Collector of Central Excise, Kanpur

Vs

Flock (India) Pvt. Ltd. C-7, Panki Industrial Area, Kanpur

Civil Appeal No. 2552 of 1989

04.08.2000

JUDGMENT

D.P. Mohapatra, J.:— The consequence of non-challenge of an appealable order passed under the Central Excise and Salt Act, 1944 (hereinafter referred to as 'the Act') arises for determination in this appeal. To be more specific the question is in a case where the Assistant Collector of Central Excise passes an order classifying a product under a particular tariff item and the said order, though appealable is not challenged by the assessee in appeal whether in the application for refund of the duty paid the assessee is entitled to question the order of the Assistant Collector as erroneous?

The facts relevant for determination of the question may be stated thus: M/s. Flock (India) Pvt. Ltd. - respondent herein, was manufaturer of jute hessian floked with nylon flocks under L-4 licence issued under the Act. The respondent filed a classification list in which it was claimed that the said product comes under tariff item 22-A. The Assistant Collector after examining the contents of the product and the particulars furnished by the respondent passed an order on 21.1.1978 holding that the product in question is classifiable under tariff item 22-B and not under tariff item 22-A and the applicable rate of duty would be 25% ad valorem. In the said order the Assistant Collector expressly stated that the assessee may prefer and appeal against his order to the Collector (Appeals). The assessee neither challenged the said order by filing any appeal nor did it pay the duty under protest.

The respondent filed an application on 6.4.1979 claiming refund of duty paid alleging inter alia that the product in question were wrongly classified under tariff item No. 22-B, instead it ought to have been classified under tariff item No. 22-A and that the differential duty should be refunded. The Assistant Collector after service of notice on the respondent passed the order dated 27.8.1980 dismissing the claim for refund on the ground that the order dated 21.1.1978 classifying the product as falling under tariff item 22-B had attained finality, and therefore, the claim from refund was not maintainable.

The respondent filed appeal before the Collector (Appeals), New Delhi, assailing the said order. The Collector by order dated 6.1.1984 allowed the appeal, set aside the order dated 27.8.80 passed by the Assistant Collector and remanded the matter to him with direction to reconsider the matter on merits including the question whether the goods were classifiable under tariff item 22-A or 22-B. The appellant herein challenged the order of the Collector (Appeals) by filing an appeal before the Customs, Excise & Gold (Control) Appellate Tribunal (CEGAT) which was dismissed by the order passed on 19.9.88. The said order is under challenge in this appeal filed by the Collector of Central Excise Kanpur.

On the facts stated in the foregoing paragraphs the question formulated earlier arises for determination. The solution of the point formulated depends on the answer to the question whether the jurisdiction of the Assistant Collector while considering an application for refund of duty paid is

independent of the jurisdiction exercised by him in determining classification of the product in question. It is the contention of the respondent-assessee that the jurisdiction to determine the validity and sustainability of the claim for refund of duty is an independent jurisdiction and in exercise of that jurisdiction the Assistant Collector is not fettered by any order passed by the authority regarding classification of the product. As such the Assistant Collector could independently consider the claim for refund of duty on merits without being fettered by the previous order passed by him in the matter relating to the question of clasification of the product and failure on the part of the assessee to challenge the orders of classification of the product under tariff item 22-B is of no consequence.

At the relevant time the provisions for claim for refund of duty was made in Rule 11. The said Rule reads as follows:

"Rule 11 Claim for refund of duty:—

(1) Any person claiming refund of any duty paid by him may make an application for refund of such duty to the Assistant Collector of Central Excise before the expiry of six months from the date of payment of duty:

Provided, that the limitation of six months shall not apply where any duty has been paid under protest.

Explanation: Where any duty is paid provisionally under these rules on the basis of the value or the rate of duty, the period of six months shall be computed from the date on which the duty is adjusted after final determination of the value or the rate of duty, as the case may be.

(2) If on receipt of any such application the Assistant Collector of Central Excise is satisfied that the whole or any part of the duty paid by the applicant should be refunded to him, he may make an order accordingly.

(3) Where as a result of any order passed in appeal or revision under the Act, refund of any duty becomes due to an person, the proper officer may refund the amount to such person without his having to make any claim in that behalf.

(4) Save as otherwise provided by or under these rules no claim for refund of any duty shall be entertained.

Explanation: For the purposes of this rule, "refund" includes rebate referred to in Rules 12 and 12A".

Section 35 of the Act provides regarding appeals to Collector (Appeals). In sub-section (1) thereof it is laid down that any person aggrieved by any decision or order under the Act by a Central Excise officer lower in rank than a Collector of Central Excise may appeal to the Collector (Appeals) within 3 months 7 from the date of communication to him of such decision or order. In the proviso to sub-section (1) the power is vested in Collector (Appeals) to extend the period by further three months if he is satisfied that the appellant was prevented by sufficient cause from presenting the appeal aforesaid within the period of three months prescribed under sub-section. Section 35-A lays down the procedure to be followed in disposal of the appeal. In sub-section (3) thereof it is provided that the Collector (Appeals) may after making such further inquiry as may be necessary pass such order as he thinks fit confirming, modifying or annulling the decision or order appealed against, or

may refer the case back to the adjudicating authority with such directions as he may think fit for a fresh adjudication or decision, as the case may be. The proviso to the said sub-section are not relevant for the purpose of the present case. Section 35B(1)(b) makes an order passed by the Collector (Appeals) under Section 35A appealable to the appellate tribunal.

From the aforementioned provisions of the Act the position is clear that any order passed by an authority under the Act is appealable to the Collector (Appeals) and a further appeal to the appellate tribunal against the order of the Collector (Appeals) is also provided in section 35. The hierarchy of authorities for adjudication and determination of a matter relevant for charging the exercise duty is for a purpose. It is not an empty formality. Classification of the goods manufactured by an assessee is important for the purpose of levy and collection of excise duty. Under Rule 173 B every assessee is required to file with the proper officer a list of goods manufactured by him for approval and the proper officer shall after such inquiry as he deems fit approve the list with such modifications as are considered necessary and all clearance are to be made only therefter.

A right of appeal is a creature of the statute. It is a substantive right. An order of the appellate authority is binding on the lower authority who is duty bound to implement the order of the superior authority. Refusal to carry out the direction will amount to denial of justice and destructive of one of the basis principles in the administration of justice based on hierarchy of authorities.

Coming to the question that is raised there is little scope for doubt that in a case where an adjudicating authority has passed an order which is appealable under the statute and the party aggrieved did not choose to exercise the statutory right of filing an appeal, it is not open to the party to question the correctness of the order of the adjudicating authority subsequently by filing a claim for refund on the ground that the adjudicating authority had committed an error in passing his order. If this position is accepted then the provisions for adjudication in the Act and the Rules, the provision for appeal in the Act and the Rules will lose their relevance and the entire exercise will be rendered redundant. This position, in our view, will run counter to the scheme of the Act and will introduce an element of uncertainty in the entire process of levy and collection of excise duty. Such a position cannot be countenanced. The view taken by us also gain support from the provision in sub-rule (3) of Rule 11 wherein it is laid down that where as a result of any order passed in appeal or revision under the Act, refund of any duty becomes due to any person, the proper officer, may refund the amount to such person without his having to make any claim in that behalf. The provision indicates the importance attached to an order of the appellate or revisional authority under the Act. Therefore, an order is not liable to be questioned and the matter is not to be reopened in a proceeding for refund which, if we may term it so is in the nature of execution of a decree/order. In the case at hand it was specifically mentioned in the order of the Assistant Collector that the assessee may file appeal against the order before the Collector (Appeals) if so advised.

On the discussions made in the foregoing paragraphs and for the reasons stated therein the order of the tribunal is unsustainable. Accordingly the appeal is allowed and the impugned order is set aside with costs.