced below - "An express grant of statutory power carries with it by necessary implication the authority to use all reasonable means to make such grant effective. The powers which have been conferred by Section 254 on the Appellate Tribunal with widest possible amplitude must carry with them by necessary implication all powers and duties incidental and necessary to make the exercise of those powers full effective.

Section 255(5) of the Act does empower the Appellate Tribunal to regulate its own procedure, but it is very doubtful if the power of stay can be spelt out from that provision. But the Appellate Tribunal must be held to have the power to grant stay as incidental or ancillary to its appellate jurisdiction. This is particularly so when Section 220 (6) deals expressly with a situation when an appeal is pending before the Appellate Assistant Commissioner, but the Act is silent in that behalf when an appeal is pending before the Appellate Tribunal. When Section 254 confers appellate jurisdiction, it impliedly grants the power of doing all such acts, or employing such means, as are essentially necessary to its execution and that the statutory power carries with it the duty in proper cases to make such orders for staying proceeding as will prevent the appeal if successful from being rendered nugatory.

The power of stay by the Tribunal is not likely to be exercised in a routine way or as a matter of course in view of the special nature of taxation and revenue laws. It will only be when a strong *prima facie* case is made out that the Tribunal will

consider whether to stay the recovery proceedings and on what conditions and the stay will be granted in most deserving and appropriate cases where the Tribunal is satisfied that the entire purpose of appeal will be frustrated or rendered nugatory by allowing the recovery proceedings to continue during the pendency of the appeal." 7. The Tribunal in the case of Smt. Pravita Rani Samanta v. Collector of Central Excise, Calcutta reported in (1984 ECR 294) had held that the Tribunal had an inherent power to rectify the mistakes. Extract from the same is reproduced below :- "Undoubtedly, this court has inherent powers in view of the Supreme Court's judgment in the case of ITO v. Muhammad Kunhi (71ITR 815) and Puran Mal Kantia v. ITO (98 ITR 39). It was also held in the case of Jagadambika Pratap v. ITO (76 ITR 619) that the Tribunal has inherent jurisdiction to rectify a wrong committed by itself when that wrong causes prejudice to an innocent party. There is another judgment reported in 82 ITR 314 Malchand Surana v. CIT where it was held that having decided an appeal on a preliminary issue, the Tribunal has implied jurisdiction to vacate the order in appropriate cases and hear the appeal on merits." 8. In view of the various judicial pronouncements discussed above, we are of the view that the Tribunal has got powers to rectify its own mistakes and rectification of the mistake does not amount to the review of the order.

9. Shri K. Narasimhan, the learned advocate had cited the judgment of the Tribunal in the case of Collector of Central Excise v. Himalaya Laminators [1987 (29) ELT 230]. This judgment cited by the learned advocate does not help him because the facts of the judgment cited by the learned advocate are not similar. In the said case, the authorisation under Section 35-B(2) was neither in the file of the Tribunal nor in the file of the Departmental Representative when the Bench had passed the order on 29th April, 1986. In the matter before us, the authorisation by the Collector in favour of the Asstt. Collector was very much there though there was a typographical error. Hon'ble Supreme Court in the case of Maharana Mills Ltd. v. Income-tax officer reported in (AIR 1959 SC 881) had held that the record consists, not merely of assessment order, but includes all proceedings and materials on which the assessment is based. The Supreme Court had reaffirmed its earlier decision in the case of Mahendra Mills Ltd. v. P.B. Desai Appellate Assistant Commissioner of Income-tax and Anr. (AIR 1975 SC 910). Accordingly, we are of the view that there was mistake on record.

Accordingly, we exercise our inherent powers and recall the order No.455/87-A, dated 16th June, 1987 and restore the appeal to its original number.

10. Now, we take up the appeal on merits. Briefly, the facts of the case are that the respondents are manufacturer of sulphuric acid falling under Tariff item 14-G of the Central Excise Tariff. They had removed the sulphuric acid during the period from 1st November, 1980 to 28th October, 1983 without paying duty on the value of the packing materials namely, the procelain jars and carbuoys contending that these carbuoys and procelain are durable in nature and returnable to the assessee and hence in accordance with Clause (i) of Section 4(4) (d) of the Central Excises and Salt Act,1944 the value of these jars and carbuoys was not to be included in the assessable value of the sulphuric acid cleared by the respondents. The appellants (Revenue) was of the view that these containers were assessable to duty and four show cause notices were issued by the Superintendent of Central Excise on 20.7.82,15.12.82, 2.5.83 and 28.10.83 demanding the differential duties at Rs. 40,976.00, Rs. 85,687.88, Rs. 22,782.05 and Rs. 18,831.80. The respondents had contended in the adjudication proceedings that the containers were of durable in nature and returnable to the assessee and imposing of the demands were time-barred under Section 11A of the Act.

The learned Asstt. Collector had held that the containers were not returned by the buyer and the test to be adopted was to verify the facts whether all the containers were returned except in the unavoidable circumstances like breakages, loss etc. The appellants had collected sales tax from his customers The cost of containers could not be treated as deposit. The learned Asstt. Collector had confirmed the demands.

11. Being aggrieved by the aforesaid order, the respondent had filed an appeal before the Collector of Central Excise (Appeals). It was also contended before the appellants that there were endorsements on the invoices "jars returnable". the learned Collector of Central Excise had observed that the appellants had indicated about the issue of circulars by them providing that amounts spent towards the cost of packing would be returned to the customers, if the containers are returned back to the appellants and this submission was not disputed by the original authority in

his order. The learned collector of Central Excise (Appeals) has held that it was not necessary that the buyer must return the container. He had allowed the appeal of the respondents.

12. Being aggrieved from the aforesaid order. Revenue has come in appeal before the Tribunal. Shri S. Krishnamurthy, learned Departmental Representative, who has appeared on behalf of the appellants, has reiterated the contentions made in the appeal memo. He has relied on the order-in-original and has argued that 95% of the containers were not returned and the respondents were not insisting on the buyers return the containers. He was collecting the cost of containers from the buyers and also pays sales-tax on them. Only 2% were returned. In support of his argument, he cited the case of Ahmedabad Manufacturing & Calico Printing Ltd. and Ors. v. Union of India (1982 ELT 821). Shri Krishnamurthy has pleaded for the acceptance of the appeal.

13. Shri K. Narasimhan, the learned advocate who has appeared on behalf of the respondents, has reiterated the facts and has argued that the appellants had issued circulars. He has referred to one of the circular dated 8th April, 1981 which appears on page 14 of the paper book and in terms of that circular, the rate of deposit on container was Rs. 42/- and if the customer returned the container within 15 days, he may be entitled to refund of Rs. 32, if returned within 30 days, refund of Rs. 30/-, if returned within 60 days, refund of Rs. 25/- and more than 60 days, refund of Rs. 23/- and for jerry cans of 25 kg capacity, deposit per container was Rs. 35/- and if the customer returned the container within 15 days, he may be entitled to refund of Rs. 32 -, if returned returned within 30 days, refund of Rs. 30/-, if returned within 60 days, refund of Rs. 25/- and if returned more than 60 days, refund of Rs. 20/-. Shri Narasimhan has argued that there was no suppression of facts on the part of the respondents and as such the extended period of limitation could not be invoked in case of the respondents. The show cause notice dated 20.7.82 is time barred, show cause notice dated 15.12.83 was partially time barred and show cause notice dated 28.10.83 was in time and he has argued that the differential demands accrued by the Department are in respect of the returnable pecking. The learned Asstt. Collector did not touch the time bar issue. In support of his argument that returnable packing actually need not be returned, he has

referred to a larger Bench decision of the Tribunal in the case of Associated Cement Companies Jabalpur and Ors.

v. collector of Central Excise, Indore and Ors. reported in [1987 (27) ELT 746]. He has pleaded for the rejection of the appeal.

14. We have heard both the sides and have gone through the facts and circumstances of the case. The respondents had issued circulars for the returnability of the packing viz. Jars. In the matter before us, the appellants (Revenue) has not disputed the facts of the case. It is admitted on both the sides that circulars for the returnability of the durable packing were issued and also endorsements were there to this effect. We have perused the circular dated 8th April, 1981 relating to the deposit of containers Acid Jars and HDPE Jerry cans. We have also seen the invoice dated 31st October, 1979 which appears on page 16 of the paper book and there is endorsement of "A.S. Jars Ours returnable".

It is also admitted by both sides that containers were returnable through in 95% cases, the containers were not returned. The Larger Bench in the case of associated Cement Companies Ltd., Jabalpur and Ors. v. CCE Indore [1987 (27) ELT 746 (Trib.)] has held that the cement gunny bags were returnable and as such, the cost was not includible in the value of the same. Extracts from this judgment are reproduced below: "After the arguments before us were concluded a Supreme Court Judgment on the meaning of "returnable" in Section 4(4)(d)(i) has come to our notice [1987 (27) ELT 398 (SC)] -1986 (2) Scale 880 (Nov. 24-30) - K. Radha Krishnaiah v. Inspector of Central Excise, Gooty and Ors. The Supreme Court has held that "it cannot be said that the packing is returnable by the buyer to the assessee unless there is an arrangement between them that it shall be returned". As we see it, it confirms the judgment of Madhya Pradesh, Andhra Pradesh and Karnataka High Courts in regard to cement. In the light of this judgment and the judgments of the Madhya Pradesh, Andhra Pradesh, Gujarat and Bombay High Courts, it would be worthwhile summarising the norms relevant to returnability of durable containers. We list the norms as under - (1) Though the word "returnable" used in Section 4(4) (d) (i) is distinguishable from "returned", mere capability of being returned is not enough. Returnability should be a term of

sale either by contract between the buyer and the seller or by statute. It cannot be said that the packing is returnable by the buyer to the assessee unless there is an arrangement between them that it shall be returned.

(2) Actual return is not relevant. What is necessary is that if the buyer chooses to return the packing, the seller should be obliged to accept it and refund the stipulated amount.

(4) The mode of return is a matter of mutual convenience. Whether the packing is returned direct to the seller or through his collection agent makes no difference.

The cases of cement gunny bag during the material period before us satisfy the above norms of returnability. We, therefore, hold that their cost was not includible in the assessable value of cement.

In the appeals at 2-4 of M/s. Shree Digvijay Cement Co. Ltd., an additional point is involved in that a part of the duty demand served on them relates to a certain quantity of cement which was cleared in bags supplied by the customer. The following two High Court judgments have settled this issue -(Bombay), *Govind Pay Oxygen Ltd. v. Assistant Collector of Central Excise*.

(2) 1986 (24) ELT 23 -1986 (10) Part 4 ECC 281(Kart) *Alembic Glass Industries Ltd. v. Union of India and Ors.*

No contrary judgment of any other High Court has been brought to our notice. The aforesaid two judgments have already been accepted by this Tribunal in quite a few cases. Respectfully following the ratio of these High Court judgments, we hold that cost of packing supplied by the customer cannot be included in the assessable value of the goods packed therein.

In the result, we allow all the 8 appeals with consequential relief to the appellants." 15. In view of the above discussion, we are of the view that it is not necessary that durable container must be actually returned by the buyer before an assessee could claim abatement. The Revenue's argument that the respondent had paid sales-tax on the packing has got no relevance in the matter. Accordingly, we find no merit in the Revenue's appeal.

The same is dismissed.

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