

(1996) 10 SC CK 0012

In the Supreme Court Of India

Case No : Civil Appeal Nos. 288 of 1987, 517/88, 2986/87 and 3885/90

Collector of Central Excise, Pune

APPELLANT

Vs

Maharashtra Scooters Ltd.

RESPONDENT

Date of Decision : 03-10-1996

Acts Referred:

Central Excises and Salt Act, 1944 — Section 11A, 35, 35A, 36

Citation : (1997) 68 ECR 32 : (1996) 88 ELT 307 : (1997) 10 SCC 481

Hon'ble Judges : A. M. Ahmadii, C.J.; K. S. Paripoornan, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

A.M. Ahmadi, CJI. and K.S. Paripoornan, J.—In exercise of power conferred on the Central Government by Sub-section (2) of Section 86 of the Central Excises and Salt Act, 1944 (hereinafter called the "Act"), a show cause notice dated 1-10-1981 was issued to the respondent-assessee as the Central Government had, on the examination of the records of the case, tentatively, taken the view that the order in appeal was not proper, legal and correct. According to the Central Government in the matter of calculation of duty two Notification Nos. 21/77, dated 26-2-1977 and 198/96, dated 16-6-1976 came into play but the question was as to which had to be applied first for the purpose of working out the excise duty. The respondents, manufacturers of scooters had availed of the proforma credit of duty by them on I.C. Engines used in the manufacture of scooter. They have further availed of 25% reduction in excise duty under Notification No. 198/76 dated 16-6-1976. The net duty liability was worked out on the basis of assessable value multiplied by 75% of the effective rate of duty. The duty amount arrived at was adjusted through the proforma credit. However, the Assistant Collector, Central Excise, Sangali held that the amount of proforma credit equivalent to the duty on I.C. Engines had to be deducted first from the duty leviable on scooters. Only, thereafter, would the assessee be entitled for reduction in duty under Notification No. 198/76. The Collector of Central Excise

(Appeals), Bombay, after considering the records and submissions made before it, setting aside the order of the Assistant Collector held that the assessee had rightly applied the Notification No. 198/76 first in point of time and thereafter, the Notification No. 21/77. The Central Government was of the tentative view that this procedure adopted for working of the Excise Duty was not correct. The tentative view of the Central Government is stated thus :

It would, therefore, appear that first the duty leviable on the Motor Vehicle had to be determined by taking into account Notification 21/77 and thereafter the concession under Notification No. 198/76 is to be worked out. It would appear that this position in law would not be altered by the fact that the assessee was following the Rule 56A procedure for Availing the benefit of Notification No. 21/77. The Appellate Collector, therefore, appears to have added in allowing the appeal and holding that there was no question of first deducting the amount of proforma credit and then working out the duty payable by applying 25% deduction.

On this basis the Central Government invoked the power conferred by Section 36(2) of the Act.

2. Section 36(1) empowers the Central Government of receipt of an application from any person aggrieved by any decision or order passed under the Act or the Rules made thereunder by any Central Excise Officer or the Central Board of Excise and Customs and from, which no appeal lies to reverse or modify such decision or order. Sub-section (2) which has three provisions thus reads as under :

Sub-section (2) of Section 36 :

(2) 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 u/s 35 or Section 35A 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 defence:

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.

3. The question is whether the second proviso or the third proviso comes into play in the backdrop of facts mentioned hereinbefore. If the second proviso comes into play the period of limitation prescribed thereunder is one year from the date of decision or order. If the third proviso comes into play the period of limitation is the one specified in Section 11A i.e. six months from the relevant date. There is no dispute before us that if the third proviso applies the action initiated u/s 36(2) is beyond the period of limitation. However, the Revenue contends that the matter fall under the second proviso, the assessee contends to the contrary and invokes the third proviso. The limited question which we are called upon to consider is whether the assessee is right in contending that the third proviso is attracted and, therefore, the initiation to exercise of Revisional Jurisdiction u/s 36(2) of the Act is barred by limitation.

4. The contention urged by the assessee found favour with the Customs, Excise and Gold (Control) Appellate Tribunal, New Delhi. It held that it was by now well settled that such show cause notices have to be issued within the period of limitation prescribed by the third proviso to Section 36(2), i.e. within six months from the relevant date. Of course there is no discussion regarding the applicability of the third proviso presumably because the Tribunal had consistently taken this view over a period of time.

5. This provision has an historical background. Under Rule 10 of the Central Excise Rules, 1944, when duties or charges were short levied through inadvertence, error, collusion or misconstruction on the part of an officer or through mis-statement as to the quantity, description or value of such goods on the part of the owner or where any such duty or charge, after having been levied, had been owing to any such cause, erroneously refunded, the proper officer could, within three months from the date on which the duty or charge was paid or adjusted in the owner's account/current, if any, or from the date of making the refund, serve the notice on the person whom such deficiency in duty or charges had to be recovered requiring him to show cause why he should not pay the amount specified in the notice." Thus, under Rule 10 in cases of short levy the action had to be taken within a period of three months from the date on which the duty or charge was paid or adjusted in the owner's account/current or from the date of making the refund, as the case may be. Subsequently, Section 11A was engrafted in the Act which provides that when any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded, the Central Excise Officer may, within six months from the relevant date, serve notice on the person chargeable with the duty which has not been levied or paid or which has been short-levied or short-paid or to whom the refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice. Therefore, under the newly introduced Section 11A also in case of non-levy or short levy or erroneous refund the action has to be taken within six months from the relevant date. The proviso

to Section 11A is not relevant for our purpose. It will thus be seen that in the category of cases falling under Rule 10 and 11A the period of limitation which was initially three months under the former was raised to six months under the latter. Section 36(2) posits that where the Central Government is of the 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 unless the person affected by the [proposed] order is given a notice to show cause against it within the time limit specified u/s 11A. It, therefore, seems clear to us that in cases of non-levy or short-levy or erroneous refund, it is the third proviso which comes into play and not the second proviso which is general in nature and states that no proceeding shall be commenced under Sub-section (2) of Section 36 in respect of any decision or order after expiration of the period of one year from the date of such decision or order.

6. By the show cause notice in question and the tentative decision reproduced earlier it is intended to recover from the assessee the shortfall in the duty on the premise that Notification No. 21/77 should have been applied first in point of time and thereafter the benefit of Notification No. 198/76 should have been allowed to the assessee. This tentative view if accepted would result in a short levy duty which would be recovered from the assessee. However, Mr. Ganguli the learned senior counsel for the Revenue contended that by the show cause notice all that the Revenue was trying to do was to correct the procedure in the matter of calculation of duty and if as a consequence thereof there is a shortfall which the assessee may be called upon to make good the case would not fall in the third proviso and but would be governed by the second proviso. As against this, contention of the counsel for the assessee Mr. Dave is that if the ultimate impact of the action contemplated by Section 36(2) is to recover a shortfall in the duty payable by the assessee the case falls within the purview of the third proviso to Section 36(2). Having regard to the historical background it seems to us that the legislature desired that cases of non-levy, short-levy, and erroneous refund should receive a different treatment and the period of limitation should be consistent with the period of limitation u/s 11A of the Act, that is to bring about a uniformity in the matter, of correcting an error which has resulted in short-levy of duty. Otherwise in each case of short-levy or non-levy, there would be some error committed by the authorities below which would require correction. But where the correction ends up in one of the three matters referred to in the third proviso then the period of limitation has to be the same as provided in Section 11A of the Act. But if that is not the consequence of the order the matter would fall within the second proviso and the enlarged period of limitation would be available to the Revenue.

7. The consistent view taken by the Tribunal in such cases is that the third proviso to Section 36(2) gets attracted. If that be so, this Court would be slow in interfering where two views are equally possible. We are, therefore, of the opinion that having regard to the historical background of the third proviso to

Section 36(2) it would be proper to hold that where the impact of the exercise of Revisional Jurisdiction is non-levy, short-levy or erroneous refund, the case would fall within the third proviso and the period of limitation would be six months as outlined in Section 11A of the Act. For the above reasons, we see no merit in these appeals and they shall stand dismissed but in the circumstances of the case we make no order as to costs.