
(1995) 03 MAD CK 0079
In the Madras High Court
Case No : Writ Petition No. 13773 of 1993

Advani Oerlikon Ltd.

APPELLANT

Vs

A.C.C. Ex., Madras-VII Division, Madras-34

RESPONDENT

Date of Decision : 27-03-1995

Acts Referred:

Central Excises and Salt Act, 1944 — Section 11B

Citation : (1996) 82 ELT 198

Hon'ble Judges : R. Jayasimha Babu, J

Bench : Single Bench

Advocate : Shri Srirampanchu, for the Appellant; Shri K. Jayachandran, for the Respondent

Judgement

1. In this writ petition, the petitioner seeks refund of the excise duty paid by it on the ground that the Department has, after considering the refund claim of the petitioner, directs such refund as early as on 8-8-1989 and that even though the petitioner had challenged the order before the Asstt. Commissioner and was unsuccessful in that challenge, the Department itself has not disputed the claim made by the petitioner to the extent it came to be allowed on 8-8-1989. It is the case of the petitioner that the amount directed to be refunded to the petitioner by the order of the Assistant Commissioner dated 8-8-1989 has got to be refunded notwithstanding the fact that as on the date of Amending Act (40 of 1991), which came into force viz., 20-9-1991, the actual refund had not been effected.

2. The petitioner had been called upon to produce proof by the officers of the Department in support of its claim that Modvat credit taken by its buyer had been reversed, before the sum due to the petitioner as refund could be released. According to the petitioner, the petitioner's customers Bharath Earth Movers Limited, has reversed the credit, it had taken in respect of the duty paid by the petitioner and has also recovered the sum of Rs. 1,44,585/- from the petitioner.

3. Learned counsel for the Revenue contends that after Section 11B of Central

Excises & Salt Act, 1944 came to be amended, refund has to be made strictly in accordance with the Section 11B(2) of the Act and that the refund in this case not having been actually made as on the date the amending Act came into force, refund cannot be made pursuant to the orders made prior to the date of coming into force of the Amending Act and that the Assistant Commissioner must now consider the petitioner's claim for refund, by applying the criteria laid down in Section 11B(2) of the Central Excises & Salt Act, 1944.

4. Counsel for the respondents relied upon Section 11B (sic) of the Central Excises & Salt Act, 1944 which reads as follows :

"Notwithstanding anything to the contrary contained in any judgment, decree, order or direction of the Appellate Tribunal or any Court or in any other provision of this Act or the rules made thereunder or any other law for the time being in force, no refund shall be made except as provided in Section (2)..... ".

5. Reliance was placed on the decision of the Supreme Court in *Union of India and others Vs. Jain Spinners Ltd. and another*, wherein the Supreme Court held that the Section 11B of the Act after its amendment is retrospective and applies not only to all pending applications for refund of duty but also to all earlier orders and directions given by any court for such refund.

6. Counsel for the petitioner on the other hand submitted that as on the date the Amending Act came into force there was no proceedings pending before any authority and so far as the department is concerned, the direction for refund had become final and what is now sought by the petitioner is merely implementation of the order, which had been made prior to the date of the Amending Act. In this context, learned counsel for the petitioner relied upon the decision in *Gopal Hosiery Vs. Assistant Collector of Central Excise*, . That judgment was rendered by a learned single Judge of the Calcutta High Court, wherein it was held that if the order become final prior to the date of Amending Act, refund was bound to be made. Counsel also relied upon the decision of the Supreme Court in *Union of India and others Vs. I.T.C. Limited*, of the judgment wherein the Supreme Court pointed out that because the judgment of the High Court had not become final, on account of the pendency of the appeal before the Supreme Court, Section 11B(2) as amended would apply and that refund could only be made in accordance with the amended provisions.

7. In view of the law declared by the Supreme Court in *Union of India and others Vs. Jain Spinners Ltd. and another*, it is beyond any doubt that by virtue of Section 11B as amended, notwithstanding any order that might have been made whether such order has been made by the officer of the Department or by the Appellate Authority action under the provisions of the Act or by a Court, the refund of excise of duty after the amendment came into force, can only be made in accordance with the amended provision of Section 11B(2) of the Act. The term refund in this context means, the actual refund of the amount directed to be refunded by the Department, Tribunal or Court. That such is the object of the

amendment as evident from Section 11B(3) which specifically provides that the amended provision is to take effect notwithstanding anything contrary contained in any judgment, decree, order or direction of the Appellate authority or any court. The provision interdirects any refund being made except in accordance with the amended provision.".. no refund shall be made except provided in sub-section (2)."

8. The refund claimed by the petitioner has, therefore to be decided only by the Assistant Commissioner acting in accordance with Section 11B(2) of the Act notwithstanding the fact that on an earlier occasion an order for refund had come to be made and that order has also be affirmed in appeal by the Appellate Collector. So long as the actual disbursement of the refund had not taken place it must be held that the claim for refund is still pending.

9. The claim application already filed by the petitioner shall be considered by the Assistant Commissioner in the light of criteria laid down in Section 11B(2) of the Central Excises and Salt Act, 1944. In view of the fact that the petitioner's claim for refund has been pending since 1988, the respondent is directed to consider and decide the claim of the petitioner for refund within a period of eight weeks from the date of receipt of a copy of this order and if it is found that petitioner is entitled to the refund, the respondent is directed to make the refund within a period of eight weeks thereafter. The writ petition is ordered accordingly.