

(2013) 01 DEL CK 0185
In the Delhi High Court
Case No : Writ Petition (C) 504 of 2010

Union of India

APPELLANT

Vs

M/s. IND Metal Extrusions Pvt. Ltd. and Another

RESPONDENT

Date of Decision : 02-01-2013

Acts Referred:

Citation : (2013) 289 ELT 106 : (2013) 18 GSTR 82 : (2013) 3 ILR Delhi 1641 : (2013) 39 STT 416

Hon'ble Judges : S. Ravindra Bhat, J;R.V. Easwar, J

Bench : Division Bench

Advocate : Ashwani Bhardwaj and Mr. Jitender Choudhary, for the Appellant; C. Hari Shankar with Mr. S. Sunil, Pushkar Kumar Singh and Mr. Jagdish N., for the Respondent

Judgement

R.V. Easwar, J.—The respondent, Ind Metal Extrusions Pvt. Ltd. has raised a preliminary objection to the maintainability of the writ petition. Since it goes to the root of the matter, it needs to be dealt with first. The matter arises under the Central Excise Act, 1944. The respondent is a merchant-exporter and registered with the central excise authorities. It lodged rebate claims under Rule 18 of the Central Excise Rules, 2002 in respect of excise duty paid on goods procured from manufacturers initially for home consumption but subsequently exported. The claim was rejected by the Assistant Commissioner (Tech.), Central Excise, Delhi-II, who is the petitioner herein on the ground that some of the goods were exempt from duty as they were manufactured in specified areas, disentitling the respondent from claiming the rebate. A show-cause notice was accordingly issued to which the respondent objected on various grounds, including the ground that the notice had become in fructuous due to the amendment made to Rule 18 by the Finance Act, 2008. Accepting the objections, the petitioner allowed the rebate claims. An order-in-original to that effect would appear to have been passed on 26.11.2008.

2. The order-in-original passed as above was reviewed by the Commissioner,

Central Excise, Delhi-II who took the view that it was not in order. He accordingly directed the Assistant Commissioner (Tech.) to file appeals to the Commissioner (Appeals), Central Excise, Delhi-II against the order-in-original u/s 35E(2) of the Act. The appeals were however rejected by the Commissioner (Appeals) by order dated 20.01.2009, holding that the substantial benefit given to the respondent herein cannot be taken away on the ground of procedural infractions. This order was passed by the Commissioner (Appeals) u/s 35A of the Act.

3. The Commissioner, Central Excise, Delhi-II, being dissatisfied with the appellate order passed by the Commissioner (Appeals), directed the Asst. Commissioner (Tech.) to file a revision application before the Central Government in terms of Section 35EE(1A). A revision application was accordingly filed, reiterating the same grounds on which an appeal was preferred by the petitioner herein in the appeal filed before the Commissioner (Appeals).

4. By order dated 11.09.2009 in Office order No. 316/09-CX, the Central Government dismissed the revision application. After a detailed examination of the facts and the contentions and on a survey of the relevant case-law, the Central Government, acting through the Joint Secretary to the Government of India, upheld the order of the Commissioner (Appeals). The operative portion of the order in revision is as under:

From the perusal of the records, Govt. observes that the Commissioner (Appeals) has already passed a very detailed and reasoned order. Govt. agrees with the findings in said order and finds no reason to interfere with the said impugned order-in-appeal.

11. In view of the above discussions & findings, Govt. observes that the rebate was admissible in this case and accordingly Govt. upholds the impugned orders-in-appeal and rejects the revision application being devoid of merit.

5. The present writ petition was originally filed by the Assistant Commissioner (Tech.), who passed the order-in-original accepting the rebate claim challenging the order passed by the Government of India in revision u/s 35EE of the Act. An amended memo of parties was later filed showing the "Union of India through Commissioner, Central Excise Commissionerate, Delhi-II" as the petitioner and the assessee, the Commissioner (Appeals) and the Joint Secretary (Ministry of Finance) as respondents. We are asked to issue a writ of certiorari quashing the impugned order and a writ of mandamus directing the Government of India to pass fresh orders after re-adjudication.

6. The preliminary objection taken by the respondent, both in its counter-affidavit and in the written submissions supported by oral arguments before us is that neither the Assistant Commissioner (Tech.), Central Excise, Delhi-II nor the Union of India can question the order passed in revision as it has been passed by the Central Government; that no writ can be filed by a government functionary questioning the decision of the Government itself, nor can the Union of India question its own order.

7. Section 35EE of the Act deals with "Revision by Central Government". Under sub-section (1), any person aggrieved by an order-in-appeal passed u/s 35A which is of the nature specified in the first proviso to sub-section (1) of section 35B, may move an application to the Central Government for annulment or modification of such order. Sub-section (1A) inserted by Act 27 of 1999 w.e.f. 11.05.2009 confers a similar right to the Commissioner of Central Excise in case he is of opinion that an order passed by the Commissioner (Appeals) u/s 35A is "not legal and proper". He may direct the proper officer to make an application on his behalf to the Central Government for revision of such order. He is the real and actual applicant before the Central Government, and the "proper officer" who is directed to file an application for revision merely performs the ministerial function of filing the application. No filing fee is prescribed in case the application is filed by the Commissioner of Central Excise. Sub-section (4) of section 35EE empowers the Central Government, of its own motion, to annul or modify any order referred to in sub-section (1). Sub-section (5) provides for enhancement of penalty or fine by the Central Government subject to certain conditions. Sub-section (6) makes similar provision for enhancement of duty. No appeal, either by the assessee or by the Commissioner of Central Excise, against the order passed by the Central Government u/s 35EE to the Customs, Excise and Service Tax Appellate Tribunal (CESTAT) has been provided by the Act. The order of the Central Government passed in revision is thus final, subject only to judicial review under Article 226/ 227 of the Constitution of India.

8. The preliminary objection seems to us to be well-taken. The order passed by the Central Government u/s 35EE cannot be challenged or questioned by a functionary of the Central Government. The Act is a central Act. The functionaries under the Act, such as the Assistant Commissioner, Deputy Commissioner, Joint Commissioner, Additional Commissioner, Commissioner of Central Excise, Commissioner (Appeals) or Chief Commissioner of Central Excise are all functionaries under the Central Government, executing the Act. It is the Central Government itself which acts u/s 35EE as revisionary authority, dealing with revision applications filed both by the assessee and the Commissioner of Central Excise. Since the Central Government also has to act only through human agency, the function is entrusted to an official of the Central Government who is of the rank of Joint Secretary in the Ministry of Finance. He does not pass the revision order in his individual capacity or as a functionary under the Act; his orders are those of the central government itself. The section repeatedly refers to the "Central Government" and not to any official or functionary thereof. The Joint Secretary acts for the Central Government in passing the order. A perusal of the impugned order shows that there is repeated reference to the Central Government; thus the decision is of the Central Government itself. If this position is realised, it would appear clear that the contention of the petitioner that the writ petition has been filed not against the Central Government but against a decision of the Joint Secretary acting as revisionary authority is untenable. There is finality attached to the order which cannot be questioned by functionaries

under the Act since the order is passed by the Government-Union of India-itself.

9. There is no definition of "Central Government" either in section 35EE or in any other provision of the Act. Section 3(8) of the General Clauses Act, 1897 defines "Central Government" in an inclusive manner. Clause (b) says that "in relation to anything done or to be done after the commencement of the Constitution means the President". Under Article 53 of the Constitution, the executive power of the Union of India is vested in the President. It is however not possible to consider the order passed by the Central Government u/s 35EE of the Act as an executive order in that sense; the order is passed on an application by the aggrieved party-the assessee or the Commissioner of Central Excise-questioning the legality and propriety of the order passed in appeal u/s 35A, and has to be necessarily viewed as a quasi-judicial order. The proper question to be asked is whether the fact that the order is a quasi-judicial order can sustain the maintainability of a writ against it by the Central Government itself.

10. The question was decided by the Nagpur Bench of the Bombay High Court in Commissioner of Central Excise and Another Vs. Indorama Textiles Ltd. and Another, a decision cited on behalf of the petitioner, where the Division Bench pointed out the distinction between an executive or administrative order passed by the Central Government and a quasi-judicial order passed by it; it was held that in the latter case, the Central Government (the revisionary authority) acts as a quasi-judicial Tribunal and so its order would be amenable to the jurisdiction under Article 226 at the instance of the aggrieved party, be it the Central Government itself. This decision limits itself to the nature of the order passed by the revisionary authority u/s 35EE and, with respect, does not examine the further question, necessarily to be answered, whether the Central Government can both be the author of the decision and also the aggrieved party. It is true-and in this aspect we respectfully agree with the Bombay High Court-that the order passed u/s 35EE is quasi-judicial in nature; but in our view, whether the order is administrative or is quasi-judicial, the basic principle is that one cannot be said to be aggrieved by one's own order and in this view of the matter the Central Government cannot question its own order passed under that section. This aspect, with respect, does not appear to have been examined in the decision, though it did proceed on the basis that the order u/s 35EE is in fact and law one passed by the Central Government.

11. The apprehension of the petitioner that there will be discriminatory result because of the view taken by us, in as much as the functionaries under the Act would be left with no judicial remedy against an erroneous order passed by the Central Government u/s 35EE while an assessee would be entitled to seek judicial redress is, with respect, baseless. It is open to an assessee who feels aggrieved by an order passed by the Central Government u/s 35EE to strain every nerve to challenge the same in appropriate proceedings; that is only a constitutional means of seeking redress. But that is not true in the case of an order of the Central Government passed u/s 35EE which is sought to be

challenged by the Central Government itself-i.e., the authorities executing the Act, which is a central Act. There is an inherent impossibility or contradiction in countenancing such a view, in addition to fostering indiscipline and chaos in the administration of the Act.

12. Counsel for the respondent is right in relying on sub-sections (5) and (6) of section 35EE to point out that in case the Central Government suo motu decides to issue notice to the assessee to enhance the penalty or fine or duty and after hearing the assessee decides to drop the proceedings, no grant of any opportunity to the Commissioner of Central Excise or any other officer executing the Act is envisaged. This shows that if the Central Government is of the view that the order of the Commissioner (Appeals) is legal and proper and requires no interference (by way of enhancement of duty, fine or penalty), there is no right conferred upon the Commissioner of Central Excise to challenge the decision to drop the proceedings. If the Commissioner of Central Excise chooses to take the appeal route against the order of the Commissioner (Appeals) to the CESTAT, he may lawfully pursue his challenge right up to the Supreme Court. But if he chooses to take the revisionary route and question the legality and propriety of the order of the Commissioner (Appeals) before the Central Government u/s 35EE, he must, if the decision of the Central Government goes against him, accept it as final. The section does not recognise any grievance that the Commissioner may nurse against the decision of the Central Government. In short, the Commissioner of Central Excise cannot claim to be more loyal than the King! The result of the foregoing discussion is that the preliminary objection taken by the respondent is upheld and the writ petition is dismissed in limine with no order as to costs. We clarify that we have not examined the merits in the view we have taken.