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(2021) 04 CESTAT CK 0028

In the Customs, Excise And Service Tax Appellate Tribunal

Case No : Excise Appeal No. 87040 Of 2019

M/s Kellogg India Private Limited — APPELLANT

Vs

Commissioner Of Central Excise And Service Tax, Raigad — RESPONDENT

Date of Decision : 16-04-2021

Acts Referred:

Central Excise Act, 1944 — Section 11B(2), 11B(3), 35

Citation : (2021) 04 CESTAT CK 0028

Hon'ble Judges : Dr. Suvendu Kumar Pati, J

Bench : Single Bench

Advocate : Mahesh Raichandani, Sanjay Hasija

Final Decision : Allowed

Judgement

1. Denial of refund of Rs. 28,77,899/- after the tax demand was set aside by CESTAT on 17.03.2017, in the second round of litigation that originally commenced in 1999, has brought this dispute to the present forum.

2. I have heard the submissions from both sides at length and perused the case record. 3. The ground of rejection of appeal by the Commissioner (Appeals) is that the appeal was time barred as was field after the appeal period was over and after the condonable period of further 30 days available with the Commissioner (Appeals), it can't be entertained. However, in his order dated 10.05.2019 he made the following observation at para 7.5

"On perusal of the letter of the Assistant Commissioner, he has reported that impugned order dated 15.03.2018 should be considered as invalid on the ground that on the same issue the appellant had already field refund claim earlier and order was passed vide Order-in-Original dated 17.07.2017 against which no appeal was filed and on the same issue refund claim was again filed and, therefore, Order-in-Original issued dated 15.03.2018 should be considered as invalid. However, the appellant has not brought these facts on record."

4. These facts are admitted by both the parties that there were two refund

applications filed against which two Orders-in-Original rejecting the refund were passed and no appeal had been preferred against the first rejection order for which, as per principle of Res-Judicata followed in the Civil Courts, that is stated by the learned Authorised Representative to have been applicable to taxation statute also, subsequent refund application is barred and also the appeal against the same.

4.1 Be that as it may, there are certain issues which are required to be placed on record to give justice to the appellant -

(i) As per proviso to Section 35 of the Central Excise Act, 1944 presentation of appeal beyond the period of 60 days can be allowed by the Commissioner (Appeals) up to a further period of 30 days if sufficient cause is shown. Thereafter it was not within the condonable period of the Commissioner (Appeals). This appeal being filed after 90 days, which appellant claims to have been filed in a wrong court and pleads for application of the spirit/principle of the Indian Limitation Act on the basis of the decision of the Hon'ble Supreme Court passed in M P Steel case (Date of Judgement 23.04.2015), he should not have admitted the appeal when noticed a different fact or circumstance, as has been held in Yapp India Automotive System Pvt. Ltd. Vs. CCE & ST, Pune-I reported in MANU/CM/0145/2018, but he was not empowered to entertain hearing of the appeal or decide on the merit of the said appeal. Therefore, the above reproduced paragraph is non est in the eyes of law.

(ii) Judgment of a court would be fruitless if the ultimate hardship is not mitigated. It is therefore execution proceedings, contempt of court proceedings etc are in existence to give enforceability to the order/decree passed by a court of law. It is surprising that in the Tax Appellant Tribunal's order are not being dully honoured by the departmental officers by wrongly interpreting judicial decisions and the provisions of the statutes. Admittedly sub-Section 3 of Section 11B stipulates that irrespective of the existence of judgment, decree order or direction of the Appellate Tribunal, refund shall be made as provided in Section 2 of Section 11B. However, a close scrutiny of sub sec -2 of Section 11B would clearly spell out that empowered excise official is to satisfy himself that the whole or part of duty including interest etc. paid by the appellant is refundable. When payment is acknowledged by the department in the two rounds of proceedings up to CESTAT level, should there be a requirement of asking for duty paying documents after laps of more than 20 years when the justifiability of the refund is found in the order of the CESTAT passed way back in 2017. He has to satisfy if duty already paid by the appellant is refundable and not required to scrutinise if duty was actually paid by physically inspecting the duty paying document after the legality of such payment is already determined by the Tribunal.

(iii) Both parties concede that two refund applications were filed and there was bifurcation of jurisdiction owing to transition to GST regime. However those are the submissions while the facts on record narrate a different story. Going by the

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Order-in-Original at para 2 refund requests was made online on 17.04.2016 and hard copies of connected documents were received at Taloja Division Office, Commissioner of Central Excise, Belapur on 17.04.2016. It is not very clear that the photo-copy of the order dated 17.03.2017 of CESTAT was filed subsequent to filing of the rest of documents or those dates were noted in para 2 erroneously. These aspect remain unanswered by the parties for which taking the adjudication Order-in-Original dated 15.03.2018, it can be presumed that refund application which is presently under challenge, was filed in 2016 in advance much before the alleged first refund application dated 19.04.2017 against which Order-in-Original dated 17.03.2017 was allegedly passed (not submitted by either parties). Therefore, without any correction being possible to the noting of dates in Order-in-Original dated 15.03.2018 the said order has to be accepted as the order of rejection of refund and principle of Res-Judicata would not be applicable to this for another strong reason that the first alleged Order-in-Original was not issued by the court of competent territorial jurisdiction, which is a paramount requirement of the principle of Res-Judicata.

5. In view of the foregoing discussion and in view of the fact that appellants claim for refund was rejected only on the ground that duty paying document was not produced which is contrary to the text of sub-Section 2 of Section 11B of Central Excise Act, 1944 and contrary to the evidence available on record being admission of respondent-department throughout the proceedings including at CESTAT that this amount was additionally claimed from the appellant and paid by it, I find it is a fit case for remand to the adjudicating authority to get himself satisfied with the certified copy of the order of CESTAT passed on dated 17.03.2017 and to dispose of refund application in accordance to the law with due regard to the findings of CESTAT. Hence the order.

ORDER

6. The appeal is allowed by way of remand to the original adjudicating authority for re-adjudication of refund proceedings in accordance with the observations made above.

(Order pronounced in the open court on 16.04.2021)

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