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**(1991) 08 MAD CK 0099**

**In the Madras High Court**

**Case No : Writ Petition No. 8965 of 1991**

Elgi Tyre and Tread Limited

APPELLANT

Vs

Asstt. Collector of Central Excise

RESPONDENT

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**Date of Decision : 05-08-1991**

**Acts Referred:**

Central Excises and Salt Act, 1944 — Section 35F

**Citation :** (1994) ECR 471 : (1992) 58 ELT 413

**Hon'ble Judges :** K.S. Bhakthavatsalam, J

**Bench :** Single Bench

**Advocate :** Shri C. Natrajan, for the Appellant; Shri T. Srinivasamoorthy, Additional CGSC, for the Respondent

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**Judgement**

1. The petitioner challenges the order passed by the 2nd respondent under Sec. 35F of the Central Excises and Salt Act 1944. As against the orders of the 1st respondent in respect of classification under sub-heading 4016.99 of the Central Excise Tariff Act 1985, the petitioner preferred an appeal to the 2nd respondent along with an application under Sec. 35F of the Act. In that application filed u/s 35F of the Act, the petitioner has stated that it had made a claim for a sum of Rs. 3,00,99,579.96 and it had obtained two refund orders to the tune of Rs. 3,38,75,548.60 payable by the respondents and under such circumstances, it is stated that the insistence of depositing a sum of Rs. 2,67,06,353.25 made by the 1st respondent as against the petitioner need not be given effect to as against the two refund orders obtained by the petitioner and the same is insisted upon the petitioner, it will cause undue hardship to the petitioner, and therefore, the petitioner has requested to dispense with such deposit of Rs. 2,67,06,353.25 and for stay of recovery of the said amount. By the impugned order, the 2nd respondent has directed the petitioner to deposit 25% of the duty payable and to furnish unconditional bank guarantee for the balance of the duty within six weeks from the date of the order. It is this order that is challenged before me.

2. Notice of motion was ordered on 2-7-1991 and the respondents have filed a

counter. Though the respondents have narrated the events upto the filing of the writ petition, it is not necessary to refer such of these details for the purpose of this case. I think it is suffice to refer to the averments made in paragraph 4 of the counter affidavit filed by the respondents, which read as follows :

".... The amount of Rs. 3,38,75,548.80 stated to have been sanctioned by way of refund in relation to their factory situated at Hindpur, Andhra Pradesh could not be a crucial factor to tilt the discretionary powers exercised u/s 35F which is inextricably linked with the appeal made u/s 35F in relation to the order of the 1st respondent dated 21-1-1991 finalising the classification dispute and the resultant demand of Rs. 2.67 crores raised in Trichy Collectorate."

"It is further stated in the counter with regard to the refund application that a show cause notice has been issued and certain proceedings were taken against the petitioner. However, it is seen from the counter that the respondents themselves admit that a sum of Rs. 3,38,75,548.80 has been sanctioned by way of refund, to the petitioner.

3. Mr. C. Natarajan, learned counsel for the petitioner points out that the refund orders have been passed in favour of the petitioner and in such circumstances the 1st respondent ought to have considered the same when the application filed u/s 35F of the Act was taken up. It is further contended by the learned counsel for the petitioner that the impugned order has been passed mechanically with total non-application of mind on the part of the 1st respondent. Section 35F of the Central Excises and Salt Act, 1944 reads as follows :

Section 35F. Deposit, pending appeal, of duty demanded or penalty levied :-

Where in any appeal under this Chapter, the decision or order appealed against relates to any duty demanded in respect of goods which are not under the control of Central Excise authorities or any penalty levied under this Act, the person desirous of appealing against such decision or order shall, pending the appeal, deposit with the adjudicating authority the duty demanded or the penalty levied :

Provided that where in any particular case, the Collector (Appeals) or the Appellate Tribunal is of opinion that the deposit of duty demanded or penalty levied would cause undue hardship to such person the Collector (Appeals) or as the case may be, the Appellate Tribunal, may dispense with such deposit subject to such conditions as he or it may deem fit to impose so as to safeguard the interests of revenue."

4. The learned counsel for the petitioner relies upon the judgment of the Supreme Court reported in N.C. Mukherjee and Co. Vs. Union of India and Another, ) and the decision of the Calcutta High Court reported in In Re : American Refrigeration Co. Ltd., for the proposition that whenever any amount is due from the Department or refundable by the Department, the same should be taken note of by the authorities when they (Department) insist upon the

payment for future period. Per contra, the learned counsel for the Department contends that the interest of the revenue should be protected and the impugned orders have been passed exercising discretion to protect the interests of the Revenue and this Court sitting under Art. 226 of the Constitution should not interfere with the same.

5. Considering the arguments of the respective counsel and the relevant materials on record, I am of the view that the impugned order has to be set aside on the simple ground that when the petitioner has obtained refund orders to the tune of Rs. 3,38,75,548.60 payable by the Department, the 1st respondent ought to have taken note of this fact before passing the impugned order. The authority has proceeded mechanically without application of mind while passing the impugned order. In my view, as against the refund orders obtained by the petitioner, the Department need not insist upon the petitioner to pay the duty, especially, when the petitioner undertakes not to withdraw the amount referred to in the refund order. In *In Re : American Refrigeration Co. Ltd.*, the single Judge of the Calcutta High Court has pointed out in a similar situation, that when the petitioner therein was ready to give an undertaking that he would not withdraw the amount consequent upon the refund orders pending disposal of the appeal, the Tribunal should have come to a conclusion that the petitioner therein had made out a prima facie case for grant of exemption from predeposit of duty. Similarly in *N.C. Mukherjee and Co. Vs. Union of India and Another*, K. Subba Rao, Chief Justice speaking for the Bench of the apex court has held -

".... We think that justice demands that before the Certificate Officer executes the demand against the appellant-firm, amounts refundable to it or its partners should be ascertained by the concerned Income Tax Officer so that the demand may be executed only for the balance. We therefore direct the concerned Income Tax Officer to complete his enquiry in regard to the amounts refundable to the appellant-firm or its partners under the Income Tax Act within 3 months from the receipt of the order by him. The Certificate Officer will thereafter execute the demand for the balance of the amount, if any, due from the appellant-firm."

From the above, it is clear that justice demands that before any recovery is made against an assessee, the Department should take into consideration the amount or amounts refundable to the assessee that the demand could be reduced to that extent. As already stated the 1st respondent has passed the impugned order mechanically with total non-application of mind and therefore the same has got to be set aside and is accordingly set aside. The 1st respondent is directed to reconsider the application of the petitioner afresh according to law in the light of the above observations made herein and also taking into account the undertaking of the petitioner that it will not withdraw the amount till the appeal is disposed of. The 1st respondent is directed to dispose of the application within four weeks from today. The writ petition is ordered in the above terms. No costs.