

(1985) 05 MAD CK 0001
In the Madras High Court
Case No : R.C. No. 12 of 1984

Collector of Central Excise, Madras	Vs	APPELLANT
Chennai Bottling Company, Madras		RESPONDENT

Date of Decision : 03-05-1985

Acts Referred:

Central Excises and Salt Act, 1944 — Section 11, 11B, 35G, 35P

Citation : (1986) 8 ECC 70 : (1986) 24 ELT 3

Hon'ble Judges : Ramanujam, J;M.A. Sathar Sayeed, J

Bench : Division Bench

Advocate : T. Somasundaram, Addl. Central Government Standing, for the Appellant; K. Jayachandran, for the Respondent

Judgement

Ramanujam, J.—This is a case referred to this Court by the Customs, Excise and Gold (Control) Appellate Tribunal, New Delhi, u/s 35G of

the Central Excises and Salt Act, 1944 (hereinafter referred to as the Act) referring the following two questions :-

1. Whether, in the facts and circumstances of the case, the letter dated 2-2-1973 and 14-3-1973, can be construed to be a protest in terms of

Section 11B of the Central Excise and Salt Act 1944 ?

2. Whether, in the facts and circumstances of the case, the protest, if any, related to the question of valuation only or could cover rate of duty as

well ?

at the instance of the Collector of Central Excise, Madras, as arising out of its order dated 9-8-1983.

2. The facts which gave rise to the above reference are as follows :

The respondent herein is a manufacturer of aerated waters assessable to duty at all material times under Item No. 1-D of the First Schedule to the

Act, 20% ad valorem during the financial year 1973-74 and 20% ad valorem plus 50% thereof as auxiliary excise duty during financial years

1974-75 and 1975-76. On or about 18-6-1977, the respondent filed a claim for refund of Rs 10,77,987.70, claimed to be the amount of Central

Excise duty paid in excess during the period between 18-3-1976 and 16-6-1977. In the said refund application, the respondent and contended

that aerated waters is classifiable under Item 1-D(2) of the First Schedule to the Act, rather than under 1-D(1)(a) thereof. Agreeing with the

aforesaid contention of the respondent, it was ultimately held by the Government of India, on 26th September 1980, in revision, that the

respondent was entitled to the refund of duty paid in excess upto a period of one year prior to the date of filing the application for refund, while

rejecting the claim for the anterior period. Accordingly, the refund came to be made in respect of the excess payment for the period of one year

prior to the date of the claim for refund. Thereafter, the respondent applied on 23-12-1980, for refund of Rs 13,96,582.23 p. for the period

between 5-2-1973 and 17-3-1976. In that application for refund, the respondent relied upon the order of the Government of India, dated 26-9-

1980 ordering refund and submitted that the respondent was entitled to refund pursuant to the said Government order, since the payment of duty in

question was under protest. The said claim for refund of the excess payment for the period between 5-2-1973 and 17-3-1976 was rejected by

the Assistant Collector on the ground that the claim related to a period when the old Section 11 of the Central Excise Act was in operation under

which refund of duties erroneously paid was barred unless the claim was preferred within three months from the date of payment of such duty and

that there was nothing in the said Act to save the claim from the aforesaid bar of limitation on the ground of payment under protest. Against the said

order of the Assistant Collector, an appeal was preferred to the Collector of Central Excise and the said appeal was allowed on the ground that

since the application for refund was made on 23-12-1980, after Section 11-B of the Act was introduced on 17-11-1980 itself Section 11-B that

will be applicable and not the old Section 11 as has been held by the Assistant Collector. But, in terms of Section 11-B, the claim for refund was

not barred by limitation, when it is paid under protest. Thereafter, the Government of India issued a show cause notice dated 18-9-1982 u/s 16(2)

[Section 36(2)] of the Act, as it stood then, requiring the respondent to show cause as to why the order of the Appellate Collector of Central

Excise should not be set aside and the order of the Assistant Collector of Central Excise be restored. While that suo motu aforesaid proceedings

before the Government of India was pending, Section 35-P of the Act came to be introduced and as a result of that provision, the said Revisional

Proceedings stood transferred to the Customs, Excise and Gold (Control) Appellate Tribunal, and the said Tribunal after hearing the counsel on

either said, quashed the show cause notice as unsustainable in law and upheld the order of the Appellate Collector.

3. At the instance of the Collector of Central Excise, Madras, a reference application was filed requiring the Tribunal to refer certain questions as

arising out of its order and the Tribunal has, however, chosen to refer only the two questions set out above.

4. It is significant to note that the questions referred to this Court proceed on the basis that the old Section 11 of the Act is not applicable and only

Section 11-B of the Act is applicable to the facts of this case. Therefore, it is not possible to go into the question as to whether Section 11 of the

Act (which did not provide any saving clause in case of payment under protest) is applicable to the case or not. When the matter was taken up for

hearing, the learned counsel for the respondent submitted that the questions referred to this Court are questions of fact and that as Section 35-G of

the Act contemplates a reference only on questions of law, the reference itself is incompetent. This is countered by the learned counsel appearing

for the Revenue, on the ground that the question whether the payment was under protest depends upon the construction of certain letters

emanating from the respondent and that it is well established that construction of a document is a question of law, and therefore, the reference

should be held to be competent. The preliminary question that has to be considered is as to whether the questions referred to this Court are

questions of law as contended by the Revenue or questions of fact as contended by the respondents.

5. It has been held by the Supreme Court in *I.C.I. (India) Private Ltd. Vs. The Commissioner of Income Tax, West Bengal, and Commercial Art*

Press Vs. Commissioner of Income Tax, that interpretation of a document will amount to a question of law. The learned counsel for the

respondent would, however, say that the document whose interpretation are involved should be a document in a nature of document of title and

interpretation of a mere letter or correspondence between the parties will not amount to a question of law. However, we do not see how we can

make a distinction between a document and a letter. Even letters or communications that passed between the parties can be construed as

documents and the dispute as to interpretation and the question arising therefrom such a dispute can be treated as question of law. It is not,

therefore, possible for us to reject the reference as incompetent u/s 35-G of the Act.

6. Then we proceed to deal with the merits of the questions referred to us. As already stated, the other points of dispute which arose before the

Tribunal have not been referred to us and we have, therefore, to proceed on the basis that there is no dispute as to classification and that the article

manufactured falls under Tariff 1-D(1)(a) alone and not under 1-D(2), on the basis of which the excise duty had been collected from the petitioner.

Similarly, the dispute as to whether old Section 11 of the Act applies or not, we have to proceed on the basis of the Tribunal's finding that Section

11-B of the Act alone applies to the facts of this case. It is only on that basis, we proceed to consider the first question which raises the question as

to whether there is a payment under protest in terms of Section 11-B of the Act and whether the letters dated 2-2-1973 and 14-3-1973 evidence

such payment said to have been made under protest. After deciding as to whether there was a protest while making the payment, we have to deal

with the second question as to whether such protest related to the question of valuation only or it covered the rate of duty as such. To find out as to

whether the payment was made under protest, the following admitted facts are relevant. The claim for refund made in the refund application for Rs

3,96,582.23 p. dated 23-12-1980 was in relation to the period between 6-2-1973 and 17-3-1976. On 2-2-1973, the respondent has sent a

letter to the Superintendent of Central Excise to the following effect :

With reference to your approval of our Price List dated 2nd February 1973, we like to inform you that we have included the freight charges in the

price list and are paying the duty under protest, reserving our rights to go on appeal.

Later, on 14-3-1973, another letter has been addressed by the respondent to the Superintendent of Central Excise, to the following effect :

We refer to our letter of 2nd February 1973. Further, to the discussion we had with you and as suggested by you, we are affixing a separate seal

for the duty paid under protest, reserving our rights or claim for the excess amount of duty paid by us in any manner.

We have to see that under what circumstances, the above two letters came to be written by the respondent.

7. According to the respondent, it came to know from the filing of a writ petition before Bombay High Court and therefore, it chose to make the

payment towards the excise duty under protest. However, we find that the original case put forward by the respondent was that it came to know

about the mistake from the judgment of the Bombay High Court rendered on 18-8-1977 and not before. Therefore, in February and March, 1973

when the said two letters had been sent by the respondent to the Superintendent of Central Excise, they could not have been aware of the mistake

in making the excess payment. As a matter of fact, the other circumstances indicate that the protest referred to in the two letters was in respect of

some other matter and not in respect of the excess duty paid. In the Revision Application filed before the Government of India, wherein they had

succeeded in getting a refund for a period of one year prior to the date of the filing of the claim petition, the respondent has stated as follows :

4.2. We had admitted that payment of duty earlier on the basis of Classification List was due to a mistake of law in interpreting the Tariff and that

the claim was made within the period of limitation. The declaration in the Classification List was made in accordance with direction and advice of

the Central Excise Officers and with a view to clear the goods without any hold-up of manufacture and/or delivery of consumption.

4.3. We did not contend, in the beginning, that the flavoured material was only an essence and not a concentrate. When we become aware of the

distinction and the effect on classification brought out in the Bombay High Court Judgment, we hastened to correct the inadvertance and/or

misconstruction.

The above extract clearly indicates that the petitioners became aware of the mistake only after the date of the Judgment of the Bombay High Court

in 1977. Before the date of the Judgment of the Bombay High Court, the respondent could not have been aware of the alleged mistake and

therefore they could not have raised any protest in 1973, regarding the classification. In the written arguments given by the respondent before the

Appellate Collector of Central Excise, Madras, the following passages occur :

1.2. The claim for re-assessment was based on the Bombay High Court Judgment, in what is now popularly known as Dukes case. The judgment

was delivered on 8/11th October 1976, and as soon as the appellants became aware of the decision that Aerated waters made using flavouring

essences will not attract levy under Tariff Item 1-D(1), they approached the Assistant Collector of Central Excise asking for the re-classification of

the goods and grant of consequential refund of duty.

4.3. This difference in describing the raw material i.e., the flavouring essence has been made by all manufacturers who use flavouring essence and

not blended flavouring essence in the manufacture of aerated waters. After the judicial pronouncement in Dukes case, that Essences are distinct

from Concentrates, the appellants became aware of the inadvertence and misconstruction in the description of their goods and approached the

Central Excise Officer for re-classification of the goods and refund of duty not due.

These passages also indicate that the respondent could not have raised any protest as regards the classification. Further, their price list submitted

for approval by the respondent to the Central Excise authority in the year 1973, which has been enclosed along with the letter dated 2-2-1973

indicates that the assessee could have raised protest only as regards the inclusion of freight charges in the sale price. That price list contains the

following writing in manuscript :

The above prices are inclusive of freight charges,

which indicates that while the respondent sought exclusion of the freight charges as part of the price, the Department wanted the freight charges

also to be included as part of the price. Even the order of the Appellate Collector dated 5-11-1973, shows that the dispute between the authorities

and the respondent was only regarding the freight or handling charges, which the assessee wanted to have excluded. Therefore, the protest

referred to in the first letter dated 2-2-1973, can only relate to the includibility of the freight or handling charges in the price and the said protest has

not relevance to the classification.

8. The second letter dated 14th March 1973 refers to the earlier letter dated 2nd February 1973, and says that they are paying the duty under

protest and reserving their right to claim refund of the excess payment of duty paid by them in any manner. According to the learned counsel, for

the respondent, the protest referred to in the letter dated 14th March 1973, will relate to classification in view of the reference therein to "the

amount of duty paid in any manner". However, we are inclined to consider the expression "in any manner" as not comprehending a dispute

regarding the classification. It can be construed only as meaning that whatever be the mode in payment of duty, they are making a protest in

relation to the inclusion of freight or handling charges. It is not in dispute that the Act and Rules contemplate various modes of payments of excise

duty and the expression "paid in any manner" occurring in that letter can only be interpreted as meaning the manner in which the excise duty is paid.

If ultimately the freight charges or handling charges are not includible, they will be entitled to claim refund. In this case, the Tribunal while construing

the first letter dated 2-2-1973, has come to the conclusion that the protest referred to therein applies only to the inclusion of the freight or handling

charges in the assessable value and it does not relate to the classification. However, the Tribunal has taken the view that the second letter dated

14-3-1973 is comprehensive enough to include a protest in the matter of classification. But, we find that such a conclusion has been reached by the

Tribunal by an erroneous interpretation of the letter dated 14-3-1973. After referring to the argument of the learned counsel for the respondent

regarding the interpretation of the letter dated 14-3-1973, the Tribunal straightaway proceeded to say -

We have heard both the parties. We agree with Shri Sarvanai that letter dated 14-3-1973, sent by the respondent to the Excise authorities was

clearly to safeguard their interest by way of a protest with regard to the classification aspect in this case. The language of the letter and its contents

are absolutely clear and do not admit of any ambiguity with regard to their legal content or meaning.

We are not in a position to agree with the Tribunal on this aspect of the matter. For one thing, there is no discussion by the Tribunal as to how it

considered the letter dated 14-3-1973, as including a protest with regard to the classification. On the date when the letter dated 14-3-1973 was sent by the respondent to the Superintendent of Central Excise, both parties proceeded on the basis that the goods manufactured came under Tariff Item 1-D(i)(a) and it is only after the Bombay High Court held that it will come under Tariff Item 1-D(2) and therefore chargeable at 10% ad valorem, the respondent would have been aware of the mistaken classification. In the year 1973, the respondent could not have raised a protest in the classification as at that time, the classification was not the subject matter in issue between the parties. The only matter in issue was as regards the includibility of the freight or handling charges in the assessable value. As a matter of fact, the respondent had filed an appeal as regards the inclusion of the freight or handling charges and when he failed before the authority he took the matter in writ petition before this Court which was however dismissed. It clearly indicates that the protest in the two letters can only be for the inclusion of freight and handling charges. If really these two letters contained protest in regard to classification, the respondent would have continued to make such protest in the later years 1974, 1975 and 1976. When the respondent did not make any such protest and admittedly the respondent came forward with a claim for refund only in the year 1977, when he become aware of the Bombay High Court judgment holding that the classification made by the respondent was erroneous. The non-raising of a protest in the subsequent years would indicate that the protest made in the two letters was in respect of the freight charges and that question having been concluded and decided by this court later, the protest was not repeated in the subsequent years. Thus, taking into account the two letters referred to above, and taking them along with the assessee's conduct and the possibilities of the case, we have to hold that the Tribunal is in error in taking these two documents as containing a protest as against the classification. Further, we are clearly of the view that a protest regarding the inclusion of the freight charges cannot be treated as equivalent to a protest in regard to classification. In this view of the matter, we have to answer question No. 1 in the negative and against the assessee. Similarly, question No. 1, 2 is answered that the protest relates to the question of valuation and not the rate of duty or classification.

9. In view of the answers given by us, the Tribunal is directed to finally dispose of the appeal in the light of our judgment. There will be no order as to costs.