

CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL

SCO 147-148, SECTOR 17-C, CHANDIGARH – 160 017

COURT NO. I

Appeal No. E/1639/2011-DB

Date of Hearing/ Decision : 04.06.2018

[Arising out of Order-in-Appeal No. OIA-99/CE/APPL/CHD-I(JK-2011 dated 03.05.2011 passed by the Commissioner (Appeals) Central Excise & ST, Jammu]

M/s. JMW India Pvt. Limited

: Appellant

vs.

Commissioner of Central Excise & ST, Jammu **: Respondent**

Appearance:

Shri R.K. Hasija, Advocate for the Appellant(s)

Shri Harvinder Singh, A.R. for the Respondent(s)

CORAM:

Hon'ble Mr. Ashok Jindal, Member (Judicial)

Hon'ble Mr. Devender Singh, Member (Technical)

Final Order No. 62430 / 2018

Per : Ashok Jindal

The appellant is in appeal against the impugned order wherein the demand has been raised against them under Section 11A of the Central Excise Act, 1944 for erroneous refund of amount on account of freight beyond the place of removal on which the appellant has paid duty and claimed refund thereof, in terms of Notification No. 52/2002-CE dated 14.11.2002.

2. The Id. Counsel for the appellant submits that in this case, the refund claim has already been sanctioned and the same has not been appealed against. In that circumstance, the proceedings against the appellant are not sustainable in the light of the decision in the case of *Bharat Box Factory Limited* vide Final order No. 62192-62193/2018 dated 20.03.2018 which has followed the decision of the Hon'ble Apex Court in the case of *CCE, Shillong vs. Jellalpore Tea Estate – 2011 (268) ELT 14 (Guj.)*.

3. On the other hand, Id. AR relied on the decision of this Tribunal in the case of *J&K Pigments Pvt. Limited* vide Final Order No. 60444-60491/2018 dated 06.03.2018 saying that appellant are not entitled to claim refund of duty paid beyond the place of removal.

4. Heard the parties. On merits we are in agreement with the Id. AR that appellant is not required to pay duty on the freight beyond the factory premises and consequently claiming refund thereof. But in the case in hand, the case of the appellant is that appellant's claim has already been sanctioned and the same has not been challenged before the higher forum and therefore, the refund sanctioned by them has become final and the provisions of Section 11A are not applicable. We find that the said issue has been examined by the Hon'ble High Court of Gauhati in the case of *Jellalpore Tea Estate* (supra) wherein the Hon'ble High Court observed as under :-

“13. That apart, the Assistant Commissioner of Central Excise, Silchar had passed a final order in favour of the assessee on 29-4-2002 and admittedly, this order was revisable under Section 35-E of the Act. For reasons best known to

the Commissioner of Central Excise, Shillong no action was taken to have the order of the Assistant Commissioner revised or set aside. Having failed to avail of the statutory remedy available under the Act, the Revenue sought to circumvent the law (as it were) by taking recourse to Section 11A of the Act. In our opinion, this was clearly impermissible inasmuch as what is required to be done in a manner prescribed by law, ought to be done in that manner only or not at all.

14. Insofar as the present case is concerned, the prescription of law required that the order of the Assistant Commissioner passed on 29-4-2002 could be challenged only by resorting to Section 35-E of the Act. The Revenue could not initiate collateral proceedings to set aside the order dated 30-4-2002 by resorting to the enabling power under Section 11A of the Act.

15. Consequently, we are of the opinion that : (i) Section 11A of the Act is not applicable to the facts of the case since the issue raised did not concern any approval, acceptance or assessment relating to the rate of duty on or valuation of any excisable goods. The issue raised by the assessee related to its entitlement to the benefit of Notification No. 33/99-C.E., dated 8-7-99, (ii) Even otherwise, the Revenue could not take recourse to Section 11A of the Act when it had a statutory remedy available to it to challenge the order dated 29-4-2002 passed by the Assistant Commissioner of Central Excise, Silchar by resorting to the revisional power available under Section 35-E of the Act."

This order has been followed by this Tribunal in the case of *Bharat Box*

Factory Limited and the Tribunal has observed as under:-

5. Heard the parties, considered the submissions. After hearing the contentions of both sides, we find that the issue emerges before us is that, as refund claims were sanctioned to the assessee, and without challenging those assessment orders of refund claims sanctioning thereof, can be challenged by way of issuance of show cause notice under Section 11A of the Act or not. The said issue is exempted by the Hon'ble High Court of Gauhati in the case of *Jellalpur Tea Estate* (supra), wherein the Hon'ble High Court observed as under:-

"13. That apart, the Assistant Commissioner of Central Excise, Silchar had passed a final order in favour of the assessee on 29-4-2002 and admittedly, this order was revisable under Section 35-E of the Act. For reasons best known to the Commissioner of Central Excise, Shillong no action was taken to have the order of the Assistant Commissioner revised or set aside. Having failed to avail of the statutory remedy available under the Act, the Revenue sought to circumvent the law (as it were) by taking recourse to Section 11A of the Act. In our opinion, this was clearly impermissible inasmuch as what is required to be done in a manner prescribed by law, ought to be done in that manner only or not at all."

Therefore, we hold that provisions of Section 11A of the Act are not applicable to the facts of this case. Accordingly, demands against the assessee are not sustainable."

5. As the issue has already been settled that until and unless it is challenged, the provisions of Section 11A of the Act are not applicable. Therefore, we set-aside the impugned order and allow the appeal.

(Order dictated and pronounced in the court)

Devender Singh
Member (Technical)

Ashok Jindal
Member (Judicial)

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