Indian Textile Paper Tube Company Limited

Vs

Collector of Customs, Madras

Civil Appeal No. 5014 of 1984

(CJI Ranganath Misra, M. M. Punchhi, P. B. Sawant JJ)

04.05.1990

JUDGMENT

P. B. SAWANT, J. -

1. The appellant imported Top Line Tube Winder Endless Belts of the value of Rs. 31,101 from the United Kingdom under the Bill of Entry dated August 6, 1979. The goods were assessed to duty under heading 40.05/16(3) at 40 per cent plus countervailing duty at the rate of 25 per cent under Item 16-A(4) of the Customs Tariff Act, 1975. The appellant thereafter made an application for refund of the excess of duty so charged contending that the goods were in fact liable to be classified under heading 59.16/17 and without countervailing duty. The Assistant Collector rejected the claim by his order of October 12, 1979. Against it, the appellant preferred an appeal under Section 128 of the Customs Act, 1962 (hereinafter referred to as the 'Act') to the Appellate Collector of Customs. On May 2, 1981, the Appellate Collector allowed the appeal holding that the goods were classifiable under heading 59.16/17.

2. On November 21, 1981, the government issued a notice to the appellant under Section 131(3) of the Act asking him to show-cause as to why the goods should not be classified under heading 39.07 which attracted duty at 100 per cent ad valorem and also to show-cause as to why the order of May 2, 1981 passed by the Appellate Collector should not be annulled. Against the said show-cause notice, the appellant preferred an appeal to CEGAT. The contention with regard to limitation was that the show-cause notice was barred by limitation as laid down by sub-section (5) of Section 131 read with Section 28 of the Act, which was six months from the date of short levy and in any case six months from the date of the appellate order. The Tribunal dismissed the appeal holding that the notice was in time and also further that the assessment proposed to be made under heading 39.07 was proper. It is against this decision of September 3, 1984 of the Tribunal that the present appeal is preferred.

3. Before us the only contention raised is that the show-cause notice was barred by limitation and hence, the government had no power to annul the Appellate Collector's order under Section 131(3) of the Act. The argument is that the limitation for initiating action under sub-section (3) of Section 131 is laid down in sub-section (5) thereof. For, the cases in which the Central Government would initiate action under sub-section (3) can only be the cases either of the absence of levy or of the short levy or of refund. In any of the said cases, the limitation laid down under sub-section (1) read with sub-section (3) of Section 28 is six months. In the present case, the levy of duty was on August 6, 1979 and the order of the Appellate Collector was of May 2, 1981, while the show-cause notice was issued on November 21, 1981. In any case, therefore, the notice was beyond six months and hence barred by limitation.

4. According to us, this contention is not available to the appellant in view of the decision of this Court in Geep Flashlight Industries Ltd. v. Union of India ((1976) 4 SCC 677 : (1977) 1 SCR 983) in which it is held that the provisions of Section 131(5) and therefore the limitation laid down in Section 28 of the Act do not apply to the action taken by the government under Section 131(3). The relevant observations are as follows : (SCC p. 681, paras 22 and 23)

> "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 annul or modify any order. This power is exercised by the Central Government suo motu. Of course the power is to be exercised on giving notice to the person concerned.
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> 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 annul 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."

5. Further, even if it was held that the limitation as laid down in Section 28 would apply to the initiation of action under Section 131(3), since the appellate order has only allowed the appeal of the appellant declaring him as being entitled to the refund, and no refund has yet been made, the action of the government under Section 131(3) is clearly not barred by limitation. Section 28 of the Act states that when any duty has been erroneously refunded, the proper officer may, within six months from the relevant date, serve notice on the persons chargeable with the duty to whom the refund has erroneously been made, requiring them to show-cause why they should not pay the amount specified in the notice. Sub-section (3) of Section 28 then defines the expression "relevant date" for the purposes of sub-section (1). Clause (c) of the said sub-section (3) states that the "relevant date" in a case where duty has been erroneously refunded means the date of refund. The decision in Geep Flashlight Industries Ltd. case ((1976) 4 SCC 677 : (1977) 1 SCR 983) has while dealing with this very aspect pointed out that in the case of erroneous refund, the notice under Section 28 of the Act has to be given within 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 granting refund is not actual refund. Admittedly, in the present case no refund has been made to the appellant under the appellant customs order dated May 2, 1981. Hence, even if it is held that the provisions of sub-section (3) of Section 131 are governed by sub-section (5) thereof and, therefore, the limitation laid down under Section 28 of the Act applies to the action of the government under Section 131(3), the present show-cause notice is not barred by limitation.

6. Even otherwise we are also of the view that the orders which are contemplated under sub-section (3) of Section 131 are orders passed under Section 128 or Section 130 only, namely, the order passed in appeal by the Appellate Collector or in revision by the Board respectively. Sub-section (3) does not speak of any other order. That is clear from the language of the said sub-section which reads as follows :

> "(3) The Central Government may of its own motion annul or modify any order passed under Section 128 or Section 130."

7. It is, therefore, clear from the provisions of the said sub-section that it does not give power to the Central Government to act suo moto to annul or modify an order passed by the original assessing authority. On the other hand, the provisions of sub-section (5) of Section 131 contemplate proceedings against actions of the original assessing authority which haves resulted in either not levying or short levying the goods. That sub-section by implication also covers cases of refunds, when goods are cleared initially under the provisional assessment, and the final assessment shows, that the assessee is entitled to a refund of duty charged in excess earlier. But all the cases whether of non-levy, short levy or of refund which are contemplated in sub-section (5) are cases arising out of the acts of omissions and commissions of the original assessing authority, and it is when such orders passed by the original assessing authority which are sought to be annulled or modified, that the provision of limitation contained in Section 28 applies.

8. Thus the situations contemplated by sub-section (3) and by sub-section (5) are mutually exclusive in that whereas sub-section (3) speaks of the annulment or modification of the appellate or revisional orders, sub-section (5) speaks of the orders passed by the original assessing authority. Hence, the limitation applies when the government seeks to annul or modify orders of the original assessing authority under sub-section (5) and not when the government takes action to annul or modify the appellate or revisional orders under sub-section (3).

9. This interpretation is also consistent with the provisions of sub-sections (1) and (4) of Section 131. Sub-section (1) speaks only of appellate and revisional orders passed under Sections 128 and 130 respectively and of no other order. Similarly, clauses (a) and (b) of the sub-section (4) make a distinction between the appellate and revisional orders passed under Sections 128 and 130 respectively. Where an appellate or revisional order has already been passed enhancing any penalty of fine in lieu of confiscation or confiscating goods of greater value, it does not permit government to pass any order again enhancing the penalty or fine. It, however, permits passing of such order in any other case, but within a period of one year from the date of the order sought to be annulled or modified. Hence the legislature has in Section 131 all along maintained the distinction between the orders passed under Sections 128 and 130, and other orders. Viewed from this angle also, it is necessary to read the provisions of sub-section (3) of Section 131 as being applicable only to orders passed under Sections 128 and 130 and the provisions of sub-section (5) as being confined to orders other than those passed under Sections 128 and 130.

10. Hence, the conclusion is inescapable that the limitation prescribed by Section 28 is applicable when under sub-section (5) of Section 131 the government seeks to annul or modify orders other than those passed under Sections 128 and 130. It is not applicable to the action taken under sub-section (3) for annulling or modifying orders passed under Sections 128 and 130. Since in the present case the impugned show-cause notice is issued to annul/modify the order passed by the Appellate Collector of Customs under Section 128, it will have to be held that it is not barred by limitation.

11. In this view of the matter the appeal fails and is dismissed with costs.

PUNCHHI, J. (dissenting)-

Has the Central Government violated the bar of limitation while exercising suo moto revisional powers under Section 131 of the Customs Act, 1962 is the limited question which crops up for consideration in the instant appeal against the judgment and order of the Customs, Excise and Gold (Control) Appellate Tribunal, New Delhi dated September 3, 1984 passed in Appeal No.CD (SB)(T)

1604/81-C.

13. The appellant imported a consignment of Top Line Tube Winder endless belts valued at Rs. 31,101. The consignment came from the United Kingdom and was covered under a Bill of Entry dated August 6, 1979. The goods were assessed to duty under heading 40.05/16(3) at 40 per cent plus countervailing duty at the rate of 25 per cent under Item 16-A(4) of the Customs Tariff Act, 1975. The appellant lodged a refund claim with the Assistant Collector on grounds which are factual in nature, asserting that the goods had not correctly been assessed to duty and that they should have been assessed under a different heading 59.16/17 of the Customs Tariff Act, 1975. On October 12, 1979 the claim for refund was rejected by the Assistant Collector by an order. On appeal by the appellant the Appellate Collector of Customs took a different view as to the nature of the consignment imported and assessed it to duty under heading 59.16/17 allowing the appeal with consequential relief. On the report of the Collector of Customs the government issued a suo moto show-causes notice dated November 21, 1981 prima facie being of the view that the Appellate Collector was not correct in classifying the goods under heading 59.16/17 of the Customs Tariff Act, 1975, as also that the original classification under heading 40.05/16(3) done by the Assistant Collector was also not in order. The matter thus was sent to the Customs, Excise and Gold (Control) Appellate Tribunal, New Delhi where the plea of limitation was raised by the appellant besides raising factual pleas with regard to the nature of the consignment and its liability to be classified under an appropriate head. The Tribunal, instead, on facts classified the consignment as articles of plastic under heading 39.07 of the Customs Tariff Act, 1975 and not under heading 59.16/17 as done by the Appellate Collector and thus set side the order of the Appellate Collector allowing the revision.

14. The plea of time bar raised by the appellant was repelled by the Tribunal in the following words :

> "On the question of time bar we find that the Appellate Collector issued the orders on July 4, 1981, the show-cause notice was issued on November 21, 1981 and served on the party on November 24, 1981. The show-cause notice has therefore been issued within the period of six months. Section 131(5) of the Customs Act, 1962 refers to a case of non-levy and short levy. For those cases the time limit of Section 128 would be applicable. Section 131(3) provides for the Central Government to annul or modify any order passed under Section 128 or 130. The Supreme Court in Geep Flashlight Industries Ltd. v. Union of India ((1983) 13 ELT 1596) held as follows : (ELT p. 1600, para 23)
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> '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 annul 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.'
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> That was a case of refund. In Collector of Customs, Bombay v. Nav Bharat Enterprises, New Delhi ((1984) 16 ELT 332 (CEGAT) (N.D.) it was held that Section 131(3) of the Customs Act, 1962 empowers the Central Government to annul or modify any order passed under that Act and that the time limit provided in Section

131(5) would not be applicable to the notice issued under Section 131(3). Further 'relevant date' as provided under the third proviso to Section 36(2) will be computed from the date of passing of the appellate order and not from the date of passing the order by the original assessing authority. The show-cause notice is therefore in time."

15. Learned counsel for the appellant has confined this appeal to the question of limitation. The fact that the consignment was classifiable under head 39.07 of the Customs Tariff Act, 1979 remains in these circumstances unquestioned.

16. Section 131 of the Customs Act, 1962 is as follows :

"131. Revision by the Central Government. - (1) The Central Government may, on the application of any person aggrieved by -

(a) any order passed under Section 128, of

(b) any order passed under Section 130 otherwise than on the application of any aggrieved person, or

(c) any order passed on the application of any aggrieved person under Section 130 where the order is of the nature referred to in either of the provisions to sub-section (1) of that section,

annul or modify such order.

(2) An application under sub-section (1) shall be made within six months from the date of the communication to the applicant of the order against which the application is being made :

Provided that the Central Government may, if it is satisfied that the applicant was prevented by sufficient cause from presenting the application within the aforesaid period of six months, allow it to be presented within a further period of six months.

(3) The Central Government may of its own motion annul or modify any order passed under Section 128 or Section 130.

(4) No order enhancing any penalty or find in lieu of confiscation or confiscating goods of greater value shall be passed under this section -

(a) in any case in which an order passed under Section 128 or Section 130 has enhanced any penalty or fine in lieu of confiscation or has confiscated goods of greater value; and

(b) in any other case, unless the person affected by the proposed order has been given notice to show-cause against it, within one year from the date of the order sought to be annulled or modified.

(5) Where the Central Government is of opinion that any duty of customs has not been 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 28."

The Tribunal seems to take the view that sub-section (3) of Section 131, if employed, eclipses sub-section (5) of Section 131. In other words, the Tribunal seemingly is of the view that when the Central Government on its own motion proposes to annul or modify any order passed under Section 128 or Section 130 then it is not fettered by the time limit specified in Section 28 even though it entertains the opinion that any duty of customs has either not been levied or has been short levied. This approach appears to me to be wholly erroneous. There is nothing in the language of sub-section (3) to suggest that it overpowers or renders otiose sub-section (5). Both the sub-sections need not militate against each other, components as they are of the singular power conferred by the legislature on the Central Government for revision. The harmonious way to read these sub-sections would be that the Central Government is empowered on its own motion to annul or modify any order passed under Section 128 or Section 130, but if it is an order whereby any duty of customs has either not been levied or has been short levied, the Central Government can levy or enhance the duty by giving the person affected by the proposed order a notice to show-cause against it but within the limit specified in Section 28, which is six months from the date of the order.

17. Section 28 envisages three kinds of errors in regard to custom duties. One is non-levy. This means that the goods were not classified to duty whereas they could be. The second is short levy. In this could be included a case in which the goods could be classified in one entry but were erroneously classified under another entry resulting in short levy of customs duty, or the like. The third is the the case of erroneous refund. This category springs up in the process of assessment only where two kinds of errors, i.e. non-levy or short levy, may occur and lead to an erroneous refund. Since levy is linked to assessment, a case for refund may arise which may be erroneous. These are the three categories of known errors in regard to duties.

18. In Geep Flashlight Industries Ltd. v. Union of India ((1976) 4 SCC 677 : (1977) 1 SCR 983), this Court had occasion to deal with a case of erroneous refund and while examining the scope of Section 28 of the Act ruled as follows : (SCC p. 680, para 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 six 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 refund. In any other case, the relevant date is the date of payment of duty."

It can thus be clearly gathered that in cases of duty not levied or short levied the "relevant date" is the date on which the concerned officers makes some orders for the clearance of the goods on payment of no duty or the date of adjustment of duty on framing the final assessment, as the case may be.

19. Now reverting to the facts of the instant case it is evident that the goods were classified and assessed to duty under one heading, say A, on August 6, 1979 whereafter claim for refund was made by the appellant which was rejected by the Assistant Collector on October 12, 1979. The exercise of the Assistant Collector in levying duty under heading A, when it should have been levied

under another heading, say C, despite the appellant's claim that it should be still under another heading, say B, was a case of case of short levy insofar as the goods were classified as attracting lesser duty under heading A whereas higher duty should have been attracted on classifying it under heading C. So the orders of levy of duty had two facts. The duty from the point of view of the appellant had been excessively levied necessitating him to challenge the same and seek refund. On the other hand, from the point of view of the revenue the duty had been short levied giving rise to cause to have it levied under proper heading. If these two facts are understood in the right perspective, it was incumbent on the Central Government to exercise its suo moto power under sub-section (3) read with sub-section (5) of Section 131 within six months from August 6, 1979, the date when the duty was short levied and undeniably the Central Government did not take such timely step even though it had a cause to do so. The appellant, however, made claim for the refund of the excess duty levied taking shelter under another heading and on its refusal by the Assistant Collector on October 12, 1979 had its appeal accepted on May 2, 1981 from the Appellate Collector who ordered refund. The Central Government then got a cause to take suo moto action under Section 131(3) of the Customs Act, 1962 to annul or modify the order of the Appellate Collector, or the actual refund itself under that order, in accordance with Geep Flashlight Industries Ltd. case ((1976) 4 SCC 677 : (1977) 1 SCR 983). It being a case of erroneous refund sub-section (3) of Section 131 was attracted and not sub-section (5) of Section 131 as at that point of time it was not a case of non-levy or short levy, and these two categories of errors could not be equated with the error of erroneous refund inasmuch as these three categories of errors are treated separately in the scheme of things. Merely because the Central Government had the power to suo moto revise the orders of refund passed by Appellate Collector it does not follow a fortiori that it had the power to revise the orders of short levy at that stage. The ultimate analysis is that if there was an error of short levy in the order of the Assistant Collector in classifying goods at A instead of C as claimed by the revenue and not classifying them at B as claimed by the importer, then on the grant of relief by the Appellate Collector classifying them under heading B, can at best give occasion to the Central Government to annul or modify the classification brought under head B, and so as to leave it classified at heading. A, but could not have it re-classified under heading C unless the exercise was undertaken within the period of limitation prescribed under Section 28 as required under sub-section (5) of Section 131 of the Customs Act, 1962. The error committed by the Tribunal, for the view afore-expressed, is so patent that it cannot be allowed to go uncorrected as a tolerable error. Inevitably this appeal is to be, and is, hereby allowed, modifying the orders of the Tribunal passed in Appeal No. CD(SB)(T) 1604/81-C so as to revive the order of the original assessment dated August 6, 1979 and the order of the Assistant Collector of Customs, Madras dated October 12, 1979, keeping upset the orders dated May 2, 1981 of the Appellate Collector of Customs, Madras passed in Appeal No. C/3/212/80.

20. The appellant shall have their costs.

ORDER OF THE COURT

21. According to the decision of the majority, the appeal stands dismissed with costs.

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