

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH – COURT NO. – IV

Excise Appeal No. 52284 of 2018 [DB]

[Arising out of Order-in-Appeal No. 98/Central Tax/AppI-II/Delhi/2017 dated 29.12.2017 passed by the Commissioner(Appeals), Central Tax, Delhi-II]

Commissioner of C.G.S.T.

Commissionerate Delhi West
5th Floor, EIL, Annexe Building
Bhikaji Cama Place
New Delhi

...Appellant

Vs.

M/s. Santec Exim Pvt. Ltd.

Plot No. 92/6, Road No. 4
Gali No. 1, Mundka
Udyog Nagar, Nangloi
Delhi

...Respondent

APPEARANCE:

Shri P. Juneja, Authorised Representative for the Appellant
Shri Ram Prasad, Advocate for the Respondent

Coram: HON'BLE MR. C.L. MAHAR, MEMBER (TECHNICAL)
HON'BLE MRS. RACHNA GUPTA, MEMBER (JUDICIAL)

DATE OF HEARING/ DECISION : 25.07.2019

FINAL ORDER No. 51099/2019

RACHNA GUPTA

Present Appeal has been preferred by the Department on the basis of Review Order No. 06/GST/West/2018 dated 06.04.2018 vide which the Order-in-Appeal No. 98 dated 29.12.2017 allowing the Appeals of the Respondent herein has been questioned.

2. The relevant factual matrix for the purpose is that the appellants are registered under Central Excise as a manufacturer of excisable goods. Majority of goods manufactured by them are

exported out of India under the claim of rebate or under exemption from payment of duty in view of Rule 19 of Central Excise Rules, 2002. After the export of goods, the appellants had regularly been filing the rebate claims during the period from May, 2011 to January, 2013. Fifteen such rebate claims totalling to an amount of Rs. 26,27,586/- have been sanctioned in their favour. However during an audit of the Respondents/ assessee's record in December, 2013 for a period from 2008-09 to 2011-12, Department observed that appellant is an EoU. Hence, the amount of rebate claimed and sanctioned to them was not admissible and as such has been erroneously refunded. Based on the said observation that the show cause notice dated 23.03.2015 was served upon the appellant proposing recovery of the aforesaid refund amount alongwith the interest at the appropriate rate and the proportionate penalty. The said proposal was confirmed vide Order-in-Original No. 52/ADC/D-I/2016 dated 31.08.2016. The Appeal thereof was allowed vide the aforementioned Order-in-Appeal No. 98 dated 29.12.2017. Being aggrieved thereof the Review Order was passed by Commissioner GST, West on 6.04.2018 directing that Appeal be filed against the said Order. Resultantly, the Department is in Appeal before this Tribunal.

3. We have heard Shri P. Juneja, learned Authorised Representative on behalf of the Department/appellant and Shri Ram Prasad, learned Advocate on behalf of the Respondent/assessee.

4. It is submitted on behalf of the Department that the assessee was granted letter of permission dated 01.03.2006 to undertake manufacturing of hydraulic balling press components and other

machinery by setting up a 100% EoU. It has been the contention of the Department that respondent/assessee was only required to export goods without payment of Central Excise duty under Rule 19 of The Central Excise Rule, 2002 read with Notification No. 42/2001 – CE (NT) dated 26.06.2001. The respondent has paid Central Excise duty on clearance of export goods and claimed rebate of such duty in contravention to the provisions of law as applicable for a 100% EoU unit. The assesseees were thus not entitled to claim the rebate on the export goods.

4.1 Hence, the rebate claims which were initially sanctioned are erroneous. The recovery thereof was rightly been proposed and there is no infirmity in confirmation thereof vide the Order-in-Original dated 31.08.2016. It is submitted that Commissioner(Appeals) has committed error while ignoring Section 5A(1a) of Central Excise Act that the goods manufactured by the noticee were exempted vide the Notification No. 24/2003 as such the assessee was not supposed to pay duty and claim rebate at a later stage. The Order under challenge is, therefore, prayed to be set aside and Appeal is accordingly prayed to be allowed.

5. While rebutting these arguments, learned Counsel for the assessee/respondent has submitted that the show cause notice has been issued based on the audit objections noticed in December, 2013 for the period 2008-09 to 2011-12 but the show cause notice is of March, 2015 objecting the sanction and disbursement of fifteen rebate claims of the period 2010-11. Thus, the show cause notice is much beyond the normal period of one year of the limitation. The assessee's amount being less than Rs.5 Lakhs, it was subject to pre

audit as well as post audit. The Department has wrongly invoked the extended period of limitation. Show cause notice is accordingly prayed to be held as barred by time. It is submitted that the sanction and disbursement of the rebate amount was not objected at the appropriate time. The Order which has attained finality could not have been set aside by the original Adjudicating Authority. Commissioner(Appeals) has rightly allowed the Appeal of the assessee on the said ground. Justifying the Order, Appeal of the Department is prayed to be dismissed.

6. After hearing both the parties, we are of the opinion as follows:

6.1 The Respondent/ assessee had filed fifteen rebate claims for an amount of Rs.26,27,586/- for a period 2010-11 and 2011-12. The said rebate claims were sanctioned for the period 2010-11 vide order dated 19.05.2011 and 04.08.2011 and for the period 2011-12 vide Order dated 25.09.2012, 07.01.2013 and 31.01.2013. These Orders were appealable Orders however, were also subject to review under Section 35E of the Central Excise Act, 1944 but the Department did not take recourse to the provisions under Section 35E(2) of the Act due to which no Appeal, in furtherance of Section 35A of the Act, could have been filed against the said Orders by the Department. As a result of this silence on the part of the Department, the aforesaid Orders sanctioning the rebate claims stands to have attained finality. The correctness thereof has wrongly been challenged subsequently vide the impugned show cause notice. Law has otherwise been settled that once the Order passed by the Adjudicating Authority under Section 11B of the Act

granting refund of excise duty has attained finality. Show cause notice under Section 11A of the Act cannot be issued. We draw our support from the decision of Hon'ble Supreme Court in the case of **Collector of Central Excise, Kanpur Vs. Flock (India) Pvt. Ltd.** reported in **2000 (120) E.L.T. 285 (S.C.)**. The said decision has recently been followed by this Tribunal in Final Order No. 50312/2019 dated 30.01.2019 in the case of **Bridgestone India Pvt. Ltd. Vs. CGST & CE, Ujjain**. Hon'ble High Court of Madras also while hearing the Appeal of **Eveready Industries India Ltd. Vs. CESTAT, Chennai** reported in **2016 (337) E.L.T. 189 (Mad.)** has held that once an application for refund is allowed under Section 11B, the amount refunded will not fall under the category of "erroneous refund" so as to enable the Order of refund to be revoked under Section 11A of the Act.

6.2 Further, as brought to the notice that the impugned refund claims being less than an amount of Rs.5 Lakhs were subject to post audit. We observe from CBEC's Excise Manual of Supplementary instructions about pre audit/post audit of refund. The relevant extract reads as follows:

" **Board has further decided that:**

(i) All refund/rebate claims involving an amount of Rs.5 Lakhs or above should be subjected to pre audit at the level of Jurisdictional Commissioner. In such cases a suitable Order-in-Original should be passed by Deputy/Assistant Commissioner of Central Excise. Since the claim is pre audited with the concurrence of Commissioner, the usual review proceedings under Section 35E may not be necessary in such case.

(ii) For refund/rebate claims involving an amount of Rs.50,000/- but below Rs.5 Lakhs, Order-in-Original should be issued by Deputy/Assistant Commissioner of Central Excise. These Order-in-Originals should be subjected to compulsory post audit at the level of Additional/Joint Commissioner(Audit). The Order-in-Original shall also be subjected to review under Section 35E.

8.4 All refund/rebate claim papers should be sent by the Divisional Deputy/Assistant Commissioner to the Commissionerate Headquarters [Additional/Joint Commissioner (Audit)] for post audit within a week of payment thereof irrespective of the amount involved."

6.3 It becomes clear from the above provision that the refund claims of the assessee/respondent had already undergone sufficient scrutiny at pre audit as well as post audit stage of refund, before those were actually sanctioned by the Adjudicating Authority. Raising an audit objection after two years of such sanction and even disbursement, is beyond the legislative intent. Issuing of show cause notice in March, 2015 proposing the recovery of claims sanctioned and disposed way back in 2011-12 is, therefore, not sustainable. The show cause notice is rather beyond the period of limitation.

7. There is no iota of even whisper that the assessee had any intention to evade the duty. The admitted fact remains that the respondent/assessee has exported the goods on payment of duty under claim of rebate. Admittedly goods have been exported out of India and proof of export has been duly submitted. Respondent admittedly has been regularly filing the ER>Returns which were never objected by the Range Officer at the appropriate time. These admissions are sufficient to hold that the facts were already in knowledge of Department and that the appellant had no intention to evade the payment of duty. Accordingly, we are of the opinion that Commissioner(Appeals) has committed no error while holding the show cause notice as being barred by time and holding the assessee otherwise entitled

to the claim for getting the refund of duty as was paid by them on finished goods exported out of India.

8. Finding no infirmity in the said Order, we hereby uphold the same. As a result, the Appeal of the Department is hereby dismissed.

[Operative part pronounced in the open Court]

(C. L. MAHAR)
MEMBER (TECHNICAL)

(RACHNA GUPTA)
MEMBER (JUDICIAL)

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