
(1994) 02 MAD CK 0051

In the Madras High Court

Case No : Writ Appeals No. 177 and 178 of 1994

Gem Cables and Conductors Ltd.

APPELLANT

Vs

Collector of Customs, Hyderabad

RESPONDENT

Date of Decision : 17-02-1994

Acts Referred:

Central Excises and Salt Act, 1944 — Section 11, 11A, 11B
Constitution of India, 1950 — Article 14, 19
Customs Act, 1962 — Section 11C, 11D, 27

Citation : (1994) 48 ECC 1 : (1994) 72 ELT 848

Hon'ble Judges : K.A. Swami, C.J.;Somasundaram, J

Bench : Division Bench

Advocate : Shri C. Natarajan, for the Appellant; Shri K. Jayachandran, Additional Central Government Standing Counsel, for the Respondent

Judgement

K.A. Swami, C.J.—These Appeals are preferred against a common order dated 24-1-1994 passed by the learned single Judge in W.P. Nos. 933 and 934 of 1994.

2. In the Writ Petitions, the petitioners sought for quashing the order dated 6-1-1994 bearing No. E/Misc/713/MAS (M/Order No. 11/94) passed by the second respondent. The petitioner appellant also sought for quashing another order of the same date passed by the second respondent in E/Misc/713/93/MAS (M/Order No. 11/94) and further sought for a direction to hear and decide the appeals, without insisting for pre-deposit of Rs. 6,78,562.30, pursuant to the order of the first respondent in O.R. No. 58 of 1991, dated 19-3-1993.

3. Before we consider the contentions raised in these Appeals, necessary facts are to be adverted to. The petitioners are engaged in the manufacture of cables and they are registered as small scale units. They are required to pay excise duty on ad valorem basis at 15% for clearance upto Rs. 75,00,000/- and at 25% for clearance from Rs. 75,00,000/- to Rs. 2,00,00,000/-. Beyond the limit of rupees two crores, they do not have the benefit of concessional duty.

4. It is not disputed by the petitioners-appellants that they did collect the excise

duty from the purchasers at 25 per cent on the sales below Rs. 75 lakhs also, even though they were required to pay excise duty only at 15% upto Rs. 75 lakhs.

4.1 A show cause notice dated 14-2-1992 was issued by the first respondent, demanding the payment of Rs. 6,78,562.30 being the excess collection of excise duty from the consumers during the period 1-4- 1990 to 9-6-1990, invoking Section 11D of the Central Excises and Salt Act, 1944, (hereinafter referred to as the Act). It may be pointed out that this provision along with the other concomitant provisions was introduced with effect from 20th September, 1991 by the Amending Act No. 40 of 1991. The petitioners-appellants have collected 25% on all the amounts during the period 1-4-1990 to 9-6-1990. The excess collection representing the Excise Duty was to the tune of Rs. 6,78,562.30 and this amount of Rs. 6,78,562.30 represents excess collection of excise duty is not in dispute.

4.2 The petitioners-appellants, pursuant to the show cause notice, submitted a reply. After hearing the petitioners-appellants, the first respondent has determined the sum payable by the appellants at Rs. 6,78,562.30, which amount, as already pointed out, the appellants did not and even now do not dispute that it was collected from the customers, as representing the excise duty, which was in excess of the excise duty payable by them.

4.3 Aggrieved by the order of the first respondent, an appeal has been preferred before the CEGAT. The appeal is still pending on the file of the CEGAT. During the pendency of the appeal, CEGAT has directed the appellants to deposit the amount. The appellants did not deposit the amount. They made an application requesting that the appeal be heard without insisting for deposit of the amount. The CEGAT has rejected the request. Therefore, both the orders are challenged by filing the aforesaid two writ petitions.

4.4 Learned single Judge has held that as the collections in a sum of Rs. 6,78,562.30 represent the excise duty is not in dispute and as, in the event the appellants succeed before the CEGAT they would be entitled to refund of the amount deposited, there is no justification for interfering with the order of the CEGAT. Learned single Judge has also repelled the contention of the learned counsel for the appellants based on a decision of the Supreme Court in Income Tax Officer v. M.K. Mohamed Kunhi AIR 1969 SC 430.

5. It is urged before us by the learned counsel for the appellants that in the light of the provisions contained in Section 11B and 11D of the Act, if the appellants deposit the amount, even if they succeed in the appeal, they would not be entitled to seek refund, nor it would be permissible in law to direct return of the amount, therefore, if the order of the CEGAT, directing to deposit of the amount is to be complied with it would render the appeal infructuous and the hearing of the appeal would become an empty formality, because even if the appeal is allowed, in the light of the provisions contained in Section 11B and 11D of the

Act, the appellants would not be entitled to refund. In other words, it is contended that unless it is held that the provisions contained in Section 11D of the Act are held to be applicable to or operative only in respect of the amount collected as representing excise duty on and from 20th September, 1991, as otherwise the deposit will attract the provisions of Section 11D of the Act. It is also contended that Section 11D of the Act cannot at all be construed as retrospective, so as to cover the period prior to 20th September, 1991. On the contrary, it is contended by the learned counsel for the respondents that there is no question of construing Section 11D of the Act as retrospective inasmuch as Section 11A, 11B, and 11D of the Act are to be read together and the power of demanding the excise duty if it has not been levied or paid or has been short-levied or short paid or erroneously refunded would be exercisable only upto the period as stated in Section 11A, namely, within six months from the relevant date in the case of service of 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 or five years from the relevant date in the event it is found that the excise duty has not been levied or paid or has been short-levied or short-paid or erroneously refunded by reason of fraud, collusion or wilful misstatement or suppression of facts, or contravention of any of the provisions of the Act or Rules made thereunder. As such, as long as the power to recover the duty exists, the liability to pay the duty cannot be held to have been wiped out. Hence, the operation of Section 11D of the Act cannot go beyond the period the power u/s 11A is exercisable. It is also further submitted that even if the appellants deposit the amount, it would still be open to them, if they succeed, to claim refund, if they are able to provide that their case falls in one of the categories mentioned in sub-section (2) of Section 11B of the Act. In that event, Section 11D of the Act does not disable the appellants to claim refund inasmuch as Section 11D itself specifically states that the refund is permissible and such a refund can be made in accordance with the provisions contained in Section 11B of the Act. It is also contended that merely because the statute, in its operation, takes certain facts from the past, it does not become retrospective. It is also further submitted that the whole object of introduction of the provisions contained in Section 11A to 11D of the Act is to ensure that there is no unjust enrichment by the person who is liable to pay excise duty. Reliance is placed on the objects and reasons to the Amendment.

6. In the light of these contentions, the points that arise for consideration are as follows :

(1) What is the scope and ambit of Section 11D of the Act ?

(2) Whether, in the event the deposit is made, as directed by the CEGAT, Pending disposal of the appeal, and the appellants succeed in the appeal, they would be entitled to have the amount refunded ?

7. Points 1 and 2. - As both the points are interlinked and the reasons overlap, we take up both the points together for determination. For our purpose, it is

sufficient to refer to the relevant provisions contained in Sections 11A, 11B, and 11D of the Act. Section 11A reads as follows :-

* * * * * Section 11B of the Act reads as follows :

* * * * * The other sub-sections, namely, sub-sections (4) and (5) are not relevant for our purpose. Section 11D was introduced by Amendment Act 40 of 1991, and section 11B and 11C also came to be amended by the very same Act. As far as Section 11A is concerned, it was already there in the statute prior to Act 40 of 1991. Section 11D of the Act reads as follows :

* * * * *

These provisions fall in the category of fiscal statutes, therefore, the rule of interpretation applicable to fiscal statutes has to be applied and in the event there is any doubt that doubt should lean in favour of the person, who is made liable to pay the duty.

8. The objects and reasons of the Amendment are as follows :

"(1) The question of "unjust enrichment" in case of goods subject to duty of excise or customs has been the subject-matter of discussion for quite sometime now. The concept of "unjust enrichment" in so far as it relates to the said duties, is that any refund of these duties made to any manufacturer or importer, who may have initially paid these duties but had passed on the same to the buyers, would be in the nature of a windfall gain to such manufacturer or importer.

(2) The Public Accounts Committee made an inquiry into all aspects of the issue relating to refund of Central Excise duty. The Committee presented its report to the Parliament on the 11th day of March, 1991. The Committee has also recommended for the introduction of suitable legislation to amend the Central Excises and Salt Act, 1944 and the Customs Act, 1962 to deny refunds in cases of unjust enrichment.

(3) The Bill aims at giving effect to the aforesaid recommendation of the Committee and propose the following main amendments in the said Acts, namely :-

(a) the manufacturer or importer of goods shall not be entitled to refund of the duty of excise or, as the case may be, the duty of customs if he has already passed on the incidence of such duty to the buyer;

(b) the burden of proof that the incidence of the duty has not been passed on to the buyer shall be on the person claiming the refund;

(c) every person, who is liable to pay duty of excise or, as the case may be, the duty of customs on any goods, shall be under an obligation to prominently indicate, at the time of clearance of the goods, in all the documents relating to assessment etc., the amount of duty which will form part of the price at which such goods will be sold;

(d) the refund of any of the said duties is proposed to be made only to the person who has ultimately borne the incidence of such duty;

(e) it is proposed to establish a Consumer Welfare Fund wherein the amount of duty of excise or, as the case may be, the duty of customs, which is not refundable to the manufacturer or importer or the buyer in accordance with the proposed provisions, shall be credited. In addition, any income from investment of the amount credited to the Fund and any other monies received by the Central Government for the purposes of the Fund will be credited to the Fund. The Fund will be utilised by the Central Government for the welfare of the consumers in accordance with the rules to be made in this behalf;

(f) it is also proposed to provide that notwithstanding anything to be contrary contained in any judgment, decree, order or direction of the Appellate Tribunal or any Court or in any other provision of the said Acts, etc., no refund shall be made except as provided in new sub- section (2) of Section 11B of the Central Excises and Salt Act, 1944 and Section 27(2) of the Customs Act, 1962;

(g) it is also proposed to provide that where any manufacturer or importer of goods has collected any amount in any manner from the buyer as representing the duty of excise or, as the case may be, the duty of customs, he shall pay the said amount to the credit of the Central Government and the said amount shall be utilised in adjusting the duty payable by the manufacturer or importer on finalisation of assessment. The surplus, if any, will be dealt with in accordance with the aforesaid provisions of Section 11B of the Central Excises and Salt Act, 1944 and Section 27 of the Customs Act, 1962."

Thus, it is clear that the object for introduction of the Amendment Act is to ensure that there is no unjust enrichment made by manufacturers or importer of goods subject to duty of excise or customs and in the event there is such unjust enrichment made by the manufacturer, to recover the said amount and to credit it to the Consumer Welfare Fund. At the same time, care is also taken to ensure that such an amendment is not arbitrary and does not take away the right of the manufacturer or importer in the event he is able to prove that he has not passed on that duty to the buyer, that such amount is not collected and even if it collected, it should be refunded to him. Therefore, while ensuring that there is no unjust enrichment, the Amendment has also kept in view that no excess collection is made or hardship or any loss is caused to the manufacturer or the importer, by reason of collecting the excess amount from him by the Revenue Department. Keeping these objects in view, we have to interpret Sections 11A, 11B and 11D of the Act. As far as Section 11A is concerned, the Supreme Court has already considered the same in *J.K. Cotton Spinning and Weaving Mills Ltd. and Anr Vs. Union of India (UOI) and Ors*, . It has held that the said provision is valid and is not arbitrary or unreasonable, nor it is violative of the provisions contained in Articles 14 and 19(1)(g) of the Constitution of India. It has also been held that as per the provision in Section 11(A)(1), the excise authorities cannot recover duties not levied or not paid or short levied or short paid or

erroneously refunded beyond the period of six months or five years, as the case may be. Therefore, Section 11D can be invoked only within the period that is permissible u/s 11A, because the said section only declares that notwithstanding anything to the contrary contained in any order or direction of the Appellate Tribunal or any Court in any other provision of the Act or the Rules made thereunder, every person, who has collected any amount from the buyer of any goods in any manner as representing the duty of excise, shall forthwith pay the amount so collected to the credit of the Central Government. The amount payable under this section can only be collected by exercise of the powers u/s 11A of the Act. In addition to complying with the conditions laid down in Section 11A of the Act, it is also to be further proved that a person has collected the amount from the buyer of any goods in any manner as representing the duty of excise. If it is not proved that the amount collected by any person not representing the same to be as duty of excise, then it would not be permissible to recover the amount or direct such person to credit the amount to the Central Government. Of course, the case on hand stands on a different footing because in this case it is not at all disputed by the appellants that they had collected the amount at 25% representing to the customers that it is excise duty, even though excise duty upto Rupees 75 lakhs was payable by the appellants at 15% and such collection, it is not disputed amounts to a sum of Rs. 6,78,562.30, as determined by the first respondent.

9. When in exercise of the power u/s 11A of the Act, duty is demanded on one or other of the grounds falling u/s 11A of the Act and such a demand is within the period specified in Section 11A(1) of the Act, it cannot be said that on the date such a demand is made, whether it may relate to the period prior to 20th September, 1991, or subsequent to 20th September, 1991, as on the date the demand is made, Section 11D being in operation, the appellants can escape from its clutches. This does not mean that Section 11D is retrospective, because as long as the power to recover or demand u/s 11A of the Act is not lost, it cannot be said that any indefensible right is accrued to the manufacturer or importer to claim that he is not liable to pay any excise duty. The liability itself would be kept alive and open. Therefore, we are of the view that even without construing Section 11D of the Act retrospective, it is permissible to hold that it is applicable to such of the claims as may be made by the department within the period as specified u/s 11-A of the Act. In fact, in *Mithilesh Kumar and Another Vs. Prem Behari Khare*, , this aspect of the matter has been specifically considered and it has been held that a statute is not properly called a retrospective statute, because, a part of the requisites for its action is drawn from a time antecedent to its passing. The general scope and purview of the statute and the remedy sought to be applied must be looked into and also what was the former state of law and what the legislation contemplated, has to be considered. It has also been further held that it is not every law that impairs or takes away rights vested argueably to existing laws is retrospective.

10. We have already pointed out the object, which is sought to be achieved by

the Amendment. The whole object of the amendment is to put an end to unjust enrichment at the cost of the consumers, by the manufacturers or importers. At the same time it has also taken care of the interests of the consumers, as it also creates a Consumer Welfare Fund. In addition to this, the amendment sufficiently protects the interests of the manufacturer and also an importer by giving him an opportunity to prove that there has not been any unjust enrichment on his part and that he has not actually passed on the liability to the consumers and as such, he is entitled to the refund of the amount. Therefore, looking from any point of view, Sections 11A, 11B and 11D read together, make it clear that it is open to the authorities to demand payment of the duty on the ground that the amount has been collected by the manufacturer or importer from the consumers stating that it represents excise duty, even though such a demand may pertain to the period prior to 20th September, 1991, as long as such a demand falls within the period specified u/s 11A of the Act. As such, it is not possible to hold that Section 11D of the Act in its operation is retrospective. Its operation is commensurate with the period within which the power to recover the duty is exercisable u/s 11A of the Act.

11. It is not possible to agree with the contention that once the amount is deposited as per Section 11D(1) of the Act, it would not be liable to be refunded. We have already pointed out that refund is permissible if the conditions laid down in Section 11B(2) of the Act are satisfied. Therefore, we are of the view that the direction issued by the CEGAT, especially in the light of the fact that the appellants have admitted the fact that they had collected the entire amount in question, in excess of 15% as representing the excise duty and the determination of the amount is correct, we see no ground to interfere with the order. Learned Single Judge is justified in dismissing the writ petitions. We answer both the points 1 and 2 accordingly.

12. However, at this stage, a submission is made on behalf of the appellants that as the appellants have not disputed that they had collected the amount in question, as representing excise duty which is more than 15% on a sum of Rupees 75 lakhs and in the light of the interpretation placed on Section 11D of the Act, they would not press the appeal and such a submission will be made before the CEGAT on 28-2-1994 on which date the appeal is coming up before CEGAT for hearing and the appeal will be got dismissed as not pressed. Therefore, taking into consideration the fact that the appellants are a small scale industry, some instalments be granted for depositing the amount, as directed by the first respondent. Learned counsel for the department submits that as the appellants had collected this amount about two years ago and have enjoyed the benefit of the entire amount, it is not a case in which the Court should accede to the submission made by the appellants. It is submitted on behalf of the appellants that it would be possible for the appellants to pay the entire amount in six monthly instalments of Rupees on lakh each and the last instalment being the balance of the amount, namely Rs. 1,78,562.30 and the first instalment will be paid by the 20th of March, 1994 and the subsequent instalments will be paid on

the 20th of each successive month. The submission is placed on record. While dismissing the Appeals, the appellants are directed to deposit the sum of Rs. 6,78,562.30 in six monthly instalments of Rupees one lakh and the last instalment shall be of Rs. 1,78,562.30. The first instalment shall be paid on or before the 20th of March, 1994 and the successive instalments on or before the 20th of each succeeding month. There will be no order as to costs in these Writ Appeals.