CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
SOUTH ZONAL BENCH
BANGALORE

Appeal(s) Involved:

E/714/2008-SM

[Arising out of Order-in-Appeal No. 97/2008 dated 30/05/2008 passed by the Commissioner of Central Excise, Bangalore-I (Appeals)]

ITC Limited
Pulikeshi Nagar
Bangalore
Karnataka

Appellant(s)

Versus

C.C.E - Bangalore-II
PB 5400, CR Buildings,
Queens Road,
Bangalore – 560 001,
Karnataka

Respondent(s)

Appearance:

Mr. N. Anand, Advocate
No. 152 (18), Race Course Road,
Bangalore – 560 001,
Karnataka

For the Appellant

Mr. K. Veerabhadra Reddy, AR

For the Respondent

Date of Hearing: 04/09/2018
Date of Decision:10/09/2018

CORAM:
HON'BLE MR. P DINESHA, JUDICIAL MEMBER

Final Order No. 21347 / 2018

Per: P DINESHA

This is an assessee's appeal wherein the assessee has questioned the denial of refund of Rs. 11,20,539/- (Rupees Eleven Lakhs Twenty Thousand

Five Hundred and Thirty Nine only). Briefly stated, the facts relevant are that the appellant during the course of its activity of manufacturing of cigarettes, also manufactured 'Slides and Inner Frames' for self consumption on which it had paid excess duty. Learned advocate appearing for the assessee during the course of his argument took me through the background wherein a dispute regarding classification was involved in respect of Slides and Inner Frames and the issue was settled by the Hon'ble Supreme Court by its order dated 26.11.2002 whereby the CEGAT's order was upheld. Pursuant to the above, the assessee filed application for refund before the Assistant Commissioner of Central Excise with respect to the excess duty paid on 'Slides' and 'Shells' for the period February 1986 to March 1994, for an amount of Rs. 87,77,432.28. (Rupees Eighty Seven Lakhs Seventy Seven Thousand Four Hundred and Thirty Two only). The adjudicating authority passed Order-in-Original No. 21/1999 dated 24/29.09.1999 after following due process of law and rejected the appellant's claim for refund in entirety and on appeal by the assessee, the Commissioner (Appeals) vide Order No. 8/2002 CE dated 31.01.2002 granted partial relief/refund to the extent of Rs. 59,54,749/- (Rupees Fifty Nine Lakhs Fifty Four Thousand Seven Hundred and Forty Nine only). On appeal against the partial rejection by the Commissioner (Appeals), the CESTAT vide order dated 12.11.2004 remanded the matter back to the file of Commissioner (Appeals) for fresh consideration, with direction which reads as under:

> *"2…..The commissioner shall give full opportunity to the appellants to establish that they are eligible for the refund of the amounts which have been rejected and that they have not passed on the element of duty to the consumer…."*

In remand proceedings, the learned Commissioner (Appeals) while endorsing that the duty paid on already cleared goods would not attract *unjust enrichment*, but, however, allowed the refund to a further extent of Rs. 17,02,145/- (Rupees Seventeen Lakhs Two Thousand One Hundred and Forty Five only) thereby denying the refund of Rs. 11,20,539/- (Rupees Eleven Lakhs Twenty Thousand Five Hundred and Thirty Nine only) against which the present appeal has been filed.

2. Mr. N. Anand, advocate appeared for the appellant and Mr. K. Veerabhadra Reddy, DR for the Revenue. During the course of hearing, the learned advocate submitted that the partial denial of refund for the reason as given by the Commissioner (Appeals) was not justified since, according to the learned advocate, during the first round of litigation the appellate Commissioner had called for and referred to the report of Range Officer, a part of which, is extracted at pages 5 and 6 of the Order-in-Appeal dated 31.01.2002. Relying on this report, the learned advocate contended that, the Department/Range Officer was convinced that the appellant had produced/provided all the requisite documents i.e. Copy of RT 12's, PLA's, TR-6 challans and further contended that, as the Range Officer had recommended refund, the reasoning given by the First Appellate Authority in the remand proceedings was not proper. Learned advocate further contended that in the regime of physical controls, the Department invariably scrutinizes the movement of goods vis-à-vis relevant documents in the factory premises and therefore nothing could escape the attention or close scrutiny monitored by the Revenue.

3. Per contra, the learned DR contended that the Department had nowhere refused refund rather what has been allowed was based on the documentary evidences furnished in support by the appellant. Learned DR further drew the attention to the impugned order, particularly page 18 of the appeal file and pointed out that the appellant was asked to produce documents by the learned Commissioner (Appeals) to which the appellant sought for time repeatedly and after repeated requests, the appellant could produce supporting evidence to an extent of Rs. 18,04,590/- (Rupees Eighteen Lakhs Four Thousand Five Hundred and Ninety only); after considering the same the learned Commissioner (Appeals) granted a refund of Rs. 17,02,145/- (Rupees Seventeen Lakhs Two Thousand One Hundred and Forty Five only) after noting that for most part of the documents, the assessee was already granted refund in the first round of litigation. Learned DR further pointed out to paragraph 2 at page 24 of the appeal folder, which is the relevant portion of the order of this Bench in the first round of litigation, to emphasis that there was a direction to the appellant to establish its eligibility for refund which was rejected and that the same was not passed on to the consumer. With these, the learned DR vehemently contended that the appellant has in effect produced same set of the documents based on which refund has worked out and granted. The learned DR, however, fairly contended that even now if the appellant furnishes all necessary documents in support of its claim as per the direction of this Court in the first round, the same could be considered. On the appellant's plea as to the report of Range Officer referred to by the First Appellate Authority in the first round, the learned DR submits that the same having merged with

the order of this Court in the first round after considering which this Court had directed the appellant to establish its eligibility for refund of that portion which was rejected, the same cannot be treated as an evidence anymore, more so when such a report was not binding on an Appellate Authority. With regard to various case-law relied on by the learned advocate for the appellant, the learned DR submits that all the cases are distinguishable on facts since in the case on hand, the earlier orders as well as the report of Range Officer has merged with the order of this Bench in the first round which the appellant has not complied with; and further concludes that even as on date, the assessee has not proved whether the duty was paid before or after the claim for refund.

4. In reply, learned advocate submits that the assessee has not preferred any appeal against the order of this Bench in the first round, but, however relies again on the report of Range Officer referred to by the Commissioner (Appeals) in the first round. He also submits that assessee is willing to furnish all necessary documents in support of the refund of the balance amount.

5. I have heard the rival contentions, perused the documents placed on record, have gone through the decisions relied on by the learned advocate. From the directions issued by this Bench in the first round which has been extracted supra, I find that the appellant was directed to establish its eligibility and also the fact that they have not passed on the element of duty to the consumer, and as submitted by the learned Advocate, the said order has become final.

6. I therefore, deem it proper to give one more opportunity, in the interest of justice, to the appellant to go before the learned Commissioner (Appeals), comply with the directions of this Bench by producing all such necessary documents to prove its eligibility. While placing on record fair submissions of the learned DR and also learned Advocate, I am of the opinion that this Bench cannot step into the shoes of an adjudicating authority or First Appellate Authority for that matter, in the light of the directions of this Bench in the first round. The appellant shall cooperate with the Commissioner (Appeals) without seeking unnecessary adjournments and the learned Commissioner (Appeals) shall dispose of the appellate proceedings within a period of six months from the date of receipt of the order.

7. The appeal is therefore allowed by way of remand.

(Order Pronounced in Open Court on **/09/2018**)

(P. DINESHA)
JUDICIAL MEMBER

iss...