
(2021) 05 CESTAT CK 0023

In the Customs, Excise And Service Tax Appellate Tribunal

Case No : Excise Appeal No. 70628, 70674 Of 2019, Cross Application
No.70411 Of 2019

M/s. Parle Agro Pvt. Ltd.

APPELLANT

Vs

Commissioner, Central Goods And Service Tax, Noida

RESPONDENT

Date of Decision : 25-05-2021

Acts Referred:

Central Excise Act, 1944 — Section 3, 11A, 11AA, 11AB, 11B, 11BB, 11B(2), 11D, 11DD
Constitution Of India — Article 365

Citation : (2021) 05 CESTAT CK 0023

Hon'ble Judges : Delip Gupta, J;P.V. Subba Rao, Technical Member

Bench : Division Bench

Advocate : Bharat Rai Chandani, Anupam Tiwari

Final Decision : Allowed/Dismissed

Judgement

1. Excise Appeal 70628 of 2019 has been filed by M/s. Parle Agro Pvt Ltd, the Appellant to modify the order dated 28.05.2019 passed by the Commissioner, CGST(Appeals), Noida, the Commissioner (Appeals), to the extent that interest should be granted @12% instead of @6%, as ordered by the Commissioner (Appeals). This order modifies the order dated 01.11.2018 passed by the Assistant Commissioner to the extent that interest on the refund amount has been allowed from the date of deposit till the date of payment. It needs to be noted that the Assistant Commissioner, while deciding the refund claim filed by the appellant pursuant to the order dated 31.01.2017 passed by the Customs, Excise and Service Tax Appellate Tribunal, the Tribunal, sanctioned the refund claim with interest from the date the appellant became entitled to claim the refund (i.e. 01.12.2005) up to the date of order passed by the Tribunal (i.e. 31.01.2017).

2. Excise Appeal 70674 of 2019 has been filed by the Principal Commissioner for setting aside the order dated 28.05.2019 passed by the

Commissioner (Appeals). In this appeal, cross-objections have also been filed by the appellant for dismissing the appeal filed by the Department.

3. The appellant is, inter alia, engaged in the manufacture of Non-Alcoholic Beverages Base, NABB, which is an excisable product.

4. On the basis of purported information/ intelligence that the appellant and its group companies were allegedly evading central excise duty by under

booking and transferring cost on some group companies of NABB and mis-utilizing the modvat credit of duty paid on the inputs used in or in relation to

the manufacture of NABB, investigation was initiated against the appellant. The officers visited the factory premises and the office premises of the

appellant on 20.10.1993.

5. During the pendency of the investigation, the appellant debited a sum of Rs.4,33,650/- from PLA on 26.11.1993 and a further sum of Rs.4,02,535/-

from PLA on 26.11.1993 with endorsements that the amount was being paid under protest. The appellant also deposited a sum of Rs.1.50 crores

through TR-6 Challan on 28.06.1994 with a similar endorsement.

6. Based on the above investigation, a show cause notice dated 04.04.1994 was issued to the appellant demanding differential duty for clearances of

NABB to the extent of Rs.2,66,26,717/- for the period from 01.03.1989 to 30.11.1993 and of Rs.26,48,860/- for the period from period April 1989 to

September 1992.

7. The adjudicating authority confirmed the demand raised in the show cause notice with redemption fine of Rs.50 lacs and penalty of Rs.2 crores by

order dated 19.08.1996.

8. Feeling aggrieved by the aforesaid order passed by the Adjudicating Authority, the appellant filed an appeal before the Tribunal. By an interim order

dated 13.12.1996, the Tribunal directed the appellant to deposit a sum of Rs.22 lacs towards duty and furnish a bank guarantee of Rs.50 lacs towards

fine. The appellant complied with the terms of the aforesaid interim order passed by the Tribunal.

9. The Tribunal, ultimately by order dated 02.08.2005, partly allowed the appeal. The duty demanded for the cost of advertisement charges was set

aside and the appeals filed by the officers of the company, on whom penalty was

imposed, were allowed and the imposition penalties were set aside.

However, the penalty imposed on the manufacturer was reduced to Rs.10 lacs and the demand on short levy on account of non-passing of the sales

tax collected from the bottlers was upheld. The order passed by the Tribunal is reproduced below:

4. The Appellants Pepsi Agro is a manufacturer of beverages concentrates Non-Alcoholic Beverage Base (NABB). Dispute in this Appeal

is about the valuation of NABB. The impugned order has held that some recoveries were being made towards advertisements of soft drinks

produced out of NABB and that these recoveries should form part of the assessable value of NABB. While receipt of this main part of the

demand, there is also demand of about 28 lakhs on the ground that the Appellants claim for deductions towards sales tax was not correct in

as much as their product was exempt of sales tax so far as the NOIDA factories are concerned.

5. The Appellant is not contesting the demand relating to the sales tax issue. That demand, therefore, is confirmed.

6. When the main issue of charging including recoveries towards advertisement, the prayer of learned Counsel is that the advertisement cost

of another product namely aerated waters cannot be in relation to the valuation of NABB and this position remains concluded by the

decision of the Hon'ble Supreme Court in the Appellants own case in Civil Appeal No. 6460- 6483/99 dated 16.3.05. We find that the same

view was taken by this Tribunal in Final Order No. No. 495-96/05 in our order dated 1.7.05 in Appeal No. E/1029-1030/90-A in the case of

Bisleri Beverages (P) Ltd. and Parle (Exports) Pvt. Ltd.'s case. Thus it is clear that duty demand in regard to advertisement is not assessable.

Therefore, the duty demand on that count is set aside.

7. The remaining Appeals of the Appellant company are against the penalties imposed on the manufacturers. The said penalty is in the light

of the total duty demand, and that the duty demand is to be limited to a part of the demand originally confirmed. The penalty is also required

to be reduced. Therefore, the penalty is reduced to Rs. Ten lakhs.

8. Now we take up the Appeal of the officers of the company. The contention of the learned Counsel is that the allegation on the officers is

in their capacity as management of the Company and that they are not liable to pay any penalty. It is also being pointed out therein in the

findings of impugned order that officers are in no way personally guilty. As against this, the learned Senior Departmental Representative

submits that penalties on the officers are also justified inasmuch as the duty evasion has taken place on account of their actions.

9. As already noted, the part amount of the duty demand remains vacated. It is also seen that, no specific offence found in particular

against the officers of the Company. In the circumstances, we are of the view that there can be no penalties on the officers of the company,

who have not violated the provisions of the rules, they are accordingly set aside. The appeals are partly allowed in the above terms with

consequential relief, if any, to the Appellants.â??

(emphasis supplied)

10. Pursuant to the aforesaid order passed by the Tribunal, the appellant filed an application dated 02.09.2005 for refund of the excess amount of

Rs.1,48,36,185/- deposited during investigation and that deposited for compliance of the interim order passed by the Tribunal.

11. The refund application filed by the appellant was rejected on the ground of limitation by order dated 31.01.2006. The appeal filed before the

Commissioner (Appeals) was also dismissed on 17.7.2006.

12. An appeal was, thereafter, filed by the appellant before the Tribunal. This appeal was allowed by order dated 31.01.2017. The operative part of

the order is reproduced below:

â??6. Having considered the rival contentions, we find that as held by Hon'ble of Punjab and Haryana High Court and as earlier held by

this Tribunal the amounts, which are deposited during the pendency of investigation and proceedings, if the same are not adjudged as duty

fine or penalty then the amount that is not adjudged as duty, fine and penalty is to be treated as Revenue deposit and the provisions of

refund of duty shall not be applicable to the same. The amount which has been adjudged is as per the authority of law and the amount

which is in excess of the adjudged amount if retained that such retention of said amount shall be without authority of law and Article 365 of

Constitution of India has not authorized Revenue to retain such amount. In the

present case, the penalty was reduced to Rs.10 lakh.

Therefore, we allow Revenue to recover Rs.10 lakh from Rs.1.5 crore which was deposited by the appellant and direct the Original

Authority to refund Rs.8,36,185/- and Rs.1,40,00,000/- and also pay the appropriate interest on the same. We do not pass any order in

respect of bank guarantee since the matter was not subject matter of either the Order-in-Original or Order in-Appeal impugned. We allow

the appeal as held herein above.â??

(emphasis supplied)

13. The appellant, thereafter, filed a letter dated 24.05.2017 seeking refund of Rs.1,48,36,185/- pursuant to the order dated 31.01.2017 passed by the Tribunal.

14. The Assistant Commissioner, by order dated 30.10.2018, sanctioned the refund of Rs.1,48,36,185/- and granted interest to the appellant after the expiry of three months from the date of filing of the refund claim i.e. w.e.f. 01.12.2005.

15. The appellant felt aggrieved to the extent interest was not granted from the date of deposit of the amount and further interest was granted only

@6% instead of @12%.

16. The Commissioner (Appeals), by order dated 28.05.2019, granted interest from the date of deposit of the amount @6% only and not 12%, as claimed by the appellant.

17. It is this order dated 28.05.2019 that has led to the filing of Excise Appeal No. 70628 of 2019 by the appellant for payment of higher interest

@12% per annum and Excise Appeal No. 70674 of 2019 by the Department for rejecting the refund claim filed by the appellant.

18. In Excise Appeal No. 70674 of 2019 that has been filed by the Department, cross objection has been filed by the appellant contending that the

appeal itself is not maintainable. In this connection, it has been submitted that the relief claimed in the appeal filed by the Department is for setting

aside the order dated 28.05.2019 passed by the Commissioner (Appeals) by challenging the finding recorded by the Commissioner (Appeals) that the

disputed amount is a deposit, whereas it was central excise duty.

19. The contention of learned counsel for the appellant is that a specific finding

was recorded by the Tribunal in the order dated 31.01.2017 that it was a revenue deposit of amount and not central excise duty and as the Department had not filed any appeal to assail the finding recorded in order of the Tribunal, this finding attained finality and, therefore, cannot be assailed in this appeal filed by the Department. Learned counsel further submitted that the Commissioner, pursuant to the order passed by the Tribunal, had also sanctioned the refund.

20. This submission of learned counsel for the appellant deserves to be accepted. Once a finding was recorded by the Tribunal in the order dated

31.01.2017 that the amount which had been deposited by the appellant during investigation and that deposited pursuant to the interim order passed by

the Tribunal was a revenue deposit and not an excise duty deposit and there was no challenge to this finding of the Tribunal, the appellant cannot now,

after the Commissioner (Appeals) has allowed the appeal by order dated 28.05.2019, raise this issue by filing the present appeal to assail the order

dated 28.05.2019.

21. It also needs to be noted that the revenue had accepted the order dated 31.01.2017 passed by the Tribunal, as is clear from the letter dated

09.10.2017, the relevant paragraph of which is reproduced below:

11. The review Branch of CGST Commissioner of Noida Vide their letter C. No. V (15) JUD/CESTAT/FO/PAPL/N-1/238/2017/1856 dated

09.10.2017 informed that the Competent Authority has accepted CESTAT Final Order No. A/70145/2017-EX (DB) dated 31.01.2017 on

06.10.2017.

22. This apart, the Assistant Commissioner, by the order dated 13.10.2018, had also ordered for refund of the amount and this order was also not

assailed by the Department.

23. Excise Appeal No. 70764 of 2019 filed by the Department is, therefore, liable to be dismissed and the cross objections filed by the appellant are

liable to be allowed.

24. Excise Appeal No. 70628 of 2019 has been filed by the appellant for a relief that interest at the rate of 12% should be granted to the appellant

from the date of deposit of the amount instead of 6%, as ordered by the Commissioner (Appeals). In this connection, learned counsel for the appellant

has placed reliance upon the following decisions:

(i) Sandvik Asia Ltd. vs. Commissioner of Income Tax-I, Pune, 2006 (196) E.L.T. 257 (S.C.).

(ii) Pace Marketing Specialities vs. Commissioner of Central Excise, 2012 (27) S.T.R. 420 (All.).

(iii) Ebiz. Com Pvt. Ltd. vs. Commissioner of Central Excise, Customs & S.T., 2017 (49) S.T.R. 389 (All.)

(iv) Riba Textiles Ltd Village Chidana, Tehsil Gohana Dist Sonapat, Haryana vs. Commissioner of Central Excise and Service Tax Panchkula, 2020-

TIOL-932-CESTAT-CHD.

25. Before advertng to the aforesaid decisions relied upon by the learned counsel for the appellant, it would be appropriate to refer to the provisions

contained in the Central Excise Act 1944, Excise Act relating to refund.

26. Section 11A of the Excise Act relates to recovery of duties not levied or not paid or short levied or short paid. It provides that in such cases, the

central excise officer shall serve a notice on the person chargeable with duty requiring him to show cause why he should not pay the amount of duty

alongwith interest payable thereon under section 11AA.

27. Section 11AA deals with interest on delayed payment of duty. It provides that the person, who is liable to pay duty, shall, in addition to the duty, be

liable to pay interest at the rate specified in sub-section (2). The interest rate that has been specified in sub-section (2) is not below 10% and not

exceeding 36% per annum as the Central Government, by notification in the Official Gazette fix.

28. Section 11B of the Excise Act deals with claim for refund of duty and interest, if any, paid on such duty. It provides that any person claiming

refund of any duty of excise and interest may make an application for such refund of duty and interest.

29. Section 11BB provides for interest on delayed refund. It states that if any duty ordered to be refunded under sub-section (2) of section 11B is not

refunded within three months from the date of receipt of the application, than the applicant shall be entitled to interest after the expiry of three months

from the date of receipt of the application at such rate not below 5% and not exceeding 30% as may be notified by the Central Government in the

Official Gazette.

30. In the present case, the provisions of section 11B of the Excise Act would not be applicable. This is for the reason that the appellant was not claiming refund of duty. The applicant, as noticed above, had claimed refund of the revenue deposit. Such a finding has also been clearly recorded by the Tribunal in the order dated 31.01.2017, which order has attained finality.

31. Section 11D of the Excise Act deals with duties of excise collected from the buyer to be deposited with Central Government. It provides that every person who is liable to pay duty and has collected any amount in excess of the duty assessed from the buyer of such goods in any manner as representing duty of excise, shall forthwith pay the amount so collected to the credit of the Central Government.

32. Section 11DD of the Excise Act deals with interest on the amount collected in excess of the duty. It provides that where an amount has been collected in excess of the duty from the buyer of such goods, the person who is liable to pay such amount shall, in addition to the amount, be liable to pay interest at such rate not below ten per cent., and not exceeding thirty-six per cent per annum, as is for the time being fixed by the Central Government, by notification in the Official Gazette.

33. There is no provision in the Excise Act, which deals with refund of revenue deposit and so rate of interest has not been prescribed, when revenue deposit is required to be refunded.

34. To be able to have some guidance regarding the rate of interest in case revenue deposit has to be refunded, the aid of the interest provisions under section 11AA (which deals with interest on delayed payment of duty), section 11BB (which deals with interest on delayed refunds under section 11B(2) and section 11DD (which deals with interest on the amount collected in excess of the duty) can be taken.

35. The Notification issued under section 11AA of the Excise Act provides interest at the rate of fifteen per annum. The notification is reproduced below:

Notification No. 15/2016-C.E. (N.T.), dated 1-3-2016

Notification Under Section 11AA

Rate of interest on delayed payment of duty (w.e.f. 1-4- 2016). " In exercise of the powers conferred by section 11AA of the Central

Excise Act, 1944 (1 of 1944) and in supersession of the notification of the Government of India in the Ministry of Finance (Department of

Revenue) No. 5/2011 " Central Excise (N.T.), dated the 1st March, 2011 published in the Gazette of India, Extraordinary, Part II, Section

3, sub-section (i), vide, number GSR 136(E), dated the 1st March, 2011, except as respects things done or omitted to be done before such

supersession, the Central Government hereby fixes the rate of interest at fifteen per cent per annum for the purpose of the said section.

2. This notification shall come into force from the 1st day of April, 2016.

36. The Notification issued under section 11BB provides interest at the rate of six per cent per annum. It is reproduced below:

Notification No. 67/2003-C.E. (N.T.), dated 12-9-2003

Notification Under Section 11BB

Interest @ 6% per annum on delayed refunds. " In exercise of the powers conferred by section 11BB of the Central Excise Act, 1944 (1

of 1944) and in supersession of the notification of the Government of India in the Ministry of Finance (Department of Revenue) No.

17/2002-Central Excise (N.T.), dated the 13th May, 2002 [GSR 353(E), dated the 13th May, 2002], except as respect things done or omitted

to be done before such supersession, the Central Government hereby fixes the rate of interest at six per cent per annum for the purpose of

the said section.

37. The Notification issued under section 11DD provides interest @ of 15% per annum on the amount collected in excess of duty. It is reproduced

below:

M.F. (D.R.) Notification No. 68/2003-C.E. (N.T.), dated 12-9-2003

Notification Under Section 11DD

Interest @ 15% per annum on amounts collected in excess of duty. " In exercise of the powers conferred by section 11DD of the Central

Excise Act, 1944 (1 of 1944) the Central Government hereby fixes the rate of interest at Fifteen percent per annum for the purpose of the

said section.

38. It would also be to pertain to refer to the Notification issued under section 11AB of the Excise Act, as it existed prior to 08.04.2011. It provides

interest @18% per annum. The said Notification is reproduced below:

Notification No. 6/2011-C.E. (N.T.), dated 1-3-2011

Notification Under Section 11AB

Rate of interest on delayed payment of duty. " In exercise of the powers conferred by section 11AB of the Central Excise Act, 1944 (1 of

1944) and in supersession of the notification of the Government of India in the Ministry of Finance (Department of Revenue) No. 66/2003-

Central Excise (N.T.), dated the 12th September, 2003 [GSR (E), dated the 12th September, 2003], except as respects things done or omitted

to be done before such supersession, the Central Government hereby fixes the rate of interest at eighteen percent per annum for the

purpose of the said section.

This notification shall come into force from the 1st day of April, 2011.

39. In this connection reference can also made to the decisions of the Allahabad High Court in Pace Marketing Specialities and Ebiz. Com Private

Limited, wherein after making reference to the decision of the Supreme Court in Sandvik Asia Ltd., the High Court granted interest at the rate of 12%

per annum in matters relating to refund of amount deposited during investigation and adjudication.

40. In Riba Textiles, the Tribunal also granted interest at the rate of 12% on refund of amount deposited during investigation and at the time of

entertaining the stay application.

41. In view for the aforesaid decisions, and the fact that the rate of interest varies from 6% to 18% in the aforesaid Notifications issued under sections

11AA, 11BB, 11DD and 11AB of the Excise Act, the grant of interest @12% per annum seems to be appropriate.

42. Thus, for the reason stated above, Excise Appeal No. 70628 of 2019 is allowed and the order dated 28.05.2019, passed by the Commissioner

(Appeals) is modified to the extent that interest shall be granted to the appellant @12% instead of @6% from the date of deposit till the date of

payment. Excise Appeal No. 70674 of 2019 filed by the Principal Commissioner for setting aside the order dated 28.05.2019, passed by the

Commissioner (Appeals) is dismissed.

(Pronounced on 25.05.2021)