Customs, Excise and Gold Tribunal - Delhi
South India Alloy Industries vs Collector Of Central Excise on 29 September, 1985
Equivalent citations: 1986 (6) ECR 256 Tri Delhi, 1986 (23) ELT 132 Tri Del
ORDER Harish Chander, Member (J)

1. M/s. South India Alloy Industries, 73, Puthur Ittery Road, Nethimedu, Salem-636003 (Tamil Nadu) had filed a Revision Application under erstwhile Section 36 of the Central Excises and Salt Act, 1944 to the Special Secretary, Government of India, Ministry of Finance, Department of Revenue being aggrieved from order in Review No. 30/1981 file No. 199/49/78/CXV(A) dated 16-9-1981 passed by the Central Board of Excise and Customs, New Delhi. After coming into existence of the Tribunal the said Revision Application stands transferred to this Tribunal under Section 35P of the Central Excises and Salt Act, 1944 to be disposed of.

2. Briefly the facts of the case are that the assessee had been manufacturing and clearing Rock Phosphate without taking Central Excise licence and without paying Central Excise duty from 11-9-1975. A sample of the said Rock Phosphate was drawn on 9-11-1976 by the Central Excise Officers and was tested to check whether it was liable to duty as "Fertilizers, All Sorts" under item 14-HH of the Central Excise Tariff. The assessee was called upon vide show cause notice C. No. V/14-HH/15/14/77-G.L.2 dated 19-12-1977 to show cause (a) as to why the duty of Rs. 1,11,130.37 P should not be demanded from the assessee under Rule 9(2) of the Central Excise Rules 1944 and (b) why a penalty should not be imposed under Rule 9(2) and 173Q of the Central Excise Rules, 1944 for the contravention of Rules 174, 9(1) and 173-Q of the Central Excise Rules, 1944. In reply to the said show cause notice the Appellant had contended before the Assistant Collector that the samples drawn on 9-11-1976 was not representative in character and therefore, the test report should not be made applicable to the clearances which took place before the drawal of samples. It was also argued that the sample was not drawn in the presence of their representative. The learned Assistant Collector had come to the conclusion that in respect of crushed Rock Phosphate cleared upto the date of drawal of sample on 9-11-1976, no positive conclusion could be arrived as to the fineness of the rock phosphate cleared by the party, even though in the same order he had held that the test report revealed that the samples tested conformed to the description of fertilizers as contained in the Schedule to the Fertilizer Control Order, 1957 (as amended) and that all the major consumers of the Rock Prosphate to whom supplies had been made by the party had stated that they had used Rock Phosphate received by them for making mixture of fertilizers or had sold them directly for use in plantations as manure. The Board being not satisfied with the order passed by the Assistant Collector, issued a show cause notice No. F. No. 199/49/78-CXV(A) dated 21-10-1978 under Section 35A of the Central Excises and Salt Act, 1944. The assessee had replied to the show cause notice and the Board had set aside the order passed by the Assistant Collector and had directed the assessee to pay a duty of Rs. 1,36,659.68 P and has levied a penalty of Rs. 1,30,000/- Being aggrieved from the aforesaid order the Assessee filed a Revision Application to the Central Government which stands transferred to the Tribunal.

3. Shri S. Ramanathan the learned Consultant has reiterated the facts. He pleaded that the learned Assistant Collector had passed an adjudic ation order dated 29-10-1977 and the Appellant had accepted the adjudication order, and 00 21-10-1978 the Central Board of Excise and Customs, New

Delhi had issued a Review Show Cause Notice which appears on page 43 of the paper book. The learned consultant has pleaded that the Review Order passed by the Central Board of Excise and Customs is prima facie, illegal and bad in the eyes of law and he will initially argued on the illegality of the order and in case this Court feels dissatisfied with his arguments he will argue other merits of the case. The learned consultant has pleaded that Section 23 of the Customs, Central Excise and Salt and Central Boards of Revenue (Amendment Act, 1978) (Act No. 25 of 1978), for the old section 35-A of the Act substituted a new section. And this section came into force with effect from the first day of July 1978 and by virtue of this amendment the power of review which was earlier exercised by the Board was bifurcated. He has pleaded by virtue of the amended provision of Sub-section (1) of Section 35-A where the order had been passed by the Collector of Central Excise, the review power was vested with the Board and as per provision of Sub-section (2) of Section 35-A where an order has been passed by a Central Excise Officer who was subordinate to the Collector of Central Excise, the power of review was to be exercised by the Collector of Central Excise. The learned Consultant has referred to a judgment of the Tribunal in the case of Apar (Pvt.) Ltd., Baroda v. Collector of Central Excise, Baroda in order No. 75/83-C dated 9-3-1983 reported in 1983 (2) E.T.R. 78. The learned consultant has pleaded that the facts of the earlier order of the Tribunal were similar to the Appellant's case and the Appellant's case is fully covered by the earlier judgment of the Tribunal. He has also stated that the Appellant had not taken this stand earlier and there is no bar for taking the same at this stage. The learned consultant has also referred to the reply to the Review Show Cause Notice which appears on pages 31 to 42 of the paper book. The learned consultant has referred to the written argument filed before the Central Board of Excise and Customs and has laid special emphasis on paragraphs 11, 12, 13 and 14 of the said written argument dated 28-5-1981 which appear on pages 27 and 28 of the paper book. The learned consultant has pleaded for the acceptance of the Appeal on the ground of the illegality of the Review Order passed by the Central Board of Excise and Customs. In reply, Shri Sundara Rajan, the learned JDR has pleaded that the amendment of Section 35-A by the Customs, Central Excises and Salt and Central Boards of Revenue (Amendment Act, 1978) (Act No. 25 of 1978) does not affect the powers of the Board as the power which could have been exercised by the Collector could be exercised by the Superior Authority viz. Central Board of Excise and Customs. He has also argued that there is no definition of the Collector in the Central Excises and Salt Act, 1944. He has further pleaded that in the case of Apar (Pvt.) Ltd. Baroda v. Central Excise, Barada different arguments were taken and the appeal was not accepted on these grounds.

4. In reply Shri S. Ramanathan, the learned Consultant has pleaded that the Review Order passed by the Board was in its quasi-judicial capacity and the Board could not deviate the procedure and machinery as provided in the Act by the Legislature. The learned Consultant has further argued that the Board had no authority to exercise the review power in the instant case where the order was passed by the Assistant Collector. The power to review the order vested with the Collector of Central Excise in terms of provisions of Sub-section (2) of Section 35-A of the Central Excises and Salt Act, 1944. The learned consultant has pleaded for the acceptance of the Appeal.

5. After hearing both the sides and going through the facts and circumstances of the case, we would like to observe that in the instant case the adjudication order was dated 29-10-1977 and the Review Show Cause Notice was issued by the Central Board of Excise and Customs on the 21st October

1978; there is no dispute that the amended provisions came into operation w.e.f. 1st July 1978 vide notification No. 227/A/6/78-SRP(CCX), dated 19-6-1978 by section 23 of the Customs, Central Excises and Salt and Central Boards of Revenue (Amendment) Act, 1978 (25 of 1978). Section 35-A which came into force from 1-7-1978 is reproduced as under :-

"Section 35-A. Revision by Board or Collector.-(1) 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 under Section 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 under Section 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 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.

(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, 1978] after the expiration of a period of one year from the date of such decision or order."

6. A simple perusal of Sub-section (1) and Sub-section (2) of Section 35-A of the Central Excises and Salt Act, 1944 shows that the intention of the Legislature is that where an order has been passed by the Collector, Central Excise, the power to review an order vests with the Board and where the order has been passed by any Central Excise Officer subordinate to the Collector of Central Excise, the power to review the order vests with the Collector. There can be no deviation from the machinery and the procedure provided by the legislature. We are in full agreement with the observations of our learned Brothers in the case of Apar (Pvt.) Ltd. Baroda v. Collector of Central Excise, Baroda reported in 1983 (2) E.T.R. 78. Para Nos. 8 and 9 from the said judgment are reproduced as under :-

"Para 8. The problem need not detain us long as what body or officer should deal with revision is not a matter of any right or liability, but only a question of procedure. It is well settled that, as a general rule, amended law relating to procedure operates retrospectively subject to certain qualifications, that it does not create new disabilities or obligations or impose new duties in respect of transactions which were complete at the time the amending Act came into force. For the point in question, we can do no better than extract from the judgment of the Supreme Court in N.C. Mitra v. The State of Bihar-A.I.R. 1970, Supreme Court 1636 wherein the Supreme Court after referring to the English law and earlier Indian law on the subject held as under :

"It is therefore clear that as a general rule the amended law relating to procedure operates retrospectively. But there is another equally important principle, viz- that a statute should not be so construed as to create new disabilities or obligations or impose new duties in respect of transactions which were complete at the time the amending Act came into force (See In re : A Debtor 1936 Ch. 237 and In re : Vernazza, 1960 A.C. 965). The same principle is embodied in Section 6 of the General Clauses Act."

Para 9, The view of the Board could have been said to be sustainable if show cause notice had been issued before the amended Section 35-A came into force. In such a case Board could have continued to deal with the matter in accordance with the earlier provisions.

In view of the Supreme Court's pronouncement referred to above, after the amended Section 35-A had come into force the Board could not have exercised revisionary powers over orders passed by the Assistant Collector of Central Excise. This could be done only by the Collector. The Board in issuing show cause notice and acting thereon acted without jurisdiction. The show cause notice issued by the Board and the consequent order passed by it cannot be held legal and must therefore be set aside.

As a result of aforesaid discussion, the impugned order is set aside and the appeal allowed."

7. The argument of the learned JDR to the effect that the power which was to be exercised by the Collector, could have been exercised by a superior authority has no footing. During the course of arguments, the learned authorised representative for the Appellant had argued that the present argument was not taken earlier, does not bar the raising of plea at this stage. The Hon'ble Andhra Pradesh High Court in the case of Commissioner of Income Tax, Andhra Pradesh v. Gangappa Cables Pvt. Ltd. reported in 116 I.T.R. 778 bad held that where all the details are on record, the Appellate Tribunal can allow such a claim in spite of the fact that the said claim was neither raised before the Income Tax Officer nor before the Appellate Commissioner of Income Tax. Head Note from the said judgment is reproduced as under :-

"The Appellate Tribunal disposing of an appeal under the I.T. Act has not the power to allow the assessee to put forward a new claim, notwithstanding the fact that such a claim was not raised by him before the ITO or the AAC, provided there is sufficient material on record to allow such a claim.

The assessee, for the first time, raised a plea in second appeal before the Appellate Tribunal that the expenditure incurred by the assessee before it went into commercial production was an admissible deduction for the purpose of S. 80J(1) of the I.T. Act. The revenue resisted the claim on the ground that the said claim having not been put forward by the assessee before the ITO or the AAC, it could not be raised in second appeal. The Tribunal held that the directors' report accompanied by balance sheet and profit and loss account and other statements were filed by the assessee before the ITO and practically all the details for allowing a claim under Section 80J(1) of the Act were on record and hence it was open to the Tribunal to allow such a claim. On a reference :

Held, that the Tribunal was correct in allowing the claim of the assessee as there was material on record for allowing the same."

Accordingly we hold that there is no bar for taking this plea before this Tribunal for the first time.

In view of the above observations, we set aside the order passed by the Central Board of Excise and Customs and restore the order passed by the Assistant Collector of Central Excise, IDO, Salem. In the result, the appeal is allowed.