(2009) 10 SHI CK 0012

In the High Court Of Himachal Pradesh

Case No : C.E.A. No. 6 of 2005

Himachal Road Transport Corpn. APPELLANT

Vs

Deputy Commr. of C. Ex. and Cus. RESPONDENT

Date of Decision : 05-10-2009

Acts Referred:

Central Excises and Salt Act, 1944 — Section 11B, 11B(1), 12A, 3
Constitution of India, 1950 — Article 265

Citation : (2010) 256 ELT 392

Hon'ble Judges : V.K. Ahuja, J;Deepak Gupta, J

Bench : Division Bench

Judgement

Deepak Gupta, J.—This excise appeal was admitted on the following substantial questions of law:

(1) Whether duty paid under the Central Excise Act, 1944 on non-excisable goods can be retained by the respondents because the same had not been collected accordingly to the provisions of charging section, Section 3 of the Act?

(2) Whether the duty collected against the provisions of Section 3, the charging Section, would not amount to unjust enrichment by the respondent so as not to refund the same to the appellant?

(3) Whether the duty collected against the provisions of Section 3, the charging Section, would be subject to limitation as prescribed u/s 11B of the act so as to refuse the refund of the same?

(4) Whether the duty collected in contravention to Article 265 of the Constitution of India could be retained by the respondents?

(5) Whether the refund of duty paid under mistaken law could be denied on the ground that the same is time barred because of the limitation prescribed under the Act?

2. The basic question which arises for consideration is whether the claim of

refund of excise duty deposited by the appellant HRTC is barred by limitation or not. Section 11-B(1) as applicable at the relevant time reads as follows:

11-B. Claim for refund of duty.- (1) Any person claiming refund of any duty of excise may make an application for refund of such duty to the Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise before the expiry of six months from the relevant date in such form and manner as may be prescribed and the application shall be accompanied by such documentary or other evidence (including the documents referred to in Section 12-A as the applicant may furnish to establish that the amount of duty of excise in relation to which such refund is claimed was collected from or paid by him and the incidence of such duty had not been passed on by him to any other person:

Provided that where an application for refund has been made before the commencement of the Central Excises and Customs Laws (Amendments) Act, 1991 (40 of 1991), such application shall be deemed to have been made under this sub-section as amended by the Act and the same shall be dealt with in accordance with the provisions of Sub-section (2) as substituted by that Act:

Provided further that the limitation of six months shall not apply where any duty has been paid under protest.

Amendment has been made in the aforesaid Section and period of six months has been enhanced to one year.

3. The case of the appellant HRTC that it had deposited the amount under protest and is, therefore, governed by the second proviso to the aforesaid sub-section and no limitation is applicable in its case. Normally, this is a finding of fact which would not have been interfered with, but Mr. M.M. Khanna, learned Senior Advocate, has produced before us the original documents of the HRTC wherein it is mentioned that the deposit of excise duty under protest.

4. Whether the duty was in fact deposited under protest is a question of fact or not, it appears that this matter was not seriously contested before the Excise Authorities. We may make it clear that if the duty was not deposited under protest then the limitation for seeking refund is six months only. However, it is deposited under protest, there is no limitation to claim refund.

5. We, therefore, in the interest of justice, set aside the orders passed by the Customs, Excise and Service Tax Appellate Tribunal and remit the matter to the Assessing Officer who shall decide the question as to whether the duty was in fact deposited under protest or not. Needless to say, he shall give adequate opportunity to the parties to put forth their contentions and to produce documentary evidence in this regard.

6. With the aforesaid observations, the excise appeal is disposed of.