Yes
Withholding
of Increment

IN THE CENTRAL ADMINISTRATIVE TRIBUNAL
AHMEDABAD BENCH

(3)

O.A. No. 20 of 1990
T.A. No.

DATE OF DECISION 16-12-1992

Shri S. Gautam Petitioner

Shri R.S. Dinkar Advocate for the Petitioner(s)

Versus

Union of India and Others Respondent

Shri Akil Kureshi Advocate for the Respondent(s)

CORAM :

The Hon'ble Mr. N.V. Krishnan Vice Chairman.

The Hon'ble Mr. R.C. Bhatt Member (J)

1. Whether Reporters of local papers may be allowed to see the Judgement ? ✓
2. To be referred to the Reporter or not ? ✓
3. Whether their Lordships wish to see the fair copy of the Judgement ? ✓
4. Whether it needs to be circulated to other Benches of the Tribunal ? ✓

S. Gautam
Superintendent of Central Excise &
Customs, A.R. Mehsana, Mehsana. Applicant.

Advocate Shri R.S. Dinkar

Versus

1. Union of India
Through Secretary,
Ministry of Finance
Department of Revenue,
North Block, New Delhi.

2. Collector,
Central Excise & Customs,
Ahmedabad.

Advocate Shri Akil Kureshi Respondents.

JUDGEMENT

In

O.A. 20 of 1990 Date : 16-12-1992

Per Hon'ble Shri N.V. Krishnan Vice Chairman.

The applicant is a Supdt. Central Excise at Mehsana and he is working under the second respondent, the Collectior of Central Excise and Customs Ahmedabad. He is aggrieved by the minor penalty imposed on him, in pursuance of the disciplinary proceedings initiated against

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him and hence he has filed this application.

2. The facts can be briefly stated as follows : -

2.1. By the Annexure-A-5, memorandum dated 11.12.1987, the second respondent initiated disciplinary proceedings against the applicant under, Rule - 16, of the Central Civil Services (Classification, Control and Appeal) Rules, 1965 with a view to imposing a minor penalty on him, and a statement of imputations was served on the applicant which reads as follows :

> "Audit Report bearing No.1652/84 was received at the Range Office Non 25.1.85 which contained certain major & minor objections. Minor objection under S.No.5 pointed out that in respect of cotton & MMF cleared by M/s Ashoka Mills Ltd., Ahmedabad, during the period 1.1.84 to 31.12.84, differential Central Excise duty was to be paid by the party on insurance charges which were recovered from the buyers, if the charges were more than what was paid to the Insurance company as the said insurance charges recovered from the buyers by the Mills in excess, would form part of the assessable value under Section 4 of Central Excise and Salt Act, 1944.
>
> That the said Shri S.Gautam, Supdt. incharge failed to verify the receipt of extra amounts collected by the party from the invoices at the time of assessment of the R.T. 12 returns filed by the unit nor did he take immediate action to issue a demand for collecting the differential duty on receipt of the Audit report on 25.1.85.
>
> That the said Shri S.Gautam, Supdt. issued a SCN bearing No.VI/Audit/Ashoka/85 only on 23.5.85 demanding duty Rs.32,056.68 under Section 11 A of Central Excise Salt Act, 1944 read with Rules 9 and 49 of Central Excise Rules, 1944. However, demand for duty for the period from 1.1.84 to 22.11.84 amounting to Rs.30,225.91 had to be dropped by the Asstt. Collector, Central Excise, Division - II, Ahmedabad as it was time barred.
>
> Explanation dt. 11.12.86 was received from Shri S.Gautam, Suptd. in which he has stated, inter alia, that the party was requested to supply the relevant information and statistics for recovering proper duty, but the party had refused to comply with that and then the Section Officer was also deputed several times for that purpose but the party did not co-operate.

Whereas it appears that if the particulars regarding the insurance charges etc. were not supplied by the party then Shri S.Gautam should have issued a notice demanding the differential duty without indicating the actual amount involved in order to avoid the demand getting time - barred. Instead of that, he issued the SCN only on 23.5.85 i.e. after a lapse of about 4 months from the date of receipt of the Audit Report No. 1652/84.

Thus Shri S.Gautam, Superintendent by his aforesaid act had failed to maintain absolute devotion to duty and behaved in a manner unbecoming of a Govt. servant and brought a pecuniary loss of Rs.30225.91 on the Government and thereby contravened Rule 3 of CCS (Conduct) Rules 1964."

2.2. A detailed reply was sent by the applicant on 23rd March 1988 denying the imputations. Annecure-A-6 is the copy of the reply but does not contain the enclosures referred to therein. He states in para-4 of this reply that the disciplinary proceedings were necessitated only because the Asst. Collector had dropped the proceedings initiated by him against the assessee as time barred and therefore, it was necessary to see whether the decision was right. In para - 1 of this reply, he, pointed out that even by the time the audit report was received, a sizeable amount of excise duty had already become time barred, and therefore, he should not be held responsible for the entire amount that had become time barred. He also pointed out in para- 6 of this reply that he had brought to the notice of the Assistant Collector the facts of the case and requested him to amend the notice to the assessee by invoking the extended period of five years limitation for assessment in such cases.

2.3. The disciplinary authority considered this reply and passed the impugned order dated 18.10.1988, (Annexure-A-9), holding that there has been negligence on the part of the applicant in discharging his duty and that his contention that the Asst. Collector was wrong in dropping the case, was not substantiated. Accordingly, he found the applicant guilty

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and imposed the penalty of " withholding of the next increment from the pay of Shri S.Gautam for a period of two years. This order withholding his next increment from his pay will not have any cumulative effect."

2.4 The applicant preferred an appeal on 29.11.1988, to the Government of India (Annexure-A-11). This was referred to the Union Public Service Commission (U.P.S.C.) for advice and on its receipt, the impugned Annexure-A-10, appellate order dated 8.11.1989, rejecting the appeal was passed by the first respondent in terms of the UPSC advice in its letter F-3/125/89-SI dated 13.10.1989.

2.5. It is in these circumstances that this application has been filed seeking the following reliefs :

"A. The impugned orders may be quashed and set aside.

B. The applicant may be declared not to be guilty in the performance of his duties :

C. The Respondents and their subordi - nate officers may be directed to reimburse the applicant the amount equivalent to the increment already withheld in pursuance of the impugned orders

D. The Respondents may be directed not to take cognizance of the impugned orders while conducting a D.P.C. for promotion to the Indian Central Excise & Customs Service Group 'A'. "

3. The respondents have filed a detailed reply, contending that the applicant is not entitled to any relief. It is stated that the procedure laid down in the C.C.A. Rules had been followed. It is pointed out that the applicant issued a notice dated 23.5.1985 to the assessee demanding Rs.32,056.68 under secion - 11-A of the Central Excise Salt Act 1944 (Act for short) read with Rule 9 and 49 of the

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Central Excise Rules 1944. The demand from 1.1.1984 to 22.11.1984 amounting to Rs.30,225.91, had to be dropped by the Asst. Collector Central Excise Decision I as it was time barred. It is thus clear, this is gravamen of the imputation against the applicant and it is contended that this has been fully : established.

4. We have heard the parties and perused the records.

5. Shri R.S.Dinkar, learned counsel for the applicant, first contended that a higher penalty has been imposed by the appellate authority than what was awarded by the disciplinary authority without following the prodedure laid down in the C.C.A. Rules. Obviously, this is a mistake as can be seen from para - 2.3. in which the penalty as imposed is extracted. On the advice of the UPSC, the penalty of "withholding of two increments without cumulative effect imposed by the disciplinary authority", was confirmed in the Annexure-A-10 appellate order. It is thus clear that this is not a case of enhancing the penalty but only one of an inadvertant mistake which can always be corrected by the appellate authority by a corrigendum.

6. In so far as the merit of the case is concerned, the important ground raised by the learned counsel for the applicant is that the applicant was not responsible for any loss of revenue due the demand being rendered time barred, because, he had taken timely action to request the Asstt. Collector to issue notice for action under the extended period of limitation under Section - 11-A of the Act.

The learned counsel for theapplicant referred us to the provisions of Section - 11-A of the Act which reads as follows :

"Section (11 A. Recovery of duties not levled or short-paid or erroneously refunded.-

(1) When any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded, a Central Excise Officer may, within six months from the relevant date, serve notice on the person chargeable with the duty which has not been levied or paid or which has been short-levied or short-paid or to whom the refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice :

Provided that where any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded by reason of fraud, collusion or any wilful mis-statement or suppression of facts, or contravention of any of the provisions of this Act or of the rules made thereunder with intent to evade payment of duty, by such person or his agent, the provisions of this sub-section shall have effect, (as if for the words "Central Excise Officer", the words "Collector of Central Excise" and) for the words "six months", the words "five years" were substituted.

Explanation - Where the service of the notice is stayed by an order of a court, the period of such stay shall be excluded in computing the aforesaid period of six months or five years, as the case may be.

(2) (The Assistant Collector of Central Excise or, as the case may be, the Collector of Central Excise) shall, after considering the representation, if any, made by the person on whom notice is served under sub-section(1), determine the amount of duty of excise due from such person (not being in excess of the amount specified in the notice) and thereupon such person shall pay the amount so determined."

He contends that even if there is contravention of the rules by the assessee, action can be taken under the proviso to Section-11-A and the extended period will apply. He submitted that there were sufficient reasons for invoking powers under this provisions and, had such proceedings been taken, there would not have been any loss of revenue and there would have been no occassion to proceed against the applicant under the C.C.A. Rules. He submitted that, though such a contention was raised in the reply dated 23rd March, 1988 (Annexure-A-6) sent by the applicant to the disciplinary authority, this was not all considered by him in the impugned order dated 18.10.1988, (Annexure-A-9). This was also a specific ground taken in the appeal, memorandum dated 29.11.1988, (para-X of Annexure-A-11),

but it has not been dealt with properly by the UPSC and the appellate authority.

7. Shri Akil Kureshi, the learned Counsel for the respondents submitted that even if it is held that the legal issue of action under proviso to section 11-A was not dealt with by the authorities, the applicant cannot escape liability on other counts. For even granting that some amount of duty had already become time barred for recovery when the audit report was received, the applicant could have prevented the other additional amount of duty from becoming time barred if he had issued the notice to the assessee, immediately after the receipt of the audit report, instead of issuing it only on 23-5-1985. Further, there is an allegation that the applicant failed to verify the receipt of extra amounts collected by the assessee much earlier from the invoices, at the time of the assessment of the R.T. 12 returns filed by it. There is also a charge that, if the assessee did not furnish all particulars, the applicant should have issued notice without indicating the amount involved to avoid the demand getting time barred. Hence, the penalty imposed is justified on these grounds

8. After hearing the Counsel of the parties and after persuing the records we are satisfied that the main ground for instituting the discipinary proceedings is the alleged loss of revenue of Rs 30225.91 due to demand to this extent becoming time barred, as a result of the delay in issuing the notice to the assessee by the applicant. The central question, therefore, is whether this demand had actually become time barred. The applicant's contention that this issue has not been properly examined.

9. It is seen from the record that the applicant gave a notice on 1-2-1985 (Annexure A-1) to the assessee in which information has been sought on five different items, one of which relates to the insurance charges, which is the subject matter of the statement of imputations in the disciplinary proceedings. The notice in this behalf reads as follows :

> " On verification of invoices it is also observed that the insurance charges have been collected from the buyers. You are requested to furnish the Insurance Policy and Insurance recovered from the buyers for the period from 1-12-1983 to 30-11-1984. As far as possible the particular may be furnished month wise/ policy wise."

The reply of the assessee dated 15-2-1985 (Annexure A-2) to this item reads as follows :-

> " We are collecting the insurance charges from the customers after the consignments have been cleared out of our factory gate and therefore, whatever we collect as insurance charges, the same cannot be included in the assessable value of the goods as per the judgement of the Supereme Court in Union of India Vs. Bombay Tyre International Limited reported in 1983 ELT 1986 SC. We, therefore do not find it necessary to furnish any information in this connection ".

There is an admission in the reply that the assessee is not at all including the insurance charges collected

from the customers in the assessable value, relying on the Supereme Court's judgement in Union of India Vs. Bombay Tyre International Ltd., (1983 ELT 1896 SC) cited in the reply and contending that it was therefore not necessary to furnsih any information in this regard.

10. It is nobody's case that the contentions of the assessee reproduced above is correct. Therefore, on the assessee's own admission there is at least an escapement of duty, if not evasion. The question then is whether the assessee could be assessed under the provis to section 11 A (i) of the Act as contended by the applicant, in which case the demand would not have escaped assessment as being time barred.

11. This contention of the applicant ought to have been properly considered. The alleged misconduct does not refer to a mere administrative act. It alleges error of ommission and commission in respect of a quasi-judicial act. Therefore, the reply given by the applicant in this regard i.e. Annexure A-6 and more particularly paras 5,6,7,12 which raise certain legal issues, should have been properly considered by the disciplinary authority and the appellate authority. The disciplinary authority has dismissed this contention by merely stating that this allegation is not tenable since the Assistant Collector's order has been found to be in order and no review was felt necessary. This is hardly convincing. If this is the case, the applicant could not have been charged with allowing Rs. 30225.91

to get time barred, because a substantial portion of the demand pertaining to the period from 1-1-1984 to 25-1-1984 had already become time barred on the day (25-1-1985) the audit report was received. Secondly, the remedy suggested in the Annexure A-5, statement of imputation (ie that the show cause notice could be issued without mentioning the amount) has been countered by the applicant in para 12 of his reply (Annexure 6) that this would be illegal. This point has not been examined in the impunged Annexure A-9 order where in also the same remedy is stated to be available to the applicant. The disciplinary authority has also failed to give the reasons why the proviso to section 11-A(1) of the Act is not attracted in this case, which should have been given in the circumstances of the case.

12. In the appeal filed by the applicant (Annexure A-11) the applicant had stated as follows in para (ix)

> "The appellant had also pointed out that the Assistant Collector ought not to have dropped the demand, as refusal on the part of the Mills to furnish the details necessary for issuance of show cause notice amounted to defiance of the lawful instructions of the competent authority Not only this, it also clearly says that the Mill was recovering insurance charged separately from its buyers. It was therefore pointed out that there was suppression of facts on the part of the Mills, who had also contravened the provisions of the Act and the Rules by not intimating the fact of excess recovery which was possible to ascertain only from the private records of the Mills. Therefore, the appellant had submitted that the Assistant Collector ought not to have dropped the demand as time barred, in as much as the said action on the part of the Mills had attracted the

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provisions of proviso (i) to sub-section (1) of Section 11 A of Central Excise Act, 1944 as a result of which, the extended time limit of five years could have applied."

It has been noted by UPSC in para 3 of its letter dated 13-10-1989 to Government (enclosure to Annexure A-10) that the applicant had raised the following objections in his appeal.

" The appellant further has added that had he issued such a vague show cause the same would have been struck down by the judcicial authority as being vague and inoperative He has further added that the show cause notice issued by him was not affected by the limitation of time as the larger period of five years could be involved in that case as such there was no need for him to call for the explanation of the Inspector ".

In regard to these contentions the advice of the UPSC in para 4 reads as follows.

"The Commission have observed after going through the records of the case that Shri Gautam did not serve the notice on the party within time and it was because of this reason that the Government was put to a revenue loss of Rs.30,225.91 They consider that this loss caused to the government could have been avoided had the appellant sent the demand notice promptly. With regard to the plea taken by Shri Gautam that the Assistant Collector wrongly dropped the proceedings as time barred, the Commission consider that if it was not time barred, then the appellant should have been in a posit--ion to recover the amount. It could not been done (Sic) and this goes to establish that the demand notice was time barred. The commission have further noted that the charged officer should have summouned the party immediately after it failed to submit the relevant documents called for. They also consider that there was no harm if the demand notice was sent to the party without qualifying the amount and this action would have taken care of time limit aspect. The legal substainability of such a notice could have been examined later, if the party had objected to it. "

We notice that the UPSC has not at all referred to the legal question whether the disputed demand could have been recovered under theprovisio to section 11 A (1) of the Act. We are also perturbed by the observation of the UPSC in the above extract, which we have emphasized. The question is can a government servant be punished for failing to take an action in respect of which he alleges that, in similiar circumstances, such action has been declared to be illegal by Courts/Tribunal ? The effect of sub-section (2) section 11 A of the Act has also not been considered. As pointed out above, this is the remedial action which, it is imputed, was not taken by the

the applicant. When the applicant has challenged in para 12 of his reply that as this would be illegal appellate authority has to consider (i) whether such action would be illegal and (ii) if it is illegal, whether the failure of the applicant to take such action renders him liable to punishment.

13. We are, therefore, satisfied that important legal issues have not been properly considered in the advice tendered by the UPSC to Government and therefore, in the appellate order. In fact, the UPSC should have also noted that the Disciplinary authority had not examined these legal aspects carefully.

14. In these circumstances, we are of the view that the case has to be reconsidered on remand. The question is whether it should be remanded to the disciplinary authority or to the appellate authority. We have preferred a remand to the latter authority because that authority has to act on the advice tendered by the UPSC. We have only to observe that the matter raised in this appeal involves legal issues of a complicated nature. Therefore, it would be in the interests of justice if the UPSC, which has to tender advice afresh in the appeal filed by the applicant, gives a hearing to the applicant through his counsel and likewise, hears the second respondent or gives an opportunity to the Department also to present its case through counsel.

15. With these observation we dispose of this application with the following orders.

(a) The impunged Annexure A-10 appellate order dated 8th November 1989 is quashed and set aside. We make it clear that the letter No. F/3/125/89 /SI dated 13th October 1989 of the UPSC addressed to the first respondent automatically stands quashed as it has fully merged in the quashed appellate order.

(b) We remand the appeal to the appellate authority i.e. first respondent, to reconsider the appeal of the applicant, particular attention being paid to the following points.

(1) Could the demand of Rs 30225.91, dropped by the Assistant Collector on the ground that it is time barred, have been raised against the assessee under the proviso to section 11 A (i) of the Act within a period of five years ?

(ii) Was it open under law to the applicant to issue a notice without quantifying the demand ?

(iii) If the answer to (ii) is in the negative, did the applicant render himself liable to action when he did not initiate any such action merely to save the unquantified demand from getting time barred ?

(iv) Would any of the other imputations referred to by the learned counsel for the

respondents- as stated in para 7 supra, have been made against the applicant in the first instance, if the Assistant Collector had not dropped the disputed demand and resorted to the provisio to section 11 A (i) ?

16. We have not finally decided any issue on merits and therefore, this order shall not stand in the way of the applicant from raising these issues again if the need therefor arises.

17. Application is disposed of as above. No orders as to costs.

(R.C. Bhatt)
Member (J)
16-12-1992

16/12/92
(N.V.Krishnan)
Vice Chairman.
16-12-1992

*AS.