

(1980) 04 DEL CK 0039

In the Delhi High Court

Case No : Civil Writ Petition No. 149 of 1980

Associated Cement Companies Ltd.

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 17-04-1980

Acts Referred:

Citation : (1981) 8 ELT 421

Hon'ble Judges : V.S. Deshpande, C.J.;B.N. Kirpal, J

Bench : Division Bench

Judgement

V.S. Deshpande, C.J.—The main question of law in this writ petition relates to the proper construction of the third proviso to sub-section (2) of Section 36 of the Central Excises and Salt Act, 1944 as amended on 1-7-1978. The petitioner manufactures "portland cement" and also "pozzolana cement".

2. The cement of all varieties is charged to excise duty under Item 23 of the Central Excise Tariff read with Section 3 of the Act. By Notification No. 89/76-C.E. of 16th March, 1976 certain exemptions from payment of duty in respect of certain types of cement were granted as follows :-

-----	S. No.	Variety
Duty -----	1.	Water-
		proof (Hydrophobic) cement
	2.	Grey
		cement of specific surfaces not
		Rupees ninety-one per less than 3500 Om. 2 gm.
	3.	Others
		Rupees eighty-two per metric tonne.

3. The Superintendent of Central Excise M. O. R. Peddapalli by demand orders O.C. No. 859 dated 23-10-1976 and No. 96/77 dated 27-8-1977 called upon the petitioner to pay duty at Rs. 91/- per metric tonne on "pozzolana cement" manufactured by the petitioner under Tariff Item 23 read with Item No. 2 of the exemption notification. In the appeals preferred by the petitioner to the Appellate Collector, Central Excise the said demands were ordered to be withdrawn and the

Superintendent of Central Excise was directed that even though the specific surface may be not less than 3500 Cm² all such cement should be assessed under Item No. 3 of the exemption notification at the rate of Rs. 82/- per metric tonne only. Thereupon the two impugned notices were issued by the Central Government on 12th November, 1979 and 17th November, 1979 u/s 36(2) of the Act calling upon the petitioner to show cause why the orders of the Appellate Collector should not be reviewed and set aside and the demands made by the Superintendent should not be restored. These notices were issued after the expiry of six months but within the period of one year after the orders of the Appellate Collectors were passed. These notices have been challenged by the present writ petition as being ultra virus of the third proviso to Section 36(2) being barred by limitation there under.

4. Section 36(2) reads as follows :-

"The Central Government 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 u/s 35 or section 36A of this Act 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 defense :

Provided further that no proceedings shall be commenced under this sub-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 sub-section) after the expiration of a period of one year from the date of such decision or order :

Provided also that where the Central Government 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 11A."

5. The power of the Central Government to review an order in appeal passed u/s 35 or passed in revision u/s 35A is expressed in very broad terms, namely, "for the purpose of satisfying itself as to the correctness, legality or propriety of such decision". A longer and a shorter periods of limitation for review are provided in the second and the third provisos respectively. The scheme of these provisos is this. Notice of intention to review "any" decision u/s 35 or Section 35A can be issued within one year from the decision under the second proviso.

6. On the contrary the third proviso is limited in its scope. It applies only when the Central Government "is of opinion that any duty of excise has not been levied or has been short-levied or erroneously refunded". Notice to show cause, has to

be issued within the shorter period of six months from the date of decision. Reading the second proviso, it would appear that while every order in respect of which the opinion of the Central Government can be formed under the third proviso would also be generally covered by the all embracing language of second proviso, the converse is not true. That is to say, all orders which fall within the ambit of the second proviso will not fall in the ambit of the third proviso. The reason is that while the second proviso is a provision as general as the substantive part of Section 36(2), the third proviso is a provision which carves out a particular area only from Section 36(2) but leaves out the rest to be covered by the second one. The only opinion to which the third, proviso refers is the opinion of the Central Government that any duty of excise has not been levied or has been short levied or erroneously refunded by the appellate order which is sought to be revised by the Central Government u/s 36(2). By way of contrast it is to be noted that under the second proviso there is no such limitation in respect of the order sought to be revised by the Central Government. Once the Central Government wishes to examine the legality, propriety or correctness of an order passed u/s 35 or 35A, then it automatically is covered by the second proviso.

7. The difficulty which has arisen in the present case is that while the orders of the Appellate Collector are such that according to the tentative view formed by the Central Government, they resulted in short-levy of excise duty, the language of the impugned notices does not use these words which are found in the third proviso. No reference to short-levy or non-levy is made in the notices. On the contrary the notices say that the Central Government wishes to review the legality, correctness or propriety of the appellate orders. On the strength of the language used in the impugned notices, it is argued for the respondents that the impugned notices are given under the second proviso and they are, Therefore, not barred by limitation inasmuch as they are issued within a period of one year from the dates of the orders of the Appellate Collector.

8. In our view this contention of the respondents is contrary to the Scheme of section 36(2) including the provisos.

9. The substantive part of Section 36(2) deliberately uses wide language so that a suo motu revision by the Central Government can be made on any ground which touches the correctness, legality and propriety of the decision u/s 35 or Section 35-A. A sufficiently long period of limitation for the issue of notice required by the first proviso is provided in the second proviso, probably because the opinion of the Central Government that the appellate order is either not correct or legal or proper is not so prejudicial to the person to be affected by the proposed order as should be the order which would be proposed by the Central Government under the third proviso. This is the reason why the shorter limitation is provided for under the third proviso for reviewing the appellate order because the Central Government is of the opinion that appellate order has resulted in a non-levy or short-levy of duty. Short-levy or non-levy of duty results in great

prejudice to the Revenue and revision of that order on that ground would also result in great prejudice to the assessed. Since a finding of short-levy and non-levy and the order passed on such a finding is of comparatively greater importance both to the revenue and the assessed, it is expected that the revenue would be prompt to initiate action by way of revision under the third proviso and the assessed should also be relieved of the risk of such revision after a comparative short period of six months. The third proviso has been inserted by the amendment of 1-7-1978 to distinguish revision relating to order of short-levy or non-levy from the review of other orders. For instance an appellate order for confiscation or penalty may not be an order of short-levy or non-levy and would fall only under the second proviso while the third proviso would not be attracted. On the contrary an order of short-levy or non-levy u/s 35 or Section 35-A would fall only under the third proviso and not the second one.

10. The stand taken in the impugned show-cause notices apparently is that the jurisdiction of the Central Government to revise the orders of the Appellate Collector is based on Section 36(2) because these orders are either incorrect or illegal or improper, While any order which is sought to be revised u/s 36(2) must be shown to be incorrect, illegal or improper, it cannot be said that every order sought to be revised there under is of short-levy or non-levy. The later category is carved out of the former and is confined to the third proviso. While it is for the Central Government to choose its language in giving show-cause notices under the first proviso to Section 36(2), the view of the Central Government has to be gathered not only from the language used in the show-cause notices but also by reading the said language with the orders passed u/s 35 or 35-A which are sought to be reviewed by the orders proposed in the show-cause notices. Once the notices are read with the orders passed u/s 35 or 35-A, it would be clear whether the notices are issued under the third proviso. The language of the impugned show-cause notices in the present case purports to be under the substantive part of Section 36(2). It cannot, however, attract the application of the limitation prescribed under the second proviso because if the notices are read as a whole and particularly if they are read with orders passed by the Appellate Collector, it becomes quite clear that the revision sought by these notices is of appellate orders of short-levy. It may be that along with short-levy the appellate order would also be incorrect or illegal in the opinion of the Central Government. This does not mean, however, that third proviso can be ignored and the notices can fall under the second proviso.

11. To conclude, the notices having been covered by the third proviso which is a special law, they cannot seek the benefit of the longer period of limitation prescribed in the second proviso which is general law. As the special law prevails over the general law, the impugned notices were barred by limitation and were, Therefore, illegal inasmuch as they were, issued after the expiry of a period of six months from the dates of the appellate orders.

12. In passing we may make it clear that we understand the words "Time limit

specified in Section 11-A" used at the end of the third proviso to section 36(2), to mean a period of six months from the date of the order passed u/s 35 or 35-A. We emphasise that the expression "relevant date" is not used in the third proviso. The reason, according to us, is that the limitation which is specified in section 11-A has to be read into the third proviso in section 36(2) in relation to the orders passed u/s 35 or 35-A. The relevant date in section 11-A is of action taken by assessing authorities and, Therefore, it is not applicable and cannot be incorporated in the third proviso to Section 36(2) for the simple reason that the revision u/s 36(2) is not of the orders of the original assessing authorities but only of the orders passed in appeal/revision u/s 35 or 35-A. We have, Therefore, calculated the period of six months for the purposes of the application of the third proviso to Section 36(2) from the date of the appellate orders. It may also be mentioned that the same policy of providing a shorter period of limitation, namely, of six months with reference to duties not levied or not paid or short levied or not paid in full or erroneously refunded is to be found in Rule 9.

13. In view of this finding we think it is unnecessary to consider the other contentions raised by the petitioner against the impugned show-cause notices.

14. For the above reasons, the writ petition is allowed and the impugned show-cause notices Exhibit I and Exhibit K in the writ petition are quashed with no order as to costs.