
(2008) 04 GUJ CK 0072

In the Gujarat High Court

Case No : Special Civil Application No. 2730 of 1989

Patel Filters Ltd.

APPELLANT

Vs

Union of India (UOI) and Another

RESPONDENT

Date of Decision : 28-04-2008

Acts Referred:

Central Excises and Salt Act, 1944 — Section 11A, 35A(3), 35A(4), 4(1)
Constitution of India, 1950 — Article 226

Citation : (2008) 120 ECC 6 : (2008) 156 ECR 6 : (2009) 234 ELT 444 : (2008) 2 GLR 1585 : (2009) 13 STR 245

Hon'ble Judges : Z.K. Saiyed, J;D.A. Mehta, J

Bench : Division Bench

Advocate : Uday M. Joshi, for Trivedi and Gupta, for the Appellant; Hriday Buch, Learned Additional Standing Counsel for Central Government for Respondents 1-4, for the Respondent

Judgement

D.A. Mehta, J.—This petition challenges primarily order dated 12.12.1988 (Annexure-H) made by Collector of Customs and Central Excise (Appeals), Mumbai (hereinafter referred to as "the appellate authority").

2. The petitioner-Company filed an appeal against Order-in-Original dated 21.05.1987 made by the Assistant Collector of Central Excise, Division-IV, Ahmedabad, approving price list No. 181/83-84 dated 22.06.1983 by adding 30%. However, after hearing the petitioner-appellant the appellate authority came to the conclusion that one M/s. Hindustan Dorr Oliver Company Limited (the buyer company) was "closely related" with the petitioner-Company; that the relationship between the two is so interrelated that the petitioner-appellant and the buyer company have direct interest in the business of each other. Therefore, they would be covered by Proviso (ii) of Section 4(1)(a) of the Central Excise and Salt Act, 1944 (the Act). Hence, the appellate authority set aside the order made by the adjudicating authority and held that the price charged by the buyer company to the customers of the buyer company shall be treated as the assessable value of the goods manufactured and sold by the petitioner-appellant

and the petitioner-appellant was to be charged excise duty accordingly.

3. On behalf of the petitioner-appellant it is submitted that the entire order made by the appellate authority is without jurisdiction as the appellate authority has travelled beyond the subject matter of the appeal by holding that the petitioner-appellant and the buyer company are related persons. It is submitted that originally a show cause notice was issued by the adjudicating authority on the ground that the petitioner-Company and the buyer company are related. The show cause notice came to be challenged by the petitioner by way of Special Civil Application No. 5922 of 1986 which came to be disposed of vide order dated 09.04.1987 whereunder the petitioner was directed to reply to the show cause notice. Upon the reply having been tendered the adjudicating authority came to the conclusion that the petitioner and the buyer company were not related. However, the adjudicating authority came to the conclusion that drawing and designing charges were required to be added in the assessable value of the goods in the hands of the petitioner-Company. It is this order which was challenged by the petitioner-Company, but there was no appeal filed by the revenue against the finding of the adjudicating authority about the petitioner and the buyer company not being related.

4. Learned advocate, therefore, submitted that the subject matter of appeal before the appellate authority was restricted to limited ground of addition to the extent of 30% to the price list while arriving at the assessable value and no other issue was alive before the appellate authority. Inviting attention to Sub-section (4) of Section 35A of the Act it was stated that the order of the appellate authority disposing of the appeal had to record in writing the points for determination and the decision on such points accompanied by reasons for the decision. That the order of the appellate authority, therefore, could not have travelled beyond the subject matter of the appeal.

5. At this stage attention of the learned advocate of the petitioner was invited to Sub-section (3) of Section 35A of the Act inviting submissions as to operation of Second Proviso under the said sub-section. It was submitted that the Second Proviso can come into play only provided a notice within the prescribed time limit was issued to the appellant to show cause against the proposed order, but the appellate authority having failed to issue any such notice, the appellate authority could not have resorted to the provisions of the Second Proviso to Sub-section (3) of Section 35A of the Act. In support of the submissions made reliance was placed on the following decisions:

- i. India House Vs. Kishan N. Lalwani, to submit that once limitation was prescribed it was not open to pass any order beyond the period of limitation;
- ii. Nasiruddin and Others Vs. Sita Ram Agarwal, to submit that once the language of the statute was unambiguous and plain, recourse could not be had to the principles of interpretation other than the literal rule.
- iii. Singh Enterprises Vs. Commissioner of Central Excise, Jamshedpur and

Others, was referred to in context of the period of limitation.

6. On behalf of the respondent-department Mr. H.C. Buch, learned Additional Standing Counsel for the Central Government, submitted that Second Proviso under Sub-section (3) of Section 35A of the Act had to be read so as to make the provisions workable. That the petitioner-appellant had already been issued a show cause notice by the adjudicating authority and hence, it was not as if the order had been made by the appellate authority without any notice to the petitioner-Company. Alternatively, it was pleaded that if it was required that it should be the appellate authority who should issue notice the impugned order could be set aside and the appeal restored to the file of the appellate authority for issuing a show cause notice as required by the provisions. A further alternative contention was raised to the effect that the impugned order itself could be treated as a show cause notice required by provisions of the Second Proviso to Sub-section (3) of Section 35A of the Act and this would ensure that there would be no issue of limitation considering the facts of the case. That hearing had taken place before the appellate authority on 15.11.1988 and the impugned order was made on 12.12.1988 and, therefore, if the impugned order was treated as the show cause notice the same would be within the statutory period of limitation prescribed under the Second Proviso to Sub-section (3) of Section 35A of the Act. In support of the submissions made reliance was placed on the Apex Court decision in the case of Girnar Traders Vs. State of Maharashtra and Others, with special reference to Paragraph Nos. 38 and 39 to point out that in a case where the plain meaning assigned to the words of a statute may result in palpable injustice and an interpretation which would fail to carry out manifest intention of the legislature should be avoided; that in a case of two interpretations, an interpretation which assigns meaning to further the intention of the legislature should be adopted. It was, therefore, submitted that in any view of the matter, no prejudice would be caused to the petitioner if the matter was restored to the file of the appellate authority and the petitioner was given an opportunity of hearing by treating the impugned order as a show cause notice.

7. Section 35A of the Act as was applicable for the period under consideration reads as under:

SECTION 35A. Procedure in appeal. -- (1) The Collector (Appeals) shall give an opportunity to the appellant to be heard, if he so desires.

(2) The Collector (Appeals) may, at the hearing of an appeal, allow an appellant to go into any ground of appeal not specified in the grounds of appeal, if the Collector (Appeals) is satisfied that the omission of that ground from the grounds of appeal was not wilful or unreasonable.

(3) The Collector (Appeals) may, after making such further inquiry as may be necessary, pass such order as he thinks fit confirming, modifying or annulling the decision or order appealed against, or may refer the case back to the adjudicating authority with such directions as he may think fit for a fresh

adjudication or decision, as the case may be, after taking additional evidence, if necessary:

Provided that an order enhancing any penalty or fine in lieu of confiscation or confiscating goods of greater value or reducing the amount of refund shall not be passed unless the appellant has been given a reasonable opportunity of showing cause against the proposed order:

Provided further that where the Collector (Appeals) is of opinion that any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded, no order requiring the appellant to pay any duty not levied or paid, short-levied or short-paid or erroneously refunded shall be passed unless the appellant is given notice within the time-limit specified in Section 11A to show cause against the proposed order.

(4) The order of the Collector (Appeals) disposing of the appeal shall be in writing and shall state the points for determination, the decision thereon and the reasons for the decision.

(5) On the disposal of the appeal, the Collector (Appeals) shall communicate the order passed by him to the appellant, the adjudicating authority and the Collector of Central Excise.

Sub-section (3) of Section 35A of the Act specifically empowers the appellate authority to pass such order as the appellate authority thinks fit confirming, modifying or annulling the decision or order appealed against, if necessary, after making such further inquiry as may be required. The First Proviso under the said sub-section permits enhancement of penalty or fine, etc. upon the appellant being given a reasonable opportunity of showing cause against the proposed order. The Second Proviso permits the appellate authority to call upon the appellant to pay any duty not levied or paid, short-levied or short-paid or erroneously refunded, subject to the rider that no such order shall be passed unless the appellant is given notice within the time limit specified in Section 11A of the Act to show cause against the proposed order. However, before such a notice could be issued, the appellate authority is bound to record an opinion that any duty has not been levied or paid, etc. To wit, in the first instance, the appellate authority is bound to record a prima facie opinion that some duty of excise has either not been levied or paid or short-levied or short-paid, or erroneously refunded. After such an opinion is recorded the appellant is required to be given a notice within the prescribed period of limitation to show cause against the proposed order.

1. Therefore, till the point of time an appeal is formally lodged before the appellate authority there can be no question of the appellate authority either recording an opinion or issuing a show cause notice. In the circumstances, the contention on behalf of the respondent-revenue that a show cause notice had already been issued initially by the adjudicating authority and hence, there was substantial compliance with the requirement of the provisions cannot be

accepted. The language of the Second Proviso permits the exercise of such powers only by the appellate authority and none else. At the stage when the adjudicating authority had issued the show cause notice there was no appeal pending before the appellate authority and the appellate authority could not have recorded any opinion that any excise duty had not been levied or paid etc. If the appellate authority could not have recorded an opinion there was no question of the appellate authority issuing any show cause notice. The show cause notice issued by the adjudicating authority, therefore, cannot be equated with the show cause notice required by the provisions of the Second Proviso to Sub-section (3) of Section 35A of the Act.

2. There is one more aspect of the matter. Legislature has used the word "appellant" and not assessee. The position in law is well settled that an appellant could be a person aggrieved by an order made by the adjudicating authority and such an appellant need not necessarily be only an assessee against whom an adjudication order has been made. [Reference: Lalbhai Trading Company and Others Vs. Union of India (UOI) and Others, . Therefore, also, the show cause notice issued by the adjudicating authority cannot take place of the show cause notice to be issued by the appellate authority.

3. After recording an opinion the appellate authority is required to issue a notice to the appellant to show cause against the proposed order. The said words, "the proposed order" indicate the legislative intention, namely, the recording of opinion is not an idle formality. It is not merely a formation of opinion, but the notice has to contain the basis, the material, the reasons for forming of such an opinion. In the present case admittedly no notice was ever issued by the appellate authority. Thus the conditions precedent for assumption of jurisdiction and exercise of powers under the Second Proviso to Sub-section (3) of Section 35A of the Act are not shown to have been fulfilled.

11. Admittedly, the maximum period of limitation u/s 11A of the Act as prescribed is six months unless and until existence of exceptional circumstances is shown to exist extending the period of limitation upto five years. In the present case the limitation would be a period of six months and, therefore, on the assumption, that the appellate authority had formed an opinion on 15.11.1988 when the hearing of the appeal took place the period of six months had to be counted therefrom. The said period of six months already stands expired. The contention on behalf of the respondent-Revenue that the petitioner must not be permitted to take advantage of the pendency of the present proceedings by frustrating the appellate authority from issuing show cause notice within a period of six months by preferring the petition on 15.04.1989 also does not merit acceptance. This contention loses sight of the fact that on 12.12.1998 the appellate authority had become functus officio as the appellate order had already been made. Thereafter, there was no scope for the appellate authority to either issue any notice or pass any order, except as may be permitted by the statutory provisions, if any, or unless and until the appellate order was quashed

and set aside by a superior forum restoring the appeal to the file of the appellate authority.

12. In so far as the contention / submission that the impugned order dated 12.12.1988 be treated as a show cause notice and the appeal be restored to the file of the appellant authority permitting the appellant-petitioner to reply to the show cause notice, suffice it to state that once the statutory period of limitation has expired there can be no occasion for the appellate authority to issue any show cause notice. What the appellate authority cannot do directly cannot be permitted to be done indirectly by asking this Court to exercise powers under Article 226 of the Constitution. Condoning delay on existence of sufficient cause being shown is different from extending period of limitation which is otherwise circumscribed by the statute. In this context one may usefully refer to the succinct observations made by the Apex Court in the case of Parashuram Pottery Works Co. Ltd. Vs. Income Tax Officer, Circle I, Ward A, Rajkot,

It has been said that the taxes are the price that we pay for civilization. If so, it is essential that those who are entrusted with the task of calculating and realising that price should familiarise themselves with the relevant provisions and become well-versed with the law on the subject. Any remissness on their part can only be at the cost of the national exchequer and must necessarily result in loss of revenue. At the same time, we have to bear in mind that the policy of law is that there must be a point of finality in all legal proceedings, that stale issues should not be reactivated beyond a particular stage and that lapse of time must induce repose in and set at rest judicial and quasi-judicial controversies as it must in other spheres of human activity.

13. In the circumstances, it would not be just and proper to extend the period of limitation after a period of nearly two decades because the appellate authority is bound to be well versed with the provisions of the Act, more particularly the provisions which relate to procedure in appeal which an appellate authority is required to statutorily comply with. If the appellate authority has failed to comply with the requisite statutory provisions and show from the record satisfaction of the prerequisite conditions for exercise of jurisdiction to enhance the assessment by making addition of any duty of excise which has not been levied or paid, etc. the appellate authority cannot be permitted a second innings. It is incumbent upon the appellate authority to establish that such prerequisite conditions stand fulfilled before the appellate authority assumes jurisdiction to act under the Second Proviso to Sub-section (3) of Section 35A of the Act.

14. In the result, the impugned order dated 12.12.1988 cannot be sustained and is hereby quashed and set aside. The petition is allowed accordingly in the aforesaid terms. Rule made absolute. Interim relief which was granted is hereby confirmed. There shall be no order as to costs.