(2008) 09 DEL CK 0192

In the Delhi High Court

Case No : WP (C) No. 2258 of 1981

Kashmilon Processing Industries — APPELLANT

Vs

Union of India (UOI) — RESPONDENT

Date of Decision : 22-09-2008

Acts Referred:

Central Excises and Salt Act, 1944 — Section 11A, 35, 35A, 36, 36(2)

Citation : (2008) 133 ECC 288 : (2008) 159 ECR 288 : (2009) 234 ELT 442

Hon'ble Judges : Rajiv Shakdher, J;Badar Durrez Ahmed, J

Bench : Division Bench

Advocate : Shikha Tyagi and Vandana Sharma, for the Appellant; Mukesh Anand, Zeba Tarannum Khan and Shailesh Tiwary, for the Respondent

Final Decision : Allowed

Judgement

Badar Durrez Ahmed, J.—The short point raised in this writ petition is that the order passed by the Central Government on 30.01.1981 u/s 36 of the Central Excise Act, 1944 was beyond time. The facts are that the Appellate Collector of Central Excise had passed an order u/s 35 of the said Act in favour of the petitioner on 28.3.1978. The show cause notice u/s 36(2) of the said Act was issued on 16.10.1978. Consequent to the said show cause notice, the impugned order dated 30.01.1981 has been passed.

2. The provisions of Section 36 as it stood at the relevant point of time read as under:

Section 36: Revision by Central Government.- (1) the Central Government may on the application of any person aggrieved by any decision or order passed under this Act or the rules made thereunder by any Central Excise Officer or by the Central Board of Excise and Customs constituted under the Central Boards of Revenue Act, 1963, and from which no appeal lies, reverse or modify such decision or order.

(1A) Every application under Sub-section (1) shall be accompanied by a fee of rupees one hundred and twenty-five.

(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 passed 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. A plain reading of the said provision makes it clear that by virtue 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 passed u/s 35 of Section 35(A) of the said 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. The third proviso to this Sub-section, which is applicable in the present case as the allegation is of short levy, stipulates that where the Central Government is of the opinion that any duty of excise has, inter alia, been short levied, no order levying or enhancing duty shall be made under the said section "unless the person affected by the proposed order is given notice to show cause against it within the time limit specified u/s 11A". Section 11A as it stood at the relevant point of time prescribed a period of six months from the relevant date in case of duty short levied. It is common ground that the proviso to Section 11A is not applicable in as much as there is no allegation that the alleged short levy was on account of fraud, collusion or any willful mis-statement or suppression of facts or contravention of any of the provisions of the said Act or rules made thereunder with intent to evade payment of duty. Consequently, the extended period of limitation of five years available under the proviso to Section 11A would not be relevant for the purposes of the present case.

4. This being the position, the show cause notice under the third proviso to Section 36(2) would have to be issued within six months of the order u/s 35 passed by the Appellate Collector. The Appellate Collector had passed the order

on 28.3.1978. It is relevant to note that in the writ petition in ground (h) the petitioner has specifically taken the plea that the show cause notice was time barred. The plea taken was that:

The show cause notice, however, is dated 16.10.78, i.e, well after the time limit of six months specified in Section 11A of the said Act from the order in appeal dated 28.3.78. It is submitted that the first respondent has no power at all to initiate the impugned review proceedings u/s 36(2) of the said Act and the said show cause notice dated 16.10.78 and the said order in review were patently without jurisdiction, illegal, null and void.

5. In response to this plea, the respondents in their counter affidavit have only taken the point that the said plea was an afterthought and did not appear to have been agitated before the reviewing authority at the time of personal hearing. However, even if the submission made by the respondents is taken to be correct, since the requirement of issuing the show cause notice within a stipulated period of time is a mandatory requirement, whether the petitioner took or did not take the plea that the show cause notice was time barred would not be of much relevance. It is a jurisdictional issue and can be taken at any point. It was for the respondent to show that the show cause notice had been issued within the stipulated period of six months. There is no denial of the fact that the show cause notice was, indeed, issued after the period of six months from the date of the order dated 28.3.1978.

6. In these circumstances, we are of the view that the show cause notice dated 16.10.1978 was beyond the period prescribed u/s 36(2). Consequently, the impugned order dated 30.01.1981 which is the culmination of the proceedings initiated on the basis of the said show cause notice would also be without jurisdiction. The impugned order is liable to be set aside. We may indicate that in this conclusion of ours we are supported by a decision of this Court in the case of Rollatainers Ltd. Vs. Union of India and Others, .

7. The writ petition is allowed. The impugned order dated 30.01.1981 is set aside. The bank guarantee furnished by the petitioner to the department shall be returned to the petitioner within two weeks of an application being made for the same. There shall be no order as to costs.