

**(1990) 03 CEGAT CK 0001**

**CUSTOMS, EXCISE AND GOLD (CONTROL) APPELLATE TRIBUNAL (SPECIAL BENCH), NEW DELHI**

**Case No:** 35/90-A IN E/MISC/NO 694/89-A; E/MISC/657/89-A

Textile Bearings (Kci) (Pvt.) Ltd.

APPELLANT

Vs

Collector of C. Ex.

RESPONDENT

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**Date of Decision:** March 20, 1990

**Hon'ble Judges:** D. C. Mandal, D. M. Vasavada

**Advocate:** D. Dave Lal, Bindu Chib, V. K. Sharma

**Final Decision:** Application allowed

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**Judgement**

**D.M. Vasavada, Member (J)**

1. This application has been preferred by the applicants/appellant praying that Order No. 309/89-WRB dated 30-8-1989 passed by the West Regional Bench in E/Stay/424/89, SB (WR) be revised/reviewed or any other order that may be deemed fit be passed.

2. The applicants had filed this appeal with West Regional Bench at Bombay and had also preferred the above-mentioned Stay Petition. The Stay Petition was decided by West Regional Bench on 30-8-1989 and the applicant was directed to deposit a sum of Rs. 4 lakhs in cash and furnish bank guarantee for the balance amount. The applicant has not complied with the said order. Meantime, as the subject-matter was within the jurisdiction of the Special Bench, the record of the appeal has been transferred to the Special Bench at New Delhi. Thereafter, the applicant submitted this application before the WRB, but as the appeal was transferred to the Special Bench, he was directed to prefer this application before the Special Bench. That is how the applicant has preferred this Misc. Application before the Special Bench and it came up for hearing before Special Bench.

3. We have heard Sh. D.A. Dave, L.A., with Mrs. Bindu Chib, L.A. for the

applicant/appellant and Sh. V.K. Sharma, Ld. S.D.R. for the respondent.

4. The applicant has preferred this application as a Misc. Application praying for revision/review of the order passed below the Stay Petition by the WRB. So, at the outset, question arose as to whether it is open to this Bench to review the order passed by the WRB. There is no specific provision for review in the Central Excises & Salt Act, 1944 or in the CEGAT (Procedure) Rules. But then, it is an accepted practice that any judicial forum can review its own order provided there is sufficient justification (parameters of which need not be spelt out here). In that case, the question may arise as to which will be the proper forum. It is admitted that the appeal is within the exclusive jurisdiction of the Special Bench and as per instructions dated 15-2-1986, the Stay Application was preferred before the WRB and was decided there. So, this Bench always had jurisdiction and has jurisdiction to decide the Stay Petition. It is a question of judicial propriety and wisdom that the review application should be heard and decided by the same Bench, but at the same time, there is no such legal provision, or at least it is not pointed out to us. Para 4 (sub-para 2) of the above referred two directions, which has come into effect from 15-2-1986 (ref. page 3.26 of Central Excise Manual - Cen Tax -Ninth Edition 1989-90) reads as under :

"Except in cases covered by paragraph 4 above, as soon as orders have been issued on the condonation applications and/or stay applications, the Registry of the Regional Bench will forward the appeal and connected records to the Central Registry of the Tribunal at New Delhi. Further action on the appeal will be taken by the concerned Special Bench at New Delhi, which will also deal with all further applications and references connected with such appeals."

5. As per this direction, the appeal has been forwarded to this Bench and has been duly numbered. So, all further applications connected with such appeal have to be dealt with by the Special Bench at New Delhi. So, there is no irregularity/impropriety in the Special Bench dealing with this application.

6. Moreover, as we shall presently discuss, we are deciding this application on a point which was not raised and consequently not discussed by the WRB, so it would not be improper for us to discuss this point and it would not result into our sitting in appeal over the said order or reviewing the said order.

7. As stated above, the appellant/applicant has preferred this Misc. Application seeking revision/review of the order passed by the WRB, but in effect this is a fresh Stay Petition. It is settled position of law that it is always open to the applicant to prefer another Stay Petition if it can point out any other new facts or provisions of

law. So, in effect, this is a new Stay Petition and we treat it as such.

**8.** To appreciate this application, it is necessary to recite a few facts of this subject-matter.

**9.** The applicant had submitted six refund claims for duty allegedly paid in excess by it on its products falling under erstwhile T.I. 49 and T.I. 68 aggregating to Rs. 16,74,911.48. These were sanctioned by the Assistant Collector and six cheques were issued to the applicant which have been encashed by the applicant. Thereafter, the Collector of Central Excise, Rajkot, in exercise of the powers conferred upon him under Section 35E(2) of the Central Excises & Salt Act, 1944 directed/authorised the Assistant Collector, Rajkot Division to file an appeal with the Collector (CE), Bombay for the purpose of determining the legality, propriety and correctness of the order in original passed by the Assistant Collector (granting the refund). In accordance with the said directions, the said Assistant Collector filed an application in form EA-2 Under Section 35E(4) of the Act which was treated as an appeal and after hearing the parties (including the applicant/appellant), the Collector (Appeals) set aside the Order-in-Original dated 5-4-1979 and also set aside the orders of refund and allowed the appeal. Against this order, the applicant/appellant has come in appeal.

**10.** It has been contended in this application and submitted by the Ld. Advocate, Sh. Dave that the provisions of Section 11A have to be followed for recovery of the refund which has been made erroneously. The relevant portion of Section 11A reads as under:

"SECTION 11A - Recovery of duties not levied or not paid or short-levied or short-paid or erroneously refunded - (1) When any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded, a on the person chargeable with the duty which has not been levied or paid or which has been short-levied or short-paid or to whom the refund has been erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice."

**11.** According to Sh. Dave, L.A. for the applicant, this is the only procedure whereby the refund made erroneously, can be claimed by the Department and so, the department has to issue show cause notices. As stated in this application, the department has issued show cause notices also which are pending for adjudication. So, the department cannot recover the amount only on the basis of the impugned order. He has cited - (1) Kirloskar Cummins Ltd. v. Collector of Central Excise - 1988 (37) E.L.T. 219 (Tri.) and (2) Collector of Central Excise v. Universal Radiators Ltd. - 1988 (37) E.L.T. 222 (Tri.).

**12.** We have perused both these orders wherein it has been laid, down as under:

"The only way by which an erroneously refunded duty can be recovered is a notice Under Section 11A; an application and proceedings Under Section 35E are not a step in that direction."

So, the applicant/appellant has a prima facie case. We have noted that this point was not raised in the Stay Petition which was decided by the WRB and so they had no occasion to express any opinion on this aspect of the case. So, this being a new point decision on which does not amount to reviewing or revising the order passed by the WRB, but it will be on a new ground. This is a point of law and we are satisfied that it can be raised and new Stay Petition would be maintainable on this ground.

**13.** It may also be noted that if, in view of the above citations, the department may not be able to recover the amounts Before the adjudication of the show cause notices, the department cannot be permitted to recover any part, even temporarily by way of pre-deposit also.

**14.** In light of our discussion above, we are satisfied that the appellant/applicant has a prima facie case, therefore, we allow this application and pass the following final order:

This application is allowed and the requirement of pre-deposit of the amount of refund alleged to have been erroneously refunded to the appellant, is waived.