

Commissioner of Central Excise Vs. Century Laminating Co.

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Court : Allahabad

Decided On : Jan-30-2004

Reported in : 2005(183)ELT16(All)

Judge : Rajes Kumar, J.

Acts : [Central Excise Act, 1944](#) - Sections 11A and 35G; [Constitution of India](#) - Article 142; Central Excise Rules, 1944 - Rules 9, 10, 10A, 11(3), 49, 56A and 56A(2B); Customs Central Excise and Central Board of Revenue (Amendment) Act, 1978 - Sections 21

Appeal No. : Civil Misc. Writ Petition No. 435 of 2002

Appellant : Commissioner of Central Excise

Respondent : Century Laminating Co.

Advocate for Pet/Ap. : S.P. Kesarwani and ;C. Harishanker, Advs. assisted by Anil Sharma and Harpreet, Advs.

Disposition : Petition dismissed

Judgement :

ORDER

Rajes Kumar, J.

1. By means of the present writ petition, petitioner is challenging the impugned order dated 28-12-2001 passed by respondent No. 2, Customs, Excise & Gold (Control) Appellate Tribunal, New Delhi (in short 'CEGAT')

2. Brief facts of the case are that respondent No. 1, M/s. Century Laminating Company, Hapur, Ghaziabad was manufacturer of decorative laminated rigid plastic sheets, industrial laminated plastic sheets, as final product and melamine formal dehyde resins, phenol formal dehyde resins for captive consumption. In their classification list submitted for the period 13-7-1981 to 28-2-1982, respondent No. 1 claimed that the above two resins were non-excisable as they were intermediate products. Assistant Commissioner, however, held that resins were liable to duty under items 15-A of Central Excise Tariff and demanded duty thereon. Said order was challenged in appeal and thereafter, matter went to Tribunal. Meanwhile Rules 9 and 49 of Central Excise Rules (hereinafter referred to as 'Rule') were amended retrospectively in 1982 bringing the concept of deemed removal in respect of captive consumption. Respondent No. 1 thus became liable to pay duty on resins captively consumed. Before Tribunal, respondent No. 1 pleaded that they should be granted facility of proforma credit of input duty under Rule 56A of Rules or they should be allowed set off of import duty under Notification No. 201/79, Tribunal decided the appeal with the observation that the appellant had not paid duty on resin because of the judicial position, which was supportive of their contention that these goods were not excisable. Tribunal noted that under Rule 56A(2B) the Commissioner has powers to condone delay on the part of manufacturer in filing application for availing proforma credit under certain circumstances and so also the Commissioner had discretion under set off Notification No. 201/79 to condone non-compliance with procedural formalities. Tribunal remanded back the matter with the direction to the appellants to approach the Commissioner for exercising his powers under Rule 56A and Notification No. 201/79 accordingly.

3. Respondent No. 1 accordingly, applied on 4-12-1987 to the Commissioner for being granted proforma credit facility or set off of input duty under Notification No. 201/79 and sought condonation of delay in making such an application. Commissioner rejected the application and refused to condone the delay.

Respondent No. 1 further filed appeal before Tribunal. Tribunal vide order dated 2-4-1996 following the decision of Hon'ble Supreme Court in the case of Formica India Division v. Collector of Central Excise, reported in 1995 (77) E.L.T. 511, held as follows :

'Applying the ratio of the decision cited supra, the impugned order is set aside with the that the Commissioner may permit proforma credit facility to the appellants, if otherwise in order and as per law on being satisfied regarding the use of the intermediate goods in the final product for which reasonable opportunity may also be given to the appellants.'

4. It appears that in pursuance of the order dated 2-4-1996 respondent No. 2 became entitled for the refund and since the effect of the order dated 2-4-1996 was not given by the authorities concerned in spite of the repeated requests, respondent No. 2 filed Misc. application for necessary direction to the authority concerned to implement the order of Tribunal. Tribunal vide order dated 28-12-2001 has directed to implement the order of Tribunal immediately and to intimate the compliance of the same within two months from 28-12-2001. The matter was fixed for 15-3-2002. Challenging the aforesaid order, present writ petition has been filed.

5. Heard Shri S.P. Kesarwani, learned counsel for the petitioner and Shri C. Harishanker, Advocate assisted by Shri Anil Sharma and Shri Harpreet, Advocate.

6. Learned counsel for the petitioner contended that Rule 56A has been omitted by Notification No. 23/94-C.E.(N.T.), dated 20-5-1994. The effect of which is that no benefit can be allowed under Rule 56A and therefore, direction given by the Tribunal to implement the order dated 2-4-1996 which purported to allow benefit of proforma credit under Rule 56A could not be given. He submitted that once Rules is omitted, it can not be read in Statute and no action can be taken by any authority of the Statute under the said Rule after its omission and, therefore, the order of Tribunal dated 28-12-2001 directing the authority concerned to implement the order dated 2-4-1996 is illegal and liable to be quashed. In support of his submission he relied upon the decision of Constitutional Bench of the Apex Court in the case of Kolhapur Canesugar Works Ltd. and Anr. v. Union of India and Ors.,

reported in 2000 (119) E.L.T. 257 (S.C) = JT 2000 (1)C, 453.

7. Learned Counsel for the respondents contended that order dated 2-4-1996 passed by Tribunal has become final as same has not been challenged in reference as contemplated 35G and inasmuch as no application has been moved for recalling or rectification of the said order and, therefore, said order reached to its finality. He further submitted that the order passed by Tribunal dated 28-12-2001 directing to implement the order dated 2-4-1996 is consequential order and can not be challenged. He submitted that once order dated 2-4-1996 had become final, said order has to be implemented by the authorities concerned and mere direction to implement the said order is only a consequential order, which was wholly justified. He submitted that, implementation of the order dated 2-4-1996 can not be challenged, once it has become final while challenging the consequential order on the ground that it was erroneous. In support of his contention he relied upon the decision of the Apex Court in the case of Collector of Central Excise, Kanpur v. Flock (India) Pvt. Ltd., reported in 2000 (120) E.L.T. 285 (S.C.). He further submitted that manufacturer became entitled to get the benefit of proforma credit under Rule 56A on the arrival of goods inside the factory and its use in the manufacturing of final product or in a case of goods used in captive consumption on its use in the manufacturing of the final product and the such accrued right cannot be taken away on account of the omission of Rule. He submitted that omission of Rule has a prospective effect and in a case where right has accrued and the proceedings started prior to its omission, and in continuity of such proceeding, if any direction was given by the Appellate Court to allow the benefit under Rule 56A it can not be said to be without jurisdiction.

8. Having heard rival submissions of learned counsel for the parties. In my view, the argument of learned counsel for the petitioner has no force. Admittedly, order of Tribunal dated 2-4-1996 has not been challenged by the petitioner. Petitioner had a right to file reference under Section 35G against the said order. This right had not been exercised and no reference has been filed. No application for recalling or rectification of the said order was moved and, therefore, order dated 2-4-1996 has reached to its finality. Learned counsel for the petitioner has tried to challenge the order dated 2-4-1996 in the present writ petition, which cannot be

permitted after lapse of five years. In first para of the writ petition it has been stated that the petitioner by means of the present writ petition is challenging the impugned order dated 28-12-2001 passed by the respondent No. 2, therefore, petitioner cannot be permitted to challenge the order of Tribunal dated 2-4-1996 after lapse of five years, which had already attained the finality and the right of the respondent No. 2 vested to get the said order implemented. Impugned order dated 28-12-2001 passed by respondent No. 2 was only consequential to the order dated 2-4-1996 and against the said order, writ petition is not maintainable.

9. In the case of Collector of Central Excise, Kanpur v. Flock (India) Pvt. Ltd. (supra) respondent was manufacturer of jute hessian flocked with nylon flocks filed a classification list in which it was claimed that the manufactured product falls under tariff item 22-A. Assistant Collector held that the manufactured product was classifiable under tariff item 22-B and not under tariff item 22-A and the applicable rate of duty would be 25% ad valorem. The said order of the Assistant Collector was not challenged by either of the party and the said order had become final. The respondent M/s. Flock (India) Pvt. Ltd. filed application claiming refund of duty paid alleging inter alia that the product in question were wrongly classified under tariff item No. 22-B, instead it ought to have been classified under tariff item No. 22-A and that the differential duty should be refunded. The Assistant Collector rejected the claim on the ground that the earlier order dated 21-1-1978 classifying the product as falling under tariff item 22-B had attained finality, and therefore, the claim for refund was not maintainable. Assistant Collector set aside the order dated 27-8-1980 and remanded back the matter with the direction to reconsider the matter on merit including the question whether goods were classifiable under item 22-A or 22-B. Assistant Collector of Central Excise challenged the order before CEGAT. CEGAT dismissed the appeal vide order dated 19-9-1988 and against the said order appeal was filed before the Apex Court. Apex Court allowed the appeal and held as follows :

'Coming to the question that is raised there is little scope for doubt that in a case where an adjudicating authority has passed an order which is appealable under the statute and the party aggrieved did not choose to exercise the statutory right of filing an appeal, it is not open to the party to question the correctness of the order

of the adjudicating authority subsequently by filing a claim for refund on the ground that the adjudicating authority had committed an error in passing his order. If this position is accepted then the provisions for adjudicating in the Act and the Rules, the provision for appeal in the Act and the Rules will lose their relevance and the entire exercise will be rendered redundant. This position in our view, will run counter to the scheme of the Act and will introduce an element of uncertainty in the entire process of levy and collection of excise duty. Such a position cannot, be countenanced. The view taken by us also gain support from the provision in Sub-rule (3) of Rule 11 wherein it is laid down that where as a result of any order passed in appeal or revision under the Act, refund of any duty becomes due to any person, the proper officer, may refund, the amount to such person without his having to make any claim in that behalf. The provision indicates the importance attached to an order of the appellate or re-visional authority under the Act therefore, an order which is appealable under the Act is not challenged then the order is not liable to be questioned and the matter is not to be reopened in a proceeding for refund which if we may term it so is in the nature of execution of a decree/order. In the case at hand it was specifically mentioned in the order of the Assistant Collector that the assessee may file appeal against the order before the Collector (Appeals) if so advised.'

10. In the case of *Jairampur Steel Udyog Pvt Ltd., Azamgarh v. State of Uttar Pradesh and Ors.*, reported in 2003 NTN (Vol. 23), 879, Division Bench of this Court held as follows :

'Filing this kind of petition is nothing but an abuse of the process of the Court. In fact, petitioner as indirectly challenged the order against which he had preferred the writ petition before earlier and he could not succeed.

In *Jagir Singh v. Ranbir Singh*, reported in AIR 1979 SC 381, the Apex Court has observed that an authority cannot be permitted to evade a law by 'shift or contrivance'. While deciding the said case, the Hon'ble Supreme Court placed reliance on the judgment in *Fox v. Bishop of Chester*, (1824) 2B7C 635, wherein it has been observed as under :

'To carry out effectually the object of a statute, it must be considered as to defeat all attempts to do, or avoid doing in an indirect or circuitous manner that which it has prohibited or enjoined.' Law prohibits to do something indirectly which is prohibited to be done directly. Similar view has been reiterated by the Apex Court in *M.C. Mehta v. Kamal Nath and Ors.* AIR 2000 SC 1997, wherein it has been held that even the Supreme Court cannot achieve something indirectly which cannot be achieved directly by resorting to the provisions of Article 142 of the Constitution, which empowers the Court to pass any order in a case in order to do 'complete justice.'

11. So far as decision of the Apex Court in the case of *Kolhapur Canesugar Works Ltd. and Anr. v. Union of India and Ors.* (supra) is concerned, same is not applicable to the present case for the following, reasons;

(1) as held above once the order of Tribunal has attained its finality, the said order has to be implemented. Tribunal has passed consequential order dated 28-12-2001, which could not be challenged in the writ petition because the main order had already attained its finality and at the stage of implementation of the said order it can not be permitted to challenge said order after lapse of five years;

(2) In the case of *Kolhapur Canesugar Works Ltd.* (supra) validity of order passed under the old Rules 10 and 10A was involved while during the pendency of the proceeding both the Rules were omitted and new Rule, 10 was introduced. Rule, 10 and 10A contemplated the proceeding in case of short; levy or non-levy or erroneous refund of duty and w.e.f. 6-8-1977 Rules 10 and 10A were deleted and new Rule, 10 was introduced. Further the said Rule was omitted and a new Section 11A was inserted w.e.f. 17-11-1980 vide Notification No. 182/80 C.E., dated 15-11-1980 by Section 21 of the Customs, Central Excise and Salt and Central Board of Revenue (Amendment) Act, 1978. A notice under Rule 10 was issued on 27-4-1977 by Superintendent to show cause. Assistant Collector Central Excise vide order dated 15/27-10-1977 confirmed the demand of Rs. 61,14,930/-. Before the order could be passed by Assistant Collector Rule 10 and 10A of Central Excise were deleted/omitted and a new provision was introduced as Rule 10. Appellants went in appeal to the appellate Collector, which

was dismissed by order dated 23-8-1979. The appellant, therefore, filed a revision application before Central Government, which was dismissed vide order dated 25-9-1980. Against that order, writ petition was filed before Delhi High Court, which was dismissed on 19-11-1984 and thereafter, further appeal was filed before Apex Court. In appeal it was stated that Rules 10 and 10A under which show cause notice was issued was omitted w.e.f. 6-8-1977 and a new Rule 10 was introduced. Under this background a Constitutional Bench held that once old Rule 10 was deleted, the proceeding under the said Rule could not continue unless saved by saving clause and, therefore, order passed under Rule 10 stood illegal;

(3) In the present case, right to claim proforma credit or duty accrued when the goods manufactured as intermediate product and used in the manufacturing of final product. The claim was made under Rule 56A when it was in existence. Proceeding of appeal is the proceeding in continuity to the original proceeding and, therefore, omission of Rule 56A has no effect to the right to which had already accrued much before deletion of the Rule. Constitutional Bench in Kolhapur Canesugar Works Ltd. and Anr. v. Union of India and Ors. (supra) in Para 35 categorical held that 'It is relevant to note here that in present case the question of divesting the Revenue of a vested right does not arise since no order directing refund of the amount had been passed on the date when Rule 10 was omitted.'

(4) The decision of Apex Court in the case of Kolhapur Cane Sugar Works Ltd. (supra) has to be read in the context of the issue involved.

12. For the reasons stated above, writ petition fails and is accordingly, dismissed.