(2015) 01 BOM CK 0170

In the Bombay High Court

Case No : Central Excise Appeal No. 74 of 2004

Commissioner of The Central Excise — APPELLANT

Vs

Clariant India Ltd. — RESPONDENT

Date of Decision : 29-01-2015

Acts Referred:

Central Excises and Salt Act, 1944 — Section 11B, 11B(1), 11B(2), 11B(3)

Citation : (2015) 319 ELT 646

Hon'ble Judges : S.P. Deshmukh, J.;S.C. Dharmadhikari, J.

Bench : Division Bench

Advocate : A.S. Rao and Suchitra Kamble, for the Appellant; Prakash Shah and Jas Sanghavi instructed by PDS Legal, Advocates for the Respondent

Judgement

1. This appeal challenges the order passed by the Customs, Excise and Service Tax Appellate Tribunal, West Zone Bench, Mumbai dated 12th March, 2004. That order, a copy of which is page 93 of the paper book, reads as under:

After hearing both sides and considering the material on record, it is found that the issue herein is refund generated consequent to an order of Additional Commissioner, favourable to the assessee and the same has been rejected on the ground of limitation inasmuch as duty was not paid under protest. It cannot be in view of the following provisions in paragraph 146 of the case of Mafatlal Industries Ltd. and Others Vs. Union of India (UOI) and Others, which states as follows:

....Alternatively, it may be stated that duty paid in cases, which finally ended in orders or declares or judgments of courts, must be deemed to have been paid under protest and the procedure and finalization etc. stated in Section 11B(2) read with Section 11B(3) will not apply to such cases.... Since the view is settled in favour of the appellant in appeal by ordering the withdrawal of Show Cause Notice and no appeal has been taken by the Revenue against that order, there is no cause to deny these refunds on the grounds of limitation.

2. This appeal has been admitted on one question of law and which reads as under:

Whether the amount of Rs. 1,06,275/- and Rs. 1,34,383/- (totally amounting to Rs. 2,40,658/-) paid / for the period June 97 to November 97 debited in the months of 11/97 and 12/97 without protest and the refund claim filed on 26.2.2001 i.e. after a period of 3 years from the date of such payment / debit was within the limitation of time as prescribed under section 11B of Central Excise Act, 1944? 3. The few facts necessary to appreciate the arguments of Mr. Rao appearing in support of this appeal are that the respondent assessee is a holder of Central Excise Registration and engaged in manufacture of Dyes and Chemicals falling under Chapter 32,34,35 and 38 of the Central Excise Tariff Act, 1985. An intelligence information revealed that the assessee allegedly cleared goods namely Dyes and Chemicals in 25 kgs and 50 kgs packing on payment of duty to their godown which is maintained by M/s. M.G. Industries. In the godown the dyes were repacked into small containers, like 5 kilograms, 10 kilograms as per market requirement and sold but no central excise duty was paid on the same by the assessee. The assessee was served with the show cause cum demand notices and for the period and the sums indicated elaborately at page 4 and 5 of the appeal paper book.

4. The matter was then adjudicated by Additional Commissioner, Central Excise who passed an order on 31st October, 2000 dropping the demand and withdrawing the allegations in the show cause cum demand notice. A copy of his order is at annexure B and. It is dated 31st October, 2000.

5. On the basis of this order passed by the Additional Commissioner, Central Excise, the assessee filed refund claim that is contained in an application, copy of which is at annexure C. This application dated 22nd June, 2001 was heard and allowed by the Deputy Commissioner of Central Excise by order dated 8th June, 2001.

6. The Commissioner of Central Excise, Mumbai called for the record pertaining to this refund order, examined it and arrived at a conclusion that the sanction or grant of refund is not in accordance with law. The legality and propriety so also correctness of this order was questioned by him and he directed filing of an appeal against this refund order. The authority subordinate to him, accordingly, carried out this exercise, filed an appeal and this appeal was eventually allowed by the Commissioner of Central Excise (Appeals) (IV) Mumbai by an order dated 31st March, 2003. The partial relief that the Revenue obtained in this order is that the refund in the sum of Rs. 2,40,658/- is contrary to section 11B of the Central Excise Act, 1944. The sum which comprises payment of duty by the assessee reveals that the payment was not made under protest. Therefore, the bar of limitation as prescribed by section 11B(1) (2nd proviso) would apply. Since the application was not made within a period of six months from the date of payment that the refund to this extent was bad in law.

7. The above conclusion reached in the appellate order was assailed and challenged by the assessee by filing an appeal before the Tribunal. The Tribunal allowed it by the impugned order. Mr. Rao appearing for the aggrieved revenue officials would submit that the Tribunal order is very cryptic and virtually unreasoned. The Tribunal did not apply its mind to the fact that the law does not require consideration of any application for refund if the payment of duty is not made under protest. If it is not made under protest but still refund is claimed, then, law postulates consideration of such claim for refund provided it is lodged within the time frame stipulated in the second proviso as prevalent at the time of consideration of the assessee''s application for refund. Since the duty was not paid under protest the assessee was obliged to lodge this application within six months of payment. He cannot derive any advantage of a later adjudication to claim the refund. The findings of the Tribunal and relying upon paragraph 146 of the judgment of the nine Judge Bench of the Hon''ble Supreme Court of India delivered in the case of Mafatlal Industries Ltd. and Others Vs. Union of India (UOI) and Others, . Particularly, the paragraph relied upon does not read in the manner read by the Tribunal nor does it lay down the said legal conclusion.

8. On the other hand, Mr. Prakash Shah appearing on behalf of the assessee would submit that the Tribunal order is fair, just, legal and proper. In the present case, the Tribunal essentially relied on the allegations in the show cause notice. The duty as computed and paid by the assessee was termed as insufficient, inadequate and not full. Therefore, a demand was raised by the revenue for something more than that was paid by the assessee. Until that demand was adjudicated the cause of action to seek refund would not have arisen. Once the demand was dropped by the order passed by the jurisdictional Commissioner on 31st October 2000/ issued on 22nd December 2000 that the assessee could have applied and sought refund. The application for refund and copy of which has been annexed to the paper book would reveal that it was lodged with the Department on 20th February, 2001. Thus, it was lodged within the period of six months from the date of receipt of the order dropping the demand. The details of the show cause notices have been set out and a perusal of a copy thereof would reveal that the Revenue demanded something more than what was paid and remitted and sought to adjust that payment against the demand made under the show cause notices. The differential duty was thus demanded. Mr. Shah would submit if the refund claim is made on 20th February, 2001, then, it has been rightly allowed as it was well within the period of limitation. Hence, no substantial question of law would arise and particularly as framed by this Court. Consequently, the appeal is required to be dismissed.

9. With the assistance of the learned counsel appearing for parties, we have perused the appeal paper book as also the original record transmitted by the Registry of the Tribunal. It is true that the payment of duty was made by the assessee and that was in terms of the computation made by it. It was debited in the revenue account in November and December of 1997. It is true that this payment was not made under protest. Payment was made voluntarily but the

revenue did not accept it as a clearance of duty liability and in accordance with law. The revenue therefore proceeded to raise a demand and issued four show cause notices. A reading of the show cause notices would reveal as to how the revenue proceeded to demand the sums set out therein and purported to adjust the payment already made by the assessee. Thus, the liability of the assessee was not crystallized according to the Revenue until this show cause cum demand notice was adjudicated. If that was admittedly issued and the show cause cum demand notice was required to be adjudicated in accordance with law, the adjudication order dated 22nd December, 2000 was taken to be the relevant date. In the given facts and circumstances and peculiar to the assessee the date was not reckoned from payment but from the date of receipt of a copy of the adjudication order. The demand was admittedly dropped by this adjudication order. Once that adjudication order furnished the cause for seeking refund, then the refund application, a copy of which is at page 55 of the paper book and lodged on 20 Feb, 2001 was well within time. It is not the argument of Mr. Rao that only if the refund of duty made under protest a refund of duty can be sought. Even if it voluntarily paid refund can be sought provided, the application is made in terms of the second Proviso to Section 11B(1) of the Act. If the computation of the tax by assessee in this case had been accepted and in 1997 itself, there was no question of claiming refund. Since the revenue did not accept this payment as clearance of the liability to pay duty in accordance with law it issued show cause cum demand notice. That notice demanded the sums over and above the payment made by the assessee in November and December 1997. That demand was required to be adjudicated and was indeed adjudicated by the competent authority under the Central Excise Act, 1944, the order passed by him resulted in dropping of the proceedings and the demand. Therefore, once the show cause notice was dropped the assessee in this case became entitled to seek refund. That such an application was maintainable and could have been granted, provided it was lodged within the period of limitation and as prevalent in terms of the applicable legal provision. At the relevant time, the period of limitation was six months. The period of six months was not reckoned in this case from the payment but from the date of adjudication order. If that is how the Tribunal proceeded and interfered with the order of the Commissioner (Appeals) which was assailed before it by the assessee, then, we do not see how the reversal of the order of the Commissioner by the Tribunal results in any substantial question of law. Given the admitted facts and peculiar to the assessee, the legal provision as it read at the relevant time, the claim for refund was maintainable and was rightly granted by the order dated 8th June, 2001. It is that order which has been upheld by the Tribunal. In such circumstances, we do not see any basis for the complaint by the Revenue. Mr. Rao''s submissions overlook the fact that the claim for refund can also be made if the duty is paid voluntary and not under protest or without prejudice. The only requirement is that the refund must be sought within the specified period and the limitation is provided by the second proviso to section 11B. If the application was filed within this period it could have been considered and the refund sanctioned and granted. Precisely that has been done in the instant case.

10. As a result of the above discussion, we do not find that the appeal and which has been admitted on a substantial question of law can be allowed. Rather the question will have to be answered in favour of the assessee and against the revenue. The appeal is accordingly dismissed. No order as to costs.

