(2016) 06 KL CK 0109

In the High Court Of Kerala

Case No : O.T. Appeal No. 3 of 2004

Commr. of C. Ex., Cochin — APPELLANT

Vs

Transformers & Electricals Kerala Ltd. — RESPONDENT

Date of Decision : 15-06-2016

Acts Referred:

Citation : (2017) 346 ELT 59

Hon'ble Judges : Antony Dominic and A.K. Jayasankaran Nambiar, JJ.

Bench : Division Bench

Advocate : S/Shri John Varghese, ASG and Tojan J. Vathikulam, SC, for the Appellant; S/Shri Joseph Kodianthara (Sr.) and Terry V. James, Advocates, for the Respondent

Final Decision : Dismissed

Judgement

A.K. Jayasankaran Nambiar, J.—This Other Tax Appeal is preferred by the Revenue in terms of Section 35G of the Central Excise Act, against the order dated 8-10-2003 of the Customs, Excise and Service Tax Appellate Tribunal (CESTAT), Bangalore, whereby, an appeal preferred by the assessee, against an order rejecting its refund application as ''time barred'', was set aside, and the assessee held entitled to the consequential relief of refund.

2. The brief facts leading to the passing of the aforementioned order of the CESTAT are as follows :

The assessee - M/s. Transformers & Electricals Kerala Ltd. (TELK), Angamaly, are manufacturers of power transformers, current transformers, etc. Pursuant to a show cause notice, wherein, a differential duty to the extent of Rs. 73,79,782.67 was demanded from the assessee, adjudication proceedings followed, in which, by Order-in-Original No. 60/88, dated 10-10-1988, a demand of Rs. 8,35,697.20 and a penalty of Rs. 1,00,000/- was confirmed on the assessee. It is relevant to note that, during the pendency of the adjudication proceedings, as against the demand of Rs. 73,79,782.67, the assessee paid an amount of Rs. 7,50,000/-

through a debit PLA entry dated 24-3-1987. Thereafter, on receipt of the adjudication order passed against it, the assessee preferred an appeal before the Customs, Excise and Gold (Control) Appellate Tribunal which, by an order dated 14-2-1991, allowed the appeal by setting aside the demand and remanding the matter to the Original authority for fresh adjudication. In the de novo proceedings that ensued, the adjudicating authority passed Order-in-Original No. 33/1992, dated 17-11-1992 confirming the demand to an extent of Rs. 7,62,426/- and imposing a penalty of Rs. 1,00,000/- on the assessee. The assessee, therefore, preferred an appeal against the said order before the CESTAT. When the application for waiver of pre-deposit and stay of recovery of balance amount of duty came up for hearing before the said Tribunal, by its Stay Order No. 216/1993, dated 23-3-1993, the Appellate Tribunal took note of the payment of Rs. 7,50,000/- that had already been effected by the assessee during the pendency of the adjudication proceedings, and granted a waiver of pre-deposit of balance duty and penalty pending disposal of the appeal. Later, by Final Order No. 812/1998, dated 21-4-1998, the Tribunal allowed the appeal of the assessee. The assessee thus became entitled to a refund of the amounts paid by it towards the demands that had been confirmed by the lower authorities. Accordingly, by an application dated 1-7-1998, the assessee preferred a refund claim before the Department. Thereafter, even before any order could be passed on the refund application preferred by the assessee, on 30-7-1998, the assessee suo motu took Modvat credit of the amount that it had paid towards duty by making the necessary entries in its Modvat register. By a show cause notice dated 6-1-1999, the Department proposed to reject the refund claim preferred by the assessee on the ground that the application had been filed beyond the time stipulated in Section 11B of the Central Excise Act. Another show cause notice was also issued to the assessee taking objection to its action of taking credit on the duty amounts paid by it, and directing it to reverse the said credit and pay the amount of duty, towards which, the assessee had adjusted the credit amounts. The adjudication proceedings that ensued resulted in Order-in-Original No. 56/1999, dated 30-7-1999, whereby, the refund claim preferred by the assessee was rejected as ''time barred''. The assessee therefore took up the matter in appeal before the First Appellate Authority, who, by an Order-in-Appeal No. 1/2002, dated 4-1-2002 rejected the appeal. The assessee therefore preferred a further appeal before the CESTAT, which resulted in the order dated 18-9-2003, which is impugned in the present Other Tax Appeal.

3. We have heard the learned Standing counsel for the appellant and also the learned counsel for the respondent-assessee.

4. The learned counsel for the appellant would contend that the impugned order of the Tribunal ignores the decision of the Supreme Court in Mafatlal Industries Limited & Ors. v. Union of India & Ors. [(1997) 5 SCC 536 : 1997 (89) E.L.T. 247 (S.C.)], where, a larger bench of the Supreme Court had found as follows with regard to the requirement of filing applications under Section 11B, as it stood after the amendment in 1991.

"91. A good amount of debate took place before us on the question whether sub-section (3) makes Section 11B exhaustive of all kinds of refund claims including those which are refundable as a consequence of appellate/revisional order and/or as a consequence of orders made by the High Court/Supreme Court. Shri Nariman pointed out that in Rule 11 (as it was in force during the period 6-8-1977 to 17-11-1980), sub-rule (3) expressly provided 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" and that sub-section (3) of Section 11B, before its amendment in 1991, was also in identical terms. But, Shri Nariman says, sub-section (3) of Section 11B has now been dropped; there is no corresponding provision in Section 11B as it now stands, which means, says the counsel, that even a refund claim arising as a result of an appellate order or an order of a Court has also got to be made under and in accordance with sub-sections (1) and (2) of Section 11B and will be disposed of in terms of sub-section (2) of the said section, as amended in 1991. This consequence, the learned counsel says, is unjust, unreasonable and arbitrary. There is no reason why a person who becomes entitled to refund of duty as a result of appellate or Court order should also be made to apply and satisfy all the requirements of sub-sections (1) and (2) of Section 11B (amended) when he is entitled to such refund as a matter of right. Shri Nariman submits that if a manufacturer/assessee, who succeeds in vindicating his claim after a long fight - may be, up to this Court - and applies for refund is asked to satisfy that he has not passed on the burden of tax to another, he would rather keep quiet than fighting the levy. There would be no incentive for him to file the appeal/appeals or approach the higher Courts which also involves substantial expense. If after all this fight and expense, he is to be denied the refund on the ground that he has passed on the burden of duty to third parties, why should he fight and spend money for fighting the litigation, says the counsel. Shri Sorabjee and Shri Salve too emphasised this aspect and said that this situation would lead to many an undesirable consequence. The assessing/approving officer (original authority) would become the monarch; whatever he says would be the law since there would be nobody interested in challenging his order. Illegal levies would become the order of the day. Such a situation, the learned counsel point out, is neither in the interest of law nor in the interest of consumer or the larger public interest. It is accordingly submitted that it would be just and proper that the amended Section 11B is held not to take in refund claims arising as a consequence of appellate or a superior Court order. We do not think it is possible to agree. Such a holding would run against the very grain of the entire philosophy underlying the 1991 Amendment. The idea underlying the said provisions is that no refund shall be ordered unless the claimant establishes that he has not passed on the burden to others. Sub-section (3) of the amended Section 11B is emphatic. It leaves no room for making any exception in the case of refund claims arising as a result of the decision in appeal/reference/writ petition. There is no reason why an exception should be made in favour of such claims which would nullify the provision to a substantial degree. So far as "lack of incentive" argument is concerned, it has no doubt given us a pause; it is certainly a substantial plea, but there are adequate answers to it. Firstly, the rule means that only the person who has actually suffered loss or prejudice would fight the levy and apply for refund in case of success. Secondly, in a competitive market economy, as the one we have embarked upon since 1991-92, the manufacturer''s self interest lies in producing more and selling it at competitive prices - the urge to grow. A favourable decision does not merely mean refund; it has a beneficial effect for the subsequent period as well. It is incorrect to suggest that the disputes regarding classification, valuation and claims for exemptions are fought only for refund; it is for more substantial reasons, though the prospect of refund is certainly an added attraction. It may, therefore, be not entirely right to say that the prospect of not getting the refund would dissuade the manufacturers from agitating the questions of exigibility, classification, approval of price lists or the benefit of exemption notifications. The disincentive, if any, would not be significant. In this context, it would be relevant to point out that the position was no different under Rule 11, or for that matter Section 11B, prior to its amendment in 1991. Sub-rules (3) and (4) of Rule 11 (as it obtained between 6-8-1977 and 17-11-1980) read together indicate that even a claim for refund arising as a result of an appellate or other order of a superior Court/authority was within the purview of the said rule though treated differently. The same position continued under Section 11B, prior to its amendment in 1991. Sub-sections (3) and (4) of this section are in the same terms as sub-rules (3) and (4) of Rule 11; if anything, sub-section (5) was more specific and emphatic. It made the provisions of Section 11B exhaustive on the question of refund and excluded the jurisdiction of the civil Court in respect of all refund claims. Sub-rule (3) of Rule 11 or sub-section (3) of Section 11B (prior to 1991) did not say that refund claims arising out of or as a result of the orders of a superior authority or Court are outside the purview of Rule 11/Section 11B. They only dispensed with the requirement of an application by the person concerned which consequentially meant non-application of the rule of limitation; otherwise, in all other respects, even such refund claims had to be dealt with under Rule 11/ Section 11B alone. That is the plain meaning of sub-rule (3) of Rule 11 and sub-sections (3) and (4) of Section 11B (prior to 1991 Amendment). There is no departure from that position under the amended Section 11B. All claims for refund, arising in whatever situations (except where the provision under which the duty is levied is declared as unconstitutional), has necessarily to be filed, considered and disposed of only under and in accordance with the relevant provisions relating to refund, as they obtained from time to time. We see no unreasonableness in saying so.

92. It is then pointed out by the learned counsel for the petitioners - appellants that if the above interpretation is placed upon amended Section 11B, a curious consequence will follow. It is submitted that a claim for refund has to be filed within six months from the relevant date according to Section 11B and the

expression "relevant date" has been defined in clause (B) of the Explanation appended to sub-section (1) of Section 11B to mean the date of payment of duty in cases other than those falling under clauses (a), (b), (c), (d) and (e) of the said Explanation. It is submitted that clauses (a) to (e) deal with certain specific situations whereas the one applicable in most cases is the date of payment. It is submitted that the appellate/revision proceedings, or for that matter proceedings in High Court/Supreme Court, take a number of years and by the time the claimant succeeds and asks for refund, his claim will be barred; it will be thrown out on the ground that it has not been filed within six months from the date of payment of duty. We think that the entire edifice of this argument is erected upon an incomplete reading of Section 11B. The second proviso to Section 11B (as amended in 1991) expressly provides that "the limitation of six months shall not apply where any duty has been paid under protest". Now, where a person proposes to contest his liability by way of appeal, revision or in the higher Courts, he would naturally pay the duty, whenever he does, under protest. It is difficult to imagine that a manufacturer would pay the duty without protest even when he contests the levy of duty, its rate, classification or any other aspect. If one reads the second proviso to sub-section (1) of Section 11B along with the definition of "relevant date", there is no room for any apprehension of the kind expressed by the learned counsel."

It is therefore contended by counsel for the appellant that inasmuch as in the instant case, the duty payment by the assessee was on 24-3-1987, and the refund claim preferred by the assessee only on 1-7-1998, the claim for refund by the assessee was severely belated, and hence, could not have been considered by the Department. It is his contention therefore that the Tribunal''s order dated 18-9-2003, cannot be legally sustained.

5. Per contra, the learned counsel for the assessee would point out that the payment of duty, to the extent of Rs. 7,50,000/-, was initially done through a debit in the PLA account on 24-3-1987. In the adjudication proceedings that ensued, however, the Appellate Tribunal set aside the demand confirmed by the Original authority, and remanded the matter back to the Original authority. In the second round of adjudication proceedings, when pursuant to the adjudicating order which confirmed a demand of Rs. 7,62,426/- and a penalty of Rs. 1,00,000/- on the assessee, the assessee preferred an appeal before the CESTAT, the CESTAT, while considering the waiver of pre-deposit application, by its order dated 23-3-1993, took note of the payment of Rs. 7,50,000/- already effected by the assessee, and granted a waiver of pre-deposit of the balance duty and penalty, pending disposal of the appeal. It is pointed out that, while the said appeal was eventually decided in favour of the assessee, the payment of Rs. 7,50,000/-, although initially made on 24-3-1987, assumed the nature of a pre-deposit when recognised in the Stay Order dated 23-3-1993 passed by the CESTAT. The learned counsel would therefore contend that, inasmuch as the payment of Rs. 7,50,000/- was in the nature of a pre-deposit, pending disposal of the appeal, the limitation provision under Section 11B of the Central Excise Act

would not apply going by the provisions of the Department''s own Circular M.F. (D.R.) F. No. 275/37/2K-CX. 8A, dated 2-1-2002.

6. On a consideration of the rival submissions, we find force in the contention of the learned counsel for the assessee, in that, we note that although the assessee had made a payment of Rs. 7,50,000/- towards the duty demand raised on it in 1987, in the adjudication proceedings that ensued, the demand was set aside by the Appellate Tribunal, which remanded the matter for fresh adjudication. In the de novo adjudication proceedings that followed, although there was a demand to an extent of Rs. 7,62,426/- raised on the assessee, the assessee had carried the matter in appeal before the Appellate Tribunal, where, in a waiver of pre-deposit application, the Appellate Tribunal recognised the payment of Rs. 7,50,000/- as a pre-deposit of the duty demand that subsisted against the assessee at that point in time. It was later, through the final order dated 8-2-1998 that the appeal itself was allowed, and the assessee held entitled to a refund of the amount. We note that the refund claim preferred by the assessee is dated 1-7-1998, which is less than three months after the date of the final order of the CESTAT (21-4-1998) and, further, insofar as the amount sought to be refunded was one that was recognised by the CESTAT as a pre-deposit of duty, the assessee''s claim would fall within the ambit of the Board''s Circular referred to above, the relevant portion of which is extracted hereunder :

"The issue relating to refund of pre-deposit made during the pendency of appeal was discussed in the Board Meeting. It was decided that since the practise in the Department had all along been to consider such deposits as other than duty, such deposits should be returned in the event the appellant succeeds in appeal or the matter is remanded for fresh adjudication.

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3. In order to attain uniformity and to regulate such refunds it is clarified that refund applications under Section 11B(1) of the Central Excise Act, 1944 or under Section 27(1) of the Customs Act, 1962 need not be insisted upon. A simple letter from the person who has made such deposit, requesting the return of the amount, along with an attested Xerox copy of the order-in-appeal or CEGAT order consequent to which the deposit made becomes returnable and an attested Xerox copy of the Challan in Form TR6 evidencing the payment of the amount of such deposit, addressed to the concerned Assistant/Deputy Commissioner of Central Excise or Customs, as the case may be, will suffice for the purpose. All pending refund applications already made under the relevant provisions of the Indirect Tax Enactments for return of such deposits and which are pending with the authorities will also be treated as simple letters asking for return of the deposits, and will be processed as such. Similarly, bank guarantees executed in lieu of cash deposits shall also be returned."

Resultantly, inasmuch as what the assessee was claiming was only a refund of an amount paid as pre-deposit, we are of the view that the order of the Tribunal, that is impugned in this appeal, does not need to be interfered with. In the result, the Other Tax Appeal is dismissed.

