(2024) 10 CESTAT CK 1207

In the Customs, Excise And Service Tax Appellate, New Delhi

Case No : Service Tax Appeal No.53046 of 2018

M/s Jagdambha Phosphates @APPELLANT @Hash Commissioner Of Cgst-Udaipur @RESPONDENT

Date of Decision : 28-10-2024

Acts Referred:

Customs Act, 1962 — Section 2(2), 17, 17(4), 17(3)(4), 27, 27(2), 72, 73, 128
Central Excise Act, 1994 — Section 11B(2)
Cenvat Credit Rules, 2004 — Rule 3

Citation : (2024) 10 CESTAT CK 1207

Hon'ble Judges : Dilip Gupta, President (J);P. V. Subba Rao, Member (T)

Bench : Division Bench

Advocate : Vijay Kumar, Anand Narayan, Manoj Kumar

Final Decision : Dismissed

Judgement

P.V. Subba Rao, J

1. The order dated 19.6.2018, the impugned order passed by the Commissioner (Appeals) is assailed by M/s. Jagadamba phosphates, the appellant in this appeal. By the impugned order, the Commissioner (Appeals) upheld the order dated 04.07.2018 passed by the Assistant Commissioner rejecting the refund to the appellant.

2. The appellant manufactures single super phosphate, SSP from rock phosphate. The appellant paid service tax under reverse charge mechanism, RCM on its raw material - rock phosphate- transported to its factory. It is undisputed that service tax was payable under reverse charge mechanism on the transportation of goods in the case and the appellant filed service tax returns accordingly, showing the amount paid as service tax so paid. Thereafter, the appellant felt that it was entitled to exemption notification no. 3/2013 [S.No.21(e)] and was not required to pay service tax at all on the rock phosphate which transported to its factory and filed a claim. The refund was rejected by the Assistant Commissioner, and such rejection was upheld by the Commissioner (Appeals) in the impugned order.

Submissions of the appellant

3. Shri Vijay Kumar, learned counsel for the appellant made the following submissions:

(i) The appellant had erroneously paid service tax and therefore, filed a refund claim in proper form.

(ii) Since rock phosphate was a chemical fertiliser, it’s transportation was exempted by Notification No. 3/2013 [S.No.21(e)] and the appellant was not required to pay service tax at all. Therefore, it was entitled to refund of the erroneously paid service tax.

(iii) The Assistant Commissioner rejected the refund holding that rock phosphate was not a chemical fertiliser and hence it's transportation was not eligible for exemption notification.

(iv) The Commissioner (Appeals) committed an error in upholding the impugned order.

(v) Rock phosphate is indeed, a chemical fertiliser, as held by the Bombay High Court in the following judgements:

(a) Star Chemicals (Bomba) Ltd. vs. UOI and others, 1980 (6) ELT 133 (Bom.)

(b) Albright Morarji and Pandit Ltd. vs. UOI, 1980 (6) ELT 550 (Bom.)

(vi) This appeal may, therefore, be allowed, and the impugned order may be set aside with consequential refund to the appellant.

Submissions on behalf of the revenue

4. Shri Anand Narain and Shri Manoj Kumar, learned authorised representatives for the revenue, made the following submissions:

(i) The appellant had self-assessed service tax payable on transportation of the phosphate to its factory and paid it correctly.

(ii) The assessments attained finality as neither side filed an appeal against the assessment order nor were they otherwise modified.

(iii) Refund proceedings are in the nature of execution proceedings and cannot be used to determine the mutual rights and liabilities between the assessee and the Revenue decided through assessment, including self-assessments.

(iv) Refund can be sanctioned or rejected as per the assessment already made and not so as to modify them. This is the law laid down by Supreme Court in ITC Ltd vs. Commissioner of Central Excise, Kolkata IV., 2019 (368) E.L.T. 216 (S.C.)

(v) In the case of BT (India) vs. UOI, 2019 (368) E.L.T. 216 (S.C.), by a detailed judgement and order Delhi High Court held that ITC Limited applies to service tax also, and unless the assessments including self-assessments are modified, refunds can be sanctioned or denied as per the assessment only.

(vi) While it is not necessary to go into the merits of the claim, rock phosphate is not a chemical fertiliser, but is only a mineral which the appellant uses as raw material to manufacture the fertiliser, SSP. Therefore, the appellant was not entitled to the benefit of the exemption notification. The judgements relied upon by the learned counsel for the appellant were passed by the Bombay High Court in a completely different context of classification of goods under the erstwhile Customs Tariff and it is in that context that Bombay High Court held that the product was also chemical fertiliser.

(vii) The appeal may be dismissed and the impugned order may be upheld.

5. We have considered the submissions advanced by both sides and perused the records.

6. The undisputed factual position is that the appellant had self-assessed service tax and filed returns which have not been modified through any appeal proceedings. The appellant directly filed refund claims which can be sanctioned only if the assessments are modified.

7. The settled legal position is that the refund proceedings are in the nature of execution proceedings and cannot be used to modify the assessment already made. Just as in an execution proceeding the decree cannot be modified, in a refund proceeding, the assessment cannot be modified as held by the Supreme Court in ITC Limited. The relevant portions of this judgment are as follows:

"…..

43. As the order of self-assessment is nonetheless an assessment order passed under the Act, obviously it would be appealable by any person aggrieved thereby. The expression 'Any person' is of wider amplitude. The revenue, as well as assessee, can also prefer an appeal aggrieved by an order of assessment. It is not only the order of re-assessment which is appealable but the provisions of Section 128 make appealable any decision or order under the Act including that of self-assessment. The order of self-assessment is an order of assessment as per Section 2(2), as such, it is appealable in case any person is aggrieved by it. There is a specific provision made in Section 17 to pass a reasoned/speaking order in the situation in case on verification, self-assessment is not found to be satisfactory, an order of re-assessment has to be passed under Section 17(4). Section 128 has not provided for an appeal against a speaking order but against "any order" which is of wide amplitude. The reasoning employed by the High Court is that since there is no lis, no speaking order is passed, as such an appeal would not lie, is not sustainable in law, is contrary to what has been held by this Court in Escorts (supra).

44. The provisions under Section 27 cannot be invoked in the absence of amendment or modification having been made in the bill of entry on the basis of which self-assessment has been made. In other words, the order of self-

assessment is required to be followed unless modified before the claim for refund is entertained under Section 27. The refund proceedings are in the nature of execution for refunding amount. It is not assessment or re-assessment proceedings at all. Apart from that, there are other conditions which are to be satisfied for claiming exemption, as provided in the exemption notification. Existence of those exigencies is also to be proved which cannot be adjudicated within the scope of provisions as to refund. While processing a refund application, re-assessment is not permitted nor conditions of exemption can be adjudicated. Re-assessment is permitted only under Section 17(3)(4) and (5) of the amended provisions. Similar was the position prior to the amendment. It will virtually amount to an order of assessment or re-assessment in case the Assistant Commissioner or Deputy Commissioner of Customs while dealing with refund application is permitted to adjudicate upon the entire issue which cannot be done in the ken of the refund provisions under Section 27. In Hero Cycles Ltd. v. Union of India - 2009 (240) E.L.T. 490 (Bom.) though the High Court interfered to direct the entertainment of refund application of the duty paid under the mistake of law. However, it was observed that amendment to the original order of assessment is necessary as the relief for a refund of claim is not available as held by this Court in Priya Blue Industries Ltd. (supra).

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47. When we consider the overall effect of the provisions prior to amendment and post-amendment under Finance Act, 2011, we are of the opinion that the claim for refund cannot be entertained unless the order of assessment or self-assessment is modified in accordance with law by taking recourse to the appropriate proceedings and it would not be within the ken of Section 27 to set aside the order of self-assessment and reassess the duty for making refund; and in case any person is aggrieved by any order which would include self-assessment, he has to get the order modified under Section 128 or under other relevant provisions of the Act.

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8. In BT (India) Pvt. Ltd, the Delhi High Court held that ITC Ltd would apply to service tax refunds also. The relevant portions of this judgement are below:

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57. It becomes pertinent to note that both the Customs as well as the Excise Acts follow an identical procedure of self assessment. While Section 17 of the Customs Act enables an importer or an exporter, as the case may be, to self-assess and pay the duty leviable on goods, the said provision further empowers the proper officer to verify the self assessed return that may be submitted. In terms of Section 17(4) of the said enactment, if the proper officer on verification, examination or testing of the goods comes to the conclusion that the self assessment is incorrect, it becomes entitled to reassess the duty leviable on goods. It is in extension of the aforesaid power that sub-section (5) of Section 17

speaks of reassessment and the obligation of the proper officer to pass a speaking order in support of the exercise of reassessment.

58. Section 27 enables a person to claim refund of duty or interest which may have been either paid or borne by it. Section 27(2) of the Customs Act, in terms identical to Section 11B (2) of the Excise Act, speaks of refunds being effected upon the proper officer being satisfied that the whole or any part of the duty paid is refundable. Section 27(2) is thus a provision which is pari materia with Section 11B (2) of the Excise Act.

59. The Supreme Court in ITC Limited, notwithstanding Section 27(2) employing the expression "satisfied? held that unless a self assessed return is revised or doubted in exercise of powers of reassessment, best judgment assessment or where it be alleged that duty had been short levied, short paid or erroneously refunded, those powers would not be available to be exercised at the stage of considering an application for refund. Having noticed the statutory position which prevails, we turn then to the decisions which would have a bearing on the question which stands posited.

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63. Their Lordships in ITC Limited categorically held that notwithstanding a self-assessed Bill of Entry having been merely endorsed by the competent authority, the same would nonetheless amount to an ?assessment?. It was in that backdrop that it was held that once a self-assessed return had been duly accepted, the same could not be modified or varied by an authority while considering an application for refund.

64. It becomes pertinent to note that the appellant before the Supreme Court in that case, had sought to press the claim for refund asserting that it had due to inadvertence failed to submit a self assessment return taking into consideration an exemption notification. It was this claim which came to be ultimately negatived by the Supreme Court and which held that a claim for refund cannot be entertained unless the order of assessment, and which would include a self-assessment return, is modified in accordance with the procedure prescribed in the statute. In our considered opinion, it is these principles enunciated in Flock (India), Priya Blue Industries and ITC Limited, which compel and convince us to observe that the impugned order is clearly rendered unsustainable.

65. Undisputedly, the petitioner had submitted self-assessment returns proceeding on the basis that the output services rendered by it would qualify as an "export of service? and thus it being not exigible to service tax. The aforesaid self-assessment returns remained untouched and had not been questioned by the respondents either in terms of Sections 72 or 73 of the Act. The application for refund of CENVAT credit was founded on the petitioner assessing that it was not liable to pay service tax on services so exported. The accumulation of CENVAT credit came about in light of the various input services received by the petitioner and it having availed credit of service tax paid thereon in terms of Rule

3 of the CCR Rules. It was in respect of the accumulated CENVAT credit that the application for refund came to be made.

66. In our considered view, unless the self-assessed return, as submitted had been questioned, re-opened or re-assessed and the assertion of the petitioner of the services rendered by it qualifying as an “export of service” questioned or negatived in accordance with the procedure prescribed under the Act, its claim for refund could not have been negated. As was observed by the Supreme Court in ITC Limited, a self-assessed return also amounts to an ?assessment? and unless it is varied or modified in accordance with the procedure prescribed under the relevant statute, the same cannot possibly be questioned in refund proceedings. As the Supreme Court had held in the decisions aforenoted, the authority while considering an application for grant of refund neither sits in appeal nor is it entitled to review an assessment deemed to have been made. In fact, the Supreme Court in ITC Limited had described refund proceedings to be akin to execution proceedings.

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9. This case is identical to BT (India) Pvt. Ltd. inasmuch as the question is whether refund of service tax paid can be sanctioned or denied so as to modify the self-assessments already made and it has been answered in the negative by the Delhi High Court. The only difference between this case and that of BT (India) Pvt. Ltd. is that the assessee would have been entitled to refund and in this case, the appellant would not be entitled to refund if the refund is processed as per the assessments. But that is immaterial.

10. In view of the judgment of the Supreme Court in ITC Ltd and the judgment of the Delhi High Court in BT (India) Pvt. Ltd., it is held that since the appellant had not assailed the self-assessments and as per the assessments the appellant is not entitled to any refund, the appellant would not be entitled to refund and it has been correctly rejected.

11. The impugned order is, therefore, upheld and the appeal is dismissed.

(Order pronounced on 28.10.2024)