

A COLLECTOR OF CENTRAL EXCISE, KANPUR
v.
FLOCK (INDIA) PVT. LTD. C-7, PANKI INDUSTRIAL AREA,
KANPUR

AUGUST 4, 2000

B [B.N. KIRPAL AND D.P. MOHAPATRA, JJ.]

C *Central Excises and Salt Act, 1944—Sections 35, 35-A, 35-B—Central Excise Rules, 1944—Rule 11, 173-B—Appealable order classifying a product under a particular tariff item—Not challenged in appeal—Instead, assessee filing a claim for refund on wrong classification—Consequence of non-challenge—Held, not open to question the correctness of the order subsequently by filing claim for refund which is in the nature of execution of a decree/order.*

D **Respondent-assessee, a manufacturer of jute hessian, filed a classification list claiming that the said product comes under tariff item 22-A. The Assistant Collector, by an order, held that the product is classifiable under tariff item 22-B. The assessee did not challenge the order, instead, it filed an application claiming refund of duty paid on the ground of wrong classification. The Assistant Collector dismissed the claim for refund on the ground that the order had attained finality. The assessee filed an appeal before the Collector (Appeals). The Collector allowed the appeal and remanded the matter to the Assistant Collector to reconsider the matter on merits. The appellant unsuccessfully challenged the order of Collector (Appeals) before the CEGAT.**

F **In appeal to this Court, the assessee contended 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 him regarding classification of the product.**

G **Allowing the appeal, this Court**

H **HELD : 1. 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. [160-H; 161-A]

2. If this position is accepted then the provisions for adjudication in the Central Excise 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 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. [161-B]

3. Sub-rule (3) of Rule 11 also lays 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, if an order, which is appealable under the Act, is not challenged then the order is not liable to be questioned and the matter is not to be reopened in a proceeding for refund, which is in the nature of execution of a decree/order. [161-C-D]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2552 of 1989.

From the Judgment and Order dated 19.9.88 of the Central Excise Customs and Gold (Control) Appellate Tribunal, New Delhi in A. No. 739 of 1984-D.

Mukul Rohtagi, Additional Solicitor General, K. Swamy, R.N. Verma and P. Parmeswaran for the Appellant.

Ex-parte against Respondent.

The Judgment of the Court was delivered by

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 ?

A The facts relevant for determination of the question may be stated thus:
M/s Flock (India) Pvt. Ltd.- respondent herein, was manufacturer of jute
hessian flocked 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
B 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 an appeal against his order to the
Collector (Appeals). The assessee neither challenged the said order by filing
C 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
D 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 for refund was not maintainable.

E 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
F (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.

G 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
H 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 classification 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 provision 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 any 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.”

- A 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 from the date of communication to him of such decision or order.
- B 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
- C 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
- D 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
- E the Collector (Appeals) is also provided in Section 35. The hierarchy of authorities for adjudication and determination of a matter relevant for charging the excise 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
- F 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 clearances are to be made only thereafter.

- A right of appeal is a creature of the statute. It is a substantive right. An
- G 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 basic 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 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 which is appealable under the Act is not challenged then the 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.

B.S.

Appeal allowed.