Geep Flashlight Industries Ltd vs Union Of India And Ors on 28 October, 1976

Equivalent citations: 1977 AIR 456, 1977 SCR (1) 983, AIR 1977 SUPREME COURT 456, 1977 LAB. I. C. 20, 1977 TAX. L. R. 1697, 1976 4 SCC 677, 1977 (1) SCR 983, 1977 (1) SCWR 265, 1976 U J (SC) 990

Author: A.N. Ray

Bench: A.N. Ray, M. Hameedullah Beg, P.N. Shingal

PETITIONER:
GEEP FLASHLIGHT INDUSTRIES LTD.

Vs.

RESPONDENT:
UNION OF INDIA AND ORS.

DATE OF JUDGMENT28/10/1976

BENCH:
RAY, A.N. (CJ)
BENCH:
RAY, A.N. (CJ)
BEG, M. HAMEEDULLAH
SHINGAL, P.N.

CITATION:
1977 AIR 456 1977 SCR (1) 983
1976 SCC (4) 677

ACT:
Limitation--Period of limitation in respect of suo motu revision by Central Government to annual or modify any order of erroneous refund of duty, when begins-Customs Act, 1962 Ss. 28, 131(1)(3)(5) scope of.

HEADNOTE:
The appellant succeeded before the revisional authority and obtained the orders of refund of duty levied and collected on the consignment of ten metric tonnes of Manganese dioxide. As no action was taken, the appellant gave a notice on October 3, 1974 u/s 80 C.P.C. for institution of a suit for recovery of refund. On February 10, 1975 the respondent gave a notice u/s 131(3) of the Customs Act 1962

to the appellant for suo motu revision of the order of the refund. The Writ Petition filed in the Delhi High Court, impeaching the said order was dismissed directing the appellant to raise all objections including those raised in the Writ Petition before the Central Government.

Dismissing the appeal by special leave, the Court

Held: (1) S. 28 of the Customs Act, 1962 speaks of three kinds of errors in regard to duties. One is non-levy, the second is short levy, and the third is erroneous refund. Levy is. linked to assessment. In the process of assessment two kinds of errors may occur. One is non levy and the other is short levy. The expression "erroneously refunded" means refunded by means of an order which is erroneously made. [986 F-G]

S. 131(5) of the Customs Act does not speak of any limitation in regard to revision by the Central Government of its own motion to annul or modify any order of erroneous refund of duty. The provisions contained in Section 131(5) with regard to non-levy or short levy cannot be equated with erroneous refund in as much as the three categories of errors in the levy are dealt with in Section 28. [987 D-E]

(3) Notice u/s 28 of the Customs Act speaks of demand for money to pay back and the notice is required to be given within six months from the relevant date. In the case of erroneous refund, it would be six months from the date of actual refund. If no refund has in fact been made limitation cannot be said to arise inasmuch as the relevant date u/s 28 in the case of erroneous refund speaks of the date of refund. In the instant case the impugned order dated 20, April 1972 granted refund. Grant of refund is not actual refund. [986 G-H, 987 A]

JUDGMENT:

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 1830 of 1975. Appeal by Special Leave from the Judgment and Order dated 10-9-75 of the Delhi High Court in Civil Writ Petition No. 475/75.

Soli Sorabjee, Ravinder Narain, Talat Ansari and Shri Narain, for the Appellants.

V.P. Raman, Addl. Sol. Genl. for India, S.K. Mehta and Girish Chandra, for the Respondent.

The Judgment of the Court was delivered by RAY, C.J.--This appeal is by special leave from the judgment dated 10 September 1975 of the Delhi High Court.

The appellant is a manufacturer of dry battery cells. In October 1969 the appellant received a consignment of ten metric tons of manganese dioxide. The Assistant Collector levied duty on the consignment under Tariff Item 28. The appellant preferred an appeal. The Appellate Collector confirmed the order of the Assistant Collector. The appel- lant thereafter made an application to the

Revisional Au- thority. The Revisional Authority held that the goods should be assessed under Tariff Item 26 and ordered refund of duty.

The appellant asked for refund and sent reminders to Customs Authorities for refund.

On 3 October 1974 the appellant gave a notice under section 80 of the Civil Procedure Code for institution of a suit for recovery of refund.

On 10 February 1975 a notice under Section 131(3) of the Customs Act 1962 referred to as the Act was. given to the appellant for revision of the order of refund. The appellant impeached the aforesaid notice dated 10 February 1975. The notice inter alia stated that "since the goods 'were processed ore, not meant for extraction of metallic manganese they ceased to qualify as an 'ore' within the normally accepted sense of the term as in item 26 Indian Customs Tariff. The notice thereafter said "It, therefore, appears to the Government that the appellate order does not appear to be sustainable. Therefore, in exercise of the powers under section 131(3) of the Customs Act, 1962 the Government of India proposes to annul the order in Appeal No. 590-593/1972 passed by the Appellate Collector of Cus- toms, Calcutta".

The appellant made an application under Article 226 and moved the Delhi High Court. The appellant in the applica- tion asked for a writ in the nature of prohibition restrain- ing the "Opposite party" thereto from taking any proceeding pursuant to the impugned notice. The appellant also asked for a writ of certiorari to quash the notice. The appellant also asked for a writ of mandamus not to withhold the excess duty paid by the petitioner and ordered to be refund- ed.

The contention of the appellant was that the power of suo motu revision under section 131(3) of the Act in so far as it relates to a case of non-levy or short levy of duty must be exercised within the period of limitation prescribed in section 131(5) of the Act. In short, the appellant's contention is that the power of suo motu revision contained in section 131(3) of the Act is subject to the provisions contained in section 131(5) of the Act.

The provisions contained in section 131(3) of the Act at3 as follows:

> "The Central Government may of its own motion annual or modify any order passed under section 128 or section 130."

The provisions contained in section 131(5) of the Act are as follows :--

> "Where the Central Government is of opinion that any duty or customs has not been levied or has been short-levied, no order levying or enhancing the duty shall be made under this section, unless the person affected by the proposed order is given notice to show cause against it within the timelimit speci- fied in section."

Section 28 of the Act provides for notice for payment of duties not levied, short-levied or erroneously refunded. Under section 28 when any duty has not been levied or has been short-levied

or erroneously refunded, the proper offi- cer may, within six months from the relevant date, serve notice on the person chargeable with the duty which has not been levied or which has been short-levied 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.

Counsel for the appellant extracted the provisions contained in sections 28 and 131 (3) and 131 (5) of the Act in support of the contention that any notice for suo motu revision by the Central Government in so far as it relates to a case of non-levy or short levy of duty must be given within the period of six months from the date of levy. Counsel for the appellant further contended that if the Government wanted to revise orders for refund on the ground that there should not be any refund, it would also be a case of short-levy, and, therefore, the limitation of six months as provided in section 28 of the Act should apply. Broadly stated Counsel for the appellant submitted that section 28 of the Act is a substantive provision relating to notice for non-levy or short-levy and section 131(3) of the Act is a procedural section and power under section 131(3) of the Act cannot be exercised in such a manner as to render section 28 of the Act nugatory.

The alternative contention of Counsel for the appellant is that power under section 131(3) of the Act is to be exercised within a reasonable time and the periods mentioned in section 131 of the Act supply the yard-stick or give an indication of what is reasonable time.

The Delhi High Court held that all the objections which the petitioner wishes to raise to the notice, including the objections raised in the writ petition, should be raised before the Central Government. The Delhi High Court, there- fore, directed the Government to give a hearing to the appellant and further held that the Government should con- sider all the objections. The Delhi High Court went on to say that the decision of the Government should be taken within three months unless the appellant himself took ad- journment and caused delay in the disposal of the case. The Delhi High Court also said that if any money was to be refunded, .it should be refunded within two months from the date of the decision.

The provisions contained in section 28 of the Act speak of non-levy, short-levy and erroneous refund. The provi- sions state that notice of non-levy, short-levy or erroneous refund should be given within six months from the relevant date. Section 28(3) states what the "relevant date" means. In the case of duty not levied, the "relevant date" is the date on which the proper officer makes an order for the clearance of the goods. In a case where duty is provisionally assessed under section 18 of the Act, the relevant date is the date of adjustment of duty after the final assessment. In a case where duty has been 'erroneously refunded, the relevant date is the date of refund. any other case, the relevant date is the date of payment of duty.

The Additional Solicitor General contended that the provisions in section 28 of the Act indicated that any notice with regard to non-levy, short-levy or erroneous refund, require the person to show cause why he should not pay the amount specified in the notice. This being the case of erroneous refund, the Additional Solicitor General con- tended that the limitation would be six months from the date of actual refund. The order dated 20 April 1972, which is described as the order of refund, was as follows :--

"I, therefore, allow the appeals and direct that the goods be re-assessed under Item 26 of the Indian Customs Tariff and the consequential refund of duty granted."

It may be stated here that Tariff Item 26 speaks of duty on metallic ore and Tariff Item 28 speaks of duty on Chemi- cal and Pharmaceutical products. The appellant succeeded in appeal in obtaining an order of refund. It is an admitted feature of the case that refund has not in fact been made. Counsel for the appellant contended that even if refund has not been made, the date of refund will be the relevant date and six months. would be calculated from 20 April 1972, when refund was ordered and, therefore, the notice dated 10 February 1975 will be hit by the provision of limitation of six months from the relevant date. The contention of the appellant is wrong. It is only where refund has in fact been made and money has been paid, the relevant date will be six months from the date of actual payment for refund. The contention of the appellant that refund will also be a case of short-levy is not correct. Section 28 speaks of three kinds of errors in regard to duties. One is non-levy, the second is short-levy and the third is erroneous refund. Levy is linked to assessment. Section 17th of the Act speaks of assessment order. In the process of assessment two kinds of errors may occur. One is non-levy and the other is short-levy. Refund is dealt with in section 27 of the Act. The expression "erroneously refunded" means re- funded by means of an order which is erroneously made. These are three categories of errors in regard to duties. The notice under section 28 of the Act speaks of demand for money to pay back and the notice is required to be given within six months from the relevant date. In the case of erroneous refund, it would be six months from the date of actual refund. If no refund has in fact been made, limita- tion cannot be said to arise inasmuch as the relevant date under section 28 in the ease of erroneous refund speaks of the date of refund. The order dated 20 April 1972 granted refund. Grant of refund is not actual refund.

Chapter XV contains sections 128 to 131 Of the Act. Chapter XV speaks of Appeals and Revision. Section 128 relates to appears, Section 130 deals with powers of revi- sion of Board. Section 131 speaks of revision by Central Government. Revision can be asked for by the persons aggrieved by any order passed under section 128, or any order passed under section 130. Section 131(2) provides limitation of six months for an application made under section 131(1) of the Act.

Once the provisions contained in section 131(3) are attracted, the Central Government may of its own motion annul or modify any order passed under section 128 or section 130. This provision is the power of Central Government to annul or modify any order. This power is exercised by the Central Government suo motu. Of course the power is to be exercised on giving notice to the person concerned.

The provisions contained in section 131(5) of the Act speak limitation only with regard to non-levy or short-levy. It is significant that section 131(5) does not speak of any limitation in regard to revision by the Central Government of its own motion to annul or modify any order of erroneous refund of duty. The provisions contained in section 131(5) with regard to non-levy or short-levy cannot be equated with erroneous refund inasmuch as the three categories of errors in the levy are dealt with separately. The appellants prayers for writs of Certiorari and mandamus are misconceived. There is no order either judicial or quasi-Judicial which can attract certiorari. No mandamus can go because there is nothing which is required to be done or for borne under the Act.

The issue of the notice in the present case requires the parties to represent their case. There is no scope for mandamus to do any duty or act under the statute. A writ of prohibition cannot be issued for the obvious reason that the Central Government has jurisdiction to revise.

For the foregoing reasons, the appeal is dismissed. The Central Government will hear the appeal on merits. In view of our conclusion that there is no bar of limitation in the present case it will not be open to the parties to take any plea of limitation. The Central Government will hear the matter as expeditiously as possible. In case the Cen- tral Government will hold that the order of refund is valid, the Central Government will pay the amount. We specify the period of two months from the date of the order as the period during which payment will be made. The parties will pay and bear their own costs.

S.R. Appeal dismissed.

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