

(2014) 09 MP CK 0196
In the Madhya Pradesh High Court
Case No : C.E.R. Nos. 8-11 of 2003

Bharat Heavy Electricals Ltd.

APPELLANT

Vs

Commr. of Cus. & C. Ex.

RESPONDENT

Date of Decision : 04-09-2014

Acts Referred:

Central Excises and Salt Act, 1944 — Section 2(b), 35H(1), 37B

Citation : (2015) 316 ELT 413

Hon'ble Judges : Rajendra Menon, J;A.K. Sharma, J

Bench : Division Bench

Advocate : Z.U. Alvi and Ashok Lalwani, Counsel, Advocates for the Appellant;
S.A. Dharmadhikari, Counsel, Advocates for the Respondent

Judgement

Rajendra Menon, J.—As common question of law based on identical facts are involved in all these four references made under Section 35H(1) of the Central Excise Act, 1944 and as a common order is passed by the then existing Central Excise & Gold (Control) Appellate Tribunal in disposing of four appeals, all these four references are being disposed of by this common order and for the sake of convenience the documents and pleadings available in C.E.R. No. 8/2003 is being referred to in this order. The questions of law formulated in the cases read as under:--

"1. Whether the Tribunal is justified in negating the contention raised by the assessee that in the obtaining factual matrix the Superintendent of Central Excise could have issued the notice to show cause in relation to excess availability of Modvat credit by the assessee or it was either the Assistant Commissioner or the Collector Central Excise in the case at hand?

2. Whether the Tribunal is justified in arriving at the conclusion that the department's circulars have no legal sanctity as they have not been issued in accordance with Rule 33 of the Rules?"

2. The facts in nutshell relevant for deciding the question involved goes to show

that the applicant/company was issued with show cause notices by the Superintendent, Central Excise claiming payment of duty after disallowing the Modvat credit granted to them for various periods.

3. Four show cause notices were issued in the following manner, particulars of which are as under:--

All these notices were issued by the Superintendent, Central Excise and as objections with regard to the same were rejected, appeals were filed, which were also dismissed by the Tribunal, hence these references.

4. Having appreciated facts of the case we find that two questions of law arises for consideration as has been detailed above.

5. The first question is as to whether the Tribunal was justified in holding that the department's circulars issued giving powers to issue show cause notice under Rule 57-I of the Central Excise Rules, 1944 (hereinafter referred to as "Rules" for short) to the Assistant Collector and Collector can be given effect to the same being executive and advisory in nature and not issued under the provision of Rule 233 (wrongly mentioned as 33 in the question of law framed) of the Rules. It would be seen that initially the circular was issued by the Department on 12-5-1987 designating "proper officers" entitled to take action under the Rules. In the Annexure to this circular the Superintendent Central Excise was indicated as the "proper officer" for issuing notice and taking action under Rule 57-I. However subsequently another administrative circular was issued on 15-12-1987 in the matter of issuing show cause notice under Rule 57-I(i) for disallowing Modvat credit wrongly availed of and in this circular it was indicated that if the Modvat credit is wrongly availed then the show cause notice invoking the penal provision has to be issued and decided by the Collector or the Additional Collector. Placing reliance on this circular dated 15-12-1987 the assessee argues that the show cause notice issued by the Superintendent was unsustainable and void ab initio, whereas it is the case of the Revenue that once a circular is issued under Rule 233 on 12-5-1987 authorizing the Superintendent, Central Excise to take action the finding of the Tribunal is proper and the question be answered in favour of the Revenue.

6. We find that after the circular was issued on 12-5-1987 exercising the powers under Rule 233 certain judgments were rendered in the matter by various courts including the Supreme Court and therefore the administrative clarificatory circular dated 15-12-1987 has been issued. Records indicate that in a case of the same assessee, the same Tribunal in, *Bharat Heavy Electricals Ltd. v. Commissioner of Central Excise, Indore*, reported in 2001 (127) E.L.T. 190 (Tri.-Delhi) has held that the show cause notice issued by the Superintendent is void ab initio and similar show cause notice issued by the Superintendent has been quashed and based on the subsequent circular issued on 15-12-1987 it has been held that it is only the Collector who can issue show cause notice.

7. Be it as it may, we may now proceed to consider as to what is the binding

effect of the circular issued as has been done in the present case. The question of a departmental circulars" effect and its binding nature on the officers of the Department has been considered in various cases and in the case of M/s. Ranadey Micronutrients etc. Vs. Collector of Central Excise, it has been held by Hon"ble Supreme Court that the circulars are issued by the Board under Section 37B and merely because the circular does not recite so, it does not mean that they do not bind the departmental officers. It has also been held by the Supreme Court in the aforesaid case that it is the Central Board, which is statutorily entrusted with the task of classifying excisable goods uniformly and the circulars issued by the Board are binding on the departmental officers. It is held in this case that even if the circular is found to be inconsistent to the statutory provision, for the purpose of maintaining consistency, uniformity in imposition of duty and discipline in the department these circulars should be followed by the departmental officers. Thereafter this judgment has been followed by the Supreme Court again in the case of Collector of Central Excise, Patna Vs. Usha Martin Industries, etc., and it has been held that the circular issued by the Board are binding on the departmental authorities. Similar is the view taken by the Supreme Court in the case of The Paper Products Ltd. Vs. Commissioner of Central Excise, .

8. In the meanwhile, even though in the case of Collector of Central Excise, Vadodra Vs. Dhiren Chemical Industries, a Constitutional Bench of Supreme Court held that the circular issued by the Board despite decision of the Courts to the contrary are binding on the department, another Constitutional Bench of the Supreme Court reconsidered the matter and in the case of Commissioner of Central Excise, Bolpur Vs. Ratan Melting and Wire Industries, held that when the Supreme Court or the High Court declares the law on a question that will be binding on the Department, and if a circular is issued which is not in conformity or is contrary to the law laid down by the Supreme Court or High Court the decision of the court shall be binding on the department and not the circular. If the judgments cited by the learned counsel for parties in this regard along with the written submission are taken note of it can be safely construed by us that when a circular is issued by the Board it is binding on the officers of the department and they cannot refuse to follow the same on the garb of same being an administrative circular, advisory in nature and not binding in fact the law is that such circulars are binding on the officers of the department, even if not issued under the statutory provision, in all the cases cited before us various aspects of the matter have been taken note of and principles of law which can be derived from these judgments indicates that for the purpose of maintaining discipline and consistency in the department and the Board being the highest statutory authority in the department, any circular issued by the Board has to be followed by the officers until and unless it is shown that the circular is contrary to any law laid down by the Supreme Court or any judgment of the High Court with regard to the issue covered by the circular.

9. Accordingly the officers of the department cannot in violation to the circular

proceed to take action by saying that the circular is only advisory in nature or that it is not a circular issued under the statutory rule i.e. Rule 233. Once we find that the legal position in this regard is well settled, then we have to hold that in the light of the circular issued by the Board clarifying the position with regard to who is the "proper officer" as defined under Section 2(b) of the Act, the departmental authorities are duty bound to follow the circular. Even though in the statutory circular issued by the department on 12-5-1987 initially, the Superintendent, Central Excise was declared as the proper officer to take action under Rule 57-I, but this circular has further been clarified on 8-9-1987 and finally on 15-12-1987 and with regard to taking action and for issuing of notice under Rule 57-I(i), after considering the provision of law and the judgment of Supreme Court in the case of *Pahwa Chemicals Pvt. Ltd. Vs. The Commissioner of Central Excise, New Delhi*, it has to be held that for the purpose of issuing show cause notice and taking action under Rule 57-I, it is the Assistant Collector and Collector who are authorized to take action and in the light of the Circular dated 15-12-1987, we find that the order passed by the Tribunal is unsustainable. It is not known as to how the Tribunal could take a different view from the one taken by it in an appeal filed by the same assessee on 17-10-2000 in the case of *Bharat Heavy Electricals Ltd. v. Commissioner of Central Excise, Indore* (supra). Once it is found that the show cause notice is issued by an unauthorized person, we have to hold that the entire action initiated is unsustainable, void ab initio and stands vitiated. Accordingly, we answer the question formulated to say that in the obtaining factual matrix, the Superintendent could not issue the show cause notice in relation to the recovery of Modvat credit after disallowing it and it was only the Assistant Collector or Collector who could issue the notice. Accordingly the first question is answered thus.

10. As far as second question is concerned, we hold that when a departmental circular is issued by the Board, it would be in accordance to the power available to the Board under Section 37B and until and unless it is not shown that the circular is contrary to any law laid down by the Supreme Court or judgment of High Court, the same shall be binding on all the officers of the Excise Department and only on the ground that the circular is not issued under Rule 233 of the Rules, the officer cannot refuse to follow the circular by saying that it is only advisory in nature. All the circulars issued by the Board in its administrative and executive jurisdiction are binding on the officers of the Board until and unless it can be shown that they are contrary to any law laid down by Supreme Court or High Court with regard to the subject matter of the circular.

11. In view of aforesaid answer given to the substantial question formulated, we allow all the four appeals and hold that the entire action initiated vide issuance of show cause notice details of which are given as under:--

by the Superintendent of Central Excise is void ab initio and are accordingly quashed.

Accordingly, all the proceedings based on the aforesaid proceedings are quashed. The reference stands allowed and disposed of accordingly.