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IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 24-02-2015
Delivered on: 26-03-2015

Coram:

The Honourable Mr.Justice V.RAMASUBRAMANIAN
and
The Honourable Mr.Justice P.R.SHIVAKUMAR

Writ Appeal No.821 of 2012
and
M.P.No.1 of 2012

The Deputy Commissioner of Central Excise,
Poonamallee Range I,
Poonamallee Division,
Chennai IV Coimmissionerate
Chennai 600 040. ... Appellant

Vs

1. M/s.Dorcas Market Makers Pvt. Ltd.,
rep. by its Managing Director
Mr.V.S.Pradeep, No.8, J-Block,
6th Avenue Anna Nagar East,
Chennai 600 102.

2. The Commissioner of Central Excise (Appeals)
26/1, Mahatma Gandhi Road,
Nungambakkam, Chennai 600 034. ... Respondents

Appeal under Clause 15 of the Letters Patent against the order dated 23.12.2011 in W.P.No.26236 of 2010 passed by Hon'ble Mr.Justice N.Kirubakaran, High Court, Madras.

For Appellant : Mr.P.Mahadevan, SCGSC
For Respondent-1 : Mr.Joseph Prabakar

JUDGMENT

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V.Ramasubramanian,J

The Department of Central Excise has come up with the above writ appeal, challenging an order of the learned Judge allowing a claim for refund made by the first respondent herein.

2. We have heard Mr.P.Mahadevan, learned Senior Central Government Standing Counsel appearing for the appellant and Mr.Joseph Prabakar, learned counsel appearing for the first respondent.

3. The first respondent is admittedly engaged in the export of "Medimix" brand Ayurvedic Toilet Soap, falling under CSH 3401.11.10 of the Central Excise Tariff Act 1985. They filed a claim for rebate on 17.6.2008 under Rule 18 of Central Excise Rules 2002 for refund of the duty paid for the exported goods. The claim related to the exports made by the first respondent during the period from 01.7.2006 to 31.01.2007.

4. Therefore, contending that the rebate claim was not within the period of one year as prescribed in Section 11B of the Central Excise Act, 1994, the Assistant Commissioner of the concerned jurisdiction issued a show cause notice dated 24.6.2008, proposing to reject the claim. The first respondent submitted a reply on 24.7.2008, contending interalia: (1) that the company faced severe labour unrest, leaving certain items of work unattended; (2) that the factum of exports as per ARE-1 is clearly borne out by records; and (3) that therefore, the delay cannot be held against them.

5. However, the appellant herein, namely the Deputy Commissioner of Central Excise passed an Order-in-Original No.147/2008 dated 21.8.2008, rejecting the rebate claim as time barred. As against the said

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order, the first respondent filed a statutory appeal. But, the statutory appeal was also dismissed by the Commissioner (Appeals), who is the second respondent herein, by an order dated 30.7.2010, holding that there is no mechanism for condonation of delay.

6. Aggrieved by the said order, the first respondent filed a writ petition in W.P.No.26236 of 2010. It was allowed by a learned Judge by an order dated 23.12.2011, on the ground that Rule 18 is self contained and that therefore, the claim cannot be held to be barred by limitation. Aggrieved by the said order, the Department is on appeal.

7. The main plank of the argument of Mr.P.Mahadevan, learned Senior Central Government Standing Counsel is that as per sub-section (1) read with sub-section (5) (B)(a)(i) of Section 11B of the Central Excise Act, 1944, a claim for refund of duty paid on the excisable goods used in the manufacture of goods exported shall be filed within one year from the date of departure of the Ship or Aircraft in which the goods are loaded. Since the claim was admittedly filed by the first respondent beyond the period stipulated in the statute, the same was liable to be rejected.

8. In support of the above contentions, the learned Senior Central Government Standing Counsel also invited our attention to:

(1) the decision of the Supreme Court in ***Collector of Central Excise, Jaipur vs. Raghuvar (India) Limited [2000 (5) SCC 299]***,

(2) the decision of a Division Bench of the Gujarat High Court in ***Ashwin Fasteners of Ashwin Panchal vs. Union of India [2010 (258) E.L.T. 174 (Guj.)]***,

(3) the decision of the Division Bench of the Bombay High Court in

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Everest Flavours Limited vs. The Union of India [2012 TIOL-285-HC(MUM), and

(4) the decision of the Division Bench of the Karnataka High Court in ***M/S MCI Leasing (P) Ltd, Mysore vs. Commissioner of Central Excise, Customs & Service Tax, Mysore [2012-TIOL-54-HC(KAR)***.

9. In response, it is contended by Mr.Joseph Prabakar, learned counsel appearing for the first respondent that the period of limitation prescribed in the statute, was never treated as sacrosanct by the Department either under the Customs Act, 1962 or under the Central Excise Act, 1944 and that the Rules for claiming refund always incorporate separate provisions prescribing a period of limitation and that therefore, the Rules were construed to be self contained. The learned counsel drew our attention to Section 27(1) of the Customs Act, 1962 which stipulates a period of 6 months, in contrast to which, the notification prescribed a period of one year. He also invited our attention to the notification dated 14.9.2007 as it originally stood and the subsequent notification.

10. We have carefully considered the rival submissions.

11. In order to understand the scope of the dispute, it is necessary to look into the scheme of the Central Excise Act with particular reference to Section 11B. Section 11B primarily deals with a claim for refund of duty and interest if any paid on such duty. Sub-section (1) of Section 11B postulates that a person claiming refund of any duty of Excise may make an application for refund before the expiry of one year from the relevant date. While sub-section (1) postulates the entitlement of a person to seek refund, sub-section (2) outlines the power of the Assistant Commissioner

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to pass an order, determining the amount to be refunded and further directing that the amount so determined shall be credited to the Fund. Interestingly, sub-section (3) declares that notwithstanding anything to the contrary contained in any judgment, decree, order or direction of the Appellate Tribunal or any court or in any other provision of the Act or the Rules or any other law for the time being in force, no refund shall be made except as provided in sub-section (2). In other words, the power of the Assistant Commissioner under sub-section (2) to order refund, is protected by a non-obstante clause contained in sub-section (3). Incidentally, sub-section (2) does not specifically empower the Assistant Commissioner to reject an application summarily on the ground that it was not in accordance with mandate contained in sub-section (1)

12. Sub-section (5) of Section 11B speaks about the power of the Central Government to rescind or modify any notification. In the Explanation to sub-section (5) of Section 11B, the expression "refund" and "relevant date" are defined. It is by virtue of the definition of the expression "refund" appearing in Clause (A) of the Explanation under sub-section (5) that even a rebate of duty is included within the meaning of the expression "refund". Similarly, the starting point for the period of limitation as prescribed in sub-section (1) is indicated in the definition of the expression "relevant date" in Clause (B) in the Explanation under sub-section (5) of Section 11B.

13. Therefore, one may tend to think that even a claim for rebate may have to be filed within one year from the relevant date, by virtue of sub-section (1) read with Explanation (B) for the expression "relevant

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date" under sub-section (5). But, the paradox is that the question of rebate of duty is governed separately by Section 12 and the entitlement to rebate would arise only out of a notification under Section 12(1). The definition of the expression "relevant date" under sub-section (5) of Section 11B does not take care of this contingency.

14. There is yet another paradox. As we have pointed out earlier, sub-section (3) of Section 11B contains a non-obstante Clause which excludes any judgment, decree or order of any Court or Tribunal. But, the definition of the expression "relevant date" under Clause (B)(ec) of the Explanation under sub-section (5) of Section 11B includes within its purview the date of judgment, decree or order, in cases where the duty becomes refundable as a consequence of any judgment, decree or order. This is perhaps the reason why the non-obstante Clause contained in sub-section (3) is specifically made applicable only to the power of the Assistant Commissioner to order refund under sub-section (2). It is not made applicable to sub-section (1) of Section 11B which stipulates the period of one year for filing a claim.

15. Therefore, we are of the considered opinion that the view taken by the learned Judge that Rule 18 is to be construed independently, cannot be said to be wrong. Rule 18 of the Central Excise Rules,2002, by itself does not stipulate a period of limitation. Rule 18 reads as follows:-

> *" Rule 18. Rebate of duty:- Where any goods are exported, the Central Government may, by notification, grant rebate of duty paid on such excisable goods or duty paid on materials used in the manufacture or processing of such goods and the*

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rebate shall be subject to such conditions or limitations, if any, and fulfillment of such procedure, as may be specified in the notification.

Explanation:- "Export" includes goods shipped as provision or stores for use on board a ship proceeding to a foreign port or supplied to a foreign going aircraft."

16. As rightly pointed out by the learned Judge, the rebate of duty under Rule 18 should be as per the notification issued by the Central Government. The Notification bearing No.19/2004 dated 6.9.2004 prescribes the conditions, limitations and procedures for considering the claim for refund. Under Clause 2(d) of the notification, the rebate claim may be allowed from such place of export and such date, as may be specified by the Board, by filing electronic declaration. This Notification dated 6.9.2004 superseded the previous notification bearing No.41/1994 dated 12.9.1994. At the time when the 1994 notification was issued, the procedure for filing electronic declaration had not been made. Since everything was made manually at that time, the notification of the year 1994 prescribed a time limit for filing claim. But, the 2004 notification did not contain the prescription regarding limitation. This was a conscious decision taken by the Central Government and hence, the view taken by the learned Judge is fair and reasonable.

17. Coming to the decisions relied upon by the learned Senior Central Government Standing Counsel, it is seen that the decision of the Supreme Court in ***Collector of Central Excise vs. Raghuvar (India) Limited***, arose out of the rules relating to MODVAT Credit. The Assessee, who was entitled to avail duty credit only from 10.03.1997, availed it even

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from 01.03.1997. Hence, a show cause notice under Section 11-A of the Act read with Rule 57-I of the Central Excise Rules, was issued. But it was issued beyond the period of six months. Therefore, CEGAT set aside the notice forcing the Department to seek a reference under Section 35-H of the Central Excise Act. The question that arose before the Supreme Court was whether the provisions of Section 11-A of the Central Excise Act were applicable to proceedings under Rule 57-I as it stood before the 1988 Amendment or not. It is in that context that the Supreme Court held that ***any law or stipulation prescribing a period of limitation to do or not to do a thing, after the expiry of the period so stipulated, has the consequence of creation and destruction of rights and therefore, must be specifically enacted and prescribed therefor***.

18. But, in the very same decision, the Supreme Court pointed out that even Section 11-A of the Act is not an omnibus provision and that the situation contemplated under Rule 57-I, as it stood unamended, did not fall under any of the contingencies provided for in Section 11-A of the Act.

19. As a matter of fact, the Supreme Court observed that ***there is a distinction between the recovery of credit availed of and utilised in utter breach of the faith and mutual trust and confidence and that too in gross violation of the mandatory requirements on the one hand and the demand for payment to be made under Section 11-A in respect of any duty not levied or short levied***. Therefore, the said decision can have no application to the case on hand, since we are not concerned here with a case of credit availed wrongly by an assessee.

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20. In the decision of the Division Bench of the Gujarat High Court in ***Ashwin Fasteners***, the Division Bench proceeded primarily on the basis of the observations of the Supreme Court in ***Mafatlal Industries Limited vs. Union of India [1997 (5) SCC 536]***. The Division Bench did not go deep into the scheme of Section 11-B and the notifications issued under Rule 18, both in 1994 and in 2004. Therefore, with great respect we are unable to agree with the decision of the Gujarat High Court.

21. In ***Everest Flavours Limited***, the Division Bench of the Bombay High Court actually distinguished the decision of the Supreme Court in ***Raghuvar (India) Limited***, and held that Section 11-B stands on a different footing from Section 11-A. But the Division Bench of the Bombay High Court, with great respect, did not take note of the fact that a scheme stood on its own. Moreover, the discussion before the Bombay High Court appears to have centered around the argument that even the presentation of ARE-1 form would constitute an application for refund. That argument was rightly rejected by the Bombay High Court as far-fetched. But, the Bombay High Court did not take note of the differences between the notifications issued in 1994 and 2004 to see whether the Government intended the Rules to be self contained or not. Therefore, we are unable to agree with the conclusion reached by the Bombay High Court.

22. The decision of the Division Bench of the Karnataka High Court in ***MCI Leasing (P) Ltd.***, proceeds primarily on the basis of the observations of the Supreme Court in paragraph 99 of the decision in

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Mafatlal Industries Limited. Moreover, the Karnataka High Court was concerned with a claim for refund of Service Tax mistakenly paid by an assessee. It was not a case where the claim was for refund of the Excise duty paid on goods that were exported. Therefore, the ratio laid down therein may be of no assistance to the Revenue.

23. As we have pointed out earlier, the Scheme of Section 11-B has to be seen in the context of:

(A) the enabling provision under sub-section (1) for filing an application for refund;

(B) the power conferred under sub-section (2) upon the Assistant Commissioner to order refund;

(C) the non-obstante Clause contained in sub-section (3) only with reference to sub-section (2);

(D) the definition of the expression "refund" in Clause (A) of the Explanation under sub-section (5) that includes rebate within the meaning of the expression "refund"; and

(E) the separate provision for rebate available under Section 12 and the definition of the expression "relevant date" under Clause (B) (ec) of the Explanation under sub-section (5) of section 11 B.

24. Keeping the scheme of the Act as narrated above in mind, let us now take a look at some of the Notifications relied upon by the learned counsel for the first respondent.

25. Section 27(1) of the Customs Act, 1962 entitles a person claiming refund of any duty already paid by him, to make an application for refund either before the expiry of one year from the date of any import

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or before the expiry of six months in any other case. But, in Notification No.102/2007-Cus. dated 14.9.2007, issued by the Central Government in exercise of the powers conferred by Section 25(1), no period of limitation was fixed in para 2(c) for the importer to file a claim for refund of the additional duty paid on imported goods. However, the said notification was later amended by Notification No.93/2008-Cus. dated 1.8.2008, incorporating in para 2(c), a period of limitation of one year.

26. If the prescription contained in the parent Act under Section 27(1) itself is considered to be sufficient, there was no necessity for the Central Government to issue amendment under the Notification dated 1.8.2008 to the original Notification dated 14.9.2007. Therefore, a claim for refund may have to be considered on a stand alone basis.

27. As a matter of fact, Section 27(1) of the Customs Act, 1962 actually stipulated two different periods of limitation. Section 27(1) reads as follows:-

> *"27. Claim for refund of duty*
>
> *(1) Any person claiming refund of any duty and interest, if any, paid on such duty:-*
>
> *(a) paid by him in pursuance of an order of assessment; or*
>
> *(b) borne by him,*
>
> *may make an application for refund of such duty and interest, if any, paid on such duty to the Assistant Commissioner of Customs or Deputy Commissioner of Customs:-*
>
> *(a) in the case of any import made by any individual for his personal use or by Government or by any educational, research or charitable institution*

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or hospital, before the expiry of one year;

(b) in any other case, before the expiry of six months,

from the date of payment of duty and interest, if any, paid on such duty, in such from and manner as may be specified in the regulations made in this behalf and the application shall be accompanied by such documentary or other evidence (including the documents referred to in section 28C) as the applicant may furnish to establish that the amount of duty and interest, if any, paid on such duty in relation to which such refund is claimed was collected from, or paid by, him and the incidence of such duty and interest, if any, paid on such duty had not been passed on by him to any other person;"

28. In the Notification dated 14.9.2007, paragraph 2(c) reads as follows:-

"2. The exemption contained in this notification shall be given effect if the following conditions are fulfilled:

(a) ....

(b) ....

(c) the importer shall file a claim for refund of the said additional duty of customs paid on the imported goods with the jurisdictional customs officer; "

29. The amendment made to para 2(c) in the Notification dated 1.8.2008 reads as follows:-

"(c) the importer shall file a claim for refund of the said additional duty of customs paid on the imported goods with the jurisdictional customs officer before the expiry of one year from the date of

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payment of the said additional duty of customs;"

30. As a precursor to the amendment, the Ministry issued a Circular bearing No.6/2008 dated 28.4.2008. In paragraph 4 of the said Circular it was stated as follows:-

> *"4.1 In the Notification No.102/2007-Customs, dated 14.9.2007, no specific time limit has been prescribed for filing a refund application. Under the circumstances, a doubt has been expressed that whether the normal time-limit of six months prescribed in Section 27 of the Customs Act, would apply. In the absence of specific provision of Section 27 being made applicable in the said notification, the time limit prescribed in this section would not be automatically applicable to refunds under the notification."*

31. Therefore, the understanding of the Ministry of Finance itself is quite different from what the appellant now contends. Moreover, the Department, many a times, invokes the theory of unjust enrichment. This is seen even from para 6 of the Circular of the Ministry dated 28.4.2004. In the case on hand, there is no dispute about the fact that the first respondent actually exported the goods. Their entitlement to refund is not at all in doubt. The factum of their having exported the goods is borne out by ARE-1 forms. After the advent of online filing of applications, it is very easy to check up whether the exports have taken place and whether duty had been paid or not. Therefore, in the absence of any prescription in the scheme, the rejection of the application for refund as time barred, is unjustified. Hence, the writ appeal is dismissed. There will be no order as to costs.

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(V.R.S.J.) (P.R.S.J.)
26-03-2015

Index : Yes or No
Internet : Yes or No

To

1. Mr.V.S.Pradeep, Managing Director, M/s.Dorcas Market Makers Pvt. Ltd., No.8, J-Block, 6th Avenue Anna Nagar East, Chennai 600 102.

2. The Commissioner of Central Excise (Appeals), 26/1, Mahatma Gandhi Road, Nungambakkam, Chennai 600 034.

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