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(1997) 11 KL CK 0044

In the High Court Of Kerala

Case No : O.P. No. 8414 of 1997-B

Bescoat APPELLANT

Vs

Union of India (UOI) RESPONDENT

Date of Decision : 21-11-1997

Acts Referred:
Central Excises and Salt Act, 1944 — Section 35D

Citation : (1998) 60 ECC 276 : (1998) 75 ECR 698

Hon'ble Judges : G. Sivarajan, J

Bench : Single Bench

Final Decision : Allowed

Judgement

G. Sivarajan, J.—Petitioner is a partnership firm engaged in the manufacture of various items including Kaolin Light IP/MF which according to the petitioner is a drug coming within the definition of drug given in the Drugs and Cosmetic Act 1940 and a medicament falling under Chapter 30 Sub-heading 3003.20 of the Central Excise Tariff Act. According to the petitioner, Kaolin Light IP/MF is not exigible to excise duty under the Act. In respect of certain clearances, the department has taken the view that the said item falls under Sub-heading 2505.10 of the Central Excise Tariff Act, exigible to duty at the rate of 15%. The question regarding exigibility/rate of duty in respect of certain earlier clearances is pending in appeals before the Customs, Excise & Gold (Control) Appellate Tribunal. According to the petitioner Ext. P4 appeal is pending before the Special Bench as is evidenced by Ext. P7 communication. In respect of certain subsequent clearances also the department has taken the same view and the petitioner has taken up the matter in appeals before the Tribunal. The Appellate Tribunal, South Zone, Zonal Bench at Madras took up the stay petition and the appeals for consideration and the stay of recovery of the demand was granted and by the same order, the Tribunal considered the question regarding the rate of duty applicable to the commodity in question and decided against the petitioner evidenced by Order Nos. 2576 & 2577 of 1996 and Appeal Nos. 1494 & 1495 of

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1996 (Ext. P11). The petitioner has challenged Ext. P11 order passed by the Madras Bench of the Tribunal in so far as it dismissed the appeals.

2. The learned Counsel appearing for the petitioner submitted that the Regional Bench of the Tribunal has no jurisdiction to decide the appeals relating to rate of duty except in the matter of grant of stay. The learned Counsel took me through the provisions of Section 35D(2) of Central Excise and Salt Act, 1944. Section 35D(2) provides that every appeal against a decision or order relating, among other things, to the determination of any question having a relation to the rate of duty of excise or to the value of goods for purpose of assessment, shall be heard by a Special Bench constituted by the President for hearing such appeals and such Bench shall consist of not less than two members and shall include at least one judicial member and one technical member. The learned Counsel submitted that the question involved in this case is regarding the rate of duty as to whether the item in question is exigible under subheading 3003.20 as contended by the petitioner or under sub-heading 2505.10 as held by the Department and that in view of the provisions of Sub-section 2 of Section 35D, this question can be decided only by a Special Bench constituted by the President of the Tribunal.

3. A counter affidavit has been filed on behalf of the 5th respondent, wherein it is stated that the impugned order is issued by a competent authority after observing order is issued by a competent authority after observing all the formalities under the Act and the Rules. I am not dealing with the other submissions made in the counter affidavit regarding the merits of the matter.

4. I have heard the learned Counsel appearing for the petitioner and the learned Senior Central Government Standing Counsel Sri. George C.P. Tharakan appearing for the respondents. Admittedly, the question involved in the appeals dismissed by the Tribunal as per Ext. P11 is regarding the rate of duty. In such circumstances, in view of the provisions of Section 35D(2) of the Act the said appeals can be heard only by a Special Bench constituted by the President. In the instant case, Ext. P11 is not passed by a Special Bench constituted as provided under Sub-section (2) of Section 35D. Therefore, Ext. P11 order, in so far as it relates to the consideration of the appeals on merits, cannot be sustained. I keep in tact Ext. P11 order in so far it relates to the grant of stay and set aside Ext. P11 order passed by the 2nd respondent in so far as it relates to the decision of the appeals on merits. I direct the 2nd respondent Tribunal to restore the said appeals to file and to transfer the case to the Customs. Excise and Gold (Control) Appellate Tribunal, Delhi Bench for its consideration as has been done by the 2nd respondent in Ext. P7 communication, so that this appeal also can be disposed of along with Ext. P4 appeal pending before the Delhi Bench.

Original Petition is allowed as above.

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