

(2014) 01 KL CK 0090
In the High Court Of Kerala
Case No : C.E.A. No. 10 of 2013

ITEL Industries Ltd. (M/s.)

APPELLANT

Vs

Commissioner of Central Excise, Calicut and Another

RESPONDENT

Date of Decision : 28-01-2014

Acts Referred:

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

Citation : (2014) 1 KHC 827

Hon'ble Judges : Manjula Chellur, C.J.;A.M. Shaffique, J

Bench : Division Bench

Advocate : K.B. Muhamed Kutty, Senior Advocate, K.M. Firoz and M. Shajna, Advocate for the Appellant; John Varghese, Standing Counsel, Central Board of Excise, Advocate for the Respondent

Judgement

Dr. Manjula Chellur, C.J.—The appellant, a public limited company, was running a factory at Palakkad at the relevant point of time i.e. between 01/04/1999 and 31/03/2000. It was engaged in the manufacture of telephone instruments apart from trading in Modular Terminal Rosset (MTR) in general. Appellant claimed exemption from duty on the ground that MTR is only a matching connector or plug point between telephone and telephone line, therefore no duty is payable as it is an accessory and not an essential component of telephone. Department insisted payment of duty which came to be challenged by the appellant. The duty payable for the period between 01/04/1999 and 31/03/2000 was paid "under protest" towards the supply of MTR. The appellate authority dismissed the claim of the appellant which was challenged before the Tribunal and the Tribunal allowed the appeal by order No. 1287/2009 dated 23/10/2009 with regard to the adjudication whether duty is payable or not on the sale of MTR. Subsequently appellant claimed refund of the duty paid under protest which came to be rejected by the Department on the ground that it is beyond the period of limitation as contemplated u/s 11B of the Central Excise Act. This came to be challenged before the First Appellate Authority and the appeal was allowed in favour of the appellant. This was challenged by the Department before the

Tribunal and Tribunal, agreeing with the stand of the Department, allowed the appeal of the Department opining that the claim for refund is beyond the period of one year as contemplated u/s 11B.

2. Aggrieved by the same, the present appeal is filed by the appellant contending that by virtue of second proviso to Section 11B(1) of the Act, if any duty and interest is payable and if such duty was paid under protest, the period of limitation of one year will not apply to such claims. He also places reliance on 966947--> and Commissioner of C. EX., Chennai-II Vs. Electro Steel Castings Ltd., . According to the learned counsel Mr. Muhamed Kutty arguing for the appellant, the period of limitation and the calculation of one year period would arise only in cases where the duty and interest payable were paid without any condition. If such duty was paid under protest, such cases cannot be considered with reference to any period of limitation when application for refund is filed.

3. KVR Constructions (supra) was a case where refund was in respect of the amounts paid under a mistaken impression that they were liable to pay tax and it was collected by the Department without authority of law. The said amount was considered as a deposit with the Government and does not represent any service tax. Therefore, High Court of Karnataka opined that Section 11B is not applicable to the refund thereof.

4. So far as the case of Electro Steel Castings Ltd. (supra), it was a case similar to the case on hand. Payment of duty was made during the pendency of an appeal against the very levy of duty for the earlier period. However, it was under protest. While considering the controversy by referring to the case in Dena Snuff (P) Ltd. Vs. Commissioner of Central Excise, Chandigarh, , the High Court of Judicature at Madras opined in KVR Constructions (supra) case that once the amounts are paid under protest, the payment made must be deemed to be under protest and no limitation is applicable in the light of second proviso to Section 11B. Therefore, the claim of the applicant was held to be maintainable and directed refund of the said amounts.

5. As against this, learned counsel representing the Department places reliance on Dena Snuff (P.) Ltd. (supra) in support of his contention that even in respect of payment of duty and interest, if any, under protest, period of limitation is applicable as indicated at paragraph 5 of the said judgment. He also took us through paragraph 2 in order to contend that the classification list which was the controversy in that case, date of final order to contend that from what date the period of limitation has to be counted in order to decide the relevant date as provided in Section 11B.

6. The case on hand is entirely on a different stand. In other words, according to the appellant, in general the period of one year has to be calculated whenever an application for refund of duty and other amounts is made as envisaged u/s 11B and if such duty and interest are paid under protest, those cases go out of the purview of consideration of question of limitation. Therefore, question of

computation of period of limitation with reference to relevant date would not arise in the present case. Apparently this second proviso came to be introduced with effect from 20/09/1991 and after the said date, the benefit of excluding such applications from the period of limitation whenever duty was paid under protest is in the Statute.

7. Dena Snuff (P.) Ltd. (supra) was a case pertaining to payment of duty and interest though made under protest but it was on 20/05/1990 much prior to the introduction of second proviso to Section 11B. In the absence of second proviso to Section 11B, the stand of the Department that any application for refund has to be made within one year from the relevant date may be justifiable. Once second proviso appears in the Statute the very purpose of bringing such benefit is that if the case of applicant falls within the proviso giving rise to a benefit not to question limitation it has to be extended. In other words, no question of limitation would fall for consideration or deserves to be extended depending upon the conditional deposit when duty and interest payable if any made by the applicants. If no such liberty or protest is indicated at the time of payment of duty and interest, definitely such applicants are not entitled to claim such benefit provided under the second proviso to Section 11B. In the present case computation of period of one year with reference to the relevant date is not an issue for adjudication as the very case of the appellant is such period of limitation, i.e. one year, is not applicable to his case as the duty was paid under protest. Since the duty paid by the applicant was subsequent to 20/09/1991, he is entitled to the benefit of second proviso to Section 11B, therefore the Tribunal was erroneous in setting aside the order of the First Appellate Authority which granted the benefit to the applicant. Accordingly, the appeal deserves to be allowed and allowed sustaining the order of the First Appellate Authority.