CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL NEW DELHI.

PRINCIPAL BENCH - COURT NO. II

Excise Appeal No. 53489 of 2018-SM

(Arising out of order-in-appeal No. 211-212 (SM) CE/JPR/2018 dated 27.04.2018 passed by the Commissioner (Appeals), Central Excise & Central Goods, Service Tax, Jaipur).

M/s KEC International Limited **Appellant**
14-15, Industrial Area,
Jhotwara, Jaipur.

VERSUS

Commissioner, Central Excise and Central Goods & Service Tax, **Respondent**
NCR Building, Statue Circle
Jaipur.

APPEARANCE:

Sh. Alok Kumar Kothari, Advocate for the appellant
Sh. Ravi Kapoor, Authorised Representative for the respondent

CORAM:

HON'BLE MR. ANIL CHOUDHARY, MEMBER (JUDICIAL)

FINAL ORDER NO. 50326/2022

DATE OF HEARING: 08.11.2021
DATE OF DECISION: 11.04.2022

ANIL CHOUDHARY:

The issue in this appeal is whether the Revenue has rightly adjusted interest amount (out of sanctioned rebate), which according to Revenue was payable in respect of duties paid in terms of supplementary invoice, which were raised due to 'price variation clause', from the sanctioned rebate claim.

2. Brief facts of the case are that the appellant had filed rebate claims for Rs. 32,91,702/- on 12.06.2017. The Adjudicating

Authority observed that the appellant has paid duty on an amount, over and above the transaction value, as is evident from ARE-1 and the respective shipping bill. Rebate is required to be restricted to the extent of transaction value as per Section 4 of the Central Excise Act. The appellant have paid duty on invoice value, which includes freight element and other expenses from the factory gate to the destination port. The Adjudicating Authority took into notice the report of the Range Officer dated 03.03.2017 and 28.06.2017, that regular demands are being issued to the appellant regarding non-payment of interest on price variation bills raised by them to their customers. It also appeared that the appellant was liable to pay interest on the differential duty paid on supplementary invoices, from the day duty was due with respect to the original invoice. Further, reference was made to the ruling dated 08.05.2019 of the Hon'ble Supreme Court in the case of SAIL & Others, in Civil Appeal No. 1150 of 2012 and others, wherein it was held that an assessee is liable to pay interest on the additional duty as per supplementary invoice, as the price revision is effective from the date of original invoice. It also appeared that amount was short paid duty and as such, attracts levy of interest under Section 11AB of the Act. It was further noticed that as per the details of invoicewise price variation bill, an amount of Rs.8,03,703/- for the period January, 2016 to September, 2017 and Rs. 8,900/- for the period October, 2016 to May, 2017, was bound to pay interest by the appellant. Thus, the Officer recommended interest amounting to Rs. 8,12,603/- on account of price variation for the period January, 2016 to May, 2017, may be recovered from the rebate claim filed by the appellant.

3. Accordingly, the Adjudicating Authority sanctioned the rebate claim of Rs. 28,04,687/- in cash and from such amount recovered the interest amount of Rs. 8,12,603/- as proposed by the Range Officer and thereafter disbursed the balance amount of Rs.19,92,084/-.

4. Being aggrieved by adjustment / deduction amount of Rs.8,12,603/- from the amount of sanctioned rebate, the appellant preferred appeal before the Commissioner (Appeals).

5. Vide the impugned order-in-appeal, the Commissioner (Appeals) was pleased to dismiss the appeal, being after 45 days beyond the limitation period, and accordingly was pleased to reject the appeal being beyond the power to condone the delay. Being aggrieved, the appellant have preferred appeal before this Tribunal inter alia on the ground that the Commissioner (Appeals) has dismissed the appeal without considering the ground for delay. The appellant had stated in their condonation of delay application, that the delay was circumstantial. The order related to adjustment of certain portion of sanctioned rebate and actually the appellant was under the confusion regarding the scope of appeal. Later on being advised, that adjustment of interest, which was not adjudicated, nor any show cause notice issued was bad, against the provisions of law. Accordingly, the appellant has filed the appeal with some delay in the process. It is further urged that adjustment of un-adjudicated amount of interest is bad in law and in facts. Learned Counsel urges, in the ruling of Delhi High Court in the case of **Hindustan Insecticides Ltd. vs. CCE LTU -2013 (297) ELT 332**, wherein the

question before the Hon'ble High Court was –whether the Tribunal fell into error, in holding that for recovery of interest on account of retrospective revision of prices, the extended period of limitation under Section 11A could be revoked vis-a-vis interest, especially in view of the decision of the Hon'ble Supreme Court in **Commissioner vs. TVS Whirlpool Ltd**., – and of this Court in the case of **Kwality Ice Cream Co. vs. UoI- 2012 (281) ELT 507 (Delhi H.C.**).

6. The Hon'ble High court taking notice of the fact that the appellant paid the duty and invoice was raised on clearance of goods. Subsequently, due to price variation in finalisation, the assessee issued supplementary invoices for the price difference and paid excise duty thereon, *suo motu*. The High Court held, it was reasonable that limitation as applicable to claim for principal amount, should also apply to the interest claim. Payment of interest is also in the nature of short payment and in the facts there is no case of fraud, suppression of facts etc., demand could have been raised only under the normal period. The appellant also relies on the ruling in their own case of this Tribunal, being Final Order No. 53007 – 53008/2018 dated 28.09.3028, where also similar adjustment was made from the rebate claim of the un-adjudicated interest amount. This, Tribunal observing that for collecting any interest amount appropriate proceedings are to be initiated by issuing of show cause notice. In absence of such proceedings or any confirmation of demand against the assessee, adjustment from refund amount or rebate amount is neither justified nor provided in law. Similar view was taken by this Tribunal in the case of **Himachal Futuristic vs. CCE, Chandigarh -**

2017 (349) ELT 488 (Tri. Chan.). Accordingly, learned Counsel prays for allowing the appeal.

7. During the hearing on 23.09.2021, when the matter was adjourned as part heard, this Tribunal had directed learned Authorised Representative for the Revenue to produce the copy of Annexure-A as mentioned in the order-in-original, containing details of the calculation of the amount of Rs. 8,12,603/- as it was the case of the appellant that such details were never provided to him. Further, learned AR was directed to inform whether the said amount of Rs. 8,12,603/- is by way of adjudicated dues. However, inspite of opportunity being allowed the learned AR has not submitted any reply to the clarification sought.

8. Learned Authorised Representative appearing for the Revenue relies on the impugned order.

9. Having considered the rival contentions, I find that the appellant has given cogent explanation regarding the delay in filing the appeal before the Commissioner (Appeals). Accordingly, the delay in filing the appeal before the Commissioner (Appeals) is condoned by this Tribunal. I further find that the Adjudicating Authority have adjusted the amount of Rs.8,12,603/- towards interest, which are not adjudicated dues. The power of adjustment out of the amount of refund / rebate or any other sum payable to the assessee is contained in Section 11(a) of the Central Excise Act, which provides - in respect of any duty or any other sum of any kind payable to the Central Government under any of the provisions of this

Act or the rules thereunder, the Officer empowered to levy such duty or require to the payment of such sums, may deduct the amount so payable, from any money owing to the person from whom such sums may be recoverable or due, which may be in his hands or under his disposal or control or may be in the hands or under disposal or control of such other officer.

10. From a plain reading of the provisions of Section 11(1), I find that the Central Excise Officer is empowered to adjust only the unpaid adjudicated dues. As Section 11(1) also empowers the Central Excise Officer to recover the dues, even by way of attachment and sale of excisable goods, and if the same are not recovered, is also empower to prepare a certificate duly signed by him specifying the amount due from the person liable to pay, and send it to the Collector who on receipt of such certificate, shall proceed to recover the amount specified in the certificate as if it were an arrear of land Revenue.

11. Thus, such extra ordinary power to recover are only available for recovery of adjudicated dues, or admitted dues as per return, if the same are unpaid. Under such special power under Section 11(1), the Central Excise officer cannot recover the un-adjudicated dues, as has been done in the present case.

12. Accordingly, in view of my finding, I hold that the amount adjusted Rs. 8,12,603/-, being by way of un-adjudicated dues of interest, is bad. Accordingly, the appeal is allowed and the impugned order stand modified. Further, the Adjudicating Authority is directed

to grant the refund of the balance rebate amount of Rs.8,12,603/- to the appellant, with interest as per Rules, within a period of sixty days from the date of receipt of a copy of this order.

13. In the result, the appeal is allowed.

(Pronounced on 11.04.2022).

(Anil Choudhary)
Member (Judicial)

Pant