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Collector of Central Excise Vs. Crescent Dyes and Chemicals Ltd.

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Oct-09-1983

Reported in : (1984)(16)ELT445TriDel

Appellant : Collector of Central Excise

Respondent : Crescent Dyes and Chemicals Ltd.

Judgement :

1. This is an application on behalf of the Appellant, the Collector of Central Excise, Bombay, praying for stay of "the enforcibility of the Appellate Collector's order" till the appeal is decided by the Tribunal. (Statement at the top of the application).

(c) except for a statement that the Appellate Collector's order, unless stayed, "will result in substantial temporary loss of legitimate revenue to the Central Government," there was neither any quantification of the exact amount of duty or penalty that would have become payable but for the Appellate Collector's order ; nor any reasons given as to why it is anticipated that the revenue, if found due to the Appellant in the instant Appeal, will become irrecoverable from the Respoadent; 3. It would, however, appear from the cross-objection filed for the Respondent-although no cross-objections could be entertained, since it was not as if the Respondent Appeal was allowed in part only so that there could be cross-objections for that part disallowed-an amount of Rs. 6,54,524/- had bseome refundable to the Respondent by virtue of the Appellate Collector's order, 4. The Respondent had also filed a counter to the application for stav- alleging that- * (i) the instant Appeal itself is barred having been filed beyond the period prescribed ;

and (ii) in terms of Section 35(F) of the Central Excises and Salt Act 1944 the Tribunal has jurisdiction only to dispense with a deposit of duty or penalty due as a condition precedent for the hearing of the Appeal. There is no power of stay either in terms of the said Section or otherwise of the operation of the order under Appeal 5. We have no doubt whatsoever that the contention relating to the iurisdiction of the Tribunal [para 4(ii) supra] is misconceived : (a) In terms of Section 35F of the Act, the deposit of the amount of duty or penalty, as the case may be, is a mandatory requirement for the Appeal before the Tribunal to be heard. The requirement of deposit is relatable to the maintainability of the Appeal itself; (b) In 1983(2) ETR 357 (Atma Steels Pvt. Ltd. v. Collector of Central, Excise), we had occasion to examine the scope of Sec.

35(F). It was inter alia, observed therein, that- "Prescribing, as it does, a deposit as a condition precedent for the hearing of the Appeal, it is relatable to the maintainability of the Appeal itself. An Appeal remains infructuous unless a deposit is either made or dispensed with for undue hardship. It is, therefore, a clog or fetter on the right of Appeal. A right of Appeal is one conferred by statute. It is not an inherent right, but statutory, substantive and not merely procedural. It is subject to such conditions as the statute may prescribe." Such deposit may be dispensed with, by the Tribunal, if satisfied that it would cause undue hardship to the Appellant-subject to such conditions as to security, that may safeguard the interests of the Revenue ; (c) Dispensing with the deposit is not, per se, a stay of recovery of the duty or penalty in question. Nothing prevents the recovery of such duty or penalty by the Revenue pending the hearing of the Appeal, even though the deposit thereof as a condition for hearing of the Appeal is dispensed with - unless such recovery is also stayed pending the hearing of the Appeal; (d) Such power of stay by the Tribunal, being interlocutory need not, necessarily, have to be traced to or spelt out in a specific statutory provisions, It is inherent in the power to hear and decide the appeal itself to make all such interlocutory orders, as may be necessary, to subserve the balance of convenience and to ensure that no prejudice is caused to either party to the appeal, pending the hearing thereof. In 1971 I.T.R. 851 (I.T.O. v. Mohd. Kunhi), the Hon'ble Supreme Court had held that the power to stay recovery proceedings pending an Appeal, can be exercised by the Tribunal as being incidental or ancillary to its appellate jurisdiction.

(e) Even so, the inherent power to make interlocutory orders in an Appeal cannot be but co-equal to the jurisdiction of the Tribunal to hear the Appeal itself. The jurisdiction of the Tribunal is confined to the hearing of the Appeal filed and the power to make an interlocutory order cannot, therefore, extend beyond the subject matter or scope of the Appeal itself. Accordingly, even though we rule out the objection of the Respondent as to jurisdiction, it does not appear that it is competent for the Tribunal "to stay the enforc-ability of the Appellate Collectors order," so that subsequent assessments-not the subject matter of the instant Appeal-can in any manner be touched by our interlocutory order in this Appeal. The Tribunal's power of making interlocutory orders cannot, obviously, extend to interference in classification or consequent assessments subsequent to or beyond the scope of the instant Appeal.

6. Nor can any interlocutory order be made, unless the delay, if any, in filing the Appeal, is condoned. Surprisingly, there is no separate application for condonation of delay explaining each day's delay. All that has been stated in para 13 of the Grounds of Appeal itself is that, "though the appeal is required to be filed within three months from the date of the communication of the order, the Appellant, therefore, requests that the delay may be condoned".

7. Before we proceed to the question of condonation of delay, we have, in the first instance, to be satisfied that there was, indeed, delay in filing the Appeal beyond the period prescribed.

(a) there was an adjudication by the Assistant Collector in consequence of a notice dated 7-7-1980 requiring the Respondent to show cause as to why the product manufactured by the Respondent should not be classified as one falling under Item 15AA of the First Schedule to the Central Excises and Salt Act; (b) against the order of adjudication dated 9-1-1981, an appeal was filed by the Respondent to the Collector (Appeals), Bombay; (c) the Collector (Appeals) had allowed Respondent's appeal on 12th of February, 1982 and communicated his order on the same day as would appear from the particulars given in Form EA 3 filed before us; (d) the preamble to the order in appeal discloses that an appeal against the order in Form No. EA 3 signed by the persons specified in Sub-rule (2) of Rule 213

of the Central Excise Rules, lay to the Customs, Excise & Gold (Control) Appellate Tribunal, in terms of Sec. 35B of the Central Excises and Salt Act, 1944, and it should be filed within three months from the date of the communication of the order in appeal, although, on 12-2-1982, the Tribunal was not, as yet, constituted. The relevant provisions in the statute had not become operative not having been brought into force. Although enacted by the Finance Act of 1980, they became operative only on 11-10-1982. The Rule cited also did not come into existence prior to 10-9-1982. It is not understood how the preamble refers to procedure not yet come into force; (e) on 12-2-1982, when the appeal was disposed of by the Collector (Appeals), the Appellant's remedy was actually by way of revision to the Central Government in terms of Section 36 of the Act, as it read at the relevant time and not by way of an appeal to the Tribunal; (f) no period of limitation was prescribed in terms of Section 36(1) for an Application of Revision preferred by a person aggrieved by the Appellate Collector's order. If, however, it was to be a suo motu Revision, a period of one year was prescribed in terms of the second proviso to Sub-section (2) of Section 36; (g) instead of a revision by the Central Government, it is an appeal to the Tribunal that is provided in terms of the amended provisions brought into force on 11-10-1982 [Section 35B(b)] and a period of three months, from the date on which orders sought to be appealed against were communicated, has been prescribed in terms of Sec-section (3) of Section 35-B; (h) Limitation is procedural arid has retrospective applicability unless expressly stated to the contrary. There is no provision in the amendments made to the Central Excises and Salt Act restricting the period of limitation prescribed therein to only those cases/appeals that are to be instituted after the amendment had come into force. The time lag between the enactment of the provisions in Section 35B (3) and the date when they were brought into force also leads to the conclusion, in one view, that the period of limitation prescribed therein is applicable to pending proceedings as well. Nor unfortunately, is a provision analogous to Section 30 of the Limitation Act, 1963, enacted so as to save cases in which the larger period of limitation prescribed under the repealed provision is still to run out even thongh the shorter period made applicable by the amended provision had expired.

(i) even so, it is reasonable to infer that when a larger period of limitation or no period of limitation at all has been provided under a repealed provision and a shorter period of limitation or a period of limitation for the first time, as the case may be, is prescribed in a provision taking the place of the repealed provision, such shorter period of limitation or limitation prescribed for the first time, will apply from the date when the repealed provision ceases to govern pending actions; (j) again if a statutory right of Appeal within a prescribed period had been conferred in the place of a Revision without any period of limitation or a much larger period of limitation, as the case may be, the period of limitation prescribed for such an Appeal should be reckoned from the date when the right of Appeal for the first time had been conferred.

(k) Seeing that the instant Appeal was filed within a few days of the date when the right of Appeal was conferred, (14 days in actual fact), well within three months prescribed for it, we have no hesitation in holding that it is not barred at all and there is no question of condonation of delay.

9. Reverting to the question of stay of the operation of the order of the Appellate Collector, it may be observed that significantly, (a) there is no allegation to the effect that if the amount of Rs. 6,54,524/- is now refunded, pursuant to the order of the Appellate Collector, now under Appeal to us, it becomes irrecoverable in case the Appeal is allowed. There is, thus, no reason as to why the Respondent should be deprived of the fruits of the order under Appeal; (b) nor is it as if assessments subsequent to and pursuant to the order under Appeal (by which the classification contended for the Respondent had been upheld) are in issue before us in the instant Appeal, so that we may have jurisdiction to make any interlocutory order in regard to them.

9. In the result, the application for stay is dismissed. The Appellant is directed to refund the amount of Rs. 6,54,524 without any further delay. The parties to report about compliance with this order before the Appeal can be taken up for hearing.

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