

Geep Flashlight Industries Ltd.

Vs

Union of India and Others

Civil Appeal No. 1830 of 1975

(CJI A. N. Ray, P. N. Shinghal, M. H. Beg JJ)

28.10.1976

JUDGMENT

RAY, C.J. -

1. This appeal is by special leave from the judgement dated September 10, 1975 of the Delhi High Court.
2. The appellant is a manufacture of dry battery cells. In October 1969 the appellant received a consignment of ten metric tons of manganese dioxide. The Assistant Collector levied duty on the consignment under tariff item 28. The appellant preferred an appeal. The Appellate Collector confirmed the order of the Assistant Collector. The appellant thereafter made an application to the revisional authority. The revisional authority held that the tools would be assessed under tariff item 26 and ordered refund of duty.
3. The appellant asked for refund and sent reminders to customs authorities for refund.
4. On October 3, 1974 the appellant give a notice under Section 80 of the Civil Procedure Code for institution of a suit for recovery of refund.
5. On February 10, 1975 a notice under Section 131(3) of the Customs Act, 1962 referred to as the Act was given to the appellant for revision of the order of refund.
6. The appellant impeached the aforesaid notice dated February 10, 1975. The notice inter alia stated that since the goods were processed ore, not meant for extraction of metallic manganese they ceased to qualify as an 'ore' within the normally accepted sense of the term as in item 26 Indian Customs Tariff.

The notice thereafter said :

It, therefore, appears to the Government that the appellate order does not appear to be sustainable. Therefore, in exercise of the powers under section 131 (3) of the Customs Act, 1962 the Government of India propose to annual the order in Appeals 590-593 of 1972 passed by the Appellate Collector of Customs, Calcutta.

7. The appellant made an application under Article 226 and moved the Delhi High Court. The appellant in the application asked for a writ in the nature of prohibition restraining the "opposite party" thereto from taking any proceeding pursuant to the impugned notice. The appellant also asked for a writ of certiorari to quash the notice. The appellant also asked for a writ of mandamus

not to withhold the excess duty paid by the petitioner and ordered to be refunded.

8. The contention of the appellant was that the power of suo motu revision under Section 131(3) of the Act in so far as it relates to a case of non-levy or short levy of duty must be exercised within the period of limitation prescribed in Section 131 (5) of the Act. In short, the appellant's contention is that the power of suo motu revision contained in Section 131(3) of the Act is subject to the provisions contained in Section 131 (5) of the Act.

9. The provisions contained in Section 131(3) of the Act are as follows :

The Central Government may of its own motion annual or modify any order passed under Section 128 or Section 130.

10. The provisions contained in Section 131(5) of the Act are as follows :

Where the Central Government is of opinion that any duty or customs has not been levied or has been short-levied, no order levying or enhancing the duty shall be made under this section, unless the person affected by the proposed order is given notice to show cause against it within the time-limit specified in section.

11. Section 28 of the Act provides for notice for payment of duties not levied, short-levied or erroneously refunded. Under Section 28 when and duty has not been levied or has been short-levied or erroneously refunded, the proper officer may, within viz months from the relevant date, serve notice on the person chargeable with the duty which has not been levied or which has been short-levied or to whom the refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice.

12. Counsel for the appellant extracted the provisions contained in Section 28 and 131(3) and 131(5) of the Act in support of the contention that any notice for suo motu revision by the Central Government in so far as it relates to a case of non-levy or short-levy of duty must be given within the period of six months from the date of levy. Counsel for the appellant further contended that if the Government wanted to revise order for refund on the ground that there should not be any refund, it would also be a case of short-levy, and therefore, the limitation of six months as provided in Section 28 of the Act should apply.

13. Broadly stated counsel for the appellant submitted that Section 28 of the Act is a substantive provision relating to notice for non-levy or short-levy and Section 131(3) of the Act is a procedural Section and power under Section 131(3) of the Act cannot be exercised in such a manner as to render Section 28 of the Act nugatory.

14. The alternative contention of counsel for the appellant is that power under Section 131(3) of the Act is to be exercised within a reasonable time and the periods mentioned in Section 131 of the Act supply the yardstick or give an indication of what is reasonable time.

15. The Delhi High Court held that all the objections which the petitioner wishes to raise to the notice, including the objections raised in the writ petition, should be raised before the Central Government. The Delhi High Court, therefore, directed the Government to give a hearing to the appellant and further held that the Government should consider all the objections. The Delhi High Court went on to say that the decision of the Government should be taken within three months unless the appellant himself took adjournment and caused delay in the disposal of the case. The

Delhi High Court also said that if any money was to be refunded, it should be refunded within two months from the date of the decision.

16. The provisions contained in Section 28 of the Act speak of non-levy, short-levy and erroneous refund. The provisions state that notice of non-levy, short-levy or erroneous refund should be given within months from the relevant date. Section 28 (3) states what the "relevant date" means. In the case of duty not levied, the "relevant date" is the date on which the proper officer makes an order for the clearance of the goods. In a case where duty is provisionally assessed under Section 18 of the Act, the relevant date is the date of adjustment of duty after the final assessment. In a case where duty has been erroneously refunded, the relevant date is the date of payment of duty.

17. The Additional Solicitor General contended that the provisions in Section 28 of the Act indicated that any notice with regard to non-levy, short-levy or erroneous refund, require the person to show cause why he should not pay the amount specified in the notice. This being that the limitation would be six months from the date of actual refund. The order dated April 20, 1972, which is described as the order of refund, was as follows :

I, therefore, allow the appeals and direct that the goods be reassessed under item 26 of the Indian Customs Tariff and the consequential refund of duty granted.

It may be stated here that tariff item 26 speaks of duty on metallic ore and tariff item 28 speaks of duty on chemical and pharmaceutical products. The appellant succeeded in appeal in obtaining an order of refund. It is an admitted feature of the case that refund has not in fact been made.

18. Counsel for the appellant contended that even if refund has not been made, the date of refund will be the relevant date and six months would be calculated from April 20, 1972, when refund was ordered and, therefore, the notice dated February 10, 1975 will be hit by the provision of limitation of six months from the relevant date. The contention of the appellant is wrong. It is only where refund has in fact been made and money has been paid, the relevant date will be six months from the date of actual payment for refund.

19. The contention of the appellant that refund will also be a case of short-levy is not correct. Section 28 speaks of three kinds of errors in regard to duties. One is non-levy, the second is short-levy and the third is erroneous refund. Levy is linked to assessment. Section 17 of the Act speaks of assessment order. In the process of assessment two kinds of errors may occur. One is non-levy and the other is short-levy. Refund is dealt with in Section 27 of the Act. The expression "erroneously refunded" means refunded by means of an order is erroneously made. These are three categories of errors in regard to duties.

20. The notice under Section 28 of the Act speaks of demand for money to pay back and the notice is required to be given within six months from the relevant date. In the case of erroneous refund, it would be six months from the date of actual refund. If no refund has in fact been made, limitation cannot be said to arise inasmuch as the relevant date under Section 28 in the case of erroneous refund speaks of the date of refund. The order dated April 20, 1972 granted refund. Grant of refund is not actual refund.

21. Chapter XV contains Sections 128 to 131 of the Act. Chapter XV speaks of Appeals and Revision. Section 128 relates to appeals. Section 130 deals with powers of revision of Board. Section 131 speaks of revision by Central Government. Revision can be asked for by the person

arrived by any order passed under Section 128, or any order passed under Section 130. Section 131(2) provides limitation of six months for an application made under Section 131(1) of the Act.

22. Once the provisions contained in Section 131(3) are attracted, the Central Government may of its own motion annual or modify any order passed under Section 128 or Section 130. This provision is the power of Central Government to annual or modify any order. This power is exercised by the Central Government sou motu. Of course the power is to be exercised on giving notice to the person concerned.

23. The provisions contained in Section 131(5) of the Act speak of limitation only with regard to non-levy or short-levy. It is significant that Section 131(5) does not speak of any limitation in regard to revision by the Central Government of its own motion to annual or modify any order of erroneous refund of duty. The provisions contained in Section 131(5) with regard to non-levy or short-levy cannot be equated with erroneous refund inasmuch as the three categories of errors in the levy are dealt with separately.

24. The appellant's prayers for writs of certiorari and mandamus are misconceived. There is no order either judicial or quasi-judicial which can attract certiorari. No mandamus can go because there is nothing which is required to be done or forborne under the Act. The issue of the notice in the present case requires the parties to represent their case. There is no scope for mandamus to do any duty or act under the statute. A writ of prohibition cannot be issued for the obvious reason the Central Government has jurisdiction to revise.

25. For the foregoing reasons, the appeal is dismissed. The Central Government will hear the appeal on merits. In view of our conclusion that there is no bar of limitation in the present case it will not be open to the parties to take any plea of limitation. The Central Government will hold that the order of refund is valid, the Central Government will pay the amount. We specify the period of two months from the date of the order as the period during which payment will be made. The parties will pay and bear their own costs.

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