

(2005) 11 MAD CK 0050

In the Madras High Court

Case No : CMA. (NPD) No.3465 of 2005 and C.M.P. No. 17638 of 2005

Sri Shanmuga Bleaching Works

APPELLANT

Vs

The Registrar, Customs Excise and Service Tax Appellate
Tribunal, The Registrar, Customs Excise and Gold (Control)
Appellate Tribunal, South Zonal Bench and Commissioner of
Central Excise

RESPONDENT

Date of Decision : 08-11-2005

Acts Referred:

Central Excise Rules, 1944 — Rule 173Q, 226, 52A, 57F(4A), 57G
Central Excises and Salt Act, 1944 — Section 11A(1), 35C(2), 37
Finance Act, 2002 — Section 140

Citation : (2006) 194 ELT 151 : (2006) 1 MLJ 222

Hon'ble Judges : T.V. Masilamani, J;P.D. Dinakaran, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

P.D. Dinakaran, J.—The above appeal is directed against the order No. E/ROA/52/03-MAS dated 27.12.2004 in E/Appeal No. 1426/96-MAS of the first respondent.

2. The appellant is engaged in the work of processing cotton fabrics. The Central Excise Officers attached to the Preventive Group of Erode Division searched the appellant company on 07.06.1995 and found that some process of mercerising was going on manufacturing excisable goods. The enquiry revealed that there was neither a Central Excise Registration Certificate nor any records maintained for the fabrics which were mercerised and cleared.

3. A show cause notice was issued on 18.10.1995 to the appellant company calling upon the appellant to explain as to why payment of duty on the clearances made should not be demanded and as to why the goods seized should not be confiscated and penalty imposed under Rules 9(2), 52A, 173Q and 226 of Central Excise Rules, 1944. The appellant company submitted its explanation

indicating that the process which it was indulged in was neither coming under mercerisation nor under any process mentioned under the heading 5206 and that the product is rightly classifiable under the heading 5205. Not satisfied with the explanation, the Adjudicating Officer, namely, the Commissioner, Central Excise, Coimbatore confirmed the demand of Rs. 32,284/- under Rule 9 (2) of Central Excise Rule 1944, read with Section 11A(1) of Central Excise and Salt Act 1944 being the duty involved in cotton fabrics mercerised with the aid of power and cleared and also imposed penalty of Rs. 3,000/- under Rule 9(2), 52A, 173Q and 226 of Central Excise Rule 1944 by his order dated 19.7.1996.

4. Aggrieved against the order dated 19.7.1996, the appellant company filed an appeal before the Customs, Excise and Gold Control Appellate Tribunal, second respondent herein.

5. On 9.2.2001, the second respondent dismissed the appeal along with other two appeals by a common order holding that there are enormous evidence in the form of documents and oral admissions available on record including the statements from persons who had supplied the grey fabrics stating that the said fabrics were supplied for mercerising work.

6. Against the order of the second respondent dated 09.02.2001, the appellant filed a rectification petition before the Customs, Excise and Service Tax Appellate Tribunal, South Zonal Bench, Chennai to recall the order of the second respondent contending that the process adopted by the appellant herein and the appellants in other cases was not one and the same and the plant and machinery installed were also different. It was also contended that the said rectification petition was filed within the time limit of four years from the date of order as per Section 35C(2) of Central Excise Act 1944 and though this Section has been amended restricting the time limit of filing of miscellaneous petition, the pre-existing right of appeal could not be destroyed by amendment unless the amendment was retrospective in operation and the right of appeal is a substantive right which could not be disturbed except by express enactment.

7. However, the second respondent found that the said rectification petition is time barred. Since the decision rendered by the West Zonal Bench in the case of 2003 (155) ELT 465 is contrary to the findings of the second respondent, the said miscellaneous petition was referred to a larger bench. Subsequently, the petition was transferred to the Customs Excise & Service Tax Appellate Tribunal, New Delhi, the first respondent herein. The appellant company filed their written submissions before the Customs, Excise and Service Tax Appellate Tribunal, New Delhi stating that the right of filing the miscellaneous petition is a substantive right which could not be disturbed except by an enactment with specific mentioning and in the amended section there is nothing about the retrospective operation of the said amendment.

8. A Larger Bench of the first respondent, after considering the submissions of both sides and after analysing the materials placed, rejected the miscellaneous

petition by an order dated 27.12.2004 following the decision of Supreme Court in the case of Osram Surya (P) Ltd. Vs. Commissioner of Central Excise, Indore, and holding that though the final order was passed by the Tribunal on 9.2.2001, the petition for rectification of mistake was filed on 19.8.2003 and by the time the application was filed, the provisions of Section 35C(2) had been amended by Section 140 of the Finance Act, 2002 with effect from 11.5.20 02, by which time, the period of four years was reduced to 6 months.

9. Against the order of the Appellate Tribunal dated 27.12.2004, the appellant has filed the present Civil Miscellaneous Appeal raising the following substantial questions of law:

i) Whether the Hon"ble CESTAT, Chennai Bench is right in hearing the above three appeals when the facts were not the same and passing a common order in those appeals?

(ii) Whether the Hon"ble Larger Bench of the Tribunal is right in holding that it is not open to the applicants to file an application for rectification of mistake with reference to final order dated 9.2.20 01 at any time within 4 years after the amendment of the provisions of Section 35C(2) of the Central Excise Act, 1944?

10. Heard Mr. K.R.Natarajan, learned counsel appearing for the appellant arguing for admission.

11. Mr. K.R.Natarajan, learned counsel appearing for the appellant after taking us through the order of the second respondent dated 9.2.2 001 and the order of the first respondent dated 27.12.2004 would submit that the second respondent by an order dated 9.2.2001 disposed of three appeals, even though the facts of each case were different. He also submits that the provisions of Section 140 of the Finance Act, 2002 are prospective in operation and the said amendment does not take away the substantive right to file an application for rectification of mistake. The only effect of the amendment is to reduce the time limit within which the application has to be preferred by the applicant. He has also cited a decision reported in Garikapatti Veeraya Vs. N. Subbiah Choudhury,

12. It is apt to refer Section 35C(2) of the Central Excise Act, as amended by Section 140 of Finance Act 2002, which reads as follows:

"Section 35C- Orders of Appellate Tribunal-

(1)

(1A)....

(2) The Appellate Tribunal may, at any time within six months from the date of the order, with a view to rectifying any mistake apparent from the record, amend any order passed by it under sub-section (1) and shall make such amendments if the mistake is brought to the notice by the Commissioner of Central Excise or the other party to the appeal:

Provided that an amendment which has the effect of enhancing an assessment or reducing a refund or otherwise increasing the liability of the other party, shall not be made under this sub-section, unless the Appellate Tribunal has given notice to him of its intention to do so and has allowed him a reasonable opportunity of being heard.

...."

In the above Section, the period of six months was substituted with effect from 11.5.2002 by Section 140 of the Finance Act 2002.

13.1. Concededly, the second respondent passed the final order on 09.02.2001 and the appellant filed the rectification petition on 19.8.2003. But the amendment of Section 35C(2) was implemented with effect from 11.5.2002. Hence, the rectification petition filed was well beyond the time of six months.

13.2. We are also of the considered opinion that the first respondent rightly followed the Supreme Court decision reported in *Osram Surya (P) Ltd. Vs. Commissioner of Central Excise, Indore*, wherein the Supreme Court held as follows:

"...we think that by introducing the limitation in the said proviso to the rule, the statute has not taken away any of the vested rights which had accrued to the manufacturers under the Scheme of Modvat. That vested right continues to be in existence and what is restricted is the time within which the manufacturer has to enforce that right. The appellants, however, contended that imposition of a limitation is as good as taking away the vested right. In support of their argument, they have placed reliance on a judgment of this Court in *Eicher Motors Limited and Another Vs. Union of India and Others Etc.*, wherein this Court had held that a right accrued to an assessee on the date when it paid the tax on the raw-materials or the inputs would continue until the facility available thereto gets worked out or until those goods existed. In that background, this Court held that by Section 37 of the Act, the authorities concerned cannot make a rule which could take away the said right on goods manufactured prior to the date specified in the concerned rule. In the facts of *Eicher's* case (supra), it is seen that by introduction of Rule 57F(4A) to the Rules, a credit which was lying unutilized on 16.3.1995 with the manufacturer was held to have lapsed. Therefore, that was a case wherein by introduction of the rule a credit which was in the account of the manufacturer was held not to be available on the coming into force of that rule, by that the right to credit itself was taken away, whereas in the instant case by the introduction of the second proviso to Rule 57G, the credit in the account of a manufacturer was not taken away but only the manner and the time within which the said credit was to be taken or utilized alone was stipulated. It is to be noted at this juncture that the substantive right has not been taken away by the introduction of the proviso to the rule in question, but a procedural restriction was introduced which, in our opinion, is permissible in law."

14.1. In the decision cited by the learned counsel for the appellant in *Garikapatti*

Veeraya Vs. N. Subbiah Choudhury, it has been held that the right of appeal is a vested right and such a right to enter the superior court accrues to the litigant and exists as on and from the date the lis commences and although it may be actually exercised when the adverse judgment is pronounced such right is to be governed by the law prevailing at the date of the institution of the suit or proceeding and not by the law that prevails at the date of its decision or at the date of the filing of the appeal. This vested right of appeal can be taken away only by a subsequent enactment, if it so provides expressly or by necessary intendment and not otherwise.

14.2. In our considered opinion, the decision reported in Garikapatti Veeraya Vs. N. Subbiah Choudhury, is not applicable to the facts and circumstances of the case for the simple reason, in Garikapatti case, referred supra deals with a right of appeal to the superior Court accrued to the litigant on the date of the lis commenced, but not with reference to the right to seek rectification of any mistake apparent on the record in the order already passed by the authority and seek an amendment on bringing to the notice of the mistake to the authorities concerned as in the instant case. The amendment proposed to Section 35C(2) of the Central Excise Act as brought in by Section 140 of the Finance Act 2002 is intended to introduce certain procedural restrictions but not to take away any substantial right, such as filing of the appeal vested on the litigant.

15. Hence, finding no merits, this Civil Miscellaneous Appeal stands dismissed. Consequently, C.M.P. No. 17638 of 2005 is also dismissed.