IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
REGIONAL BENCH : ALLAHABAD
COURT No. I

APPEAL No. E/990/2009-EX[SM]

(Arising out of Order-in-Appeal No.01-CE/APPL/KNP/2009 dated 13/01/2009 passed by Commissioner (Appeals) Customs & Central Excise, Kanpur)

Commissioner of Central Excise, Kanpur **Appellant**

Vs.

M/s K. P. Enterprises **Respondent**

Appearance:

Shri Pawan Kumar Singh (DR) for Appellant
Shri Anurag Mishra (Advocate) for Respondent

CORAM:

Hon'ble Mr. Anil Choudhary, Member (Judicial)

Date of Hearing : 03/11/2017
Date of Decision : 03/11/2017

FINAL ORDER NO. – 70905/2018

Per: Anil Choudhary

The issue in this appeal by Revenue is whether the Assistant Commissioner overlooked the direction given by the Commissioner (Appeals).

2. The brief facts are that the Appellant filed a refund application dated 11/03/2008 for refund of Central Excise Duty amounting to Rs.45,74,277/- alongwith interest that was deposited by them "under protest" vide TR-6 challans dated 10/02/2004, 21/02/204 and

03/03/204 in compliance of letters dated 09/02/2004 and 19/02/2004 issued by the Superintendent (Prev.), Central Excise, Kanpur. The refund was sought on the ground that the Department did not issue any show cause notice to the Appellant for demanding the duty even after the passage of a period of 4 years from the date of deposit, which shows that there was no case against the Appellant. The Appellant has claimed that the amount was deposited by the Appellant under protest which was prominently marked on the TR-6 Challans as "U/PROT". Therefore the provisions of Section 11B were not applicable in their case.

3. The Department denied the refund on the ground that the Appellant has not followed the procedure as prescribed in the Central Excise Manual 2004-05 under Chapter 13 Part III Para 4 of the CBEC's Excise Manual of supplementary instruction, in respect of duties deposited "under protest" that the duty deposited by the Appellant was not a pre-deposit in as much as the duty was deposited on the basis of the quantification made by the Department that was communicated through the letter written by the Superintendent (CP) and the directions issued therein; that the provisions of Section 11B were fully applicable because the amount deposited

by the Appellant was Central Excise Duty and not the pre-deposit under protest; that the Appellant did not submit any letter or communication to show that the duty was deposited under protest; that the word "Under Protest" were not mentioned on the TR-6 Challans and the Appellant did not submit any proof to show that the incidence of duty was not passed on to some other person or persons.

4. Being aggrieved the appellant preferred appeal before Learned Commissioner (Appeals), who vide Order-in-Appeal dated 13/01/2009 being Order-in-Appeal No.01–CE/APPL/KNP/2009 was pleased to allow the appeal holding that in his view, the amount deposited during investigation without clear-cut determination of duty liability are equivalent to the amount pre-deposited under protest, which was withheld illegally. From the facts, it is explicit that the deposit by the assessee was made under protest or voluntarily and not simply on the basis of mentioning the words "under protest" on duty paying documents. Accordingly, it was held that the Respondent - assessee is entitled to refund of the amount deposited holding the same as a 'pre-deposit'. As regards the interest it was observed that it is settled law and is evident from the relevant excerpts of the citations, quoted

that in such cases interest is to be granted from the date of deposit till the date of actual refund. Accordingly, the Learned Commissioner (Appeals) directed to grant the interest to be paid from the date of deposit till the actual refund of the same. It was further directed that interest should be awarded at the rate of 6% per annum as provided under the statute. Reliance was placed on the ruling of the Apex Court in M/s Mafatlal Industries Ltd. Vs Union of India, 1997 (89) E.L.T. 247 (SC), and also in the ruling case of M/s Hello Minerals Water Private Ltd. 2004 (174) E.L.T. 422 (Allahabad). Reliance was also made on the ruling in the case of Union of India Vs M/s Metal Distributors Ltd. 1992, (60) E.L.T. 196 (Bombay).

5. The aforementioned Order-in-Appeal attained finality as no further appeal was preferred before any higher Appellate forum by any of the parties. Thereafter, the Assistant Commissioner vide his order dated 09/04/2009 was pleased to disburse the refund of the principal amount, but as regards interest, it was observed that the CBEC vide Circular No.802/35/2004-CX dated 08/12/2004, has clarified that the interest in case of pre-deposit has to be refunded within 3 months from the date of the order passed by the Appellate Tribunals/Court or other Authority, unless there is any

stay on the order of the Appeal Authority/CESTAT/Court (by a Superior Court). In the said Circular, the orders of the Commissioner (Appeals) are not included. Nevertheless the pre-deposit has also been refunded within the period of 3 months from the date of the order, therefore, the interest is not payable.

6. Being aggrieved the Respondent – assessee again preferred appeal before Learned Commissioner (Appeals), who vide Order-in-Appeal No.194/APPL/KNP/2009 dated 27/07/2009. It was held that the portion of the order of the Assistant Commissioner denying the interest is not legal and proper and is set aside. The Appellant - assessee is entitled to get the interest as ordered vide Order-in-Appeal dated 13/01/2009. It was also observed that in the facts of the present case, it was not pre-deposit within the terms of Section 35F of the Act rather the Department had got the amount deposited during investigation, being out of pocket of the Appellant. But later on failed to establish the duty liability against the appellant and even failed to issue show cause notice. The amount was lying with the Department for more than 4 years without any reason and thus the assessee was entitled for compensation in the shape of interest which was granted to them by the Appellate order dated

13/01/2009. Also, observing that the directions of CBEC vide the aforementioned Circular is not applicable in the facts and circumstances.

7. Being aggrieved with the subsequent order of the Learned Commissioner (Appeals) dated 27/07/2009, the Revenue preferred Appeal No.3218 of 2009, which it is informed by the Learned Counsel was finally disposed of by this Tribunal vide Final Order No.71642/2017 dated 05/05/2017 observing that interest should be allowed from the date of deposit.

8. Thus, under the facts and circumstances the present appeal against the earlier order of Commissioner (Appeals) dated 13/01/2009, have become infructuous. Accordingly, this appeal is dismissed as not maintainable.

(Dictated & Pronounced in Court)

Sd/-
(Anil Choudhary)
Member (Judicial)

Lks