(1994) 04 AP CK 0008

In the Andhra Pradesh High Court

Case No : Case Referred No. 105 of 1984

K.C.P. Limited APPELLANT

Vs

Collr. of Central Ex. and Cus. RESPONDENT

Date of Decision : 13-04-1994

Acts Referred:

Central Excises and Salt Act, 1944 — Section 35G
Constitution of India, 1950 — Article 226

Citation : (1995) 56 ECR 408

Hon'ble Judges : M.N. Rao, J;J. Eswara Prasad, J

Bench : Division Bench

Judgement

M.N. Rao, J.—The Customs, Excise and Gold (Control) Appellate Tribunal, South Regional Bench at Madras, (for short "the Tribunal") has referred the following two questions of law to this Court u/s 35G of the Central Excises & Salt Act, 1944 (for short "the Act"):

1. Whether on the facts and in the circumstances of the case, the Tribunal was right in holding that the amended Rules 11 and 173J as they stood from 6.8.1977 would be applicable to the application of the assessee for refund of Rs. 15,254.28 and that the said application would have to be disposed of according to the said rules as they stood at the time of making the application?

2. On the facts and in the circumstances of the case, whether the authorities constituted under the Act including the Tribunal has no power to refund or direct refund as claimed by the assessee?

2. The assessee Company-M/s. K.C.P. Limited, Vuyyuru, Krishna District-paid excise duty on levy sugar for the season 1975-76 during the period 10.12.1976 to 18.1.1977 at the higher rate of Rs. 150.40 per ton as per the interim order passed by this Court as against the rate of Rs. 142.54 fixed by the Government of India and this payment was made in ignorance of the vacation of the interim order consequent to the dismissal of the writ petition. The as-sessee filed a claim for refund on 10.9.1977, which was received in the office of the Assistant

Collector, Vijayawada Division through the Sector Officer, Vijayawada only on 3.12.1977. The claim for refund was rejected by the Assistant Collector by his order dt. 16.1.1982 on the ground that it was barred under Rule 11 of the Central Excise Rules, 1944, as it stood subsequent to the amendment brought about by the Central Excise Notification No. 267 dated 6.8.1977. On appeal, the Appellate Collector of Central Excise by his order dt. 28.6.1982 had expressed the opinion that the assessee was entitled to take advantage of the limitation prescribed under the repealed rule and, therefore, the amount claimed should be refunded. Aggrieved by that, the Department preferred an appeal to the Tribunal, which, by its order dt. 26.9.1983, set aside the appellate order of the Collector of Central Excise and restored the order of the Assistant Collector, negativing the right of the assessee to claim refund. The Tribunal was evidently of the view that the period of limitation falls within the ambit of procedural law and the assessee, therefore, is not entitled to rely upon the larger period of limitation incorporated in the amended rule i.e., Rule 173J, although, in clear terms, this view was not articulated.

3. At the instance of the assessee, the aforesaid two questions were referred to this Court.

4. The assessee paid the duty at the higher rate during the period from 10.12.1976 to 18.1.1977. The old Rule 11 as it stood on 29.9.1951, provided for three months period of limitation for claiming refund but that period was enlarged by Rule 173J substituting the expression "one year" for "three months". The new Rule 11, which was issued on 6.8.1977 in Notification No. 267/77-CE, is in the following terms:

CLAIM FOR REFUND OF DUTY : (1) Any person claiming refund of any duty paid by him may make an application, for refund of such duty to the Assistant Collector of Central Excise before the expiry of six months from the date of payment of duty:

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

EXPLANATION : Where any duty is paid provisionally under these rules on the basis of the value or the rate of duty, the period of six months shall be computed from the date on which the duty is adjusted after final determination of the value or the rate of duty, as the case may be.

(2) If on receipt of any such application, the Assistant Collector of Central Excise 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) Where, as a result of any order, passed in appeal or revision, under the 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 otherwise provided by or under these rules, no claim for refund of

any duty shall be entertained.

5. There is no dispute that the Department was not entitled to claim the excise duty at the rate at which it was paid by the assessee for the period from 10.12.1976 to 18.1.1977. The right of the assessee to claim refund even in respect of the first payment made on 10.12.1976 had arisen on that very day itself. The limitation to enforce that right was one year as per the old ride 11, which expired by 9.12.1977. Similarly, in the case of the last payment made on 18.1.1977, the limitation to claim refund expired by 17.1.1978 as per the old Rule 11. For the entire excess duty paid for the period 10.12.1976 to 18,1.1977, the claim for refund was actually made by the assessee on 10.9.1977, by which date the new rule was already holding the field having been brought on the statute book on 6.8.1977 itself. Could it be said, in this fact situation, that the assessee had no right to claim refund because by the date of the claim, the six months period as provided hi the new rule had expired? In our opinion, the answer is in the negative.

6. The right to get refund is a vested right springing from the common Jaw and this can be altered by a statutory provision. Even before the new Rule 11 came into force, the right to claim refund had accrued to the assessee, in respect of which the limitation was one year. Within one year from the last date of payment i.e., 18.1.1977, as per the law that stood on 18.1.1977, the assessee was entitled to claim refund. There is nothing in the new rule suggestive of the inference that it has taken away the vested rights; its language clearly shows that it is prospective in operation. It necessarily implies that the accrued rights prior to the coming into force of the new rule were not intended to be deprived or taken away by the new rule.

7. A Division Bench of the Bombay High Court, in somewhat analogous circumstances, held in Universal Drinks Private Ltd., Nagpur Vs. Union of India and another, (Para 12)

In our view, the new Rule 11 is clearly prospective in its operation in the sense that it will apply to the cases in which the right to claim refund has arisen after it came into force. This view is supported by the language of the new Rule 11 itself. The said rule provides a limitation for making an application which is six months from the date of payment of duty. If the said rule was intended to apply to claims of refund prior to its coming into force, in many cases, the claims would be barred by limitation because the limitation of six months is to be computed from the date of payment of duty. It is useful to notice at this stage that whatever may be the interpretation of the new Rule 11, on the question whether it enacts complete code in itself on the matters relating to refund of duty, the old Rule 11 did not enact a complete code but provided only for certain contingencies such as payment through inadvertence error or a mis-construction and as held in several decisions, a civil suit or a writ petition under Article 226 could always be filed for refund of any duty illegally or wrongfully recovered or wrongly paid by an assessee under a mistake. In such cases, where the assessee waited for the suit to be filed, or a writ petition to be preferred, which could be done by him normally within the period of three years, as the limitation for civil suit was three years from the date of knowledge of the mistake, the said claim would be barred by limitation in some cases even before the new Rule 11 came into force if the limitation of six months prescribed thereunder to be computed from the date of payment of duty were to be made applicable. There is no provision made in the new Rule 11 that such claims could be preferred within the stipulated period from the date of application of the said rule. A right to a suit is itself a vested right and in the absence of clear provisions or clear intendment the said right cannot be allowed to be taken away by the provisions of the new Rule 11. Looked at it from another angle, there is no provision in the new Rule 11 that the claims which are barred by limitation of three months under the old Rule 11, can be preferred under the new Rule 11 if they are within six months from the date of payment of duty as provided thereunder.

We respectfully agree.

8. When there is a change in procedural law and in the absence of express language in it taking away the vested rights, no inference can be drawn that such rights are by implications extinguished by the amended procedural provision. The Supreme Court in New India Insurance Co. Ltd. Vs. Smt. Shanti Misra, Adult, adverting to a similar question, laid down the proposition:

Even though by and large the law of limitation has been held to be a procedural law, there are exceptions to this principle. Generally, the law of limitation which is in vogue on the date of the commencement of the action governs it. But there are certain exceptions to this principle. The new law of limitation providing a longer period cannot revive a dead remedy. Nor can it suddenly extinguish vested right of action by providing for a shorter period of limitation.

9. We, therefore, hold that the Tribunal was not right in its view that the right of the assessee to get refund of the excess duty paid was time barred by virtue of the new Rule 11. The authorities are bound, legally, to refund to the assessee, the excess duty collected.

10. The two points of law are accordingly answered against the revenue and in favour of the assessee.