

Commissioner of Central Excise Vs. Polymers Fabriks

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Mumbai

Decided On : Jul-18-1996

Reported in : (1996)(88)ELT281Tri(Mum.)bai

Appellant : Commissioner of Central Excise

Respondent : Polymers Fabriks

Judgement :

1. This appeal from the Department is directed against the Order-in-Appeal No. GS/1171/B-I/92, dated 10-2-1993 of the Collector of Customs & Central Excise (Appeals) Bombay.

2. Pursuant to an Order-in-Appeal, the Respondents had become eligible to get some refund and hence they filed a refund claim in the proforma specified. The Assistant Collector having jurisdiction, vide endorsement on the same application, passed an order sanctioning refund and also made endorsements for issuance of a cheque for the amount sanctioned as refund based on which, the cheque was drawn. All these orders and drawal of the cheque were on 5-4-1990. The said cheque was sent to the party under covering letter dated 6-4-1990 mentioning that the referred claim was sanctioned. It may be observed that though the claim was for refund of Rs. 57,821.21, the refund sanctioned was for Rs. 52,694.01. Subsequently however, the same Assistant Collector passed yet another order dated 22-8-1990 also sanctioning the said refund claim for the said amount. The order earlier passed was on the specified proforma, whereas the subsequent order was in the form of regular order-in original.

3. In exercise of the powers conferred vide Section 35E of the Central Excises and Salt Act, 1944, the Collector of Central Excise reviewed the said order and directed for filing application before the Collector (Appeals). The said order, however was passed on 9-4-1991.

4. Pursuant thereto, application was filed before the Collector (Appeals), where he held that the order sanctioning refund was dated 5-4-1990 and vide Section 35E(3) of the Act, period of one year from the date of passing of the order, was available, whereas here, the order to move the Collector (Appeals) was passed after expiry of the said period of limitation and hence the appeal before him was barred by limitation. For the subsequent order passed, the Id. Collector (Appeals) held that the said authority having already sanctioned refund on 5-4-1990, was functus officio when he passed the subsequent order dated 22-8-1990 and the said order was infructuous. He therefore rejected the appeal as time-barred.

5. Shri K.M. Mondal, the Id. SDR has submitted that it is only the order dated 22-8-1990 which is the real and speaking order and earlier alleged sanction and issue of cheque may be procedural and administrative irregularity and such administrative irregularity should not come in the way of the legal provisions. In his submission, only order dated 22-8-1990 provided material to the superior authority to determine as to whether review was necessary. He also submits that there is a requirement of pre-audit before sanction and accordingly, correspondence was going on. He refers to the letter dated 4-8-1989 from the concerned Assistant Collector to Assistant Collector (Audit) and the counter reply dated 16-8-1989. In his submission, the refund claims could not have been sanctioned unless cleared from the Audit Section and with no audit clearances given, the order dated 5-4-1990 could not be a legal and valid order. He also refers to the letter from Assistant Collector (Audit) dated 17-7-1990 requiring the concerned Assistant Collector to pass a speaking order and pursuant thereto order dated 22-8-1990 has been passed and as such only that order has the legal sanction and period of one year has to be computed from that date.

6. Mr. Mathew, the Id. Advocate has submitted that the effective order is only the one passed on 5-4-1990, consequent to which the cheque is drawn and delivered

and the subsequent order, at the best, be taken as addendum or noting of the reasons which led him to pass the order dated 5-4-1990. In his submission, the" concerned Assistant Collector was the real sanctioning authority and was not under the control of Assistant Collector (Audit) and in any case, when the Assistant Collector (Audit) felt the order dated 5-4-1990 as not proper, as is reflected in his letter dated 17-7-1990, he could have moved the competent authority to review the said order.

7. Considering the submissions, so far as the factual position is concerned, the same is undisputed and the entire controversy is on the legal aspect and effect of the order dated 5-4-1990.

8. Reading the disputed order dated 5-4-1990, it clearly appears to be an order sanctioning the refund. Pursuant thereto even the cheque is issued and passing of such an order is even communicated to the audit section, as is evident from the letter dated 7-6-1990 from the concerned Assistant Collector. Even assuming that the sanction of refund before due audit could not have been ordered, the said order may be taken as administratively irregular order, but does not lose the status of an order. The subsequent speaking order issued, presumably at the instance of the Assistant Collector (Audit), could not be the substitute or replacement to the order initially passed. At the best it would be the supplement to the original order dated 5-4-1990.

9. The said order dated 5-4-1990, which has been followed by actual issuance of the cheque, has therefore to be taken as the effective order and period specified in Section 35E(3) has to be computed from that date only.

10. Obviously the order under Section 35E(2) has been passed after expiry of one year. The date of order and not the date of communication has to be taken as the relevant date and when review order is passed after expiry of one year, the approach of the Collector (Appeals) in holding the appeal as barred by limitation appears to be correct.