
(2014) 08 CESTAT CK 0008

In the Customs, Excise And Service Tax Appellate Tribunal

Case No : Appeal No. 185 Of 2012, Custom Cross Application No. 2398 Of 2012

? M/s Gwalior Alcobrew Pvt. Ltd.

APPELLANT

Vs

CC, Indore

RESPONDENT

Date of Decision : 12-08-2014

Acts Referred:

Customs Act, 1962 — Section 15, 18, 18(1), 18(2), 18(3), 18(4), 18(5), 28AA, 46
Taxation Laws (Amendment) Act, 2006 — Section 21

Citation : (2014) 08 CESTAT CK 0008

Hon'ble Judges : D.N. Panda, J; Manmohan Singh, Technical Member

Bench : Division Bench

Advocate : Rachit Jain, Ranjana Jha

Final Decision : Allowed

Judgement

1. The appellant came before Tribunal challenging the order of learned Commissioner (Appeal) holding that interest on the differential duty levied on finalisation of provisional assessment shall be recoverable under section 18(3) of Customs Act, 1962 (herein after referred to as "the Act").

Appellant contends that provisions of Section 18(3) of Customs Act, 1962 shall not be applicable to the provisional assessments made before

13.07.2006 even though finalised after that date i.e. on 18.07.2011. But Id. Authority below held that interest at the prescribed rate shall be paid by the

appellant on the differential amount of duty arose upon finalisation of the provisional assessment.

2. Appellant imported alcohol beverage during the period April 2002 to May 2004. Such imports were subjected to provisional assessment. When the

final assessment resulted in enhancement of the value of the import, additional duty liability arose. That liability remained undisputed by the appellant.

The only question came for decision by the Tribunal in this appeal is whether interest shall be levied on the differential duty in respect of provisional assessments made before 13.07.2006 but finalised on 18.07.2011.

3. On the aforesaid dispute, further contentions of the appellant are as under:

(1) Interest under Section 28AA cannot be levied on finalisation of provisionally assessed bills of entry filed prior to 13.07.2006, i.e., prior to

amendment of section 18 of the Customs Act, 1962 since making of assessments on provisional basis and finalization thereof is governed by the

provisions of Section 18 of the Act.

(2) Section 18(1) of the Act provides for assessment of the goods on provisional basis. Section 18(2) provides for provisional assessment. Sub-

Sections (3),(4) & (5) to Section 18 of the Act prescribe levy of interest on duty liability and paying interest on refund as the case may be arising

consequent upon finalisation of assessment after 13.07.2006. provision in those subsections were inserted in terms of section 21 of the Taxation Laws

(Amendment) Act 2006. Prior to 13.07.2006 when there was no provision for levy of interest either on duty liability arising upon finalisation of

provisional assessment or payment of interest on refund arising out of such finalization, appellant is not required to pay interest.

(3) It is settled law that all legislations are prospective in effect, except when by "express words" or by "necessary implication" the

provisions are declared or construed to have retrospective effect for which the interest levy can not be retrospective. In the case of Binani Industries

Ltd. V. CCT, (2007) 15 SCC 435, Hon'ble Supreme Court held as under:

"13. It is cardinal principle of construction that every statute is prima facie prospective unless it is expressly or by necessary implication

made to have a retrospective operation. Unless there are words in the statute sufficient to show the intention of the legislature to affect

existing rights, it is deemed to be prospective only "nova constitution futuris formam imponere debet non praeteritis" - a new law

ought to regulate what is to follow, not the past. (See Principles of Statutory Interpretation by Justice G.P. Singh, 9th Edn., 2004 at p. 438).

[Emphasis supplied].

(4) In the case of Rochiram & Sons v. Union of India, 2008 (226) ELT 20 (SC.), the Hon'ble Supreme Court has held that substantive laws are

generally not retrospective unless specified to the contrary by the Legislature. In the case of CIT v. Gwalior Rayon Silk Mfg. Co. Ltd. (1992) 3 SCC

326, the Honâ??ble Supreme Court also observed that it is settled law that unless it is expressly stated or by necessary implication a statute should

always be read as prospective. To similar effect is the judgment of Honâ??ble Supreme Court in the case of S.L. Srinivasa Jute Mills (P) Ltd. v.

Union of India (2006) 2 SCC 740.

(5) In the present case, there are neither â??express wordsâ? nor â??necessary implicationâ? to consider the provision as retrospective. Provision of

law relating to levy of interest was inserted on 13.07.2006 vide Section 21 of the Taxation Laws (Amendment) Act, 2006 enacting sub-section (3) to

Section 18 of the Act. That shall not have retrospective effect.

(6) Honâ??ble High Court of Gujarat in the case of CC (preventive) vs. Goyal Traders 2014 (302) ELT 529 (Guj.) held that sub-section(3) does not

have retrospective application either specifically or by necessary implication. Therefore provisions of Section 18(3) of the Act, have no application to

the present case and the Assessment Order demanding payment of interest is liable to be set aside.

(7) It was clarified by the Ministry of finance, Central Board of Excise & Customs vide F. No. 354/66/2001-TRU dated 21.06.2001 that the provisions

relating to charging of interest or for allowing refund will apply only to cases in which provisional assessment is resorted to on or after 01.07.2001 and

not to past cases of provisional assessment even if the assessment are finalised on or after 01.07.2001. It is submitted that the provisions of sub-

section (3) and (4) of Section 18, which were inserted on 13.07.2006, vide section 21 of the Taxation Laws (Amendment) Act 2006 are also on similar

line. Therefore, similar interpretation ought to be given to these provisions also and no interest is payable on the demand arising on finalization of

provisional assessments where the provisional assessments were made prior to 13.07.2006.

(8) In the case of commissioner of Income Tax, Gujarat vs. Gujarat Fluoro Chemicals reported in 2013 (296) ELT 433 (SC) it has been held that

interest on delayed refund shall not be payable by revenue in absence of any specific provision to this effect and an assessee can claim only that

interest which is provided for in the statute.

(9) Interest under Section 18(3) of the Act is not leviable only in cases of finalization of provisional assessments where the provisional assessments were made after 13.07.2006. Therefore in the light of the above referred judgments no liability for payment of interest arises in respect of provisional assessments made prior to 13.07.2006.

4. On behalf of Revenue it was submitted that the provisional assessment was finalised on 18.02.2005 and appeal against that order was filed by the appellant before Commissioner (Appeal) which was disposed on 25.06.2005 directing the appellant to provide details of imports of comparable goods during 2002, 2003 and 2004 to decide on 47 bills of entry covering the import period from April 2002 to May 2004 to make re-adjudication after Tribunal decides the appeal against the order of Commissioner (Appeal) of Customs ICD Tuglakabad since that had relevance in determining the value of import goods. Re-adjudication was completed by order 18.07.2011 passed imposing interest on differential duty in such re-adjudication properly determined in final assessment. In appeal against that order, Id. Commissioner (Appeal) by his order dated 31.01.2012 confirmed levy of interest under section 18(3) of the Act on differential duty liability arose on finalisation of provisional assessment on 18.07.2011.

5. It was further submitted on behalf of Revenue that assessment includes provisional assessment. Therefore appellant is required to pay interest on the differential duty element since assessment included provisional assessment and re-assessment was mere confirmation of provisional assessment with the levy of differential duty. made after 13.07.2006. That covered the conclusion of provisional assessment. Revenue relied on the judgment in the case of Binani Industries Ltd. Vs. ect - (2007) 15 SCC 435 to argue that there should be functional interpretation to be given effect to the recovery of interest. It was also submitted that CBEC Circular relied upon by the appellant does not profit it.

6. Heard both sides and perused the record.

7. There is no dispute of the fact about the import and the date of provisional assessment as well as date of finalisation thereof. Provisional assessments were completed on 18.02.2005 and finalisation thereof was made on 18.07.2011. Sub section 18(3) of Customs of the Act authorising recovery of interest came to the statute book on 13.07.2006 which reads as

under:

(3) The importer or exporter shall be liable to pay interest, on any amount payable to the Central Government, consequent to the final

assessment order 8[or re-assessment order] under sub-section (2), at the rate fixed by the Central Government under section 28AB from the

first day of the month in which the duty is provisionally assessed till the date of payment thereof.

8. While provisional assessment was completed on 18.02.2005 above sub-section was not in the statute book. The date on which duty liability arises

under law is prescribed by section 15 of the Act. According to that section in the case of goods entering for home consumption under section 46 of the

Act, the date of presentation of bill of entry shall be the date to determine the rate of duty applicable. Accordingly, the duty liability arose in case of

imports made by the appellant on the date the bills of entry were presented. Those were presented much before the finalisation of the provisional

assessment made on 18.02.2005. Undisputably, the bills of entry in the present case were filed by the appellant during the period April 2002 to May

2004. At that time, sub-section (3) to section 18 was not in force.

9. Fiscal statute creating liability is strictly construed. Sub-section (3) enacted on 13.07.2006 is not presumable to govern the cases of bills of entries

filed prior to that date and provisional assessments also completed prior to that. It is settled principle of law in the case of *Zile Singh v. State of*

Haryana (2004) 8 SCC 1, that every statute is prima facie prospective unless it is expressly or by necessary implication made to have a retrospective

operation. But the rule in general is applicable where the object of the statute is to affect vested rights or to impose new burdens to impair existing

obligations. Unless there are words in the statute sufficient to show the intention of legislature to affect existing rights, it is deemed to be prospective

only. A new law ought to regulate what is to follow, not the past. It is not necessary that an express provision be made to make a statute retrospective

and the presumption against retrospectivity may be rebutted by necessary implication especially in a case where the new law is made to cure an

acknowledged evil for the benefit of the community as a whole.

10. It was further held by the Apex Court in the case of *Zile Singh* as follows:

The presumption against retrospective operation is not applicable to

declaratory statutes. In determining, therefore, the nature of the Act, regard must be had to the substance rather than to the form. If a new Act is to explain it would be without object unless construed retrospectively.

An explanatory Act is generally passed to supply an obvious omission or to clear up doubts as to the meaning of the previous Act. It is well settled that

if a statute is curative or merely declaratory of the previous law retrospective operation is generally intended. An amending Act may be purely

declaratory to clear a meaning of a provision of the principal Act which was already implicit. A clarificatory amendment of this nature will have

retrospective effect (ibid., pp. 468-69)

Though retrospectivity is not to be presumed and rather there is presumption against retrospectivity, according to Craies (Statute Law, 7th Edn.), it is

open for the legislature to enact laws having retrospective operation. This can be achieved by express enactment or by necessary implication from the

language employed. If it is a necessary implication from the language employed that the legislature intended a particular section to have a

retrospective operation, the courts will give it such an operation. In the absence of a retrospective operation having been expressly given, the courts

may be called upon to construe the provisions and answer the question whether the legislature had sufficiently expressed that intention giving the

statute retrospectivity. Four factors are suggested as relevant: (i) general scope and purview of the statute; (ii) the remedy sought to be applied; (iii)

the former state of the law; and (iv) what it was the legislature contemplated. (p.388). The rule against retrospectivity does not extend to protect from

the effect of a repeal, a privilege which did not amount to accrued right. (p. 392)

11. Where a statute is passed for the purpose of supplying an obvious omission in a former statute or to explain a former statute, the subsequent

statute has relation back to the time when the prior Act was passed. The rule against retrospectivity is inapplicable to such legislations as are

explanatory and declaratory in nature.

12. Maxwell in his work on Interpretation of Statute (12th Edn.) at page 226 states that the rule against retrospective operation is a presumption

only, and as such it may be overcome, not only by express words in the Act but also by circumstances sufficiently strong to displace it (p.

225). If the dominant intention of the legislature can be clearly and doubtlessly

spelt out, the inhibition contained in the rule against perpetuity becomes of doubtful applicability as the ‘inhibition of the rule’ is a matter of degree which would ‘vary secundum materiam’. Sometimes, where the sense of the statute demands it or where there has been an obvious mistake in drafting, a court will be prepared to substitute another word or phrase for that which actually appears in the text of the Act (p. 231).

13. There is no fixed formula for the expression of legislative intent to give retrospectivity to an enactment. Every legislation whether prospective or retrospective has to be subjected to the question of legislative competence. The retrospectivity is liable to be decided on a few touchstones such as: (i) the words used must expressly provide or clearly imply retrospective operation; (ii) the retrospectivity must be reasonable and not excessive or harsh, otherwise it runs the risk of being struck down as unconstitutional; (iii) where the legislation is introduced to overcome a judicial decision, the power cannot be used to subvert the decision without removing the statutory basis of the decision. There is no fixed formula for the expression of legislative intent to give retrospectivity to an enactment. A validating clause coupled with a substantive statutory change is only one of the methods to leave actions unsustainable under the unamended statute, undisturbed. Consequently, the absence of validating clause would not by itself affect the retrospective operation of the statutory provision, if such retrospectivity is otherwise apparent.

14. Ordinarily when an enactment declares the previous law, it requires to be given retroactive effect. The function of a declaratory statute is to supply an omission or to explain a previous statute and when such an Act is passed, it comes into effect when the previous enactment was passed. The legislative power to enact law includes the power to declare what was the previous law and when such a declaratory Act is passed, invariably it has been held to be retrospective. Mere absence of use of the word ‘declaration’ in an Act explaining what was the law before may not appear to be a declaratory Act but if an Act is declaratory or explanatory, it has to be construed as retrospective. (p. 2487).

15. The above rule of interpretation guides to hold that when subsection (3) was not in force on the date of filing of Bills of entry nor existing even on the date of finalisation of provisional assessments, but was enacted on 13.07.06,

that shall have no application to the case of the appellant for the reason that it is, by now, well settled that the statutory amendments, either creating fresh liability hitherto not existing or extinguishing accrued rights would be considered prospective unless statute either specifically or by necessary implication gives such provision retrospective effect. Honâ??ble High Court of Gujarat in the case of CC(preventive) v. Goyal Traders reported in 2014 (302) ELT 529 (Guj.) held that liability to pay interest created by statute shall have prospective application for which Revenueâ??s contentions are devoid of merit and the impugned order has no basis.

Accordingly appeal is allowed.

(Pronounced in the open Court on 12/08/2014)