

(2013) 02 GUJ CK 0052

In the Gujarat High Court

Case No : Special Civil Application No. 3780 of 2004

Prempreet Textile India Ltd. and Another	APPELLANT
Vs	
Union of India and Others	RESPONDENT

Date of Decision : 08-02-2013

Acts Referred:

Central Excises and Salt Act, 1944 — Section 11B, 11B(1), 11B(2), 11BB
Customs Act, 1962 — Section 128, 129E, 130, 130E, 131

Citation : (2013) 293 ELT 523 : (2013) 19 GSTR 122

Hon'ble Judges : S.G. Gokani, J; Akil Abdul Hamid Kureshi, J

Bench : Division Bench

Advocate : S.S. Iyer, for the Appellant; Harin P. Raval for Respondent No. 1 and Gaurang H. Bhatt, for the Respondent

Judgement

Sonia Gokani, J.—For understanding the dispute between the parties, the facts narrated in the petition are being reproduced briefly as under, The petitioner-company is engaged in manufacturing of draw twisted yarn (hereinafter referred to as "DTY") and twisted yarn (hereinafter referred to as "TY"), falling under Chapter Heading 54 of the Schedule to the Central Excise Tariff Act, 1985 (hereinafter referred to as "the Tariff Act").

2. The petitioner-company was searched by the officers of Preventive Branch of Surat Commissionerate. It was found during the search that a "creel register" was being maintained by the petitioners, mentioning production on the draw twisted machine (hereinafter referred to as "DIM"), On this machine of DTM, both DTY (dutiable) and TY (exempted) were being produced.

3. Some of entries in the register since were found cancelled, it was alleged that they pertained to imported partially oriented yarn (POY). The explanation offered by the petitioners was not accepted and on the ground that the petitioners sold DTY under the guise of TY without payment of excise duty, the petitioners were directed to pay excise duty of TY on March 19, 1997 by six post-dated cheques of Rs. 20 lakhs to the Superintendent of Central Excise (Preventive) along with TR-6

challan which they did under protest.

4. A communication on October 29, 1999 was addressed by the petitioners that Rs. 20 lakhs was paid under protest but they had not received TR-6 challan and they were not availed credit of Rs. 20 lakhs in PLA.

5. On March 29, 2000, a show-cause-notice was issued to the petitioners for alleged removal of DTY, demanding excise duty of Rs. 1,40,21,719. The petitioners, therefore, lodged a refund claim of Rs. 20 lakhs paid under protest as there was no reference of this deposit in the show-cause notice. This request of the refund claim was turned down by the Deputy Commissioner of Central Excise, Division-V, Surat-I vide its letter on June 13, 2000 on the ground that the show-cause notice was still pending and such claim was, therefore, untimely. Moreover, there were no substantiating document to indicate payment of duty,

6. After giving the opportunity of hearing to the petitioners, such claim was rejected on the ground that such claim was not falling under the category of section 11B(2) of the Central Excise Act, 1944.

7. Aggrieved by this, the same was challenged before the Commissioner of Central Excise (Appeals). Simultaneously, the Commissioner of Central Excise, by his order on October, 31, 2000, confirmed the demand made pursuant to the show-cause notice dated March 29, 2000 and imposed penalty of Rs. 67,07,861 on default and confiscated the plant, machinery, land, building, etc.

8. The order of refusal of the refund of Rs. 20 lakhs was challenged before the Appellate Tribunal and the Tribunal waived pre-deposit of the duty and penalty on condition that the petitioners do not pursue the refund claim during the pendency of the appeal. It also further emerges that the Tribunal allowed the appeal of the petitioners and set aside the order of October, 31, 2000, whereby the Commissioner of Central Excise, Surat had confirmed the demand pursuant to the show-cause notice.

9. The petitioners, therefore, filed a refund claim for the redemption fine of Rs. 50,000 imposed on them by the order-in-original. It appears that the Commissioner of Central Excise (Appeals) rejected the appeal of the petitioners, holding that the refund claim was filed beyond the prescribed period of six months and hence, was time barred. Being aggrieved, the petitioners had also preferred an appeal before the Appellate Tribunal. The Appellate Tribunal on August 28, 2003 had set aside the order of the Commissioner and also held that the refund claim was not hit by limitation.

10. A request was made by the petitioners to respondent No. 2 to sanction the refund of Rs. 20 lakhs with interest. Such amount was refunded to the petitioner by cheque of February 4, 2004, however, no interest was paid nor was any reference made in respect of the same. It is, therefore, urged that the petitioners are entitled to interest on the said amount of Rs. 20 lakhs.

11. In the affidavit-in-reply, the respondents have contended that the Tribunal

had allowed on March 28, 2003, the claim of the petitioners by holding that the same was not time barred, but had not granted interest on the said amount. Undisputedly, the said amount of Rs. 20 lakhs has been refunded on February 4, 2004 and it is contended that interest if any, is to be given, the same has to be from the date of the order of the CESTAT and not from the date of the deposit. They sought to rely upon the decision of this court reported in Parle International Ltd. Vs. Union of India, .

12. This court has heard learned counsel of both the sides and examined the papers produced on record with their assistance.

13. It is apparent from the record that pursuant to the search conducted on March 8 and 9, 1997, the show-cause notice had been issued on March 29, 2000, demanding duty and imposition of penalty and in the order-in-original dated October 31, 2000, such demand of duty and penalty had been confirmed. The amount of Rs. 20 lakhs had been deposited by the petitioners during the course of investigation towards the duty on twisted yarn before the Tribunal. The amount of pre-deposit was not insisted upon by the Tribunal as the undertaking was given by the counsel of the appellant herein not to pursue the refund claim till the pendency of appeal and thus, it is apparent that the Tribunal treated such amount of Rs. 20 lakhs as pre-deposit for the purpose of entertaining the appeal.

14. Moreover, in the order dated October 31, 2000 passed by the Commissioner, it confirmed the demand of duty and imposition of penalty, however, the same was set aside eventually by the Tribunal, vide its order on September 3, 2001. The Department, therefore, was liable to refund the amount of deposit which" was treated and virtually considered as pre-deposit by the Tribunal. The Bench of the Tribunal at New Delhi had clearly held that the refund claim is not time barred and till the time, the appellants preferred refund claim on March 29, 2000. Show-cause notice was also not in existence. In fact, the issuance of show-cause notice and preferring of refund claim fell on the very same day. The Tribunal held that the refund claim preferred by the appellants since was not hit by the limitation, vide its order on August 28, 2003, it set aside the order of the Commissioner, who rejected such request of refund of the amount of Rs. 20 lakhs as time barred.

15. A short question that requires to be addressed in this petition is as to whether the appellants herein would be entitled to the interest on the said refund claim. Law on the subject at this stage requires discretion before further adverting to the rival claims of the parties.

16. It would be profitable to reproduce section 11BB of the Central Excise Act as under:

11BB. Interest on delayed refunds.--If any duty ordered to be refunded under sub-section (2) of section 11B to any applicant is not refunded within three months from the date of receipt of application under sub-section (1) of that section, there shall be paid to that applicant interest at such rate not below five

per cent, and not exceeding thirty per cent, per annum as is for the time being fixed by the Central Government, by notification in the Official Gazette, on such duty from the date immediately after the expiry of three months from the date of receipt of such application till the date of refund of such duty:

Provided that where any duty ordered to be refunded under subsection (2) of section 11B in respect of an application under sub-section (1) of that section made before the date on which the Finance Bill, 1995 receives the assent of the President, is not refunded within three months from such date, there shall be paid to the applicant interest under this section from the date immediately after three months from such date, till the date of refund of such duty.

17. The decision of this court rendered in the case of Commr. of Cus. (Preventive) Vs. Ghaziabad Ship Breakers Ltd., is sought to be relied upon by the petitioners' side. The issue before the Division Bench was of the refund of the amount during the pendency of the appeal before the Supreme Court, The question was whether section 27 of the Customs Act, 1962 was applicable. The court held that any amount deposited during the pendency of appeal before the High Court or the Supreme Court would also be by way of deposit u/s 129E of the Customs Act. After a detailed discussion, the Division Bench held thus (page 121 of 19 GSTR):

However, if the person desirous of preferring appeal seeks waiver of the pre-deposit on the ground of undue hardship as contemplated under sub-section (2) of section 129E, he is required to file an application seeking dispensation of such deposit, in which case he is required to make the pre-deposit in terms of the order that may be passed by the Commissioner (Appeals) or the Appellate Tribunal. Thus, the contention that it is only the payment made pursuant to any order of any appellate authority or judicial forum u/s 129E or section 131 of the Act would fall within the ambit of pre-deposit under the said provision is fallacious and contrary to the provisions of the section itself and as such does not merit acceptance.

Another aspect of the matter is that u/s 129E of the Act in case of any appeal under the Chapter, the person desirous of appealing against an order relating to any duty and interest demanded in respect of goods which are not under the control of the customs authorities or any penalty levied under the Act, is required to deposit with the proper officer duty and interest demanded or penalty levied. Section 12913 of the Act falls under Chapter XV under the heading "Appeals", Chapter XV of the Act is comprised of various provisions from section 128 to section 131C of the Act. Section 130 of the Act which provides for appeal to High Court and section 130E of the Act which provides for appeal in Supreme Court also fall under Chapter XV. Thus, an appeal before the Supreme Court would also be an appeal under the said Chapter as envisaged u/s 129E of the Act. Thus, any amount deposited during the pendency of an appeal before the High Court or the Supreme Court would also be by way of deposit u/s 129E of the Act and has to be treated accordingly.

Adverting to the facts of the present case, it is an undisputed position that the amount in question had been deposited by the respondent during the pendency of the appeal before the Supreme Court. In the circumstances, it is apparent that the amount so deposited would squarely fall within the ambit of section 129E of the Act and has to be treated as pre-deposit. Thus, the contention raised on behalf of the appellant that the amount has been paid by way of duty and not pre-deposit, being contrary to the provisions of section 129E of the Act, does not merit acceptance.

18. The apex court in the case of CCE v. I. T. C. Ltd. reported in [2005] 5 RC 195; [2005] 179 ELT 15 (SC), has held that in the event of refund of any pre-deposit when a question arises of giving interest on the delayed refund of pre-deposit, as provided under the draft circular by the CBEC and the payment of interest on such delayed refunds beyond three months would require the payment of interest and the same is to be 12 per cent, per annum. Period of three months commences from the date of final disposal of the dispute between the parties. Circular No. 802/35/2004, dated December 8, 2009 if is also examined, it relates to return of deposit made as per the direction of the Tribunal and it is specified therein that the deposit needs to be returned within three months of the disposal of the appeal.

19. This court, in the case reported in Commr. of Cus. (Preventive) Vs. Ghaziabad Ship Breakers Ltd., , examined such question and held that the issue is concluded and for the reasons given in that case, the appeal was dismissed. The Ahmedabad Bench of the Tribunal in the case of delayed refund, had considered the request of grant of interest by the Assistant Commissioner, while sanctioning the refund amount. The Commissioner (Appeals) also confirmed the said order of the Assistant Commissioner (order-in-original) and the Tribunal had set aside both these orders and remanded the matter to the Assistant Commissioner for verifying the documents and allowing interest in accordance with the various decisions of the Tribunal. Thus, the Tribunal's order on the delayed refund of the amount in favour of the assessee came to be upheld by this court, where it also held that the refund should have been allowed suo-motu within three months by the Revenue once the assessment is finalised by the Tribunal.

20. It would be apt to refer to the judgment of the apex court rendered in the case of Ranbaxy Laboratories Ltd. Vs. Union of India (UOI) and Others, . The question that arose before the apex court was the payment of interest on the delayed refund u/s 11BB of the Central Excise Act, 1944 and whether the liability of Revenue to pay interest u/s 11BB would commence from the date of expiry of three months from the date of receipt of application for refund or on the expiry of the said period from the date on which the order of refund is made.

21. The apex court held that if any duty is ordered to be refunded under sub-section (2) of section 11B, the same should be refunded within three months from the date of receipt of application. The same should be paid with interest at

such rate, not below five per cent, and not exceeding thirty per cent, per annum. It also further held that the said provision would come into play only after the order of refund is made u/s 11B. If the duty is not refunded within a period of three months from the date of receipt of application to be submitted under sub-section (1) of section 11B, then question of interest would come into play u/s 11B at such rate of interest fixed by the Central Government on expiry of the period of three months. The court held that the Explanation appearing below proviso to section 11BB introduced a deeming fiction that where the order of refund of duty is not made by the Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise but, by the appellate authority or by the court, then for the purpose of this section, the order made by the higher appellate authority or the court shall be deemed to be an order made under sub-section (2) of section 11B of the Act. While further interpreting section 11BB, the apex court held further that interest under the said section 11B of the Act becomes payable on the expiry of a period of three months from the date of receipt of application under subsection (1) of section 11B of the Act and that the said Explanation would not have any bearing or connection with the date from which the interest u/s 11BB becomes payable.

22. The court further held that "it is a well settled proposition of law that a fiscal legislation has to be construed strictly and one has to look merely at what is said in the relevant provision; there is nothing to be read in; nothing to be implied and there is no room for any intendment." The court finally held thus (page 330 of 11 GSTR):

In view of the above analysis, our answer to the question formulated in paragraph 1 supra is that the liability of the Revenue to pay interest u/s 11BB of the Act commences from the date of expiry of three months from the date of receipt of application for refund u/s 11B(1) of the Act and not on the expiry of the said period from the date on which order of refund is made.

23. On collective reading of these decisions and on close examination of the same, it can be noted that the question here is not of interest on refund of the duty amount but of the pre-deposit. There is no express provision of payment of interest on the refund of pre-deposit. However, drawing analogy from section 11B of the Central Excise Act, which provides for the refund of the duty, section 11BB as discussed hereinabove and as held by the apex court, hereinabove, speaks of the interest on the refund of the duty as there would arise a requirement of payment of interest if the duty is not refunded within a period of three months from the date of receipt of application to be submitted under sub-section (1) of section 11B of the Act. Such interest needs to be paid as such rate fixed by the Central Government on expiry of period of three, months from the date of receipt of application. The deeming fiction u/s 11BB says that for the purpose of this section, the order made by the higher appellate authority or the court shall be deemed to be the order made under sub-section (2) of section 11B.

24. In the instant case, the application for refund was filed by the petitioner on

March 29, 2000. However, the amount claimed as refund being the duty paid continued to lie as pre-deposit. The Tribunal decided in favour of the present appellants on September 3, 2001, and also further held that payment of interest would start running from September 3, 2001. The Tribunal while so ordering to set aside the order of the Commissioner, ordered to refund the said amount. Any delay having been occasioned in refunding the amount beyond the period of three months, would attract interest. The refund of amount considered as pre-deposit would be at par with the refund of duty and the interest would be payable on such pre-deposit, as is also clear from the judgment of the apex court in the case of CCE v. I. T. C Ltd. [2005] 5 RC 195,

25. Admittedly, in the facts and circumstances of the case, the refund of the amount of Rs. 20 lakhs had been made on February 4, 2004, Thus, there has been a delay of considerable period in returning the amount after the Appellate Tribunal held in favour of the appellants-assessee. The interest on the pre-deposit is, therefore, required to be given when the Tribunal at New Delhi held that in its judgment that the claim was not barred by period prescribed under sub-section (1) of section 11B of the Central Excise Act, but on September 3, 2001, when the Tribunal set aside the order of the Commissioner with consequential relief.

26. Resultantly, this petition is allowed. The petitioners herein are held to be entitled to the interest on the delayed refund of amount of Rs. 20 lakhs for the period from September 3, 2001 to February 4, 2004. The respondents shall calculate the rate of interest prevalent during the period and shall make the payment within eight weeks on receipt of this order. Rule is made absolute to the extent above.