

Collector of C. Ex. and Cus. Vs. Rishabha Chem Industries

Collector of C. Ex. and Cus. Vs. Rishabha Chem Industries

SooperKanoon Citation : sooperkanoon.com/7165

Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Mumbai

Decided On : Nov-26-1993

Reported in : (1994)(73)ELT190Tri(Mum.)bai

Appellant : Collector of C. Ex. and Cus.

Respondent : Rishabha Chem Industries

Judgement :

1. Invoking the provisions of Section 35G(1) of the Central Excises and Salt Act, 1944, the department seeks reference to the High Court on the question, as formulated by them, and reproduced herein below, pleading the same to have arisen from the Order No. 637/93/WRB, dated 30-4-1993 of this Bench in appeal ED (BOM) 279/86, which arose out of Order-in-Appeal No. M-382/BD-243/86, dated 28-5-1986 of the Collector of Central Excise (Appeals), Bombay.

2. The Respondent-Assessee filed a refund claim, pleading themselves to be eligible for the same pursuant to Notification No. 43/82-C.E., dated 28-2-1982. Part of the claim was sanctioned by the Assistant Collector, rejecting the other part of the claim as barred by limitation, however, the Collector of Central Excise (Appeals), held that, in considering the refund claim available under such notification when the liability is dependent on the annual turn over, the period of limitation would start running from the end of the Financial Year and the entire claim filed was within the period of six months from that date. Some judicial pronouncements were relied upon to draw the said conclusion. The department thereupon came in appeal before the Tribunal, and this Bench, vide the impugned

order, upheld the findings of the Collector of Central Excise (Appeals) and rejected the appeal from the department.

3. This Bench, while rejecting the appeal from the Department has taken the view, that Notification No. 43/82 granted conditional exemption from payment of excise duty, and the fulfilment or otherwise, of the condition being dependent on the annual clearance of the goods with aggregate value, not exceeding the specified limit, the fact of their becoming eligible or other could be known only at the end of the Financial Year, and if the claim is preferred, within the period of six months, thereafter (which was the case in the said appeal) the refund claim could not stand rejected as time barred. This Bench has, in arriving at the conclusion as aforesaid, placed reliance on the decisions of (i) Andhra Pradesh High Court in *Americ Engineering (P) Ltd. v. Assistant Collector*, 1980 (6) E.L.T. 620 (AP) and (ii) Kerala High Court in *7T Pylunny Royal Smiths v. Union of India*, 1978 (2) E.L.T. 0 705). It may be observed for the purpose of clarification and putting the record straight, that this Bench has also referred to Bombay High Court judgment in Para 4 of the impugned order, but due to typographical error, citation given is shown as 1991 (51) E.L.T. 532, instead of 1991 (51) E.L.T. 323 (Bom.). It may further be observed that the decision reported at 1991 (51) E.L.T. 532, is the one from the Tribunal, and on the same issue, where view has been taken that under the circumstances, similar to those here, the period of limitation would start running from the date of payment.

4. The department now seeks reference to the High Court of Gujarat under whose jurisdiction the Respondents have their factory, on the question as formulated thus: "Whether in lieu of the Supreme Court judgment in the case of *Miles India* 1987 (30) E.L.T. 478 (SC) the CEGAT being a creature of statute, the Central Excises and Salt Act, 1944, could go beyond the provisions of Section 11B of the Central Excises and Salt Act, 1944 and hold that the refund claim filed after expiry of 6 months from the date of payment of duty was not time barred in fact and circumstances of the case." 5. Mr. Ravinder Jain, the Id. JDR, moving the application, has pleaded that though some decisions do hold contrary view, the view favouring the stand of the department that computation of time for the purpose of limitation, even in case, when the exemption is dependent upon the

annual turn over, should be from the date of payment. For this, he has referred to the Tribunal decision in *Asian Bearing Ltd. v. Collector of Central Excise*, 1991 (51) E.L.T. 532 (Tribunal). He has also pleaded that the judgment of Kerala High Court relied upon by this Bench as well as by the Collector (Appeals) has stood set aside by the Division Bench of the same High Court, in *Assistant Collector v. TT Pylunny Royal Smiths*, 1983 (14) E.L.T. 2156 (Kerala DB). In his submission, the notification under consideration itself has provided the procedure to be followed and hence they were required to merely file a declaration, but instead they opted to pay the duty at the initial stage, and then sought for refund, which act being not contemplated or call for, there is no question of viewing the issue from the equitable point of view, and has further pleaded that the Tribunal is bound by the statutory provisions and cannot traverse beyond that, and that Section 11B of the CESA, 1944, does not include within its explanation of "relevant date", the date at the end of the Financial Year. In his submission, therefore, the issue of law as formulated, is required to be referred to the High Court.

6. Though notice of hearing is served, none has appeared for the Respondent. It may be observed that even when the appeal was heard by this Bench, the Respondent had remained unrepresented.

7. From what has been pleaded, it is clear that some divergent views exist on the issue and various authorities have given different versions to the problem. This by itself could justify reference to the High Court, which is being done here.

8. However, before doing that, it may be observed that the law gets derived from two sources, namely statutory provisions and the case law based on due interpretation of such statutory provisions and the law as laid down from both the sources has to be considered.

9. The issue here is, whether the refund claim filed by the assessees for refund of the duty paid during the course of the year, but realising at the expiry of the financial year, that by virtue of some specific notification, they are eligible to claim exemption from excise duty, and that the duty paid by them was not payable, should stand negated on the ground of bar of limitation which is six months from the date of payment, as per Section 11B of the CESA, 1944.

10. No specific wordings, covering this type of exigencies are found in Section 11B of CESA, 1944. The Bombay High Court have, in *Weikfield Products Company (India) Pvt. Ltd. v. Union of India*, 1991 (51) E.L.T.323 (Bom.), while interpreting Rule 11 read with Rule 173J of the Central Excise Rules, 1944 (as they existed then) held that in such circumstances, the part of the claim cannot be rejected as time barred.

Andhra Pradesh High Court have also held a similar view in *Americ Engineering Pvt. Ltd. v. Assistant Collector*, while interpreting Rule 11 of the Central Excise Rules, 1944 (as it then stood). The interpretation given by them are not in relation to the inherent powers invested in them, but in relation to the statutory provision. The provisions that then existed in the Rules have now been brought in the Act.

11. At the same time however, the Tribunal, in *Rainbow Industries v. Collector*, 1991 (53) E.L.T. 56 (Tribunal) and in *Asian Bearings Ltd. v. Collector*, 1991 (51) E.L.T. 532 (Tri.), have held the contrary view that computation has to be from the date of payment even if the benefit is to be available on the annual turn over, when only, the eligibility could be ascertained. It also appears that the Division Bench of the Kerala High Court, having once held the view that limitation commences from the end of the financial year 1978 (2) E.L.T. (J 705) have held that the period commences from the date of payment 1983 (14) E.L.T.2156.

12. The divergent views thus necessitates referring the matter as prayed for. It however appears that the composite question as formulated may be bifurcated into two so as to facilitate the Hon'ble High Court to answer the same.

13. Under the circumstances, the prayer is granted vide Section 35G(1) of CESA, 1944. Reference be made to the High Court of Gujarat at Ahmedabad, under whose jurisdiction the Collectorate and the factory are situated on the following two questions :- (i) Whether the date for commutation of the period of limitation, for the refund claim based on the annual turn over, should commence from the date of end of the financial year or from the date of payment of duty? (ii) If yes, whether it is open to the CEGAT to commute the period of limitation from the date on which the financial year ended? 14. The Registry may prepare the statement as contemplated under Section 35G(1) for reference to the High Court and submit the

same before the said Court.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com