(1991) 12 MAD CK 0063

In the Madras High Court

Case No : Appeal No''s. 1471 to 1473 of 1991

Cethar Vessels Ltd. APPELLANT

Vs

Assistant Collector of Central Excise and Others RESPONDENT

Date of Decision : 16-12-1991

Acts Referred:

Central Excises and Salt Act, 1944 — Section 11A, 35, 37, 37B, 5A
Constitution of India, 1950 — Article 14, 19, 265

Citation : (1993) 41 ECC 199

Hon'ble Judges : S. Nainar Sundaram, Acting C.J.;Somasundaram, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Somasundaram, J.—The petitioner in W.P. Nos. 15015 to 15017 of 1991 respectively are the appellants in these writ appeals. The respondents in the writ petitions are the respondents in the writ appeals. For the sake of convenience, the parties are referred to as per the nomenclature in the writ petitions.

2. The petitioner in all these three writ petitions is one and the same viz., Cethar Vessels Ltd., represented by its Joint Managing Director, Mr. R.T. Arasu. The petitioner is a manufacturer of boiler components and has entered into contracts with purchasers of boilers at site. One type of such boilers is Cethar Fluidix Boiler, which uses fluid bed combustion system for converting water into steam. The petitioner has classified the same in the year 1985-86 claiming exemption from excise duty under Notification No. 120 of 1981 dated 15.06.1981 as amended by Notification No. 209 of 1982 dated 9.8.1982. Subsequently it claimed exemption under another Notification No. 205 of 1988 dated 25.05.1988. On investigation it was found that the petitioner was not eligible to avail exemption under notification No. 205 of 1988, because, it cleared only boiler components and that the boiler after erection is capable of being fired both by agricultural waste as also by conventional fuel like coal. In the above circumstances, a show cause notice dated 20.3.1981 was issued by the first

respondent to the petitioner calling upon the petitioner to show cause to the second respondent as to why (1) the duty of Rs. 1,65,25,983.97 should not be demanded from the petitioner by invoking proviso to Section 11-A(1) of the Central Excise Act, 1944, hereinafter called the Act, read with Rule 9(2) of the Central Excise Rules, 1944; (2) a penalty should not be imposed on them under Rule 173-Q(1)(a), (1)(bbb) and (1)(d) of the Central Excise Rules, 1944. The petitioner submitted its reply to the show cause notice on 28.08.1991 and a notice of personal hearing on 30.10.1991 was served on the petitioner on 7.10.1991. At this stage the petitioner has filed the three writ petitions referred to above.

3. The prayer in the writ petition No. 15017 of 1991 is to issue a writ of declaration declaring that Section 37-B of the Act, insofar as empowering the Central Board of Excise and Customs with powers to legislate on classification of excisable goods is ultra vires of Sections 11-A and 35 of the Act and Rule 173-B of the Central Excise Rules, 1944, and is liable to be struck down as violative of Articles 14, 19(1)(g) and 265 of the Constitution of India.

4. The prayer in the writ petition No. 15016 of 1991 is to issue a writ of mandamus directing the respondents 1 and 2 to implement and enforce Circular No. F.13/36/84 CX-1 dated 14.04.1986 issued by the third respondent for the period from 14.04.1986 till 25.09.1991 in the matter of clearance of Fluidised Bed Combustion Boilers and confer benefit of Notification 120/81 dated 15.05.1981 and Notification 205/88 dated 25.05.1988 issued under Rule 8(1) of Central Excise Rules, 1944/Section 5-A of Central Excise & Salt Act, 1944 insofar as the petitioners are concerned.

5. The petitioner filed the writ petition No. 15015 of 1991 praying for the issue of a writ of certiorari for quashing the Circular No. 13/90 CX 4 dated 8.6.1990 of the third respondent issued u/s 37-B of the Act.

6. Before the learned single Judge the learned Counsel for the petitioner raised the following three contentions.

(i) Inasmuch as Section 37-B of the Act confers on the Central Board of Excise and Customs the power to issue binding orders, circulars and directions on classification of excisable goods, interfering with the quasi-judicial functions of the adjudicating Authorities under the Act, the section is bad and has to be struck down.

(ii) The petitioner has been enjoying the benefit of the Notification No. 120 of 1981 dated 15.05.1981 and Notification No. 205 of 1988 dated 25.05.1988 so far and the respondents are estopped from denying the benefits of the said notifications and, therefore, the respondents must be directed to confer the benefit of the notifications referred to above, so far as the petitioner is concerned.

(iii) The Circular No. 13/90 CX 4 dated 8.6.1990 issued by the third respondent u/s 37-B of the Act is liable to be quashed, as the said circular was issued to nullify the effect of notifications 120/81 Central Excise dated 15.5.1981 as amended by notification 209/82 Central Excise dated 9.8.1982.

7. The learned single Judge, after examining Section 37-B of the Act, the relevant notifications and circulars, upheld the Constitutional validity of Section 37-B of the Act and further observed as follows with regard to the other contentions raised by the learned Counsel for the petitioner.

Taking the view that Section 37-B of the Central Excise and Salt Act, 1944 is valid and need not be struck down as violative of Articles 14 and 19 of the Constitution and that the petitioner can raise all the objections before the authorities including the question of promissory estoppel with regard to the period 14.04.1986 to 25.09.1991, these writ petitions stand dismissed.

Consequently by a common order the learned single Judge dismissed all the three writ petitions. Aggrieved by the common order of the learned single Judge dismissing the writ petitions the petitioners have preferred the above writ appeals.

8. Before us Mr. C. Natarajan, learned Counsel for the petitioner reiterated the same contentions which he urged before the learned single Judge. In the first place, Mr. C. Natarajan the learned Counsel for the petitioner contended that Section 37-B of the Act insofar as it confers on the Central Board of Excise and Customs the power to issue binding orders on classification of excisable goods interfering with the quasi-judicial functions of the Authorities under the Act is invalid and is liable to be struck down. For examining this contention of the learned Counsel for the petitioner it is necessary to refer to Section 37-B of the Act, which reads as follows:

INSTRUCTIONS TO CENTRAL EXCISE OFFICERS: The Central Board of Excise and Customs constituted under the Central Boards of Revenue Act, 1963 (54 of 1963), may, if it considers it necessary or expedient so to do for the purpose of uniformity in the classification of excisable goods or with respect to levy of duties of excise on such goods, issue such orders, instructions and directions to the Central Excise Officers as it may deem fit, and such officers and all others persons employed in the execution of this Act shall observe and follow such orders, instructions and directions of the said Board.

Provided that no such orders, instructions or directions shall be issued--

(a) so as to require any Central Excise Officer to make a particular assessment or to dispose of a particular case in a particular manner;

(b) so as to interfere with the discretion of the Collector of Central Excise (Appeals) in the exercise of his appellate functions.

A reading of Section 37-B of the Act shows that for the purpose of uniformity in the classification of excisable goods or with respect to levy of duties of excise on such goods, the said Section empowers the Central Board of Excise and Customs to issue orders, instructions and directions to the Central Excise Officers as it may deem fit. Such Officers and all other persons employed in the carrying out of the purpose of the Act are bound to observe and follow such orders, instructions and directions of the Board. However, the Board is not empowered to issue orders, instructions or directions as to require any Central Excise Officer to make (a particular assessment or to dispose of) a particular case in a particular manner or to interfere with the discretion of the Collector of Central Excise (Appeals) in the exercise of his appellate, functions. The proviso to Section 37-B is intended to maintain the independence of the adjudicating Authorities as well as the Appellate Authorities in exercise of their quasi-judicial functions. The proviso to Section 37-B contains sufficient safeguards protecting the independence of the adjudicating Authorities and the Appellate Authorities under the Act and in view of the proviso to Section 37-B of the Act, the orders, instructions and directions issued by the Central Board of Excise and Customs in exercise of the power conferred u/s 37-B, touching the quasi-judicial matters, are not binding on the adjudicating Authorities and the Appellate Authorities under the Act. In other words, the power exercised by the adjudicating Authorities and the Appellate Authorities under the Act is of a quasi-judicial nature and this power cannot be controlled by the directions, orders and instructions issued by the Central Board of Excise and Customs in exercise of the power conferred by Section 37-B of the Act. Therefore, it has to be held that the circulars, orders, instructions and directions issued by the Central Board of Excise and Customs u/s 37-B cannot interfere with the quasi-judicial functions of the adjudicating Authorities and the Appellate Authorities under the Act. Further it cannot be said that Section 37-B of the Act is invalid and ultra vires of the Constitution of India or the other provisions of the Act in view of the position that the orders, instructions and directions issued by the Central Board of Excise and Customs are not binding on the quasi-judicial functions of the Authorities under the Act, for the purpose of applying the statutory provisions of the Act. This view of ours derives support from the Division Bench judgment of the Gujarat High Court in Genest Engineer Pvt. Ltd. v. Union of India [1990] 29 ECC 382 . In Genest Engineers Pvt. Ltd. v. Union of India [1990] 29 ECC 382 the constitutional validity of Section 37-B of the Act was challenged on similar grounds. The Division Bench of the Gujarat High Court, while upholding the constitutional validity of Section 37-B of the Act, after referring to the principles laid down by the Supreme Court in Orient Paper Mills Ltd. v. Union of India 1978 ELT J 345 held as follows:

Considering the principle enunciated in this judgment and also Section 37-B, which we have '' extracted above we are of the definite view that this Section does not offend any of the provisions of the Constitution and there is absolutely no direction to any quasi-judicial authority to behave in a particular manner as directed by the Board. The general instructions given by the Board will bind such officers, only when they act in their administrative capacity. We are definite that this Section does not offend any of the provisions of the Constitution and as such, it is ultra vires the Constitution.

In these circumstances the learned single Judge rightly held that Section 37-B of the Act is valid and is, not liable to be struck down as violative of Articles 14 and 19 of the Constitution of India.

9. In view of our conclusion that the circulars issued by the Central Board of Excise and Customs in exercise of the power conferred by Section 37-B of the Act are not binding on the Authorities exercising quasi-judicial functions under the Act and such circulars cannot interfere with the powers of the quasi-judicial Authorities, in applying the provisions of the Act, the circular No. 13/90 CX 4 dated 8-6-1990 need not be quashed on the alleged ground that the said circular has nullified the effect of notification 120/81 Central Excise dated 15-5-1981 as amended by notification 209/82 Central Excise dated 9-8-1982. Therefore, the third contention of the petitioner that the circular No. 13/90 dated 8-6-1990 is liable to be quashed has to be rejected as devoid of merits. Equally so, neither the verbalism nor the implications of the impugned circular offends the proviso to Section 37-B of the Act as the learned Counsel for the petitioner would contend.

10. Then we are left with the second contention of the learned Counsel for the petitioner that the petitioner has been enjoying the benefit of notification No. 120/81 dated 15-5-1981 as amended by notification No. 209/82 dated 9-8-1982 so far and that the respondents are estopped from denying the benefits of the said notifications and the respondents must be directed to confer the benefit of those notifications so far as the petitioner is concerned. As already pointed out, on 20-3-1991, the first respondent has issued a show cause notice to the petitioner calling upon the petitioner to show cause to the second respondent as to why the duty of Rs. 1,65,25,983-97 should not be demanded from the petitioner by invoking the proviso to Section 11-A(1) of the Act read with Rule 9(2) of the Central Excise Rules, 1944. The petitioner has also submitted its reply to the show cause notice on 28-8-1991 and the matter is now pending before the second respondent for adjudication. Under these circumstances, as rightly pointed out by the learned single Judge it is open to the petitioner to raise the contention before the second respondent that it is entitled to the benefit of notification No. 120/81 Central Excise dated 15-5-1981 as amended by notification No. 209/82 Central Excise dated 9-8-1982 and that the circular No. 18/90 CX 4 dated 8-6-1990 is not binding on the second respondent in disposing of the matter and, therefore, it is not necessary to issue a writ of mandamus directing the respondents to implement the notifications mentioned above so far as the petitioner is concerned. As and when such a contention is raised before the second respondent, who is the adjudicating Authority in this case, it is needless to say that the second respondent is bound to consider the same and dispose of the matter on merits and according to law. Therefore, the learned single Judge is correct in refusing to issue a writ of mandamus directing the respondents to implement the notification No. 120/81 dated 15-5-1982 as amended by notification No. 209/82 Central Excise dated 9-8-1982.

11. Under these circumstances the learned single Judge by a common order rightly dismissed all the writ petitions. There is no infirmity in the order of the learned single Judge warranting interference in these writ appeals and, therefore, the writ appeals are liable to be dismissed. Accordingly, the writ appeals are dismissed.

