

Collector of C. Ex. Vs. P.N. Monga Bottlers Pvt. Ltd.

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Jul-13-1989

Reported in : (1989)(43)ELT447TriDel

Appellant : Collector of C. Ex.

Respondent : P.N. Monga Bottlers Pvt. Ltd.

Judgement :

1. This is originally a Sho Cause Notice issued by the Central Government in exercise of its powers of Revie Under Section 36(2) of the Central Excises and Salt Act, 1944, and statutorily it has been trans ferred to this Tribunal as an appeal in terms of provisions of Section 35-P(2) of the Central Excises and Salt Act, 1944.

2. When the case has come up for hearing the learned Consultant for the respondents Shri Lachhman Dev raised a preliminary objection that the revie proceed ings initiated by the Govt. of India were already dropped as per order dt. 6-9-1978 and hence the same cannot be transferred and survived as an appeal before this Tribunal. Secondly, he urged that revie proceedings initiated by the Government of India in Order-in-Appeal No. 58/CE/Appeal/KNP/77 dt. 10-2-1978 itself was barred by limita tion. Bench heard both sides on the point of preliminary objection and reserved orders.

3. The facts, in so far as they are material for disposal of the preliminary objec tion, are that the Assistant Collector of Central Excise, Meerut disallowed the deduc tion of consolidated equalised charges of Rs. 1.34 per crate from the assessable

value which were recovered by the appellants in the case of sales effected in non-franchise areas, i.e. in outstations different from Meerut District by observing that the above charges formed part and parcel of manufacturing expenses. In appeal, the Appellate Collector of Central Excise, New Delhi set aside the above order of the Assistant Collector on the ground that freight, octroi loading and unloading charges were separately identifiable items and these charges claimed by the party as deduction are in fact actually incurred and they are realised by them from other dealers in outside the franchise areas and accordingly, he held that these charges were not to be included in the assessable value. In exercise of the powers vested in the Central Government Under Section 36(2) of the Central Excises and Salt Act, 1944 at the relevant point of time issued a show cause notice dated 11-1-1979 to the respondents to show cause why these charges should not be included as the respondent has realised equalised freight and other charges though at different rates for different zones and octroi was also being collected where no octroi was levied, and hence proposed to set aside the appellate Collector's order by restoring the order of the Assistant Collector. The respondent has filed detailed reply dated 9-2-1979 to the show cause notice contending that these charges could not be included in the assessable value in view of the various decisions and in view of the same view taken by the Review/Revision Bench of the Central Government, on similar issue in the case of Bangalore Bottling Company. The Review Bench of the Central Government consisted of two members which heard the matter and dropped the proceedings as per order dated 6-9-1978 but it was not communicated. Before issue of proposed order, one of the Member had taken the view that the matter has to be reconsidered in view of the information obtained on the developments regarding this issue and in view of his notes and in consultation with the legal Cell of the Department it was kept pending and the same (Review Show Cause Notice) has been transferred to this Tribunal as an appeal as if it was a pending matter.

4. The point to be decided in this case is whether the order dated 6-9-1978 is final and conclusive or remains as Draft in the absence of communication.

5. The learned Consultant for the appellants contends that the order passed by the Review Bench is final and it is a closed chapter. Hence, the appeal is not main

tainable. On the other hand, the Departmental Representative submits that it was only a proposal and not a final order as it was not communicated.

6. The important two decisions cited during the course of hearing are relevant to the issue involved in this case. In the case of *Bachhittar Singh v. State of Punjab and Anr.*, reported in AIR - 1963 Supreme Court - 395, while dealing with the business of State under Article 166 of the Constitution, the Hon'ble Supreme Court has taken the view that order has to be expressed in the name of the Governor as required by Clause (1) of Article 166 of the Constitution, and then it has to be communicated. In that case Minister passed an order (draft) but the formality was not observed in considering the action of the State as the order has to be expressed in the name of the Governor. In that context, the Hon'ble Supreme Court observed that constitutionally speaking, the Minister is no more than an adviser and that the head of the State, the Governor is to act with the aid and advice of his Council of Ministers. Therefore, until such advice is accepted by the Governor whatever the Minister or the Council of Ministers may say in regard to a particular matter does not become the action of the State until the advice of the Council of Ministers is accepted or deemed to be accepted by the head of the State. Indeed, it is possible that after expressing one opinion about a particular matter at a particular stage of Minister of the Council of Ministers may express quite a different opinion, one which may be completely opposed to the earlier opinion.

Therefore, to make the opinion amount to a decision of the Government, it must be communicated to the person concerned. In this context, the Hon'ble Supreme Court has used the term communication emphasising that the expressed order by the competent person is to be communicated and not the opinion of the Adviser. In the present case before us, the order was passed and signed by the competent persons under the Statute while exercising the statutory powers as quasi-judicial body and there was no necessity for them to get the approval or to obtain sanction from any other person as they themselves were competent and not mere advisers like Minister" under Article 166 of the Constitution while discharging the business of State. Accordingly, they passed the order.

The decision of *Cosmic Radio v. Union of India and Anr.*, reported in 1983 (12) E.L.T. 83 is dealing directly on this issue. In that case, Bombay High Court has clearly held that if an order has been validly passed and duly signed after hearing the party in pursuance of the Sho Cause Notice then it cannot be said that still that order would have no force of law and would not come into operation, as long as the same was not communicated to the party concerned, because communication of the order is merely an administrative act and the failure to inform passing of such order would not take away the affect of such order. In the instant case also the order has been passed in pursuance to the Sho Cause Notice after hearing the party and non-communication of such an order for whatever reason, will not take away its affect. In view of this, we hold that the order dated 6-9-1978 passed by the Review Bench is final and conclusive and hence, the appeal is not maintainable.

7. In view of the foregoing decision on the substantial point of law involved in this case and the respondent succeeds on the first point itself, it is futile to go into other pleas urged by the learned Counsel for the respondents. Accordingly, the appeal is dismissed.

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