Collector of Central Excise, Madras

Vs

M/S M. M. Rubber And Co., Tamil Nadu

Civil Appeal No. 6071(NM) of 1990

(S. Ranganathan, V. Ramaswami – II, N. D. Ojha JJ)

04.09.1991

JUDGMENT

V. RAMASWAMI, J. –

1. The short question of law that rises for consideration in this appeal is as to what is the relevant date for the purpose of calculation of the period of one year provided under Section 35-E(3) of the Central Excises and Salt Act, 1944 (hereinafter called the Act). Briefly stated the question arises in the following circumstances.

2. By order in Original No. 34 of 1984 dated November 28, 1984, the Collector of Central Excise, Madras as an adjudicating authority within the meaning of the Act, held as barred by limitation the demand from the respondent towards excise duty on biaxially oriental polypropylene films as set out in the show cause notice dated October 25, 1983 and dropped further proceedings against the respondent. A copy of this order was attested by the Superintendent of the office on December 21, 1984 and despatched to the respondent. It was received by the respondent on December 21, 1984. The Central Board of Excise and Customs (hereinafter called the Board), after consideration of the order, on December 11, 1985 directed the Collector of Central Excise, Madras under the provisions of section 35-E(1) to apply to the Customs, Excise and Gold (Control) Appellate Tribunal, New Delhi, for correct determination of the points arising out of the aforesaid order and accordingly the Collector filed the application before the Tribunal as provided under Section 35-E(4) of the Act.

3. Before the Tribunal the respondent urged that the relevant date of the Collector's (adjudicating authority) order for the purposes of Section 35-E(3) should be taken as November 28, 1984 and not December 21, 1984 when it was received by the respondent and on that basis the order of the Board under Section 35-E(1) of the Act should be held as beyond the period of one year from the date of the Decision or order of the adjudicating authority and therefore the application before the Tribunal was incompetent. The Tribunal accepted this contention and held that the application was not maintainable.

4. In this appeal filed under Section 35-L of the Act the learned counsel for the appellant contended that mere writing an order in file kept in the office is no order in the eye of law in the sense of affecting the rights of the parties for whom the order is meant and that though the order of the adjudicating authority was made on November 28, 1984 a copy of the same was sent to the respondent only on December 21, 1984 and received by him on the very day and that therefore the lamination would start only at the earliest from December 21, 1984. He stated that the order was received by the Board also only subsequent to December 21, 1984. His further submission was that enabling the giving of the direction under Section 35-E(1) and the application under Section 35-E(4)

in pursuance of that direction shall be treated as if a right of appeal given to the department. On this basis his argument was that the departmental authorities and the private parties are to be treated equally as aggrieved persons for the purposes of calculating the time for making the direction under Section 35-E(3) of the Act.

5. Before we discuss the arguments of the learned counsel, it is necessary to set out some relevant provisions in the Act. Section 35 of the Act provides for an appeal by a person aggrieved by any decision or order passed under the Act by a Central Excise Officer lower than a Collector of Central Excise and that such an appeal will have to be filed "within three months from the date of the communication to him of such decision or order". Sub-section (5) of Section 35-A requires that on the disposal of the appeal, the Collector (Appeal) shall communicate the order passed by him to the appellant, the adjudicating authority and the Collector of Central Excise. Section 35-B provides for a right of appeal to any person aggrieved by, among other orders, (1) an order passed by the Collector (Appeals) under Section 35-A and (2) a decision or order passed by the Collector of Central Excise as an adjudicating authority. Such an appeal will have to be filed "within three months from the date on which the order sought to be appealed against is communicated to the Collector of Central Excise or as the case may be the other party preferring the appeal". The Appellate Tribunal also is required to send a copy of the order passed in the appeal to the Collector of Central Excise and the other party to the appeal. Section 35-E(1) authorised the Board "of its own motion, call for and examine the record of any proceeding in which a Collector of Central Excise as an adjudicating authority has passed any decision or order under this Act for the purpose of satisfying itself as to the legality or propriety of any such decision or order and may, by order, direct such Collector to apply to the Appellate Tribunal or as the case may be the "Customs and Excise Revenues Appellate Tribunal established under Section 3 of the Customs and Excise Revenues Appellate Tribunal Act, 1986 for the determination of such points arising out of the decision or order as may be specified by the Board in its order." As sub-section (2) of Section 35-E is also relevant for consideration that may also be set here and that reads :

> "(2) The Collector of Central Excise may, of his own motion, call for and examine the record of any proceedings in which an adjudicating authority subordinate to him has passed any decision or order under this Act for the purpose of satisfying himself as to the legality or propriety of any such decision or order and may, by order, direct such authority to apply to the Collector (Appeals) for the determination of such points arising out of the decision or order as may be specified by the Collector of Central Excise in his order."

6. It may be seen that the direction to file an appeal under these two sub-sections by the Board and the Collector, as the case may be, is to the very adjudicating authority who would otherwise be bound by his own order and not expected to be aggrieved by the same. When an appeal is filed on such direction, the appellate will be the adjudicating authority himself and not the authority who gave the direction.

7. Sub-section (3) of Section 35-E of the Act which deals with the limitation for exercise of the powers under sub-sections (1) and (2) of the Act and which is the relevant provision for consideration in this appeal reads as follows :

> "35-E. (3) No order shall be made under sub-section (1) or sub-section (2) after the expiry of one year from the date of the decision or order of the adjudicating authority."

8. At this state itself we may state that sub-section (4) of the Act provides that the adjudicating authority shall file the application before the Tribunal in pursuance of the order made under sub-section (1) or sub-section (2) "within a period of three months from the date of communication of the order under sub-section (1) or sub-section (2) to the adjudicating authority".

9. The words "from the date of decision or order" used with reference to the limitation for filing an appeal or revision under certain statutory provisions had come up for consideration in a number of cases. We may state that the ratio of the decisions uniformly is that in the case of a person aggrieved filing the appeal or revision, it shall mean the date of communication of the decision or order appealed against. However, we may note a few leading cases on this aspect.

10. Under Section 25 of the Madras Boundary Act, 1860 the starting point of limitation for appeal by way of suit allowed by that section was the passing of the Survey Officer's decision and in two of the earliest cases, namely, Annamalai Chetti v. Col. J.G. Cloete [ILR (1883) 6 Mad 189] and Seshama v. Sankara [ILR (1889) 12 Mad 1] it was held that the decision was passed when it was communicated to the parties. In Secretary of State for India in Council v. Gopisetti Narayanaswami Naidu Garu [ILR (1910) 34 Mad 151 : (1911) 1 MWN 28 : 8 MLT 310] construing a similar provision in the Survey and Boundary Act, 1897 the same High Court held that a decision cannot properly be said to be passed until it is in some way pronounced or published under such circumstances the parties affected by it have a reasonable opportunity of knowing what it contains. "Till then though it may be written out, signed and dated, it is nothing but a decision which the officer intends to pass. It is not passed so long it is open to him to tear off what he has written and write something else." In Raja Harish Chandra Raj Singh v. Deputy Land Acquisition Officer [(1962) 1 SCR 676 : AIR 1961 SC 1500] construing the proviso to Section 18 of the Land Acquisition Act which prescribed for applications seeking reference to the court, a time-limit of six weeks of the receipt of the notice from the Collector under Section 12(2) or within six months from the date of the Collector's award which ever first expires, this Court held that the six months period will have to be calculated from the date of communication of the award. In Asstt. Transport Commissioner, Lucknow v. Nand Singh [(1979) 4 SCC 19 : (1980) 1 SCR 131] construing the provision of Section 15 of the U.P. Motor Vehicles Taxation Act, it was held that for an aggrieved party the limitation will run from the date when the order was communicated to him.

11. The ratio of these judgments were applied in interpreting Section 33-A(2) of the Indian Income Tax Act, 1922 in Muthia Chettiar v. CIT [ILR 1951 Mad 815 : AIR 1951 Mad 204 : (1951) 19 ITR 402] with reference to a right of revision provided to an aggrieved assessee. Section 33-A(1) of the Act on the other hand authorised the Commissioner to suo moto call for the records of any proceedings under the Act in which an order has been passed by any authority subordinate to him and pass such order thereon as he thinks fit. The proviso, however, stated that the Commissioner shall not revise any order under that sub-section "if the order (sought to be revised) has been made more than one year previously". Construing this provision the High Court in Muthia Chettiar case * [ILR 1951 Mad 815 : AIR 1951 Mad 204 : (1951) 19 ITR 402] held that the power to call for the records and pass the order will cease with the lapse of one year from the date of the order by the subordinate authority and the ratio of date of the knowledge of the order applicable to an aggrieved party is not applicable for the purpose of exercising suo moto power. Similarly in another decision reported in Viswanathan Chettiar v. CIT construing the time-limit for completion of an assessment under Section 34(2) of the Income Tax Act, 1922, which provided that it shall be made "within four years from the end of the year in which the income, profit and gains were first assessable, " it was held that the time-limit of four years for exercise of the power should be calculated with reference to the date on which the assessment or reassessment was made and not the date on which such

assessment or reassessment was made and not the date on which such assessment or reassessment order made under Section 34(2) was served on the assessee.

12. It may be seen therefore, that, if an authority is authorised to exercise a power or do an act affecting the rights of parties, he shall exercise that power within the period of lamination prescribed therefor. The order or decision of such authority comes into force or becomes operative or becomes an effective order or decision on and from the date when it is signed by him. The date of such order or decision is the date on which the order or decision was passed or made : that is to say when he ceases to have any authority to tear it off and draft a different order and when he ceases to have any locus paetentiae. Normally that happens when the order or decision is made public or notified in some from or when it can be said to have left his hand. The date of communication of the order to the party whose rights are affected is not the relevant date for purposes of determining whether the power has been exercised within the prescribed time.

13. So far as the party who is affected by the order or decision for seeking his remedies against the same, he should be made aware of passing of such order. Therefore courts have uniformly laid down as a rule of law that for seeking the remedy the limitation starts from the date on which the order was communicated to him or the date on which it was pronounced or published under such circumstances that the parties affected by it have a reasonable opportunity of knowing of passing of the order and what it contains. The knowledge of the party affected by such a decision, either actual or constructive is thus an essential element which must be satisfied before the decision can be said to have been concluded and binding on him. Otherwise the party affected by it will have no means of obeying the order or acting in conformity with it or of appealing against it or otherwise having it set aside. This is based upon, as observed by Rajmannar, C. J. in Muthia Chettiar v. CIT [ILR 1951 Mad 815 : AIR 1951 Mad 204 : (1951) 19 ITR 402] "a salutary and just principle". The application of this rule so far as the aggrieved party is concerned is not dependent on the provisions of the particular statute, but it is so under the general law.

14. In Muthia Chettiar case [ILR 1951 Mad 815 : AIR 1951 Mad 204 : (1951) 19 ITR 402] both these aspects came up for consideration. The relevant provisions considered therein were Section 33-A(1) and (2) of the Indian Income Tax Act, 1922, which read as follows :

> "35-A. Power of revision by Commissioner. - (1) The Commissioner may of his own motion call for the record of any proceeding under this Act in which an order has been passed by any authority subordinate to him and may make such inquiry or cause such inquiry to be made and, subject to the provisions of this Act, may pass such order thereon, not being an order prejudicial to the assessee, as he thinks fit :
>
> Provided that the Commissioner shall not revise any order under this sub-section if -
>
> #(a) * * *(b) * * *##
>
> (c) the order has been made more than one year previously.
>
> (2) The commissioner may, on application by an assessee for revision of an order under this Act passed by any authority sub-ordinate to the Commissioner, made within one year from the date of the order, ... call for the record of the proceeding in which such order was passed, and .... may pass such order thereon ..... as he thinks fit :

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15. Interpreting these provisions the court observed :

> "In a case falling under sub-section (1) the Commissioner acts of his own motion. There is no question of the aggrieved party invoking his jurisdiction There is no question of the aggrieved party invoking his jurisdiction. There can therefore be no occasion to apply the rule enunciated in Secretary of State for India in Council v. Gopisetti Narayanaswami Naidu [ILR (1990) 34 Mad 151 : (1911) 1 MWN 28 : 8 MLT 310]. It may be said that the Commissioner's power to call for the record ceases with the lapse of one year from the date of the order by the subordinate authority. But in a case falling under sub-section (2) the party aggrieved has got to take the step of applying for revision and he is allowed one year from the date of the order. The provision is, therefore, certainly in the nature of a time-limit for the application for revision."

16. The decision in Viswanathan Chettiar case [(1954) 25 ITR 79 (Mad)] related to the reassessment power under Section 34(2) of the Income Tax Act, 1922 which read as follows :

> "34. (2) No order of assessment under Section 23 or of assessment or re-assessment under sub-section (1) of this section shall be made after the expiry, in any case to which clause (c) of sub-section (1) of Section 28 applies, of eight years and in any other case, of four years from the end of the year in which the income, profits or gains were first assessable."

17. After referring to some of the provisions in the Act and some of the earlier decisions and in particular Muthia Chettiar case [ILR 1951 Mad 815 : AIR 1951 Mad 204 : (1951) 19 ITR 402] the learned Judges observed :

> "As we have already pointed out, the time-limit of four years for which sub-section (2) of Section 34 provided was the period within which the Income-tax officer had to complete one stage of the proceedings, that is, the assessment of the income and determination of the tax payable, and that stage could be completed by the Income-tax Officer himself, even if the terms of the order of assessment were not communicated within that period of four years to the assessee. The rights of the assessee aggrieved by such an order of assessment have been specifically provided for by other sections of the Act."

18. Thus if the intention of design of the statutory provision was to protect the interest of the person adversely affected, by providing a remedy against the order or decision any period of limitation prescribed with reference to invoking such remedy shall be read as commencing from the date of communication of the order. But if it is a limitation for a competent authority to make an order the date of exercise of that power and in the case of exercise of suo moto power over the subordinate authorities' orders, the date on which such power was exercised by making an order are the relevant dates for determining the limitation. The ratio of this distinction may also be founded on the principle that the government is bound by the proceedings of its officers but persons affected are not concluded by the decision.

19. Section 35-E comes under the latter category of an authority exercising its own powers under

the Act. It is not correct to equate the Board, as contended by Sri Gaurishankar Murthy, to one of the two parties to a quasi-judicial proceeding before the Collector and the Board's right under Section 35-E to the exercise of the right of appeal by an aggrieved assessee from an order passed to its prejudice. The power under Section 35-E is a power of superintendence conferred on a superior authority to ensure that the subordinate officers exercise their powers under the Act correctly and properly. Where a time is limited for the purposes by the statute, such power, as under Section 33-A(2) of the Indian Income Tax Act, 1922 referred to in Muthia Chettiar [ILR 1951 Mad 815 : AIR 1951 Mad 204 : (1951) 19 ITR 402], should be exercised within the specified period from the date of the order sought to be reconsidered. To hold to the contrary would be inequitable and will also introduce uncertainties into the administration of the Act for the following reason. There appears to be no provision in the act requiring the endorsement, by a Collector, of all orders passed by him to the Board. If there is such a practice in fact or requirement in law, the period of one year from the date of the order is more than adequate to ensure action in appropriate cases particularly in comparison with the much shorter period an assessee has within which to exercise his right of appeal. If, on the other hand, there is no such requirement or practice and the period within which the Board can interfere if left to depend on the off-chance of the Board coming to know of the existence of a particular order at some point of time, however distant, only administrative chaos can result. We are, therefore, of the opinion that the period of one year fixed under sub-section (3) of Section 35-E of the Act should be given its literal meaning and so construed the impugned direction of the Board was beyond the period of limitation prescribed therein and therefore invalid and ineffective.

20. For the foregoing reasons we are of the view that the Tribunal was right in holding that the application before them was out of time. This appeal is accordingly dismissed. There will be no order as to costs.

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