(2003) 10 MAD CK 0201

In the Madras High Court

Case No : Writ Petition No. 184 of 1998 and W.M.P. No. 247 of 1998

D.C.W. Limited APPELLANT

Vs

Asstt. Commissioner of Central Excise RESPONDENT

Date of Decision : 21-10-2003

Acts Referred:
Constitution of India, 1950 — Article 226

Citation : (2004) 166 ELT 169

Hon'ble Judges : E. Padmanabhan, J

Bench : Single Bench

Advocate : M.S. Krishnan, for the Appellant; K. Ramakrishna Reddy, SCGSC, for the Respondent

Final Decision : Allowed

Judgement

E. Padmanabhan, J.—Petitioner has prayed for the issuance of a Writ of Certiorari to call for and quash the records culminating in passing the impugned order of the respondent bearing Ref. C. No. V/18/5/94/T2, dated 30-5-1997.

2. Heard the learned Counsel for the petitioner and the learned Senior Central Government Standing Counsel for the respondent.

3. Initially, by proceedings, dated 20-11-1995, the respondent passed an order holding that the refund claim of Rs. 2,63,495/- made by the petitioner stands settled by way of adjustment in duty payable by the assessee himself on 17-5-1994.

4. It is seen from the proceedings, dated 20-11-1995 that the petitioner made a claim for the refund of a sum of Rs. 2,63,495/- towards central excise duty paid on sodium hypochlorite under Chapter Heading No. 28 for the period from 13-9-1993 to 30-11-1993 consequent to final approval of classification list in respect of sodium hypochlorite solution by the Assistant Commissioner. It is also noticed that prior to that, the petitioner had captively consumed caustic soda lye in the manufacture of sodium hypochlorite solution and availed facility under the

Notification No. 217/86, dated 2-3-1986, which attracted the levy of Central Excise duty. After the approval of classification list with effect from 13-9-1993, the assessee was not eligible to avail the facility under the notification dated 2-3-1986 to the inputs. The excise duty leviable on the consumption of caustic soda lye in the manufacture of sodium hypochlorite from 31-3-1993 to 31-3-1994 has to be paid by the assessee as seen from the proceedings of the respondent dated 20-11-1995.

5. As the assessee claimed the refund setting off the earlier payments wrongly made, in that behalf, the respondent passed the following order :

"Regarding this matter, the assessee was asked to appear for the personal hearing before the Assistant Commissioner on 20-10-1995 with required documents vide this office letter of even No. dated 16-10-1994. The letter No. DCW. C.Ex. SCN 24695, dated 18-10-1995. The revised pH was fixed on 15-11-1995. The assessee appeared before the Assistant Commissioner on 15-11-1995 and submitted a written brief regarding this refund claim. In his written submission Para Nos. 3 and 5, they informed that the demand of duty on caustic soda lye used in the manufacture of sodium hypochlorite solution, they had adjusted the said demand of Rs. 2,73,451/- against their claim of Rs. 2,63,495/- paid erroneously by way of duty on sodium hypochlorite solution and paid the balance of Rs. 9,956/- in their RG 23A part II vide Sl. No. 134, dated 17-5-1994. Hence the question of refund does not arise."

6. Therefore, it is clear from the above portion extracted that the claim of refund made by the petitioner in a sum of Rs. 2,63,495/- has been sustained and settled by adjustment by proceedings dated 20-11-1995. On 14-5-1996, the respondent issued a notice to the petitioner to show cause as to why the refund sanctioning Rs. 2,63,495/- should not be recovered from them u/s 11A of the Central Excises and Salt Act, 1944 and credited into the consumer welfare fund in terms of Section 12C of the said Act.

7. The petitioner raised objections contending that the respondent has no authority to issue a show cause notice nor could review the matter, which has reached finality nor the respondent has the authority to revise his own order. Overruling the same, the impugned order has been passed holding that the earlier refund is erroneous and the said sum of Rs. 2,65,495/- has to be recovered from the petitioner u/s 11A of the said Act and the same should be credited to the consumer welfare fund in terms of Section 12C of the said Act.

8. It is contended by the learned Counsel for the petitioner that the respondent has neither the authority nor the jurisdiction to review the earlier order, which has reached finality in the absence of any power specifically conferred under the statutory provision and the impugned order is without any jurisdiction.

9. Per contra, learned Senior Central Government Standing Counsel contends that the earlier order is not an order of refund and therefore, the respondent is well within his powers to pass the impugned order. It is also contended that the

petitioner has approached the Court belatedly with the object of defeating the lawful demands or action that may be taken by the authorities under the said Act.

10. As regards the objection regarding the delay, it is not open to the respondent to raise such a contention at this point of time. The only point that arises for consideration is as to whether the respondent has the authority or jurisdiction to review his own order passed on the earlier occasion ordering refund and adjusting the amount.

11. It is pointed out that this contention is advanced on the ground that the respondent has no power of review of his own orders. In this respect, the learned Counsel is well-founded in his contention as has been held by Shivraj Patil, J. (as he then was) in the case of India Pistons Limited Vs. Asstt. Collector of C. Ex., wherein it has been held as follows:

"Learned Counsel for the petitioner urged (1) Respondent No. 1, having granted permission by his order dated 5-9-1986 after considering all aspects, was not justified in passing the impugned order; further, Respondent No. 1 having passed the order dated 5-9-1986 was quasi judicial authority, could not have review his own order, as is done under the impugned order; in the absence of power of review conferred on the authority by the statute, the impugned order passed by Respondent No. 1 is patently illegal and one passed without jurisdiction. In support of these submissions, he has relied on the following decisions :-

(1) Dr (Smt.) Kuntesh Gupta Vs. Management of Hindu Kanya Mahavidyalaya, Sitapur (U.P.) and Others, (2) Madras Rubber Factory Ltd. Vs. Assistant Collector of Central Excise, Madras and Another, and (3) Indian Organic Chemicals Ltd. Vs. Union of India and Others, . (2) The very object of introducing ''Modvat'' was to take away the cascading effect of levies of Central Excise Duty, merely because there was no specific provision available for granting such permission, Respondent No. 1 could not have taken the view that the permission granted was contrary to law;

Respondent No. 1 ought to have looked into the said claim as a whole.....

I have considered the submissions made by learned Counsel for the parties. As to the power of review of Respondent No. 1, in passing the impugned order, the respondents have not stated anything in the counter affidavit. Learned Additional Central Government Standing Counsel was also not in a position to show any provision under the Act which conferred power on Respondent No. 1 to review his own earlier order. He also submitted that the petitioner had an alternative remedy of filing an appeal to challenge the impugned order and without exhausting the alternative remedy available, the petitioner has rushed to this Court and as such, the writ petition may be dismissed. Learned Counsel for the petitioner, reacting to this submission, promptly stated that when the impugned order is one passed without jurisdiction on the face of it and when the writ petition is pending for the last nine years in this Court, this Court, may not be at this stage, drive the petitioner to avail the alternative remedy.

It is well settled in law that the power of review, unless conferred by the statute expressly, it cannot be assumed or exercised by the authorities. In this case, in the absence of any specific provision shown to me that Respondent No. 1 had the power of reviewing his own order, the impugned order cannot be sustained, inasmuch as the impugned order is one passed without jurisdiction, in the absence of any power given to Respondent No. 1 by the statute. This apart, the decisions afore-mentioned, cited by learned Counsel for the petitioner are the authorities on the point, which support the contention of the petitioner. Since it is settled position of law, it may not be necessary for me to state in details referring to the said decisions. Since I have taken the view that the impugned order is one passed without jurisdiction and patently illegal, it may not be necessary to drive the petitioner to avail the alternative remedy of filing appeal."

12. In the light of the above judgment of Shivraj Patil, J. (as he then was) and there being no contra binding pronouncement placed before this Court, it follows automatically that the respondent has no power of review. If the respondent has no power of review of his earlier orders, the impugned order in this writ petition is one without any jurisdiction and is liable to be quashed.

13. The impugned order is quashed and the writ petition is allowed.

No costs. Consequently, the above WMP is dismissed as unnecessary.

