IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
West Block No. 2, R.K. Puram, New Delhi – 110 066.

Date of Hearing: 30.10.2017
Date of Decision: 03.11.2017

Appeal No. E/53178/2016- [EX] SM
[Arising out of Order-in-Appeal No. 200-CE-DEL-2016 dated 26.08.2016 passed by the Commissioner (Appeals), Central Excise, Delhi-I]

CCE Delhi-I		Appellant
	Vs.	
Praveen Tobacco Co. (P) Ltd.		Respondent

Appearance

Ms. Kannu Verma Kumar, AR	-	for the appellant
Shri V.R. Sethi, Advocate	-	for the respondent

CORAM: **Hon'ble Mr. M.V. Ravindran, Member (Judicial)**

Final Order No. 57593/2017

Per M.V. Ravindran:

1. This appeal is filed by the revenue against impugned order No. 200/2016 dated 26.08.2016.
2. Heard both sides and perused the records.
3. The brief facts, after filtering out unnecessary details are the appellant herein was issued the show cause notice for the demand of a Central Excise duty on the finished goods manufactured by them; the appellant had classified the products manufactured by them as unmanufactured "Branded Chewing Tobacco" under a specific heading while the show cause notice alleged that it would get classified as manufactured branded "Branded Chewing Tobacco": Adjudicating Authority confirmed the demands raised along with interest and penalties. In order to avail the course of

appellate remedy appellant deposited the amounts confirmed and preferred an appeal before the First Appellate Authority : the First Appellate Authority upheld the classification as decided by the Adjudicating Authority but set aside the demands raised on the ground of limitation. This order of the First Appellate Authority was challenged before the Tribunal. Tribunal dismissed the appeal of the Department as also the cross objection filed by current appellant on the merits of the case. In short, the demands raised against the appellant were held to be beyond a period of limitation but on merits, the classification was held in favour of the Revenue. Aggrieved by such an order of the Tribunal, department filed the appeal before Hon'ble High Court of Delhi and their Lordships by Final Order dated 16/09/2013- as reported at [2013 (9) TMI 1041-Delhi High Court] dismissed the appeal filed by the Revenue on merits and Revenue has not filed any appeal against the order of the High Court. Perseverant to the order of the Hon'ble High Court, the appellants filed refund claim with the authorities. The Adjudicating Authority rejected the refund claim on the ground that the duty liability is held against the appellant. The First Appellate Authority set aside the said order of the Adjudicating Authority rejecting the refund claim and allowed the appellant herein. *M/s Praveen Tobacco Company Ltd.*

4. Ld. Departmental representative submit that the refund is not due as on merits, the duty liability has to be discharged by the appellant and therefore, even if the demand is set aside on limitation, deposited amount cannot be treated as voluntary. She drew my attention to the decision of the Tribunal in the case of *Hyderabad Iron & Steel Works Ltd. V/s Collector of Central Excise*

1989 (44) ELT 588 (Tri.) for this proposition and submits that the view expressed in that case has been upheld by dismissing the Civil Appeal on 06/04/1995.

5. I find that the appeal of the revenue is devoid of merits. It is undisputed fact that the demands which were raised on the assessee *M/s Praveen Tobacco Company Ltd*. were contested by them on limitation as well as on merits. During the pendency of the proceedings, they had deposited the duty liability interest and part of the amount as penalty. On successful litigation on before the Hon'ble High Court of Delhi, they rightfully claimed the amount paid/deposited by them with the authorities. In my view, the First Appellate Authority was correct in coming to a conclusion that the amounts which were deposited by the appellant are refundable. The relevant findings from the order impugned are reproduced.

> *The grounds for rejection of refund by the AA thus does not hold legal scrutiny. However, at the appeal stage it was noticed that though the order-in-appeal dated 24.09.2009 had granted consequential relief to appellants after setting aside the demand, the appellants filed the refund claim for the first time on 05.05.2014. Thus, the refund claim (with initial filing date on 05.11.2012) in order to get benefit of order-in-appeal dated 24.09.2009 was itself hit by limitation. Explanation (B) (ee) to Section 11B of the CEA, 1944 prescribes relevant date "in case where the duty becomes refundable as a consequence of judgment, decree, order or direction of appellate authority, Appellate Tribunal or any court, the date of such judgment, decree, order or direction". Thus, the claim was required to be filed within one year of the relevant date i.e. the date of the order of Commissioner (Appeals) consequent to which the refund had become due. But the appellants filed refund claim after almost 3 years of relevant date. Since the entire issue of demand was held in favour of the appellants only on the ground of limitation, it was incumbent upon the appellants to file the refund claim in time. Since the refund*

claim was found to be hit by limitation & since this ground was not taken at the adjudication stage while rejecting the refund claim, a show cause notice dated 18.05.2016 was issued to appellants under Section 35A of the CEA, 1944 proposing to treat the refund claim as time barred. A personal hearing was also held on 28.07.2016. The appellants have submitted that this ground not being there in the impugned order or in the show cause notice leading to impugned order, the ground can't be brought in at the stage of appeal & Section 35A merely allows show cause notice to be issued for recovery of any erroneous refund at the Commissioner (Appeals) level. The appellants have cited this case of Asea Brown Boveri Ltd. vs. CCE Bangalore [1999 (106) ELT 422 (T)] to submit that it is "not open to the Commissioner (Appeals) to raise a new ground which was not there in the show cause notice or the ground taken by the adjudicating authority". The cases of Precision Rubber Industries (P) Ltd. vs. CCE Mumbai [2016 (334) ELT 577 (SC)], SACI Allied Products Ltd. vs. CCE Meerut [2005 (183) ELT 225 (SC)], CCE Allahabad vs. Galaxy Indo Fab Ltd. [2003 (161) ELT 960 (Tri-Del) & Usha International vs. CC Kolkata [2003 (158) ELT 303 (Tri-Kol)] have also been cited to submit that new grounds can't be taken up at the appeal stage. The appellants have also submitted that their refund claim is not hit by limitation since the "cause of action" for them to file refund claim would arise only after the matter got finalised at the High Court after which no appeal was filed. They have cited the case of Dena Snuff (P) Ltd. vs. CCE Chandigarh [2003 (157) ELT 500 (SC)] in this regard and have submitted that department itself asked them to file refund claim only after the matter got settled in the High Court. That being so, going by the decision on the issue of 'new ground' to be taken at the appellate stage, I find that the issue of limitation or time bar for refund claim having not been taken up in the show cause notice or in adjudication order, it can't be added at this stage. Hence, the issue of time bar can't be raised here. The issue of rejecting claim on the ground remains for rejecting the refund claim of the appellants.

6. I concur with the above findings of the First Appellate Authority and find no reason to interfere in such a reasoned order.

7. As regards the decision relied upon by the Ld. Departmental representative, I find that the said decision may not carry the case of the revenue any further. Subsequent to the view expressed by the Bench, it is settled law that amount paid on the insistence of the Revenue and the matter is successfully contested in higher judicial forum it has to be considered that the assessee has deposited the amount under protest.

8. In view of the foregoing, I find no merits in the appeal filed by the revenue and the same stands rejected.

(Order Pronounced in open Court on__03/11/2017__)

(M.V. Ravindran)
Member (Judicial)

Rekha