IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, CHENNAI

Excise Appeal No. 98 of 2011

(Arising out of Order-in-Appeal No. 188/2010 dated 20.10.2010 and Corrigendum dated 16.12.2010 passed by the Commissioner of Central Excise (Appeals), Trichy)

M/s. S.A. Safiullah & Co. **Appellant**
T.S. No. 9610,Rajagopalapuram
Post Box No. 14, Pudukottai – 622 003.

Vs.

Commissioner of GST & Central Excise **Respondent**
No. 1, Williams Road
Trichy – 620 001.

Excise Appeal No. 402 of 2011

(Arising out of Order-in-Appeal No. 63/2011 dated 24.5.2011 passed by the Commissioner of Central Excise (Appeals), Trichy)

Commissioner of GST & Central Excise **Appellant**
No. 1, Williams Road
Trichy – 620 001.

Vs.

M/s. S.A. Safiullah & Co. **Respondent**
T.S. No. 9610,Rajagopalapuram
Post Box No. 14, Pudukottai – 622 003.

Excise Appeal No. 333 of 2011

(Arising out of Order-in-Appeal No. 44/2011 dated 24.3.2011 passed by the Commissioner of Central Excise (Appeals), Trichy)

M/s. S.A. Safiullah & Co. **Appellant**
T.S. No. 9610,Rajagopalapuram
Post Box No. 14, Pudukottai – 622 003.

Vs.

Commissioner of GST & Central Excise **Respondent**
No. 1, Williams Road
Trichy – 620 001.

APPEARANCE:

Shri J. Shankar Raman, Advocate for the Appellant
Shri L. Nandakumar, AC (AR) for the Respondent

CORAM

Hon'ble Ms. Sulekha Beevi C.S., Member (Judicial)
Hon'ble Shri C.J. Mathew, Member (Technical)

Final Order Nos. **40099-40101 / 2020**

Date of Hearing: 05.02.2020
Date of Decision: 05.02.2020

Per Ms. Sulekha Beevi C.S.

The issue involved in all these appeals being common, they are heard together and are disposed by this common order.

2. The assessee sold scented betel nuts / supari to various customers. Department was of the view that the said goods are classifiable under CSH 2106.90 attracting duty @ 20% advalorem. The appellant paid duty under-protest. They also filed Writ Petition No. 4265/1994 before the Hon'ble High Court of Madras contending that they are not liable to pay excise duty for the betel nut powder known as supari. As per judgment dated 29.6.1999, the Hon'ble High Court held that the goods are not subject to excise duty and remanded the matter to consider the issue of unjust enrichment.

2.1 On 24.11.1999, the appellant filed refund claim in Form – R and subsequent claim on 18.2.2000.

2.2 On 22.5.2000, Show Cause Notice was issued to the appellant proposing to deny the refund claim on limitation and also on the ground of unjust enrichment. The appellant filed reply on 29.5.2000.

2.3 On 14.9.2000, Order-in-Original No. 83/2000 was passed denying the refund on the ground of limitation as well as on the ground of unjust enrichment.

2.4 On 18.10.2002, Order in Appeal No. 149/2000 was passed setting aside the Order-in-Original and allowing the appeal with consequential relief.

2.5 On 13.2.2003, pursuant to the appeal allowed by Commissioner (Appeals) vide the above order, an amount of Rs.9,57,895/- was refunded to the appellant. However, the balance amount was not sanctioned by the refund sanctioning authority stating the balance amount has been paid by the manufacturer out of CENVAT credit and therefore this amount was denied in terms of Rule 57C of Central Excise Rules, 1944 by Order-in-Original No. 2/2003. The assessee filed appeal against this order.

2.6 On 27.10.2003, the Commissioner (Appeals) passed Order in Appeal No. 508/2003 rejecting the appeal.

2.7 Meanwhile, the department filed an appeal before the Tribunal against Order in Appeal No. 149/2002 which sanctioned the refund claim. The assessee also filed appeal before the Tribunal against Order in Appeal No. 508/2003. These appeals were decided by the Tribunal vide Final Order Nos. 1070 and 1071/2009 dated 19.8.2009. The Tribunal held that the refund claim is not time-barred and that the question of unjust enrichment has to be decided by the lower authority after considering the document filed originally as well as those filed before the appellate authority.

2.8 Pursuant to such direction to consider the issue of unjust enrichment, the Assistant Commissioner allowed refund of Rs.64,53,965/- and rejected an amount of Rs.17,602/- stating that the appellant has not furnished document to pass the test of unjust enrichment with regard to this amount. Thus, as per order No.4/2010-R dated 19.3.2010, the appellant was allowed refund of Rs.64,53,965/-.

2.9 Meanwhile, the department filed an ROM application before the Tribunal against the Final Order dated 19.8.2009. Vide Misc. Order dated 9.82010, the ROM application was dismissed observing that the refund claim is not hit by limitation and the same was filed pursuant to an order of the Hon'ble High Court of Madras to look into the question of unjust enrichment only.

2.10 The department had also filed an appeal against the order passed by refund sanctioning authority vide Order No. 4/2010-R dated 19.3.2010. The Commissioner (Appeals) vide Order in Appeal dated 20.10.2010 upheld the order passed by the Assistant Commissioner. However, the lower authority was directed to verify the eligibility of refund claim with respect to applicability of Rule 57C of Central Excise Rules, 1944 and then sanction refund if any as per law. The assessee has filed Appeal E/98/2011 aggrieved by such order.

2.11 However, as per the direction of Commissioner (Appeals) vide Order in Appeal dated 20.10.2010 remanding the matter to look into the applicability of Rule 57C, the Assistant Commissioner passed

Order No. 5/2011 dated 28.4.2011 rejecting the refund of Rs.64,53,965/-.

2.12 The assessee filed appeal against the said order before the Commissioner (Appeals) and the Commissioner (Appeals) vide Order in Appeal No. 63/2011 dated 24.5.2011 allowed the appeal setting aside the order passed by the Assistant Commissioner. The department has filed Appeal E/402/2011 against Order in Appeal No. 63/2011 dated 24.5.2011.

2.13 On 25.11.2010, the Assistant Commissioner passed an order rejecting the appellant's claim for interest. Against this order, the appellant filed appeal before Commissioner (Appeals) and vide Order in Appeal dated 24.3.2011, the Commissioner (Appeals) rejected the appeal upholding the denial of claim for interest. The assessee has filed Appeal E/333/2011 against such order.

3. The ld. counsel Shri J. Shankar Raman appeared and argued on behalf of the assessee. He referred to the order of the Hon'ble High Court in W.P. No. 4265/1994 to argue that the Hon'ble High Court had remanded the matter only for the purpose of considering the aspect whether the assessee had passed on the duty burden to the consumers or not. Hence applicability of Rule 57C cannot be raised by the department while considering sanction of refund. That the issue of Rule 57C was not raised originally by the department. The issue put forward by the department regarding Rule 57C is beyond the scope of Show Cause Notice and hence the appeal filed by department is without merit.

3.1 In regard to provision of Rule 57C of Central Excise Rules, 1944, it is submitted by him that the said provision has no application for a buyer to excisable goods. The assessee was merely a trader of the goods. There is no provision under the Central Excise Act, 1944 to deny refund of duty paid by the manufacturer after availing MODVAT credit. In fact, the endeavor of department would be contrary to the judgment of the Hon'ble High Court of Madras. The buyer of the goods cannot be denied refund merely for the reason that the manufacturer is not entitled to avail credit. This proceeding ought to have been initiated against the manufacturer within the time limit prescribed under the Act and in accordance of law. Further, Rule 57C will come into play only when the finished product is exempted. In the present case, the finished goods is not exempted but held to be non-excisable. To support this contention, he relied upon the decision in the case of Commissioner of Customs & Central Excise, Hyderabad Vs. Goldstone Teleservices Ltd. – 2012 (285) ELT 343 (AP).

3.2 The ld. counsel submitted that department had filed an appeal before the Hon'ble High Court in CMA No. 2955/2017 against the Final Order No. 1070 & 1071/2009 dated 19.8.2009. The said CMA was disposed on 4.9.2018 by dismissing the Revenue’s appeal observing that the matter was remanded only for the purpose of looking into the question of unjust enrichment and that department has misdirected itself in agitating the case as a fresh case. He prayed that the appeals may be allowed and the department be directed to grant interest for the delayed refund.

4. On behalf of Revenue, ld. AR Shri L. Nandakumar appeared and argued the matter. He supported the findings in the impugned order as well as the grounds stated in the appeal filed by the department.

5. Heard both sides.

6. The moot question that arises for consideration is whether the refund is hit by the doctrine of unjust enrichment. The assessee has been sanctioned refund of Rs.9,57,895/- on13.2.2003 and Rs.64,53,965/- on 19.3.2010. An amount of Rs.17,602/- has been rejected vide Order No. 4/2010-R dated 19.3.2010. The ld. counsel for assessee has submitted that the said amount of Rs.17,602/- is not part of the present appeals. The main ground put forward by the counsel for assessee is that the department has travelled beyond the scope of remand by the Hon'ble High Court by agitating on the ground of limitation and applicability of Rule 57C. It is worthwhile to reproduce the order in W.P. No. 4265/1994 by the Hon'ble High Court which has been upheld in Writ Appeal No. 1270 to 1272/2000 vide judgment dated 27.4.2010. The same is reproduced as under:-

> *"12. In my considered opinion, once the Central Excise Tariff clearly defines what is Pan Masala, namely as the product which contains betel nut and any one of the following, namely lime, katha, cardamom, copra and menthol and tobacco, the betel nut powder known as suprai, which do not contain tobacco, cannot be treated as Pan Masala, by inference, bringing the same under the category of others. Therefore, I am of the considered opinion that the petitioners are liable to pay the excise duty for the betel nut powder known as suprai, treating the same as Pan Masala. However, with regard to the consequential remedy, I remit the matter to the authorities to consider whether or not the duty paid by the petitioner had passed on to the consumers. If the petitioners had passed on the duty to the consumers, they are not entitled for any refund. However, it is for the authorities to take appropriate decision in the matter. Writ petitions are partly allowed and remitted to the authorities for the consequential remedy."*

6.1 The Hon'ble High Court vide judgment in CMA No. 2955/2017 dated 4.9.2018, after considering the contentions put forward by the department has observed as under:-

> *"6. The assessee contended that the scented betel nut cannot be considered as Pan Masala, as it does not contain tobacco. The Court, by common order dated 29.06.1999, held that the petitioners therein, which includes the respondent/assessee, are not liable to pay excise duty for the betel nut powder known as supari, treating the same as Pan Masala. In respect of the consequential relief sought for by the assessee, the matter was remanded to the authorities to consider whether or not the duty paid by the assessee had been passed on to the consumers and if the assessee had passed on the duty to the consumers, they are not entitled for any refund. The Court further observed that it is for the authorities to take an appropriate decision in the matter and partly allowed the writ petitions and remitted the matter to the authorities for a consequential relief. The operative portion of the order reads as follows:-*
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> *"12. In my considered opinion, once the Central Excise Tariff clearly defines what is Pan Masala, namely as the product which contains betel nut and any one of the following, namely lime, katha, cardamom copra & menthol and tobacco, the betel nut powder known as supari, which do not contain tobacco, cannot be treated as Pan Masala, by inference, bringing the same under the category of Others. Therefore, I am of the considered opinion that the petitioners are not liable to pay the excise duty for the betel nut powder known as supari, treating the same as Pan Masala. However, with regard to the consequential remedy, I remit the matter to the authorities to consider whether or not the duty paid by the petitioner had passed on to the consumers. If the petitioners had passed on the duty to the consumers, they are not entitled for any refund. However, it is for the authorities to take appropriate decision in the matter. Writ petitions are partly allowed and remitted to the authorities for the consequential remedy. WMP Nos.6815 to 1817 of 1994 and 23703 of 1995 are dismissed. No costs."*
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> *7. Subsequently, the matter was listed under the caption "for being mentioned", as there were some typographical errors. Nevertheless, the subsequent orders substantially remained the same except for certain clerical corrections. After the writ petitions were disposed of, the assessee filed an application for refund on 24.11.1999. This application was held to be time barred, as it has been filed after six months from the relevant date and there is no specific direction in the order passed by the High Court exempting the assessee from the limitation aspect stipulated under Section 11B(3) of the Act and therefore, the claim was held to be hit by limitation under Section 11B(1) of the Act. This order was put to challenge by the assessee before the Commissioner of Customs and Central Excise (Appeals), Trichirapalli. The appeal was allowed and the order passed by the adjudicating authority was set aside. The appellate authority pointed out that the Department having accepted the first part*

> *of the High Court order, with regard to the second part of the order, when the matter was remitted back to the lower authority with specific direction, cannot take such a plea that the claim is barred by limitation. The Revenue filed appeal before the Tribunal and the Tribunal, by the impugned order, held that the claim made by the assessee is not hit by limitation.*
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> *8. So far as the plea of unjust enrichment is concerned, the Tribunal remanded the matter to the adjudicating authority with certain directions. Subsequently, the Revenue filed an application for rectification of an alleged mistake. This application was disposed of by order dated 09.08.2010. The Revenue is on appeal as against the order passed by the Tribunal contending that the claim made by the appellant is hit by limitation."*

6.2 From the above, it can be seen that the scope of remand by the Hon'ble High Court was only to look into the question of unjust enrichment and not as to limitation or applicability of Rule 57C of Central Excise Rules, 1944. Therefore, the contention of the department that these aspects have to be looked into and therefore the assessee is not eligible for refund cannot sustain and requires to be set aside, which we hereby do. Appeal No. E/402/2011 filed by Revenue is dismissed. Consequently, Appeal No. E/98/2011 filed by assessee is allowed with consequential relief, if any.

6.3 The assessee has also claimed interest on the delayed refund. The Commissioner (Appeals) has upheld the order of rejection of the claim for interest vide Order in Appeal dated 24.3.2011. It is settled position of law that the assessee is eligible for interest on delayed refund when the delay is not for any reason on the part of the assessee. In terms of Rule 11BB, interest will be eligible on such duty from the date immediately after expiry of three months from the date of receipt of refund application till the date of refund of such duty. In the present case, refund claim was filed on 24.11.1999. The amount of Rs.9,57,895/- was sanctioned on 13.2.2003 and the balance of

Rs.64,53,965/- was sanctioned on 19.3.2010. The assessee would thus be eligible for interest as provided under section 11BB of Central Excise Act, 1944. Ordered accordingly. Appeal No.E/333/2011 is allowed with consequential relief, if any.

(Dictated and pronounced in open court)

(**SULEKHA BEEVI C.S.**)
Member (Judicial)

(**C.J. MATHEW**)
Member (Technical)

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