

(1995) 11 MAD CK 0084

In the Madras High Court

Case No : Writ Petition No's. 4289/95 and 7138 and 15981/95

Grasim Industries Ltd.

APPELLANT

Vs

Collector Of Central Excise, Madras

RESPONDENT

Date of Decision : 23-11-1995

Acts Referred:

Central Excises and Salt Act, 1944 — Section 11B, 11BB, 37B

Citation : (1995) 2 CTC 566 : (1996) 53 ECC 54 : (1996) 82 ELT 457 : (1996) 2 MLJ 162

Hon'ble Judges : A.R. Lakshmanan, J

Bench : Single Bench

Advocate : Shri Arvind P. Datar, for the Appellant; Shri A.S.V. Sivanandam, ACGSC, for the Respondent

Judgement

1. By consent of both the parties the main writ petition is taken up for final hearing, since the matter is covered by the decision of the Supreme Court reported in Union of India and others Vs. Kamlakshi Finance Corporation Ltd., and also of my judgment in batch of Writ Petitions Nos. 14807, 14808, 14736 and 14741 of 1995, dated 22-11-1995.

2. The short facts of the case are as follows :

The petitioner had placed an order with Bharat Heavy Electricals Ltd., (BHEL), Ranipet for supply of Electro Static Precipitator (hereinafter called as ESP), by virtue of Notification No. 78/90, dated 20-3-1990 ESP being a pollution Control Equipment, is entitled to concessional rate of duty at 5% ad valorem provided the necessary certificate is given by the Ministry of Environment and Forests. BHEL manufactured ESP and claimed exception under the above notification. As the certificate from the Ministry of Environment was awaited BHEL had to clear the ESP on payment of full duty at 15% ad valorem. The certificate from the Ministry was received subsequently and it was clarified that ESP would be liable only at the rate of 5% BHEL then claimed a refund of excess duty paid on the ESPs. This was rejected by the Assistant Collector of Central Excise, Ranipet, who

is the 3rd respondent herein on the ground of unjust enrichment since the duty had been passed on to the petitioner herein. In view of the amended provisions of Section 11B only the petitioner could claim refund of duty since the duty has been paid by the petitioner and had not been passed on to anybody else. Accordingly, the petitioner made a refund claim on 19-8-1992 for refund of excise duty of Rs. 27,74,339/- which represents differential excise duty paid in excess by BHEL. On 31-3-1993 the third respondent herein issue a show cause notice as to why the refund claim should not be rejected on the ground that BHEL had not supplied ESP in full and, therefore, was not entitled for concessional rate of duty. After adjudication the third respondent rejected the refund claim by order dated 27-5-1993. The petitioner thereupon preferred an appeal to the Collector of Central Excise (Appeals) Madras, the 2nd respondent herein, who by order dated 14-12-1993, held that the petitioner had fulfilled the conditions required for claiming concession. However, the second respondent directed the 3rd respondent to examine whether the goods manufactured and supplied by BHEL had attained essential characteristics of ESP under Rule 2(a) of the Rules of Interpretation to the Central Excise Tariff Act, 1985. This direction of the 2nd respondent was without jurisdiction. In any event the petitioner, filed an appeal against this order, but appeared before the 3rd respondent once again. In the second round of litigation the 3rd respondent once again rejected the claim. He held that ESP cleared by BHEL did not attain the essential characteristics of finished ESP under Rule 2(a) of the Rules of Interpretation. Because of this BHEL had been called upon to pay duty on ESP at 15%. But in the refund proceedings it was said that the product which was cleared was not ESP at all. Therefore, the petitioner filed an appeal to the 2nd respondent for the second time. Meanwhile, Central Board of Excise and Customs through a circular stated that the ESP, cleared in a knocked down condition would be eligible for concessional rate of duty even though the entire ESP had not been cleared from particular factory. Based on this circular the 2nd respondent passed an order dated 14-10-1994 setting aside the order-in-Original and allowed the appeal with substantial relief. In view of this order the petitioner becomes entitled to a refund of Rs. 27,74,339/-. It is contended by learned counsel for the petitioner that despite repeated reminders through telephone and through post sent to the 3rd respondent herein to refund the amount, nothing is forth coming. The petitioner had been informed that the refund will not be granted since the Department had decided to prefer an appeal against the order of the 2nd respondent.

3. Mr. Arvind P. Datar, learned counsel for the petitioner, contended that the denial of refund to the petitioner is unfair, improper and illegal. According to him, the claim for refund made by the petitioner is in accordance with the provisions of Section 11B. The petitioner admittedly has paid the duty and not passed on the same to any other customer. This apart, the 3rd respondent having rejected the claim of BHEL on the ground of unjust enrichment, cannot how deny the refund claimed on the ground that an appeal is to be preferred by the Department. The Supreme Court in *Union of India and others Vs. Kamlakshi*

Finance Corporation Ltd., held that the order of the Appellate Authority acting under the Act is binding on subordinate officers and consequently, the 3rd respondent is bound to follow the orders of the Collector (Appeals) Madras and grant consequential relief for refund of the aforesaid sum of Rs. 27,74,339/-. Learned counsel contended that the Department has denied the refund on the ground that since the Department has already preferred an appeal against the order of the 2nd respondent the petitioner will not be entitled to refund unless and until a final adjudication is made by CEGAT, Southern Regional Bench. I am unable to countenance the said contention of learned counsel for the respondents. The mere fact that the order of the Appellate Authority is not acceptable to the Department and that it is the subject matter of an appeal can furnish no ground for not following it unless its operation has been suspended by a competent court. It is not in dispute that the CEGAT has not granted any stay of operation of the order of the 2nd respondent. Under such circumstances there cannot be any impediment on the part of the petitioner in getting the refund as ordered by the Appellate Authority. In my opinion, this healthy rule, as observed by the Supreme Court in the above judgment is not followed in the instant case, will result only undue harassment to the assessee and chaos in administration of tax laws. This apart, the 3rd respondent has failed to note that once the BHEL has paid the duty on ESP, the request cannot be denied on the ground that it is not an ESP. The circular of the Board with respect to ESP has been issued u/s 37B and is, therefore, binding on all the officials of the Department. On this ground as well the refund claim of the petitioner cannot be denied. As observed by the Supreme Court the denial of refund is a mere harassment and extremely unfair attitude of the Excise Department. The Department takes coercive steps to recover the duty as soon as an order is passed adverse to the assessee even though the Board has given some time to the assessee to prefer an appeal. On the other hand, when an assessee is legitimately and genuinely entitled to a refund, the same is sought to be denied on flimsy and frivolous grounds. As already stated, the filing of an appeal before the CEGAT is not a ground at all to deny the refund. The Department, in my opinion, cannot adopt two different yardsticks one for the Department and the other for the assessee. They must act fairly and genuinely. If the petitioner is lawfully entitled for any refund of the money which has already been paid, the amount due by way of refund shall be refunded within a reasonable time. In this case money has not been refunded in spite of the order of the Appellate Authority dated 14-10-1994. The petitioner claimed refund of Rs. 27,74,339/- together with interest at 18% per annum. I am of the view that interest at 18% per annum now claimed is on the high side. Even u/s 11BB interest at the rate of 15% is payable for refund cases. Therefore, the 3rd respondent is directed to refund Rs. 27,74,339/- together with interest at 15% per annum to the petitioner.

4. For the foregoing reasons, a writ of mandamus directing the 3rd respondent to refund a sum of Rs. 27,74,339/- with interest at 15% per annum from the date of payment till the date of refund in accordance with the order in Appeal No.

226/94(M), dated 14-10-1994 shall issue and the third respondent shall refund the entire sum of Rs. 27,74,339/- together with interest at 15% per annum within one month from today. The writ petition is allowed with costs. Consequently, W. M. P. Nos. 7138 and 15981 of 1995 are dismissed. Counsel fee for petitioner is fixed at Rs. 1000/-.