
(1997) 08 BOM CK 0068

Bombay High Court (Aurangabad Bench)

Case No: Writ Petition No. 153 of 1988

Garware Plastics and
Polyester Pvt. Ltd. and
another

APPELLANT

Vs

Union of India and
others

RESPONDENT

Date of Decision: Aug. 20, 1997

Acts Referred:

- Central Excise Rules, 1944 - Rule 173
- Central Excises and Salt Act, 1944 - Section 11, 3, 4, 5

Citation: (1998) 3 ALLMR 777 : (1998) 2 BomCR 845 : (1998) 97 ELT 256

Hon'ble Judges: N.P. Chapalgaonker, J; B.B. Vagyani, J

Bench: Division Bench

Advocate: R.G. Sheth, for V.P. Muley, for the Appellant; R.G. Deo, for the Respondent

Judgement

@JUDGMENTTAG-ORDER

N.P. Chapalgaonker, J.

Petitioner No. 1- a Private Limited Company is the producer of the polyester films. On 11th November 1976, they had filed a classification list under Rule 173-B of the Central Excise Rules, 1944 that the Assistant Collector, Central Excise and Customs, Aurangabad after ascertaining the nature of the produce by chemical test and finding that the raw material used is saturated polyester chips and the final product is rigid plastic and noticing the commercial sense and trade parlance of the term "polyester films" supported by evidence, was pleased to hold that the polyester sheets are outside the purview of T.I. 15-A i.e. plastic, and as such, would fall under T.I. 68 of C.E.T. This order was passed by the Assistant Collector, Central Excise and Customs, Aurangabad on 8th December 1977.

2. On 30th November 1978, Collector, Central Excise and Customs, Pune issued a Notice u/s 35-A of the Central Excise and Salt Act, 1944 intimating his intention to set aside the impugned order passed by the Assistant Collector and calling the petitioners to show cause why the said order should not be modified as proposed. On 12th June 1980, the Collector, Central Excise and Customs, Pune annulled the order dated 8th December 1977 passed by the Assistant Collector, Central Excise, Aurangabad and held that the product is liable for excise duty under Item No. 15-A (2) of the 1st Schedule to the Central Excise and Salt Act, 1944. He has directed the Assistant Collector, Central Excise Aurangabad to determine the differential duty due on the polyester film cleared by the party at rates appropriate for tariff item No. 68 and the duty actually due under tariff item No. 15-A(2) of the C.E.T. and raise demands for the same. This order dated 12-6-1980 has been challenged in this petition.

3. Shri R.G. Sheth, learned Counsel appearing for the petitioner, raised following points assailing the order of the Collector impugned in this writ petition :---

(i) Revision of the order passed by the Assistant Collector made by the Collector was beyond the period of limitation prescribed by law.

(ii) Collector had no jurisdiction to revise the order passed by the Assistant Collector on 8-12-1977 since the power of the Collector to revise the orders of the subordinate came into existence on 1st July, 1978.

(iii) The classification accepted by the Assistant Collector was proper one and the product in question cannot be classified as plastic either on the basis of chemical properties or its recognition by the trade and industry.

(iv) Collector, Central Excise has only purported to revise the classification list of 11-11-1976. However, the subsequent classification similarly made from the year 1976 to 1977 was approved by the Assistant Collector and has not been reviewed by the Collector.

(v) Even if it is held that the goods in question do fall under Item 15-A(2), it is exempted by the Exemption Notification No. 68/71 as amended by Notification No. 198/78 dated 25-11-1978. Therefore, the direction for the recovery of the difference was totally uncalled for.

4. Shri R.G. Deo, learned Counsel for Union of India contended that the time limit prescribed for the revision of any order of subordinate in respect of the classification is one year as provided by sub-section (4) of section 35-A. He contended that if the order is in respect of the calculation of the duty and thereby seeking to recover the duty not levied or short levied or wrongly refunded, then the limitation as provided for in section 11-A of the Excise Act would be applicable but in all other cases, the revision of the orders passed by the subordinate is permissible within a period of one year. Since the show cause notice was issued on 30-11-1978 i.e. within one year from the date of the order

sought to be revised, it was well within limitation.

5. Shri Deo further contended that sub-section (2) inserted by substituting whole section 35-A on 1-7-1978 is retrospective in operation being of procedural nature and the Collector would get the power to revise the orders passed by the subordinates even prior to the date of endorsement of this power. He has further contended that on merits, the Collector's finding that the product in question is to be classified in Entry No. 15-A is perfectly justified considering properties of the product and lastly, he contended that the exemption notification does not cover polyester films.

6. Section 35-A of the Central Excises and Salt Act, 1944, as it stood prior to the amendment made in the year 1978 was as under :

35-A. Revision by Board.--- The Central Board of Excise and Customs constituted under the Central Boards of Revenue Act, 1963, may, of its own motion or otherwise, call for and examine the record of any proceedings in which any decision or order has been passed under this Act or the rules made thereunder (not being a decision or order passed on appeal u/s 35) for the purpose of satisfying itself as to the correctness, legality or propriety of such decision or order and may pass such order thereon as it thinks fit :

Provided that no decision or order shall be varied so as to prejudicially affect any person unless such person is given a reasonable opportunity of making a representation and, if he so desires, of being heard in his defence :

Provided further that no proceedings shall be commenced under this section in respect of any decision or order (whether such decision or order has been passed before or after the coming into force of this section) after the expiration of a period of one year from the date of such decision or order.

As would be seen that the powers to revise, on its own motion or otherwise, any decision or order passed under the Act or the Rules made thereunder except the appellate order, was entrusted with the Central Board of Excise and Customs constituted under the Central Boards of Revenue Act, 1963 and the period of limitation within which proceedings for such revision should commence was one year. The amendment which came into effect on 1-7-1978 substituted whole section 35-A and it now reads as under :

"35-A. Revision by Board or Collector. -

(1) The Central Board of Excise and Customs constituted under the Central Boards of Revenue Act, 1963, (54 of 1963), (hereinafter referred to as the Board), may, of its own motion or otherwise, call for and examine the record of any proceeding in which any decision or order has been passed under this Act or the rules made thereunder by a Collector of Central Excise (not being a decision or order passed on appeal u/s 35) for the purpose of satisfying itself as to the correctness, legality or propriety of such decision or order and may pass such order thereon as it thinks fit.

(2) The Collector of Central Excise may, of his own motion or otherwise, call for and examine the record of any proceeding in which any decision or order has been passed under this Act or the rules made thereunder by a Central Excise Officer subordinate to him (not being a decision or order passed on appeal u/s 35) for the purpose of satisfying himself as to the correctness, legality or propriety of such decision or order and may pass such order thereon as he thinks fit.

(3) (a) No decision or order under this section shall be varied as to prejudicially affect any person unless such person is given a reasonable opportunity of making a representation and, if he so desires, of being heard in his defence.

(b) Where the Board or, as the case may be, the Collector of Central Excise is of opinion that any duty of excise has not been levied or has been short levied or erroneously refunded, no order levying or enhancing the duty, or no order requiring payment of the duty so refunded, shall be made under this section unless the person affected by the proposed order is given notice to show cause against it within the time limit specified in section 11-A".

(4) No proceedings shall be commenced under this section in respect of any decision or order (whether such decision or order has been passed before or after the commencement of the Customs, Central Excise and Salt and Central Boards of Revenue (Amendment) Act, 1977 after the expiration of a period of one year from the date of such decision or order.

The substitution of section 35-A brought out two major changes. Firstly, apart from the power of the Central Board of Excise for examining the correctness, legality and propriety of any decision or order and revise it, Collector was also entrusted with the similar power in respect of the orders passed by his subordinates. Secondly, it was clarified that if the order to be passed under revision levies or enhances duty or requires payment of the duty refunded, it will have to be made after giving show cause notice to the person affected within the time limits specified in section 11-A. Section 11-A prescribes limitation different from prescribed by section 35-A. Therefore, if the order is covered by sub-section 3(b) of section 35-A, then it will have to be passed after a notice is served on the affected parties within six months and in the case of fraud, misrepresentation and suppression of facts within five years. Other orders which do not order the levying or enhancing of the duty or requiring payment of the duty refunded could be passed if the proceeding has commenced within a period of one year. Therefore, we will have to consider whether the order of the Collector impugned in this writ petition is an order covered by sub-section 3(b) or is an order covered only under sub-section (4) of section 35-A.

7. Shri Deo, learned Counsel for the Union of India, submitted that the scheme of the Central Excises and Salt Act differentiates between the jurisdiction to be exercised u/s 3 and the jurisdiction to be exercised u/s 4, 5 and other provisions of the Act. The liability to

pay the duty is to be determined on the basis of the classification to be done under the Rules and the liability is created by charging section i.e. section 3.

Shri Deo further pointed out that various kinds of orders are required to be passed by the Excise authorities. Unless the order relates to the calculation of the duty on the basis of a predetermined liability, special provision of the limitation prescribed by section 11-A for the recovery and by section 11B for the refund of the duty would not be applicable. According to Shri Deo, an order accepting the classification under Rule 173-B of the Central Excise Rules is not an order directing the recovery of duty not levied, short levied or erroneously refunded. The learned Counsel contends that as a consequence of the change in the classification, the duty leviable may vary but that by itself will not be sufficient for bringing the order within the bracket of section 11-A of the Excise Act. Shri Deo narrated before us various orders which can be passed under the Excise Act and Rules and contended that all these orders may be revised by authority having the jurisdiction to review such orders and the limitation thereof shall be that of one year as prescribed by section 35-A(4) and not six months as is prescribed by section 11-A. Shri Deo contends that the applicability of particular provision of limitation is not dependent on the consequence of an order but the nature of the order by itself would determine the question as to which of the provision of the limitation is applicable.

8. Section 3 of the Act empowers the Central Government to determine the tariff value of goods on which the duty may be levied. As already pointed out, Rule 173-B lays down the procedure for determining the question under which tariff duty of a particular product would come. Every assessee is required to file a list of classification for the approval of the officer and the officer has to approve it or reject it and determine the correctness thereof. After this determination, the duty is paid by assessee. The process of revision of any order in respect of classification is in effect an order revising the liability to pay the duty in respect of the quantum and, therefore, direct impact of any order passed under Rule 173-B or any revisional jurisdiction exercised u/s 35-A is to vary the liability to pay the duty, to recover the duty either not levied, short levied or wrongly refunded, There is no other purpose of the classification. Various other orders which can be passed under the Excise Act do not have such a direct impact on re-determining the levy which is payable by the assessee. The nature of the order impugned in this writ petition can speak for itself. After annulling the order of the Assistant Collector, the operative part of the order passed by the Collector of Central Excise and Customs, Pune, runs thus --

"I direct that the Assistant Collector of Central Excise, Aurangabad shall determine the differential duty due on the polyester film cleared by the Party at rates appropriate for tariff item No. 68 and the duty actually due under tariff Item No. 15-A(2) of the C.E.T. and raise demands for the same. The Party shall be liable to pay the difference and also re-credit the refund, if any, obtained by it of duty initially paid by it at rates appropriate for Item 15-A(2) of the C.E.T. as a consequence of the Assistant Collector, Central Excise, Aurangabad's order dated 8-12-77 which has been modified as above."

9. Therefore, recovery of the difference between the duty paid and the duty required to be paid is not only a consequence of the order impugned but it is part of the order itself. There is a direct order requiring Assistant Collector to make those calculations and issue orders for the recovery. In the light of these facts, it is very difficult to appreciate the distinction which the learned Counsel for the Union of India wants to make between the orders varying the classification and the orders which require the duty not levied, short levied or wrongly refunded to be paid. Supreme Court in the case of [Collector of Central Excise, Pune Vs. Maharashtra Scooters Ltd.](#), while considering the provisions of section 36(2) as was inserted by the Amendment of 1988, has considered the argument which Shri Deo wants to advance before us. Section 36(2), as it stood then, empowered the Central Government on an application of any person aggrieved to revise, reverse or modify any order from which no appeal lies. Proviso Nos. 2 and 3 were distinguishing periods of limitation within which proceedings to be initiated for revision of such orders. The second proviso laid down a general rule that no proceeding shall commence under this sub-section after the expiration of the period of one year from the date of such decision or order and the third proviso carved out a special class of the orders to be revised and laid down that when the Central Government is of the opinion that if any duty of excise has not been levied, short levied or erroneously refunded, the order levying or enhancing duty or requiring the payment of duty refunded shall be made only when the show cause notice is given to the affected party within the time limits specified in section 11-A. The distinction is similar to that we find in section 35-A. Supreme Court considered the distinction and examined the validity of a submission made which was similar to the one which the Counsel proposes to advance before us. Supreme Court said -

"Mr. Ganguli the learned Senior Counsel for the revenue contended that by the show cause notice all that the Revenue was trying to do was to correct the procedure in the matter of calculation of duty and if as a consequence thereof there is a shortfall which the assessee may be called upon to make good the case would not fall in the third proviso and but would be governed by the second proviso. As against this, contention of the Counsel for the assessee Mr. Dave is that if the ultimate impact of the action contemplated by section 36(2) is to recover a shortfall in the duty payable by the assessee the case falls within the purview of the third proviso to section 36(2). Having regard to the historical background it seems to us that the legislature desired that cases of not-levy, short-levy and erroneous refund should receive a different treatment and the period of limitation should be consistent with the period of limitation u/s 11-A of the Act, that is to bring about a uniformity in the matter, of correcting an error which has resulted in short-levy of duty. Otherwise in each case of short-levy or non-levy, there would be some error committed by the authorities below which would require correction. But where the correction ends up in one of the three matters referred to in the third proviso then the period of limitation has to be the same as provided in section 11-A of the Act. But if that is not the consequence of the order the matter would fall within the second proviso and the enlarged period of limitation would be available to the Revenue."

We respectfully agree and follow the view expressed by above and reject the contention raised by Shri Deo. We hold that the order passed by the Collector in Revision in effect is an order directing the petitioner to pay the difference which was to be calculated by the Assistant Collector in the duty which he has already paid on the basis of the classification accepted by the Assistant Collector and the duty which he would be required to pay on the basis of the classification which the Collector has made. Such orders are governed by section 11-A. Section 11-A, so far as is relevant, reads as under :--

(1) When any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded, a Central Excise Officer may, within six months from the relevant date, serve notice 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 erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice:

Provided that where any duty of excise has not been levied or paid or has been short levied or short-paid or erroneously refunded by reason of fraud, collusion or any wilful misstatement of suppression of facts, or contravention of any of the provisions of this Act or of the rules made thereunder with intent to evade payment of duty, by such person or his agent, the provisions of this sub-section shall have effect, (as if for the words "Central Excise Officer", the words" Collector of Central Excise", and) for the words "six months", the words "five years" were substituted.

The Notice to initiate proceeding for the revision was issued on 30-11-1978 and the order sought to be reviewed in the proceeding is dated 8-12-1977. Therefore, it is clearly beyond the period of limitation as was prescribed by section 11-A.

10. Section 35-A(3)(b) makes it abundantly clear that where the Board or as the case may be, the Collector of Central Excise is of opinion that any duty of excise has not been levied or has been short levied or erroneously refunded, no order levying or enhancing the duty, or no order requiring payment of the duty so refunded, shall be made under this section unless the person affected by the order is given notice to show cause against it within the time limit specified in section 11-A.

11. Therefore, we hold that the Collector had no jurisdiction to revise the order passed by the Assistant Collector accepting classification submitted by the petitioner in respect of his product polyester film beyond the period of limitation prescribed and, therefore, the order will have to be quashed. The order of the Collector impugned in this writ petition may not sustain on one more ground. Power to revise an order passed by subordinates were entrusted to the Collector of Central Excise by substitution of section 35-A on 1st July 1978. It was contended by the learned Counsel for the petitioner Shri Sheth that the Collector had no jurisdiction to revise any order which was passed before the power of the revision were bestowed upon him by the legislature before 1st July 1978. The power to revise was only with Board u/s 35A and u/s 36 with the Central Government. Collector

got those powers only on 1-7-1978. The order sought to be revised on this proceeding is prior to this date being dated 8-12-1977. The submission of the learned Counsel so far as it contends that Collector had no jurisdiction to revise any order which is passed before 1-7-1978 cannot be accepted. It is obvious from the wording of subsection (4) that the Collector had jurisdiction to revise any order passed even before the commencement of the Amendment Act, 1977. Sub-section (4) makes it clear. The clause where such decision or order has been passed before or after the commencement of the Customs, Central Excises and Salt Act and Central Boards of Revenue (Amendment) Act, 1977 " shows that the Collector had power to revise any order passed before the commencement of this amendment i.e. 1-7-1978. When an authority is given power to revise or review any order passed by his subordinate and limitation is prescribed, unless the context otherwise requires to interpret, the power is retrospective so far as it is within the limitation prescribed by the statute and not beyond that. Therefore, Mr. Sheth's contention that the Collector had no jurisdiction to revise the order which was passed before 1-7-1978 will have to be rejected. Collector had jurisdiction to revise the order even passed before 1-7-1978 provided that the proceedings were initiated within the period of limitation prescribed by law.

12. In the instant case, the limitation applicable is of six months and the relevant date of the commencement of this limitation would be the date on which the order of the Assistant Collector was passed. It could be revised by the Collector within six months i.e. on or before 8-6-1978. The difficulty was that on that date, Collector had no jurisdiction to revise orders. Therefore, it is automatically taken out of the purview of the jurisdiction of the Collector and we hold that the Collector had no jurisdiction to revise the order on two counts. Firstly, the last date on which the order could be revised, Collector had no jurisdiction u/s 35A to revise such orders and secondly, on the count that the proceedings were not initiated by service of show cause notice on the assessee as is required by section 11-A read with section 35A(3)(b) of the Central Excise and Salt Act within limitation.

13. Shri Deo, learned Counsel for the Union of India, contended that during the pendency of this writ petition because of the statutory amendments, Revision filed against the order of the Collector came to be converted into Appeal before the CEGAT but the said appeal was withdrawn by the petitioners. Since appeal was allowed to be withdrawn, this writ petition itself would not be maintainable. On the date when the appeal was withdrawn, this petition was admitted and was pending before this Court. The appeal was allowed to be withdrawn on 11-12-1990. The order passed by the learned Members of the CEGAT mentions that Excise Appeal No. 68/80-C is sought to be withdrawn on the ground that the same matter is before the Hon'ble High Court, Bombay i.e. Writ Petition No. 972/1980 which was admitted and the interim relief was granted. Counsel for the Department of Revenue had no objection for the grant of this prayer. On the basis of this, the learned Members of the CEGAT permitted the petitioner to dispose of the appeal as withdrawn. In view of this, we do not think that the fact of the withdrawal of the appeal by the petitioners

would disentitle the petitioners to pray before us in this writ petition.

14. Since we are holding that the order of the Collector being beyond the period of limitation and the Collector had no jurisdiction to revise the order of the Assistant Collector on that day, we feel it unnecessary to go into the other contentions raised in this petition. The order passed by the Collector, Central Excise and Customs, Pune in File No. IV/8-460/15-A/VC/75-Pvt. III dated 12th June 1980 is hereby quashed. The order of the Assistant Collector, Central Excise and Customs, Aurangabad dated 8-12-1977 stands restored. Bank guarantee submitted in pursuance of the interim orders of this Court may be returned after period of 8 weeks from today. Rule absolute in the above terms. No order as to the costs. Copy, if applied, be issued within two weeks.

15. Petition allowed.