(2012) 12 GUJ CK 0124

In the Gujarat High Court

Case No : Special Civil Application No. 8715 of 2004

Pacific Exports APPELLANT

Vs

Union of India RESPONDENT

Date of Decision : 26-12-2012

Acts Referred:

Citation : (2017) 346 ELT 240

Hon'ble Judges : Akil Kureshi and Sonia Gokani, JJ.

Bench : Division Bench

Advocate : Shri Kiran R. Jani and Ms. Avani S. Mehta, Advocates, for the Petitioner; S/Shri Harin P. Raval, R.J. Oza and Mrs. Suman Khare, Advocates, for the Respondent

Final Decision : Disposed Off

Judgement

Akil Kureshi, J. (Oral)—Petitioner has challenged an order dated 12-5-2004 passed by the Assistant Commissioner of Central Excise, by which he rejected the rebate claim of the petitioner amounting to Rs. 5,61,629/-.

2. Briefly stated, facts are that the petitioner had exported two consignments of bedsheets to different destinations on 2-11-2001 and 13-11-2001 respectively. It is the case of the petitioner that appropriate amount of excise duty was paid by the processors on the said goods. The petitioner filed a consolidated rebate claim for the goods so exported on 2-11-2001 and 13-11-2001 on 9-2-2004. The Assistant Commissioner of Central Excise, issued a show cause notice on 13-4-2004 why such rebate claim should not be rejected as time-barred having been made later than one year from the date of export of the goods. It was also indicated that the required documents were not submitted for the refund claim.

3. On 23-4-2004, the petitioner submitted the required documents and also explained the delay why the claim was filed late. On 12-5-2004, the Assistant Commissioner, rejected the rebate claim making following observations :

"I have carefully gone through the written submission dated 23-4-2004 and submission made during personal hearing and records available with me.

I find that the claimant had exported the goods on 2-11-2001 & 13-11-2001 whereas they have submitted their claim only on 9-2-2004 i.e. after more than 2 years from relevant dates as prescribed under Section 11B of CEA, 1944. They had to submit the claim by 2-11-2002 & 13-11-2003 but they submitted the same on 9-2-2004. There is no provision in the Act/Rules to condone such lapses and sanction claim in such situation. As such I find that the claim is barred by time as per Section 11B of CEA, 1944, and therefore, without going in further merit of the claim & without examining it further, I pass following order :

Order :

I reject the rebate claim amounting to Rs. 5,61,629/- (Rupees Five Lac Sixty One Thousand Six Hundred Twenty Nine only) to M/s. Pacific Exports, 162/3 Shad No. 2-3 Saijpur Gopalpura, Pirana Road, Piplej, Ahmedabad under the provision of Rule 18 of Central Excise Rules, 2002 read with Section 11B of the Central Excise Act, 1944 being barred by time."

It is this order that the petitioner has challenged before this Court primarily relying on the decision of a Division Bench of this Court in the case of Indo-Nippon Chemicals Co. Ltd. v. Union of India, 2002 (49) RLT 642 (Guj.) : 2005 (185) E.L.T. 19 (Guj.).

4. Under identical circumstances, we had an occasion to deal with a similar petition in Special Civil Application No. 11990 of 2004. Such petition was dismissed making following observations :

"(6) It is not in dispute that three refund claims with which we are concerned, were filed beyond the period prescribed under Section 11B of the Act. That being the position, in our opinion, the Departmental Authorities committed no error in rejecting such refund claims. Merely, because the incident of duty was not passed on to the consumer, cannot be the sole ground on which Refund Applications must be allowed. Against the order of the Adjudicating Authority, granting the refund claim, we are told the Department is in Appeal. We, are however, not concerned with such proceedings.

(7) The Apex Court in the case of Mafatlal Industries Ltd. v. Union of India, (1997) 5 SCC 536 held as under :

"108. The discussion in the judgment yields the following propositions. We may forewarn that these propositions are set out merely for the sake of convenient reference and are not supposed to be exhaustive. In case of any doubt or ambiguity in these propositions, reference must be had to the discussion and propositions in the body of the judgment.

(i) Where a refund of tax/duty is claimed on the ground that it has been collected from the petitioner/plaintiff-whether before the commencement of the Central Excises and Customs Laws (Amendment) Act, 1991 or thereafter-by misinterpreting or misapplying the provisions of Central Excise and Salt Act, 1944 read with Central Excise Tariff Act, 1985 or Customs Act, 1962 read with Customs Tariff Act or by misinterpreting or misapplying any of the rules, regulations or notifications issued under the said enactments, such a claim has necessarily to be preferred under and in accordance with the provisions of the respective enactments before the authorities specified thereunder and within the period of limitation prescribed therein. No suit is maintainable in that behalf. While the jurisdiction of the High Courts under Article 226 - and of this Court under Article 32-cannot be circumscribed by the provisions of the said enactments, they will certainly have due regard to the legislative intent evidenced by the provisions of the said Acts and would exercise their jurisdiction consistent with the provisions of the Act. The writ petition will be considered and disposed of in the light of and in accordance with the provisions of Section 11B. This is for the reason that the power under Article 226 has to be exercised to effectuate the rule of law and not for abrogating it.

The said enactments including Section 11B of the Central Excises and Salt Act and Section 27 of the Customs Act do constitute "law" within the meaning of Article 265 of the Constitution of India and hence, any tax collected, retained or not refunded in accordance with the said provisions, must be held to be collected, retained or not refunded, as the case may be, under the authority of law. Both the enactments are self-contained enactments providing for levy, assessment, recovery and refund of duties imposed thereunder. Section 11B of the Central Excises and Salt Act and Section 27 of the Customs Act, both before and after the 1991 (Amendment) Act are constitutionally valid and have to be followed and given effect to. Section 72 of the Contract Act has no application to such a claim of refund and cannot form a basis for maintaining a suit or a writ petition. All refund claims except those mentioned under Propositions (ii) below have to be and must be filed and adjudicated under the provisions of the Central Excise and Salt Act or the Customs Act, as the case may be. It is necessary to emphasise in this behalf that Act provides a complete mechanism for correcting any errors whether of fact or law and that not only an appeal is provided to a Tribunal - which is not a departmental organ - but to this Court, which is a civil Court."

(8) The decision of this Court in the case of India Nippon Company Limited (supra) cannot be applied in the present case. In the said case, the Department itself under mistaken belief had insisted on collecting certain duties from the assessee. The assessee had also paid such duty under mistake and on insistence of the Department. It was in this back-ground, that the Court granted refund of such amount collected. However, we have in a separate order passed today in Special Civil Application No. 4676 of 2004, expressed our prima facie doubt about certain observations made by this Court in case of India Nippon Company Limited (supra). In any case, the facts of the present case are vitally different. The observations of this Court in case of India Nippon Company Limited (supra) cannot be applied. The petition is therefore, dismissed. Rule is discharged."

5. Counsel for the petitioner, however, relied on a decision in the case of Cosmonaut Chemicals v. Union of India dated 30-7-2008 in Special Civil Application No. 12862 of 2004 [2009 (233) E.L.T. 46 (Guj.)] and connected petitions to contend that when the delay is caused due to reasons attributable to the Department, refund claim should not be dismissed. In the present case, admittedly, this was not the ground on which even the petitioner claimed filing of delayed refund beyond the period of limitation.

6. In the result, issue being identical as arisen in Special Civil Application No. 11990 of 2004, this petition is also disposed of relying on the above observations without giving separate reasons. Rule is discharged.