
(2024) 03 CESTAT CK 0044

In the Customs, Excise And Service Tax Appellate Tribunal

Case No : Excise Appeal No. 31256 Of 2017

My Home Industries Pvt. Ltd

APPELLANT

Vs

Commissioner Of Customs, Rangareddy

RESPONDENT

Date of Decision : 28-03-2024

Acts Referred:

Central Excise Act, 1944 — Section 11A, 11B

Citation : (2024) 03 CESTAT CK 0044

Hon'ble Judges : Anil Choudhary, Member (J); P. Nageswara Rao, Member (T)

Bench : Division Bench

Advocate : B. Venugopal, V.R. Pavan Kumar

Final Decision : Allowed

Judgement

Anil Choudhary, Member (J)

1. This Tribunal, vide Final Order No. A/30004/2023 dt.10.01.2023, had allowed this appeal, which order have been recalled vide Miscellaneous Order No. M/30156/2023 dt.08.06.2023. The issue involved was refund of amount deposited by the appellant - a manufacturer of cement. The appellant in some cases, sells cement to the customer on FOR destination basis. The issue was whether the freight from the factory of the appellant to the destination (customer's premises) has to be added to the assessable value or not. Revenue was of the view that the said amount is includible in the assessable value as per the ruling of Hon'ble Supreme Court in the case of Commissioner vs Roofit Industries Ltd [2015 (319) ELT 221 (SC)], whereas the appellant's contention was that their case is covered by the subsequent judgment of the Hon'ble Supreme Court in the case of Ispat Industries Ltd [2015 (324) ELT 670 (SC)], wherein it was held that the buyer's premises can never be the place of removal as the goods have to be sold after removal. The place of removal under Sec 4 of Central Excise Act has necessarily to be relatable to the premises of seller such as the factory of the assessee/ its depots or warehouses or place of its consignment agents. The said issue has already been decided in favour of the

assessee in the appellant's own case by this Tribunal, vide Final Order No. A/30124-30127/2022 dt.28.11.2022.

2. The dispute in this appeal is regarding the amounts paid totaling to Rs.4,22,85,418/- for the period 2014-15, April 2015, May 2015 and 1.6.2015 to 8.6.2015. During this period the appellant had not included the value of freight between factory and the buyer's premises while paying central excise duty but had subsequently paid the following amounts through challans as arrears:

Year

Challan No. & date

Freight

(Rs.)

Excise

duty (Rs.)

Interest

(Rs.)

Total (Rs.)

2014-15

0284/27.06.20

15

28,63,15,0

72

3,15,40,1

08

35,45,40

8

3,50,85,5

16

April

2015

0485/09.06.20

15

3,06,62,34
8
34,07,074
57,127
34,64,201
May 2015
2743/06.06.20
15
2,89,13,69
9
32,12,570
0
32,12,570
01.06.20
15 to
08.06.20
15
4301/06.07.20
15
47,08,183
5,23,131
0
5,23,131
Total
3,86,82,8
83
36,02,53
5
4,22,85,4
18

After these amounts were paid, no show-cause notice under Section 11A to demand the duty and appropriate the amounts paid by the appellants were issued by the Revenue. On 10.08.2016, the appellant filed a refund claim for the amounts paid, on the ground that it was not liable to pay excise duty on the freight amount. SCN dated 29.09.2016 was issued to the appellant seeking to reject the refund claim on merits and also on the ground of time bar.

3. This Tribunal allowed the appeal of the appellant/assessee as follows:

7. We have considered the submissions of both sides and perused the records. Of the total amount claimed in the appeal only an amount of Rs.4,22,85,418/- paid through four challans is being pressed by the appellant. Undisputedly, these amounts were not paid in the normal course of self-assessment and were not reflected in the ER-1 returns but were paid as differential duty of excise through those challans after being pointed out by the department. If any duty is not levied, not paid, short paid, or short paid or erroneously refunded, the procedure to recover the amount is prescribed under Section 11A of the Central Excise Act which requires a notice to be issued to the assessee within the time limits prescribed. If the non-payment of duty is due to fraud, collusion or willful misstatement or suppression of facts or violation of Act or Rules with an intent to evade payment of duty such notice can be issued within an extended period of limitation of 5 years. It is essential that a notice under Section 11A has to be issued to recover any differential amount of duty. It often happens during the course of enquiry or investigation, that the assessee pays the some or all of the disputed amount as duty. But that can only be treated as a deposit and it cannot be considered as demand of duty until it has been appropriated through an order issued in pursuance of a show-cause notice issued under Section 11A. In this case the amounts have not been appropriated and therefore they can only be considered as deposits and cannot be considered as duty. Since, no show-cause notice was issued to recover the differential duty, the amounts in dispute can only be considered as deposits. For this reason, the limitation prescribed under Section 11B for refund does not apply to this case.

8. We also consider the submissions of the learned authorized representative for the Revenue that judgment of Hon'ble Supreme Court in the case of ITC Ltd applies to this case. In ITC Ltd the Hon'ble Supreme Court dealt with a bunch of cases where duties were paid during the course of assessment and without assailing such assessments (some of which were self-assessments) claims for refund was filed. Hon'ble Supreme Court held that an assessment, including self-assessment attains finality and needs to be appealed against before a Higher Judicial Forum and without such an appeal or modification otherwise of the assessment, no refund can be sanctioned. In the present case, the amounts were not paid during the course of assessment but were paid subsequently. Learned counsel has, after consulting the appellant confirmed that the amounts so paid have not been reflected as duty in the ER-1 Returns either for those periods or for subsequent period. Therefore, the ITC Ltd does not come to the aid of the

Revenue.

9. In view of the above, and keeping in view the judgment of Tribunal in Final Order No. A/30124-30127/2022 dated 28.11.2022 in appellant's own case holding that amount of freight to buyer's premises is not includible in the assessable value. We hold that amount of Rs.6,35,36,825/- as paid by the appellants was not their duty liability. However, the amount of Rs.2,12,51,407/- has been accede to have been settled before settlement commission. Hence, we find that the impugned order needs to be modified and the appeal is allowed partially to the extent of sanction of refund of Rs.4,22,85,418 (Rs.6,35,36,825/- (-) Rs.2,12,51,407/-) to the appellant.?

4. Being aggrieved, Revenue filed a Miscellaneous Application No. E/ROM/30048/2023, pointing out that that the Final Order was pronounced on 10.01.2023 based on the assertions of the Learned Counsel for the Appellant that the Appellant has not filed any ER-1 Returns for the amount being claimed as refund. On the same day, after the Court hours, the AR's Office has contacted the jurisdictional Division Office of the Appellant and got this fact verified and they have also obtained copy of the ER-1 Returns. As per the ER-1 Return filed for the month of May and June 2015, it is seen that the Excise Duty paid by the Appellant in respect of the refund amounts claimed have been reflected in the ER-1s. Thus, factually the notings of this Tribunal in the Final Order have errors, which are apparent on record. He also submits that the fact of ER-1 Return not being filed, as asserted by the Appellant, had a direct bearing on the outcome of the Final Order. The Final Order has allowed on the ground that ITC case will not be applicable as ER-1 Return was not filed. But for this error, the outcome of the Final Order should have been to dismiss the Appeal. Therefore the AR submits that ROM petition should be allowed.

5. Opposing the ROM Application, the Learned Counsel appearing on behalf of the Appellant submits that there was no malafide intention while they have asserted that ER-1 Returns were not filed by the Appellant. As a matter of fact, at the time of making his submissions, the Appellant's Senior Official was available in the Court and only after checking this fact with this official, the Learned Counsel has made his submission about non-filing of ER-1 Returns. Further, as the said amounts in question i.e. (refund involved) was not shown in the normal course of self assessment tax, but the same was shown in a different column at serial no. 9 of the ER-1 Return (Arrears), the Appellant carries impression that this amount was not paid on account of any self assessment and hence such an assertion was made before the Hon'ble Bench. He submits that as can be observed from Para 7, the Bench has observed that these amounts were paid during enquiry (post clearance, after filing of return) and no Show Cause Notice was issued under Section 11A towards appropriation of this amount. Therefore the decision of the Bench would not have been different even if it is considered for a moment that the fact of non-filing of ER-1 was erroneously represented and noted in the Final Order.

6. This Tribunal, after considering the rival contentions, was pleased to allow the ROM Application, recalling the Final Order No. A/30004/2023 dt.10.01.2023 for re-hearing, observing as follows:

¶6. A careful reading of the above paragraphs clarifies that the Revenue was relying on Supreme Court judgment of ITC Ltd., to put forth the point that the Appellant should have first questioned the assessment made by them under ER-1 and only after this they should have filed the refund claim. In view of the submissions of the Appellant that ER-1s were not filed for the refund claim amounts, the Bench had taken the view that the case law of ITC Ltd., is not applicable in the present Appeal.

7. As the issue as to whether ER-1 has been filed or not was questioned by the Bench and the answer from the Appellant was considered and recorded in the Final Order, this has resulted in an apparent mistake on record in the Order. But the fact remains that for coming to the final outcome, the Bench has considered other points also.

8. In the present ROM Petition, the following points have to be considered:

(i) If the ROM is dismissed on the ground that the error is not apparent, then it could amount to allowing the appeal in spite of noticing that the error on account of that ER-1 Return filing point.

(ii) If, on the other hand ROM petition is allowed, then it will amount to completely overturning the final decision of this Bench which would amount to complete review of the Final Order by this Bench.

9. In view of the peculiar circumstances and facts emerging in this case, during the ROM Petition/Hearing proceedings, both the sides were asked to clarify as to whether since the factual error has been found to be correctly pointed out by the Revenue, if both the sides are ready to argue the entire case on merits on all the points once again before the Division Bench. Both the sides have given consent towards the same.?

7. Accordingly, the appeal was heard denovo by the Bench on 03.10.2023 and the order was reserved.

8. Learned Counsel for the appellant points out that initially the appellant had filed refund claim for Rs.6,33,12,253/- on 10.08.2016. This amount included an amount of Rs.2,12,51,406/-, which was paid in the matter of SCN dt.18.09.2018, which was settled by the settlement commission, vide Final Order dt.04.05.2016 relating to the period October 2010 to March 2015. Accordingly, the appellant filed a revised refund claim dt.21.09.2016 for Rs.4,22,85,418/- (Rs.6,33,12,253/- (-) Rs.2,12,51,406/-), which amount has been deposited for the period April 2014 to June 2015, subsequently in June/July 2015. The said refund claim for the balance amount of Rs.4,22,85,418/- was rejected vide OIO dt.07.11.2016, observing that the ruling of Ispat Industries is not applicable and the refund claim has been filed after more than one year of payment/deposit. In

appeal filed by the assessee, the Commissioner (Appeals), vide OIA dt.31.08.2017 held that in view of the terms and conditions of the purchase order in the instant case, the goods are to be delivered at the buyer's premises; acceptance of the goods at customer's place; ownership of goods rests with the seller/supplier/assessee till the goods are received and accepted at the buyer's place; any loss due to breakage/damage etc., is borne by the supplier/assessee; seller is liable to VAT on sale value inclusive of freight. However, this issue stands already concluded in favour of the appellant/ assessee, vide Final Order dt.10.01.2023 of this Tribunal, and was not disputed in the ROM filed by Revenue.

9. So far the question of refund is concerned, learned AR for Revenue urges that the said amount of Rs.4,22,85,418/- was paid by the assessee for April 2014 to June 2015, on assessable value including freight in respect of FOR sales, on self assessment basis. It is shown in the ER-1 Return filed by the assessee as 'self assessed arrears of duty'. The said duty is paid under Sec 11A(2B) of the Act, as such duty payment is self assessed duty paid. Hence, if the appellant now pleads for refund of the said amount, they first need to challenge the self assessment in appeal before seeking refund, as held by Hon'ble Supreme Court in ITC Ltd vs CCE, Calcutta [2019-TIOL-418-SC-Customs-LB]. Hence, the said refund is liable to be rejected as no appeal is filed by the assessee against the self assessment made by them. It is also urged that the ruling of ITC Ltd under the Customs Act is also applicable to Central Excise as Sec 11B of Central Excise and Sec 27 of Customs Act are *pari materia*. In the case of ITC Ltd, the Apex Court has held that refund application is not maintainable in case where duty has been paid as per assessment order (including self assessment), which has not been challenged by way of appeal before the appropriate authority and the assessment order is consequently modified.

10. It is further urged that the appellant/assessee has paid the said amount post clearance, as the Revenue was issuing periodical SCNs in terms of Sec 11A(2B), which provides 'where any amount of duty of excise has been short levied, the person chargeable with the duty may pay the amount of duty on the basis of his own ascertainment of such duty or on the basis of duty ascertained by Central Excise officer before service of notice under sub-sec (1) and informs the Central Excise officer of such payment in writing, who, on receipt of such information shall not serve any notice under sub-sec (1) in respect of the duty so paid.

11. Opposing the contentions of the Revenue, learned Counsel for the appellant/ assessee urges that there is a huge difference in the assessment procedure under the Customs Act, as compared with the Central Excise Act. Under the Customs Act, the importer/exporter files the shipping bill or bill of entry and each such shipping bill/bill of entry is assessed by the department, which is an appealable order. Whereas, under the Central Excise provisions, the assessee self assesses the tax at the time of each clearance of the goods from the place of removal and files the return periodically showing their self assessed turnover and admitted tax liability therein. Admittedly, in the facts of the present case, the

appellant has neither included the amount of freight in the assessable value at the time of clearance nor has amended their returns later on, nor issued any supplementary invoice on the buyer for revising the transaction value. Thus, there is no case made out of the deposit of the said amount by way of self assessment and hence, the contention of Revenue has no legs to stand. Further, Revenue has produced copy of return for the subsequent period where the appellant has reflected the said amount deposited, Rs.4,22,85,418/- in the column of 'arrear tax deposited'. Thus, the reflection of amount deposited later on does not become admitted tax or self assessed tax ipso facto. Self assessed tax or admitted tax is the tax as reflected in the periodical return under the provisions of the Act read with Rules thereunder. Accordingly, learned Counsel points out that the contentions of the Revenue are misconceived and vague and accordingly prays that the appeal may be allowed with consequential benefits.

12. Upon hearing the parties on this issue, we find that the Revenue has misconceived the facts, as admittedly the appellant had deposited the said amounts for the period April 2014 to June 2015 in June/July 2015 post clearance and had filed refund claim on 10.08.2016 and thereafter, revised refund claim on 21.09.2016, before the issue of SCNs No. V/25/18/253, 284 & 295/2016 dt.29.09.2016. Thus, evidently the said amount in question has not been deposited by way of closure/settlement or self assessment in terms of Sec 11A(2B) of the Act.

13. We also find that the said amount relating to duty on the freight component from the factory gate to the premises of the buyer, was not included at the time of clearance or self assessment, which is evident from the copy of invoices placed before this Tribunal. Accordingly, we find that the said amount is not part of the self assessed tax/admitted tax. It is also not the case of the Revenue that the appellant had revised the returns and included the said amounts in the assessable value.

14. Having considered the rival contentions, we find that so far the fact of the not including freight in Assessable value is concerned, the same were not disputed by Revenue in the ROM Application. What was disputed by Revenue was that the said amount has been paid by way of admitted tax or self assessed tax and hence, it was not refundable unless the order of self assessment was modified in accordance with law.

15. In view of our aforementioned findings and observations, we hold that the said amount of Rs.4,22,85,418/- does not form part of the self assessed tax or admitted tax of the appellant/assessee and accordingly, allowing the appeal of the assessee, we hold that they are entitled to refund of the said amount with interest as per Rules.