

PETITIONER:
M/S. GUJARAT MACHINERYMANUFACTURERS LTD.

Vs.

RESPONDENT:
COLLECTOR, CENTRAL EXCISE, BARODA.

DATE OF JUDGMENT: 11/09/1996

BENCH:
BHARUCHA S.P. (J)
BENCH:
BHARUCHA S.P. (J)
VENKATASWAMI K. (J)

ACT:

HEADNOTE:

JUDGMENT:

O R D E R

We are concerned in this appeal against an order of the Customs, Excise and Gold (Control) Appellate Tribunal (the "Tribunal") with a commodity called frit, which is manufactured by the appellants.

With the introduction into Tariff Item 23-A(4) of the words "glass and", it read "other glass and glassware including tableware". The Collector of Central Excise issued to the appellants a notice under Section 45-A of the Central Excise and Salt Act on 4th November, 1981, asking them to show cause why frit should not be classified under sub-item (4) of Item 23-A with effect from 1st March, 1979, and the order of the Assistant Collector accepting that classification under the general Item 68 be revised accordingly. The appellants showed cause. The Collector by his order dated 3.12.1981 made the notice absolute. He set aside the Assistant Collector's order. Th ordered that frit is hereby classified as other glass falling within the purview of Item 23-A(4) of the First Schedule'. He further ordered that the appellants shall pay the duty of excise at the appropriate leviabale rate on frit glass manufactured and cleared by them as applicable to Item 23-A(4) of the said First Schedule or the difference in duty, as the case may be'.

The appellants preferred a revision application to the Central Government which came to be transferred to the Tribunal when it was constituted. The Tribunal considered the evidence that had been placed on record by the appellants and upheld the classification of frit as "other glass" within the meaning of Item 23-A(4). It was contended before the Tribunal that no notice had been issued to the appellants in regard to the recovery of any short-levied duty pursuant to such re-classification and that, therefore, no demand in this behalf could have been made or sustained. The Tribunal stated that the show-cause notice dated 4th November, 1981, no doubt, did not, in terms, ask the appellants to show cause why recovery of the short-levied

duty should not be made, but, once the Collector came to the conclusion and ordered the re-classification of frit under Item 23-A(4), he was right in demanding the payment of differential duty. However, the recovery thereof could be made only in respect of the period of six months preceding the date of the order, i.e., 30th April, 1982, as determined with regard to the provisions of Rule 11 or Section 11A. The Excise authorities were directed to re-calculate the amount of the short levy in the light of the Tribunals' order the communicate the appropriate figure to the appellants.

It is unnecessary to go into the aspect of classification because the new Tariff expressly provides for the classification of frit and because we are of the view that no notice for the recovery of short-levied duty as required by Section 35A was given to the appellants.

The relevant provisions of Section 35A read thus:-

"S.35A.- Revision by Board or Collector.-

1.....

.....

2. The Collector of Central Excise may, of his own motion or otherwise, call for and examine the record of any proceeding in which any decision or order has been passed under this Act or the rules made thereunder by a Central Excise Officer subordinate to him (not being a decision or order passed on appeal under Section 35) for the purpose of satisfying himself as to the correctness, legality or propriety of such decision or order and may pass such order thereon as he thinks fit.

3(a) No decision or order under this section shall be varied so as to prejudicially affect any person unless such person is given a reasonable opportunity of making a representation and, if he so desires, of being heard in his defence.

(b) Where the Board or, as the case may be, the Collector of Central Excise is of opinion that any duty of excise has not been levied or has been short-levied or erroneously refunded, no order levying or enhancing the duty, or no order requiring payment of the duty so refunded, shall be made under this section unless the person affected by the proposed order is given notice to show cause against it within the time-limit specified in Section 11A.

Sub-section (2) of Section 35A empowers a Collector of Central Excise, suo motu or otherwise, to revise any decision or order made by a Central Excise officer subordinate to him. If he is satisfied as to its incorrectness, illegality or impropriety, he may pass such order thereon as he thinks fit. By reason of clause (a) of sub-section (3), no decision or order may be so varied as to

prejudicially affect any person unless that person has been given a reasonable opportunity of making a representation and, if so desired, of being heard. Clause (b) of sub-section (3) applies when duty which has not been levied or has been short-levied or has been erroneously refunded is ought to be recovered. In such event, no order in this behalf can be made unless the person who would have to pay is a) given notice to show cause against "it", that is, against being required to pay; and b) the notice is given within the time limit specified in Section 11A.

The order of the Collector under Section 35A gave to the appellants no notice that he proposed to make an order that would require them to pay the duty which might be found to have been short-levied if the frit was found to be classifiable under Item 23-A(4). The orders of the Collector and of the Tribunal, insofar as they required the appellants to pay the short-levied duty, even though limited to the period of six months prior to the date of the notice by the Tribunal, are bad in law.

In the result, the appeal is allowed. The order of the Tribunal is set aside insofar as it directs the Central Excise authorities to recalculate the amount of the short levy in the light of its observation that recovery of the short levied duty could be made in respect of the period of six months preceding the date of the Collector's order and requires the appellants to pay such sum. In the event that any part of such sum has been recovered, the same shall be returned to the appellants.

There shall be no order as to costs.