

(2015) 03 DEL CK 0024

In the Delhi High Court

Case No : CEAC 22/2010

Mahalakshmi Cable Industries

APPELLANT

Vs

Commissioner of Central Excise

RESPONDENT

Date of Decision : 04-03-2015

Acts Referred:

Central Excises and Salt Act, 1944 — Section 11B, 11B (1), 12A, 5A

Citation : (2015) 322 ELT 215

Hon'ble Judges : R.K. Gauba, J.;S. Ravindra Bhat, J.

Bench : Division Bench

Advocate : Rajesh Mahna and Manu Giri, for the Appellant; Satish Kumar, Advocates for the Respondent

Judgement

S. Ravindra Bhat, J.—The following substantial question of law was framed for the purpose of this appeal:-

"Whether Customs, Excise and Service Tax Appellate Tribunal was right in holding that the refund claimed by the appellant was governed by provisions of Section 11B of the Central Excise Act, 1944 and was barred by limitation?"

2. The facts briefly are that the appellant had paid excise duty during the period between 22.2.1999 and 28.8.1999. The amounts were deposited towards excise duty payable. The adjudication order for the relevant period was made on 23.6.2004 pursuant to a show cause notice. Thereafter, the assessee/appellant applied for refund of the amount deposited in 1999 aggregating to Rs. 4,12,590/-. It was contended that the amounts had been paid under protest and under directions of the audit party. The refund claimed was processed and allowed by an order dated 3.12.2004. The Assistant Commissioner while allowing the refund application, inter alia, held as follows:-

"I have carefully examined the refund claim of the applicant. The initial issue involved was whether the place of removal would be factory gate or the buyers premises and whether the amount of freight and insurance charged by the

applicant from their customers should form part of the assessable value and the same was held as not includable. Further, the Order-in-Original dated 23.6.04 has been accepted by the Department. An Affidavit dated 25.11.04 from Shri Rajiv Chanana, Proprietor of M/s. Mahalakshmi Cables Industries confirmed that the refund amount in question was paid by the applicant and that they have not issued any debit or credit notes in respect of the duty for which the refund application pertains. Further, the accounts of the applicant have been audited by Central Excise Officers even after 1999 but no such debit or credit note passing on the incidence of duty to their customers has been report. Thus, the applicant had not passed on the incidence of duty to the buyer, therefore, the provisions of unjust enrichment given in Section 11B of Central Excise Act, 1944 would also not be applicable in this case. In view of the above, the applicant is entitled to claim the refund of Rs. 4,12,590/-."

3. The Revenue, claimed to be aggrieved, applied for review before the Commissioner of the above order, and vide order dated 2.12.2005, the Commissioner directed the Assistant Commissioner to prefer an appeal before the Commissioner (Appeals) against the refund order. In the course of the appeal, the assessee preferred cross objections contending that the refund was validly made. It was submitted that the amounts were in fact paid as a consequence of directions of the concerned officials and, therefore, were not voluntary. The assessee wished to rely upon second proviso of Section 11B of the Central Excise Act which provides that limitation period for filing the refund application would not apply where the duty is paid under protest. The assessee's contentions were, however, overruled by the Commissioner (Appeals) :-

"11.1. The Respondent has contended that in the Show cause notice dated 27.09.2001 it has been clearly acknowledged that the they had deposited the sum of Rs. 4,12,590/- on the direction of the audit objections. I have examined this plea of the Respondent and find it to be factually incorrect. It is observed that contrary to the plea of the Respondent, there was no direction issued. In fact the show cause notice issued to the Respondent mentions with specific reference to the audit objection itself as follows. "Accordingly the party voluntarily paid Rs. 96,256/- [Emphasis supplied] .Thus, it is clear that the payment made by the Respondent was voluntary. The copy of letter dated 13.07.2001 relied upon by the Respondent [and referred to during personal hearing and filed by the Respondent alongwith the Memorandum of cross-objections] simply mentions the subject as "Supply of figures of amount of Freight and Insurance Charges." Nowhere does this letter contain any indication of payment having been made pursuant to any directions or to any action of a coercive nature. The letter of the Respondent ends with "Thanking you, and assuring of our best service always", which is also not indicative of any direction issued of payment of duty. Therefore, it is incorrect to say that "the deposit" of the above sum of Rs. 4,12,590/- was only against the direction of the Department and that the issue was settled only after the Order-in-original Number 100/04-05 dated 03.12.2005. Thus, I hold that the payment was made

voluntarily by the Respondent as duty of excise and was subject to the provisions of Section 11B of the Central Excise Act, 1944. It was not in the nature of a mere "deposit" as contended by the Respondent."

4. The assessee's further appeal to the Customs, Excise and Service Tax Appellate Tribunal (CESTAT) met with the same fate; the CESTAT held that the refund application was in fact time barred.

5. Learned counsel for the assessee submits that in the facts of this case, the Commissioner (Appeals) and subsequently the CESTAT fell into error in holding that the main provision of Section 11B (1) applied and, therefore, the refund application was time barred. In fact the sum was due only when the show cause notice dated 27.09.2001 was made and not earlier. The CESTAT in its order dated 28.11.2008 rejected the appeal holding that there was no infirmity in the order of the Commissioner (Appeals) . Section 11B of the Central Excise Act at the relevant time read as follows:-

" 11B. Claim for refund of duty -

(1) Any person claiming refund of any duty of excise may make an application for refund of such duty to the Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise before the expiry of six months from the relevant date in such form and manner as may be prescribed and the application shall be accompanied by such documentary or other evidence (including the documents referred to in section 12A) as the applicant may furnish to establish that the amount of duty of excise in relation to which such refund is claimed was collected from, or paid by, him and the incidence of such duty had not been passed on by him to any other person :

Provided that where an application for refund has been made before the commencement of the Central Excises and Customs Laws (Amendment) Act, 1991, such application shall be deemed to have been made under this sub-section as amended by the said Act and the same shall be dealt with in accordance with the provisions of sub-section (2) substituted by that Act :

Provided further that the limitation of six months year shall not apply where any duty and interest, if any, paid on such duty has been paid under protest.

(2) If, on receipt of any such application, the Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise is satisfied that the whole or any part of the duty of excise paid by the applicant is refundable, he may make an order accordingly and the amount so determined shall be credited to the Fund :

Provided that the amount of duty of excise as determined by the Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise] under foregoing provisions of this sub-section shall, instead of being credited to the Fund, be paid to the applicant, if such amount is relatable to -

- (a) rebate of duty of excise on excisable goods exported out of India or on excisable materials used in the manufacture of goods which are exported out of India;
- (b) unspent advance deposits lying in balance in the applicant's account current maintained with the Commissioner of Central Excise;
- (c) refund of credit of duty paid on excisable goods used as inputs in accordance with the rules made, or any notification issued, under this Act;
- (d) the duty of excise paid by the manufacturer, if he had not passed on the incidence of such duty to any other person;
- (e) the duty of excise and interest, if any, paid on such duty borne by the buyer, if he had not passed on the incidence of such duty and interest, if any, paid on such duty to any other person;
- (f) the duty of excise and interest, if any, paid on such duty borne by any other such class of applicants as the Central Government may, by notification in the Official Gazette, specify :

Provided further that no notification under clause (f) of the first proviso shall be issued unless in the opinion of the Central Government the incidence of duty and interest, if any, paid on such duty has not been passed on by the persons concerned to any other person.

(3) Notwithstanding anything to the contrary contained in any judgment, decree, order or direction of the Appellate Tribunal or any Court or in any other provision of this Act or the rules made thereunder or any other law for the time being in force, no refund shall be made except as provided in sub-section (2) .

(4) Every notification under clause (f) of the first proviso to sub-section (2) shall be laid before each House of Parliament, if it is sitting, as soon as may be after the issue of the notification, and, if it is not sitting, within seven days of its re-assembly, and the Central Government shall seek the approval of Parliament to the notification by a resolution moved within a period of fifteen days beginning with the day on which the notification is so laid before the House of the People and if Parliament makes any modification in the notification or directs that the notification should cease to have effect, the notification shall thereafter have effect only in such modified form or be of no effect, as the case may be, but without prejudice to the validity of anything previously done thereunder.

(5) For the removal of doubts, it is hereby declared that any notification issued under clause (f) of the first proviso to sub-section (2) , including any such notification approved or modified under sub-section (4) , may be rescinded by the Central Government at any time by notification in the Official Gazette.

Explanation. - For the purposes of this section, -

(A) "refund- includes rebate of duty of excise on excisable goods exported out of

India or on excisable materials used in the manufacture of goods which are exported out of India;

(B) "relevant date- means, -

(a) in the case of goods exported out of India where a refund of excise duty paid is available in respect of the goods themselves or, as the case may be, the excisable materials used in the manufacture of such goods, -

(i) if the goods are exported by sea or air ,the date on which the ship or the aircraft in which such goods are loaded, leaves India, or

(ii) if the goods are exported by land, the date on which such goods pass the frontier, or

(iii) if the goods are exported by post, the date of dispatch of goods by the Post Office concerned to a place outside India;

(b) in the case of goods returned for being remade, refined, reconditioned, or subjected to any other similar process, in any factory, the date of entry into the factory for the purposes aforesaid;

(c) in the case of goods to which banderols are required to be affixed if removed for home consumption but not so required when exported outside India, if returned to a factory after having been removed from such factory for export out of India, the date of entry into the factory;

(d) in a case where a manufacturer is required to pay a sum, for a certain period, on the basis of the rate fixed by the Central Government by notification in the Official Gazette in full discharge of his liability for the duty leviable on his production of certain goods, if after the manufacturer has made the payment on the basis of such rate for any period but before the expiry of that period such rate is reduced, the date of such reduction;

(e) in the case of a person, other than the manufacturer, the date of purchase of the goods by such person;

(ea) in the case of goods which are exempt from payment of duty by a special order issued under sub-section (2) of section 5A, the date of issue of such order;

(eb) in case where duty of excise is paid provisionally under this Act or the rules made there under, the date of adjustment of duty after the final assessment thereof;

(f) in any other case, the date of payment of duty."

6. The assessee/appellant's contention is that the amount deposited in February and August, 1999 were really by way of protest since they were pursuant to a demand and under the directions of the excise authorities. As to whether this was really so in the facts of the case was in fact determined by the Commissioner (Appeals) - as is evident from the extract of paragraph 11.1. The occasion for the

Commissioner (Appeals) to go into the matter was because the Assistant Commissioner, i.e., the authority of the first instance who adjudicated on the refund claim did not consider it necessary to address the question whether the refund application was made within time. It was apparently assumed that the show cause notice culminated in the Order in Original on 23.6.2004 and the refund application was made within six months if it were to be reckoned from that date. In a sense, there was an assumption that the application was within the stipulated time and that the second proviso did not come into play. On appeal, however, the Commissioner went into the materials and rendered the finding of fact. That finding of fact has not been upset by the CESTAT. The assessee/appellant's attempt to have that order rectified in miscellaneous proceedings too was unsuccessful, as is evident from the further order dated 4.8.2010 of the CESTAT. In these circumstances, this Court is of the opinion that in fact no question of law arises in the facts of this case. What the appellant is urging this Court to dwell deep into the factual material and render findings of fact. We are clear that the jurisdiction of this Court does not permit such an enquiry.

7. In view of the above, the appeal has no merit; the same is accordingly dismissed.