
(2023) 05 CESTAT CK 0016

In the Customs, Excise And Service Tax Appellate Tribunal

Case No : Excise Appeal No. 51737 Of 2023

M/S Pine Laminates Pvt. Limited

APPELLANT

Vs

Commissioner, Central Excise & Cgst

RESPONDENT

Date of Decision : 09-05-2023

Acts Referred:

Central Excise Act, 1944 — Section 5A(2), 11B

Citation : (2023) 05 CESTAT CK 0016

Hon'ble Judges : Binu Tamta, Member (J)

Bench : Single Bench

Advocate : G. G. Gupta, Gopi Raman

Final Decision : Allowed

Judgement

Binu Tamta, Member (J)

1. The present appeal is filed, challenging the Order-in-Appeal No. 75(RLM)/CE/JPR/2022 dated 31.12.2022 rejecting the refund application filed by the appellant as being time barred since duty was not paid under protest.

2. The appellant is engaged in manufacture of Decorative Laminate/ Sheet falling under Chapter Heading No. 4823 9019 of the First Schedule to the Central Excise Tariff Act, 1985 and had filed a refund claim for Rs.12,60,492/- on 09.01.2019 under section 11B of the Central Excise Act, 1944.

3. The department issued show cause notice dated 13.02.2019 as the refund claim appeared to be hit by time limit prescribed under section 11B of Central Excise Act, 1944 and was therefore liable to be rejected. The detailed facts as noted are as follows:-

"3. And, whereas, on scrutiny of documents submitted by the assessee, it has been revealed that:

(a) IAR No. 646/2014-152/2015 dated 19.05.2015 is covering the period from 03/2010 to 03/2015. The audit was conducted on 15.04.2015 & 16.04.2015. As

per audit report the audit had pointed out the issue and assessee agreed with their contention. Agreeing with the view of the audit, the assessee voluntarily reversed duty Rs. 6,49,017/- along with interest of Rs. 1,38,627/- and penalty of Rs. 88,947/- vide challan dated 16.04.2015. The para was raised and settled. Suitable intimation was communicated to the assessee vide letter C. No. V(I)646/IAR/GR M-I/BHD/2014/233 dated 19.05.2015.

(b) IAR No. 814/2016-17(CE) dated 13.12.2016 is covering the period from 04/2015 to 10/2016. The audit was conducted on 28.11.2016 & 29.11.2016. As per audit report, it appears that the assessee was regularly paying duty on the VAT subsidy they received but there was short duty payment of Rs. 69,750/- during the period July 2016 to September 2016. On being pointed out by the audit the assessee admitted the short duty payment on value of Rs. 5,58,000/-. Similar to above, agreeing with the view of audit, the assessee voluntarily reversed duty of Rs. 69,750/- vide cenvat debit entry dated 29.11.2016 and deposited interest of Rs. 2733/- vide challan dated 30.11.2016. The para was raised and settled. Suitable information was communicated to the assessee vide letter C. No. V(I)814/IAR/GR-9/Bhiwadi/2016-17/3977 dated 13.12.2016.

(c) Documents on record including aforesaid audit report dated 19.05.2015 & 13.12.2016 have no evidence to support the version of the assessee that they deposited duty/ penalty/ interest etc. under protest, on the contrary, as per the documents available on records, it is observed that they were in agreement with the view of the audit and therefore voluntarily deposited the duty along with the interest and penalty.

(d) The duty on VAT subsidy was last deposited on 30.11.2016 by them, during this long span of time i.e., from March, 2013 to November 2016 or thereafter, if they had any kind of doubt or protest, they were required to submit letter of protest or to file refund claim of duty/penalty deposited within the statutory period of one year provided under Section 11B of the Central Excise Act, 1944 but they never exercised any option available to them under the provision of law at any point of time. The instant refund claim has been filed by them beyond the statutory period provided under Section 11B of the Central Excise Act, 1944.

(e) On perusal of the documents of claim or refund submitted by the assessee, it is observed that nowhere it is indicated that the assessee had paid the duty pursuant to any directions/ instructions of the department. The assessee has paid the duty after agreeing with the view of the Internal audit, Jaipur. Moreover, the assessee has never informed the Department in writing regarding payment of duty "under protest".

4. Both the adjudicating authority and the Commissioner of (Appeals), confirmed the show cause notice, holding that the case do not fall under category of payment ?under protest?. The appellant has filed the present appeal challenging the said order.

5. Having considered the rival submissions on both sides and perusal of the

records, I find that authorities below have not considered the case in proper perspective and the case law on the subject.

6. It is necessary to appreciate the brief facts on merits. The appellant was eligible for subsidy as per the Rajasthan Investment Promotion Scheme whereunder they were required to deposit VAT/CST/SGST at the applicable rate with the government and in terms of the scheme, they were entitled to disbursement of subsidy which is sanctioned in Form 37B and the Challans in the Form VAT, 37B can be utilised for discharge of the VAT liability of the appellant for subsequent period. The revenue proceeded to include such subsidy amounts in the value of the goods cleared by the appellants and demanded the differential duty. The appeal before the Tribunal was allowed vide Final Order No. A/51427 - 51514/2018 dated 27.04.2018, in favour of the appellants relying on the earlier decision of the Tribunal in the case of Shree Cement Ltd., Vs. CCE Alwar, 2018-TIOL-748-CESTAT Delhi, which was based on the decision in the case of Wellspun, which concluded that there is no justification for inclusion in the assessable value, the VAT amounts paid by the assessee using VAT, 37B Challans. Accordingly, the impugned orders were set aside and the appeal was allowed with consequential relief.

7. Thus the matter on merits concerning the amount of subsidy in question was finally decided by the Tribunal vide its judgement dated 27.04.18, wherein the appellant was a party at Serial No. 47. The said order was communicated to the appellant as per the endorsement on the true copy of the order on 04.05.2018. In terms of the consequential relief granted by the Tribunal the appellant made the application for refund on 09.01.2019, which was within the period of limitation of one year from the date of the order of the Tribunal on 27.04.2018/ 04.05.2018 as per clause (ec) of Explanation B to section 11B defining the term ? relevant date?. For proper appreciation, the relevant portion of section 11B is quoted below:-

"11B. Claim for refund of duty and interest, if any, paid on such duty-

(1) Any person claiming refund of any duty of excise and interest, if any, paid on such duty may make an application for refund of such duty and interest if any, paid on such duty to the Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise before the expiry of one year from the relevant date in such form and manner as may be prescribed and

Provided that where an application for refund has been made before the commencement of the Central Excises and Customs Laws (Amendment) Act, 1991 (40 of 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 subsection (2) as substituted by that Act]:

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

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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 despatch 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 thereunder, the date of adjustment of duty after the final assessment thereof;

(ec) in case where the duty becomes refundable as a consequence of judgment, decree, order or direction of appellate authority, Appellate Tribunal or any court,

the date of such judgment, decree, order or direction;

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

From the reading of the above provisions, it is crystal clear that section 11B (1) prescribes the period of one year from the relevant date and the term ‘relevant date’ is then defined under the Explanation as given above and the relevant clause (ec) specifically provides that in case the amount is refundable as a consequence of a judgement or order of an appellate Tribunal or any Court, it is the date of such judgement, decree, order or direction. In the present case, the amount became due by virtue of the decision of the Tribunal on 27.4.2018 whereby the impugned order including the subsidy amount in the transaction value was set aside and the appeal was allowed with consequential relief, which obviously implied that the amount so deposited by the appellant has to be refunded and therefore if the period of one year is computed from the said date, the application for refund dated 09.01.2019 was within the limitation period of one year. On this count itself the refund claim ought to have been allowed.

8. Secondly, the learned counsel for the appellant has cited certain decisions on the point that the amount deposited was not payable by them as it was not for any tax liability of the appellant and the department had no authority of law to collect the same. It was merely a case of erroneous collection and therefore the refund claim filed by the appellant cannot be rejected on the ground of limitation. Reliance is placed on the decision of this Tribunal in CCEX Vs. Indian Ispat Works Private Limited - 2006 (3) STR 161, Hexacom India Limited Vs. Commissioner - 2003 (156) ELT 357, CCEX Bangalore Vs. Motorola India Private Limited - 2006 (206) ELT 90, whereby the High Court of Karnataka observed that the amount paid by mistake cannot be termed as duty in the case in hand and the time bar does not apply in such cases. Necessary to refer to the observations of the High Court of Karnataka in CCEX vs. KVR Construction - 2012 (26) STR 195-

“Therefore, mere payment made by the respondent will neither validate the nature of payment nor the nature of transaction. In other words, mere payment of amount would not make it a “service tax” payable by them. When once there is lack of authority to demand “service tax” from the respondent company, the department lacks authority to levy and collect such amount. Therefore, it would go beyond their purview to collect such amount. When once there is lack of authority to collect such service tax by the appellant, it would not give them the authority to retain the amount paid by the petitioner, which was initially not payable by them. Therefore, mere nomenclature will not be an embargo on the right of the petitioner to demand refund of payment made by them under mistaken notion.

Applying the ratio of the aforesaid decisions, I find that the present case is squarely covered as the amount deposited by the appellant was erroneous as the department directed them to do so. The Tribunal while rejecting the plea of the revenue on merits have specifically held that the subsidy amount cannot be

included in the transaction value for the purpose of excise duty and also directed for consequential relief to the appellant. In that view, I find that the Commissioner (Appeals) committed an error of law in holding that the period of levy of excise duty on VAT subsidy was from March 2010 to November 2016 and during this period, the appellant had deposited the excise duty on VAT when there was no order of CESTAT which declared not to impose levy of Central Excise duty on VAT subsidy and therefore, there was no mistake of law in payment of central excise duty on VAT subsidy. That such a finding is highly contemptuous as the appellant was a party before the Tribunal and the decision being applicable to them, which would then relate back to the period in question as well as to the consequences that would ensue by virtue of the said decision.

9. Now, I will deal with the issue whether the amount deposited by the appellant was 'under protest'. According to the appellant, the amount was deposited under protest and the audit party and the department was already informed as is evident from the Excise Return (ER-I) for the period April 15, August 15, September 15, April 16 and November 16 and the Cenvat Credit Register, which has been referred to at the time of hearing. The authorities below have wrongly rejected the RG-23 register on the ground that it is a printout of excel sheet in which the backdating is possible and also the Excise Returns given manually are not acceptable as after 2011 there was no provision to file ER-I manually since e-filing of Central Excise Returns was made mandatory for all assesses. Having considered, the Supplementary Instructions, Chapter 13 of CBECs Excise Manual, which provides the procedure to be followed, I find that it seems to be substantially complied with as the Cenvat account do mentions that, "central excise duty debited against the amount received as State VAT subsidy under protest". The same cannot be ignored and the appellant is entitle to the benefit of the proviso to section 11B of the Central Excise Act, 1944, which specifically says that period of limitation of one year shall not apply where duty and interest is paid under protest.

The decision in *India Cements Ltd., Vs. CCEX* – 1989 (41) ELT 358 dealt with the refund application which was made in similar circumstances after the duty on packing charges was held to be not leviable. The letter given by the assessee was controverted by the department that it could not be taken as a protest, however the Apex Court analyzed it and said that ordinary reading with common sense will reveal to anybody that appellant was not accepting the liability without protest. The ratio is clearly applicable in the facts of the present case.

10. I completely disagree with the findings in the order that the duty on VAT subsidy was last deposited on 30.11.2016 during the long span of time from March 2010 to November 2016 or thereafter, and if they had any kind of doubt to the audit they were required to submit letter of protest or to file refund claim of duty/interest/penalty deposited within the statutory period of one year provided under section 11B of the Central Excise Act, 1944, but they never exercised any option available to them under the provisions of law at any point of time and

therefore the instant refund claim filed by them was well beyond the statutory period provided under section 11B of the Central Excise Act, 1944.

11. In the light of what has been stated above, I am convinced that the impugned orders are liable to be set aside and the appeal is accordingly allowed. Respondents are directed to process the refund applications and make the refund in accordance with law as expeditiously as possible.