(1991) 09 AP CK 0017

In the Andhra Pradesh High Court

Case No : Writ Petition No. 3622 of 1987

Hyderabad Industries Ltd. APPELLANT

Vs

Union of India (UOI) RESPONDENT

Date of Decision : 13-09-1991

Acts Referred:
Constitution of India, 1950 — Article 226
Customs Act, 1962 — Section 27, 27(1)

Citation : (1992) 1 ALT 399 : (1992) 1 APLJ 301

Hon'ble Judges : Sardar Ali Khan, J;Bhaskar Rao, J

Bench : Division Bench

Advocate : K. Srinivasa Murty, for the Appellant; I. Koti Reddy, for the Respondent

Final Decision : Dismissed

Judgement

1. The Hyderabad Industries Limited, Sanatnagar is the Petitioner herein praying for issue of a writ of mandamus directing the Respondents to refund to the petitioner the sum of Rs. 55,326-96 illegally levied, collected and retained by the 2nd Respondent.

2. The petitioner is a company incorporated under the Indian Companies Act, having its registered office at Hyderabad and one of the manufacturing units at Sanatnagar. It was formerly known as Hyderabad Asbestos Limited. The company is engaged in the manufacture and sale of Asbestos Cement products. The raw-material utilised for this purpose is raw asbestos which is imported from outside. The imports are cleared for ware-housing at petitioner''s factory unit at Sanatnagar and subsequently on payment of customs duty, are removed from the ware-house u/s 46 of the Customs Act. In the matter of valuation of the import and arriving at the duty payable thereon, the notified exchange value of rupee to the concerned foreign currency, is to be adopted. In this matter, the concerned foreign currency for the purpose of notified exchange value of rupee, is the pound-sterling.

3. The case of the petitioner is that the conversion value adopted for the period of clearances was not in accordance with the notified exchange value prevalent on the date of such clearance. As a result of this mis-calculation in the notified exchange value of the pound sterling with the Indian rupee, the customs authorities have levied and collected from the petitioner-company an excess duty of Rs. 55,326-96. The details of the period of clearances and the corresponding excess amount collected from the petitioner-company are as given hereunder:

-- Sl. Period of Excess amount Date of Claim No. Clearances levied for refund -- 1. a. October 1976 b. November, 1976 1,60,440-70 27-2-78 c. December, 1976 d. January, 1977 2. 1.1.76 to 30.9.76 55,326-96 4-5-78 3. 1.1.78 & Feb, 1978 31,725-01 6-2-78 --

4. It is admitted by the petitioner-company that the mistake of law and fact under which the excess payment of Rs. 55,326-96 for the period from 1-1-76 to 30-9-76 was due to a mutual mistake of law and fact. The company first noticed the excess payment of duty in February, 1978 and a claim for refund of the same was made on 4-5-1978, as shown in column-4 of the above statement. We are concerned in this case only with regard to the period of clearance from 1-1-1976 to 30-9-76 and the excess payment of duty of Rs. 55,326-96, and not with regard to the other excess amounts which were levied on other occasions. It seems, the second respondent by his order dated 15-4-78 directed the refund of the excess levy made in respect of the period shown at item-3 above. However, the second respondent rejected the claims at Item Nos. l and 2 under the orders dated 23-8-78 and 31-8-78 as being barred by limitation, u/s 27 of the Customs Act. This Writ Petition, however, is filed only for the recovery of the amount of Rs. 55,326-96 shown at serial No. 2.

5. The petitioner-company filed appeals against the aforesaid two orders before the Collector (Appeals). The Collector (Appeals) by a common order dated 26-2-1979, held that though there was an excess collection, the claim of the petitioner for the refund of the amount was barred by limitation u/s 27 of the Customs Act. There is no doubt that the excess duty was levied because of a mutual mistake committed by the petitioner and the revenue authorities, due to a wrong calculation of the rates of exchange prevalent on the date of the clearance of the goods from the ware-house of the petitioner-company.

7. The contention of the petitioner is that aggrieved by the Order of the Collector (Appeals), they have a remedy by way of an appeal. But it would be futile to pursue the other remedies under the Customs Act because of the prevailing position of law as laid down by the decisions of the High Courts and the decision of the Supreme Court reported in Miles India Limited v. The Assistant Collector of Customs, 1985 ECR 289 (S.C.). Therefore, the petitioner is constrained to file the writ petition for quashing the order of the Collector (Appeals) dated 26-2-1979

confirming the order of the Assistant Collector, Customs, the 2nd respondent herein.

8. In the counter affidavit filed on behalf of the respondents, it is stated that the excess amount has been levied and collected due to an error both on the part of the petitioner as well as the revenue authorities. The claim of refund, however, is deemed to have been Barred by limitation, u/s 27 of the Customs Act. The two writ petitions No. 3200/79 and 3201/79 filed by the petitioner also came up for final hearing on 12-12-1985. This Court relying on the judgment of the Supreme Court in Miles India Limited v. The Assistant Collector of Customs {1 supra) dismissed the two writ petitions as withdrawn, the operative portion of which is as follows:

"If really the payment of the duty was under a mistake of law, the appellant may seek recourse to such alternative remedy as it may be advised. The learned counsel for the writ petitioner states the writ petitioner will have recourse to alternative forums and he may be permitted to withdraw the writ petitions. The writ petition is dismissed as withdrawn. No costs."

9. The contention of the petitioner is that the excessive levy and collection of duty is wrongful in law and equity and in fairness, it should be refunded to the petitioner and at any rate, shall not be allowed to be retained by the respondents. It is also the contention of the petitioner that it is not open to the respondents to collect more than what is authorised by law and any collection of amount over and above the authorised amount, would be an illegal levy without jurisdiction.

10. The scope of the writ petition therefore, is amply clear from the narration of the facts given above. The question arising for determination in this case is whether the petitioner is entitled to the refund of the duly u/s 27 of the Customs Act, 1962.

11. Section 27 of the Customs Act reads as follows:

27. Claim for refund of duty- (1) Any person claiming refund of any duty paid by him in pursuance of an order of assessment made by an officer of customs lower in rank than an Assistant Collector of Customs ? may make an application for refund of such duty to the Assistant Collector of Customs-

(a) in the case of any import made by any individual for his personal use or by Government or by any educational, research or charitable institution or hospital, before the expiry of one year;

(b) in any other case, before the expiry of six months, from the date of payment of duty;

Provided that the limitation of one year or six months, as the case may be, shall not apply where any duty has been paid under protest.

Explanation:- Where any duty is paid provisionally u/s 18, the period of one year of six months as the case may be, shall be computed from the date of adjustment of duty after the final assessment thereof.

(2) If on receipt of any such application, the Assistant Collector of Customs is satisfied that the whole or any part of the duty paid by the applicant should be refunded to him, he may make an order accordingly.

(3) Whereas, as a result of any order passed in appeal or revision under this Act, refund of any duty becomes due to any person, the proper officer may refund the amount to such person without his having to make any claim in that behalf.

(4) Save as provided in Section 26, no claim for refund of any duty shall be entertained except in accordance with the provisions of this section.

(5) Notwithstanding anything contained in any other law, the provisions of this section shall also apply to claim for refund of any amount collected as duty of customs made on the ground that the goods in respect of which such amount was collected were not leviable to such duty or were entitled to exemption from duty and no court shall have any jurisdiction in respect of such claim."

12. The case of the petitioner falls u/s 27(1)(b) of the Act wherein it is stated that any person claiming refund of any duty paid by him in pursuance of an order of assessment made by an officer of customs may make an application for refund of such duty to the Assistant Collector of Customs before the expiry of six months from the date of payment of the duty, provided that the limitation of one year or six months, as the case may be, shall not apply where a duty has been paid under protest. It is not disputed that the petitioner has not paid the excess duty in this case under protest. The excess duty has been levied and collected due to a mutual mistake as much on the part of the petitioner-company as on the part of the respondents. The period of limitation, therefore, applicable to this case is six months within which any person claiming refund of such duty is required to make an application for refund of the same, to the Assistant Collector of Customs. It is also not in doubt that the claim for refund of the duty in this case was not preferred within six months as required under the provisions of Section 27(1)(b) of the Customs Act. The order of the Assistant Collector of Customs dated 31-8-1978/12-4-78 shows that the excess payments were made due to the fact that the rates of exchange in this case were applied from the date of issue of notification or after the enactment of the notification and the amounts were wrongfully worked out without taking into account, the changes effected in the rates of exchange determined by the Government of India between the pound sterling and the Indian rupee. The plea of the company has been that neither the company management nor the assessing officer was aware of the amended notification which was issued in this regard giving the correct rates of exchange which should have been applied on the date when the goods were cleared from the ware-house. The claim of the petitioner was rejected on the ground that it was barred by limitation as it was preferred beyond the period of limitation of six months as provided u/s 27(1)(b) of the Customs Act, 1962. The

petitioner took the matter in appeal before the Collector of Customs who by an order dated 26-2-1979 confirmed the order of the Assistant Collector of Customs and held that the refund claim was rightly rejected as time barred, having been made after the expiry of the time limit prescribed u/s 27(1) of the Customs Act The Collector of Customs further stated that the judgment of the Madras High Court in W.P.No. 2699/72 dated 14-3-1977 was not applicable to the facts of this case. It seems that in W.P.No. 2699/72 the recovery of excess duty was clearly in contravention of the notification issued in that regard and was therefore, absolutely void as having been recovered without jurisdiction.

13. Similarly in Civil Appeal No. 1361/1966 (Union of India v. A.V. Narasimhan), the Supreme Court held that:

"Where a tax has been illegally and improperly collected by Government, the Government cannot refuse to refund the amount on technical pleas of time-bar. In such cases, the Government should act in a broader concept of justice."

From the above two decisions, the point which emerges clearly is, that the plea for the refund of excess amount and duty levied and collected, cannot be denied on the technical plea of time-bar. But if the levy of tax is not illegal and improper or is not ultra vires the authority which collected such tax or duty, then, the technical plea of limitation could be raised against the claim of refund. Aggrieved by the decision of the Collector (Appeals), the petitioner filed two writ appeals through which a reference has already been made and thereafter, having withdrawn the writ petitions, the petitioner now filed yet another writ petition on the ground that there is no efficatious alternative remedy available to the petitioner.

14. In Miles India Ltd., Baroda v. Appellate Collector of Customs, Bombay, 1983 ELT 1026 (CEGAT) in the CEGAT, Special Bench ''D'', New Delhi, it was held that;

"... For the refund of duty paid under a mistake of law, the time limit provided u/s 27 of the Customs Act, 1962, is applicable..... It is a settled proposition of law that once a party places reliance upon a statutory right then it is not open to that party to urge that the restrictions imposed by such a statute on the exercise of that right as to the entertainability of the claim are to be ignored. Since the instant case the claim for refund was made with reference to the provisions of the Customs Act, as such, it cannot be said that the claim for refund ought not be disposed of by reference to the time limit set by Section 27(1) of the Customs Act but by applying general law of land as provided u/s 72 of the Indian Contract Act."

This view taken by the CEGAT was upheld by the Supreme Court in Miles India Ltd. v. The Assistant Collector of Customs (1 supra) in a short judgment.

15. In Miles India Ltd., v. The Assistant Collector of Customs (1 supra), the Supreme Court held that the customs authority acting under the Act was justified in disallowing the claim for refund as it is bound by the period of limitation

provided u/s 27(1) of the Customs Act, 1962. It seems that the Counsel for the appellant before the Supreme Court sought leave to withdraw the appeal. The Supreme Court allowed the appeal to be withdrawn with an observation that it really, the payment of duty was under a mistake of law, the appellant may seek recourse to such alternative remedy as it may be advised.

16. In view of the above decision of the Supreme Court, the contention raised by the petitioner herein is that it would be an empty formality for them to invoke the jurisdiction of other authorities under the Statute and the only remedy available to then is, to file a writ petition under Article 226 of 32 of the Constitution of India before the High Court or the Supreme Court, as the case may be.

17. Article 265 of the Constitution reads as follows:-

"Article 265: Taxes not to be imposed save by authority of law:- No tax shall be levied or collected except by authority of law."

It is patently clear that no tax can be imposed save by authority of law and no tax shall be levied or collected except by the authority of law. If any tax is collected without the authority of law, it would be void and can be recovered by the person from whom it has been collected as an imposition of tax which is not warranted by law. In this matter, it cannot be said that the tax which has been levied, was without any authority of law. The lax was levied in accordance with the provisions of the Customs Act. However, the levy and collection of tax has been far in excess of the prescribed limit due to a wrong calculation of the rates of exchange existing at the time of the clearance of the goods from ware-house, between the English pound sterling and the Indian rupee. In other words, the claim is for a refund. It is not a claim for the recovery of tax which has not been imposed by authority of law as provided under Article 265 of the Constitution. The excess payment of excise duty is claimed under the provisions of Section 27 of the Customs Act. The Supreme Court observed as referred to above, that if a person claims refund of excess duty levied and collected by the authorities, then such a claim must be in consonance with the provisions of the Statute. Section 27(b) of the Act provided that there will be an absolute limitation of six months for the refund of any such claims. Therefore, the petitioner while preferring a claim under the Statute cannot circumvent the provision of the Statute in so far as the period of limitation prescribed in the statute is concerned.

18. In Shri Vallabh Glass Works Ltd. and Another Vs. Union of India (UOI) and Others, the Supreme Court while dealing with the question of refund of excise duty wrongfully assessed at the instance of the manufacturer, held that the claim for refund under Article 226 of the Constitution, was not admissible. The Supreme Court further observed that each case has to be judged on its own facts and circumstances touching the conduct of the parties. However, it was held that the writ petitioner cannot have recourse to agitate claims which are otherwise time barred under the provisions of the Statute. In this case, an appreciation of

facts shows that the excise duty levied was thoroughly intra vires the authority of the respondents. The mistake has been committed in the calculation of the duty payable in terms of Indian-rupees at the rate of exchange prevalent at the time between the English pound sterling and the Indian rupee. The petitioner itself is also partly responsible for not having the correct rate of exchange at the time when the duty was levied and collected. The claim for refund u/s 27 is clearly time barred as being outside the limit of six months as provided under the Statute. Therefore, even according to the facts of the case, it cannot be said that the petitioners are entitled in equity to claim the refund from the respondents. It is hot known why the petitioner kept quite for such a long time before making any claim for the refund of the amount. Moreover, taxes and excise duties are utilised within a short time for the promotion and safeguard of public interest. It is with that object, that the Statute provides that the claim for refund should be preferred within the stipulated time and "stale claims cannot be pressed as the situation with regard to the assessments or for consideration of facts, may have undergone a mass change.

19. In D. Cawasji & Co. and Ors. v. State of Mysore and Anr., 1978 ELT 154 (S.C.) the Supreme Court held that the period of limitation prescribed for recovery of money paid under a mistake of law is three years from the date when the mistake is known and it can serve as a reasonable standard by which delay in seeking remedy under Article 226 can be measured. The Supreme Court further observed that for filing a writ petition to recover the money paid under a mistake of law in cases where the particular law has been declared invalid, the starting point of limitation of three years will be the date on which such judgment was rendered. But the point of distinction in the said Supreme Court judgment is that the period of limitation of three years was referred to in cases where the imposition of tax itself was declared void by a letter judgment of the court. This means that the tax itself was levied without any authority of law, and was beyond the jurisdiction of the authority which sought to levy and recover the tax as such. In the instant case, no such situation exists, because neither the levy nor the collection of tax is either illegal or invalid, but the only question is that excess amount of excise duty has been recovered due to a mis-calculation in the rate of exchange of the foreign currency pound sterling in relation to the Indian rupee on the date of the levy of tax. The correct rate of exchange was neither in the knowledge of the petitioner company nor the respondents and therefore, an excess amount of Rs. 55,326-96 was levied and collected by the respondents. This obviously means that the tax would be refundable in accordance with the provisions of Section 27 of the Customs Act which provided a period of six months as limitation within which the claim for refund has to be preferred. Since the claim in this case was admittedly preferred beyond six months, the Assistant Collector of Excise in order dated 31-8-78/12-4-78 and the Collector of Customs in his order dated 26-2-79 rejected the claim for refund as being time barred.

20. In another case Salonah Tea Company Ltd., etc. v. Superintendent of Taxes

Newgong and Ors. etc, , the Supreme Court held that in a society governed by law, taxes should be paid by citizens since they become due in accordance with law. Equally as a corrollary of the said statement of law, it follows, that taxes collected without the authority of law should be- refused because no State has the right to receive or to retain taxes or monies realised from citizens without the authority of law. In the case before the Supreme Court the tax was collected without the authority of law. Since the levy of tax-was ultravires the authority imposing and recovering such tax, it was held that the money was not deemed to have been paid under the provisions of the Assam Taxation (on Goods carried by Road or Inland Waterways) Act, 1984. Therefore, since the tax or money was realised without the authority of law, the same was to be refunded, to the person who has paid the tax under a clear mistake of law. The essential point therefore, which should not be lost sight of, is that in cases where the levy of tax itself is ultra vires the authority which has imposed it, and is void for want of jurisdiction, it cannot be deemed to be a tax levied under Article 265 of the Constitution which provides that no tax shall be collected except by authority of law. In a matter of this nature, a Division Bench of the Andhra Pradesh High Court in U Foam Private Ltd. Vs. Collector of Central Excise, held that a duty paid under a mistake of law and collected without authority of law is refundable within three years of the date of knowledge of the mistake. In this matter, the excise duty has been paid in pursuance of an order of assessment made by an Officer of Customs in accordance with law. It cannot be said that the very imposition of tax was void and illegal and therefore, the period of limitation of six months prescribed under the Statute will apply to this case. In a writ petition, the petitioner cannot therefore, claim a refund which is barred by the period of limitation u/s 27 of the Customs Act. It is also to be noticed that the. petitioner had already filed writ petitions earlier before a division bench and later withdrawn the same on the grounds that it would have recourse to such alternative for as may be available to it under law. It is therefore, somewhat perplexing that having already invoked the jurisdiction of this Court under Article 226 of the Constitution of India, the petitioner had withdrawn the writ petitions on the plea that recourse would be had to alternative fora. This obviously meant that the petitioner was trying to have recourse to such remedies which were provided under the Customs Act. But, instead of doing so, the petitioner has again filed this writ petition on the same ground and is now seeking remedy which was denied to it by virtue of the withdrawal of the writ petitions filed by it earlier, without claiming any relief. From this point of view also, we are unable to grant any relief to the petitioner. This writ petition is therefore, dismissed with the observation that the petitioner may have recourse to such other alternative remedies that may be available to it. There will be no order as to costs.

