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GTC INDUSTRIES LTD.

v.

COLLECTOR OF CENTRAL EXCISE, NEW DELHI

JULY 22, 1997

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[S.P. BHARUCHA AND V.N. KHARE, JJ.]

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Central Excises and Salt Act, 1944 : Sec. 35E(1)—Assessee—Cigarette manufacturing company—Default in payment of excise duty—Two show cause notices issued—Subsequently third show cause notice issued—On challenge—High Court permitting Revenue to proceed with adjudication—But directions issued for not communicating the orders—Subsequently sealed envelope opened and orders shown to parties—Appeal by Revenue against the adjudication order—Held, appeal filed by the Revenue before the Tribunal is beyond time—Cannot be entertained—Each show cause notice must be limited to the case made out therein—No jurisdiction for Tribunal to direct that third show cause notice be looked into for the purpose of adjudication of 1st and 2nd show cause notices—Direction of tribunal—Beyond its adjudicatory function.

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The appellant-assessee, a cigarette manufacturing Company, was issued two show cause notices demanding excise duty. Subsequently a third show cause notice was issued to the assessee. A petition challenging the show cause notices was filed before the High Court. The High Court on 20th June 1984 while permitting the Revenue to proceed with adjudication of the first show cause notice directed not to communicate the order passed in the adjudication proceedings to the parties. By subsequent order dt. 18th June 1991 High Court gave directions for opening the sealed cover and for showing the orders to the parties. A direction for filing appeal against the adjudication order was passed by the High Court on 21st July 1994. The appeal filed by the assessee against the adjudication order on the ground that the Board's order had been passed beyond the period stipulated in Section 35E of the Central Excises and Salt Act, 1944 was

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dismissed by the Customs, Excise and Gold (Control) Appellate Tribunal. Aggrieved by the order of the Tribunal, the appellant-assessee has filed the present appeal.

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The contention of the appellant-assessee was that the Board's, order, directing that an appeal should be filed by the Revenue against the

adjudication order, was passed after the expiry of the period specified in that behalf. It was further contended that the Tribunal exceeded its jurisdiction in ordering that the allegations contained in the third show cause notice should be looked into for the purpose of adjudication, on remand of the first and second show cause notices. A

The contention of the respondent was that the High Court directed that the adjudication order should not be communicated to the assessee but should be kept in a sealed envelope. It was in consonance with the spirit of the order that the said assessment order had not been looked into by the Board under the provisions of section 35-E and therefore the period during which the said assessment order remained in a sealed envelope should not be taken into consideration for filing an appeal. B C

Allowing the appeals, this Court

HELD : 1.1. The appeal filed by the Revenue before the Tribunal is beyond time and it shall not be entertained. D

1.2. Section 35E(1) of the Central Excises and Salt Act, 1944 empowers the Board to call for and examine the record of any proceeding in which the Collector of Central Excise, as an adjudicating authority, has passed any decision or order under the Act for the purpose of satisfying itself as to the legality and propriety thereof. It can direct the Collector to apply to the Tribunal for determination of such points as arising out of the decision or order as are specified by the Board. Sub-section (3) of section 35-E requires that no order shall be made under sub-section (1) after the expiry of one year from the date of the decision or order of the adjudicating authority. The Board's order was well beyond the permitted time. [15-A-D] E F

1.3. The High Court's order required the Revenue not to communicate the assessment order to the assessee. It imposed no restriction on the activities of the Revenue. The examination of the assessment order by the Board under section 35-E of the Act was in no way inhibited by any order of the High Court; nor was the passing of an order directed to the assessing authority consequent upon such examination. Therefore, the Board's order was passed after the period prescribed in that behalf by section 35-E of the Act. [15-F-H] G H

A 2. The hearing on remand of the first and second show cause notices shall proceed, but limited to the case made out in each on its own merits. The view of the Tribunal that the allegations contained in the third show cause notice should be looked into for the purpose of adjudication of the first and second show cause notices cannot be sustained. Each show cause notice must be limited to the case that is made out therein by the Revenue.

B It is not within the jurisdiction of the Tribunal to direct otherwise; to do so is to go beyond its purely adjudicatory function. [16-E-G]

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 10858-10860 of 1996.

C From the Judgment and Order dated 25.3.96 of the Customs Excise and Gold (Contral) Appellate Tribunal, Delhi in A. No. E/1846/95- A and E/1864-66 of 1994-A.

D J. Vellapalli and Mrs. Rohina Nath. for Khaitan & Co. for the Appellant.

K.N. Bhat, S.D. Sharma, C.B. Babu and V.K. Verma for the Respondents.

The Judgment of the Court was delivered by

E **S.P. BHARUCHA, J.** The assessee is in appeal against an order of the Customs, Excise and Gold (control) Appellate Tribunal.

We set out the facts only insofar as they relate to the three issues which are canvassed at the Bar.

F The assessee, a cigarette manufacturing company, was issued a show cause notice on 26th August, 1983 in respect of its Bombay factory. A demand for excise duty in the sum of Rs. 28.93 crores was raised for the period 1978 to 1983. On 19th April, 1984 a second show cause notice was issued to the assessee. It was in respect of its Baroda factory. It related to period 1978 to 1983 and demanded Rs. 35.32 crores by way of excise duty.

G On 2nd September, 1985 a third show cause notice was issued to the assessee which related to its Bombay and Baroda factories. It sought to make the assessee and two of its job workers liable to excise duty in the sum of Rs. 13.37 crores for the period 1st July, 1978 to 30th June, 1980. The third show cause notice was issued by the Deputy Director of Anti

H Evasion, Central Excise, New Delhi.

In 1984 the assessee filed a writ petition before the High Court at Bombay challenging the first show cause notice. At subsequent stages the writ petition was amended so that the second and third show cause notices were also subjected to challenge. On 20th June, 1984 the High Court permitted the Revenue to proceed with the adjudication of the first show cause notice, but directed :

"The order signed by the concerned officer as provided herein above will not be communicated to the respondents nor will the concerned officer or any other officer of the Excise Department inform the respondents of the fact that the order has been passed and/or signed by the concerned officer."

On 18th June, 1991 the High Court noted that orders had been passed in the adjudication proceedings and directed that the sealed cover in which the orders had been placed be opened and the orders shown to learned counsel for the assessee and the Revenue; also that the Revenue should supply copies of the orders to the assessee's advocates. On 21st July, 1994 the High Court directed that the assessee and/or the Revenue "may file appeal to the Tribunal against the said orders within two months from today...." and "if the said appeal is filed by the petitioners or the respondents, as the case may be, the Tribunal to entertain the said appeal on merits without taking the objection of limitation."

On 29th May, 1992 the Central Board of Excise & Customs made an order under the provisions of Section 35E(1) of the Central Excise and Salt Act, 1944 directing the Commissioner (L & A) as Collector of Central Excise to apply to the Tribunal for determination of the questions therein stated, which arose out of the adjudication order dated 21st August, 1987 passed by the Director (L & A) on the three show cause notices, heard and dealt with together. The order of the Central Board was endorsed, amongst others, to the Principal Collector of Central Excise, New Delhi.

On 16th September, 1994 the assessee filed appeals before the Tribunal against the said adjudication order insofar as it related to the first and second show cause notices, which was adverse to it.

On 14th December, 1995 an application for clarification/directions was made by the Commissioner (L & A), Customs and Central Excise, New Delhi to the Tribunal. The application stated that an appeal had been

A lodged by the applicant against the said adjudication order on that day, namely, 13th December, 1995. It stated that since a copy of the Boards' order under Section 35E(1) had not been endorsed to the applicant, although there was a direction to file an appeal, he did not have knowledge of the direction until he was informed by the Deputy Director (Investigations), Directorate General, Anti Evasion, New Delhi by his letter dated 7th December, 1996. The application submitted that the date of communication of the Boards' order should be taken to be the date on which the applicant was informed of it, i.e. 7th December, 1995; accordingly, the appeal that was being filed should be taken on record and listed for hearing on 14th December, 1995 along with the two appeals filed by the assessee.

C . On 25th March, 1996 the Tribunal passed the order that is under appeal. It referred to the orders of the High Court and held that the effective date of the said adjudication order was not the date on which it was originally signed but the date on which the sealed envelope had been opened pursuant to the High Court's direction and the said adjudication order shown to counsel for the parties. The contention that the Boards' order had been passed beyond the period stipulated in Section 35E was, therefore, negatived. The Tribunal referred to the application made to it by the Commissioner (L & A), New Delhi and accepted his case that he came to know of the Boards' order only on or immediately after 7th December, 1995. Accordingly, it held that the Revenue's appeal against the said adjudication order was in time. The Tribunal then noted the contention of the assessee that the assessment order had traversed beyond the scope of the grounds contained in the first and second show cause notices. The Tribunal saw no reason why the details regarding extra profit margin submitted in the third show cause notice should not be looked into for the purpose of the first and second show cause notices. It held that "the allegations contained in the third show cause notice which are relevant and apposite to the period covered by first and second show cause notices can be looked into for the purpose of adjudication."

G It is submitted on behalf of the assessee that the Boards' order, directing that an appeal should be filed by the Revenue against the said adjudication order, was passed after the expiry of the period specified in that behalf. Secondly, that, in any event, the filing of the Revenue's appeal was beyond time. Thirdly, that the Tribunal exceeded its jurisdiction in H ordering that the allegations contained in the third show cause notice

should be looked into for the purpose of adjudication, on remand, of the first and second show cause notices. A

Section 35E(1) empowers the Board to call for and examine the record of any proceeding in which the Collector of Central Excise, as an adjudicating authority, has passed any decision or order under the Act for the purpose of satisfying itself as to the legality and propriety thereof. It can direct the Collector to apply to the Tribunal for determination of such points as arise out of the decision or order as are specified by the Board. Sub-section (3) of Section 35E requires that no order shall be made under sub-section (1) after the expiry of one year from the date of the decision or order of the adjudicating authority. B C

The said adjudication order was made on 21st August, 1987. The Boards' order was made on 29th May, 1992. *Prima facie*, the Boards' order was well beyond the permitted time. The learned Additional Solicitor General, appearing for the Revenue, relied upon the order of the High Court dated 20th June, 1984 which required that the adjudication order should not be communicated to the assessee but should be kept in a sealed envelope. He submitted that it was in consonance with the spirit of the order of the High Court that the said assessment order had not been looked at by the Board under the provisions of Section 35E and that, therefore, the period during which the said assessment order remained in a sealed envelope should not be taken into consideration; in other words, that the said assessment order should be deemed to bear the date on which it was removed from the sealed envelope, i.e., 18th June, 1991, from which date the appeal was in time. D E

The High Court's order dated 20th June, 1984 required the Revenue not to communicate to the assessee the said assessment order. It imposed no restriction on the activities of the Revenue. That this is so is borne out by the terms of the subsequent order of the High Court dated 18th June, 1991 in which the Revenue was directed to supply copies of the said assessment order to the assessee's advocates. The examination of the said assessment order by the Board under Section 35E of the Act was in no way inhibited by any order of the High Court; nor was the passing of an order directed to the assessing authority consequent upon such examination. We, therefore, hold that the Boards' order was passed after the period prescribed in that behalf by Section 35E of the Act. F G H

A This brings us to the application for clarification/direction made by the Commissioner (L&A), Customs and Central Excise, New Delhi to the Tribunal on 13th December, 1995. It stated, as aforesaid, that the Revenue's appeal should be entertained because the Commissioner (L & A), Customs and Central Excise, New Delhi had not been endorsed a copy of the Boards' order and that he had been informed thereof only on 7th December, 1995. The Boards' order was endorsed to the Principal Collector, Central Excise, New Delhi. The third show cause notice, in respect of which the Revenue filed the appeal before the Tribunal, was issued by an officer in the Central Excise Collectorate at New Delhi. The requirement of Section 35E that the communication of the Boards order should be made was satisfied long before 7th December, 1995. Consequently, the Revenue's appeal was filed long after the permissible period of three months.

D It is to be noted that the High Court, by its order dated 21st July, 1994, permitted the assessee and the Revenue to file appeals against the said adjudication order within two months, but the Revenue did not take advantage thereof and filed its appeal only on 13th December, 1994.

E The Tribunal found no legal difficulty in holding that the allegations contained in the third show cause notice should be looked into for the purpose of adjudication of the first and second show cause notices. We find great difficulty in upholding the Tribunal's view. As we see it, each show cause notice must be limited to the case that is made out therein by the Revenue. It is not within the jurisdiction of the Tribunal to direct otherwise; to do so is to go beyond its purely adjudicatory function.

F The appeals are allowed to the extent aforesaid. The appeal filed by the Revenue before the Tribunal is held to be beyond time and it shall not be entertained. The hearing on remand of the first and second show cause notices shall proceed, but limited to the case made out in each on its own merits.

G No order as to costs.

S.V.K.I.

Appeals allowed.