CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
REGIONAL BENCH AT HYDERABAD
Division Bench
Court – I

Appeal No. E/1481/2011

(Arising out of Order-in-Appeal No. 01/2011 (H-II) CE dated 08.02.2011 passed by Commissioner of Customs, Central Excise and Service Tax (Appeals-II), Hyderabad)

M/s Bakelite Hylam Ltd., ...Appellant(s)

Vs.

Commissioner of Customs, Central Excise & Service Tax, Hyderabad - II .....Respondent(s)

Appearance
Ms L. Maithili, Advocate for the Appellant(s).
Shri Guna Ranjan, Superintendent (AR) for the Respondent(s).

Coram:
Hon'ble Mr. M.V. RAVINDRAN, MEMBER (JUDICIAL)
Hon'ble Mr. P. VENKATA SUBBA RAO, MEMBER (TECHNICAL)

Date of Hearing: 20/12/2018
Date of Decision: 02/01/2019

FINAL ORDER No. A/30022/2019

[Order per: M.V. Ravindran]

This appeal is directed against the Order-in-Appeal No. 01/2011 (H-II) CE dated 08.02.2011.

2. The facts, in brief, of this case are that the appellants are manufacturers of excisable goods falling under ch. 32,38,39,40,48,74,76 and 85 of Central Excise Tariff. Paper based

decorative laminates of different varieties falling under Chapter Subheading No. 4828.90, is one of the products manufactured by them (hereinafter referred to as the said goods). A show cause notice OR No. 16/96-Adjn. dated 31.1.1996 demanding Rs. 2,82,58,708/- was issued to the appellants demanding duty short paid on account of (1) non-inclusion of ineligible abatements; (2) the discounts declared and the discounts passed on had no correlation and were in deviance from the declarations made to the department; (3) alleging additional consideration of flow back received directly by the appellants and was not loaded to the assessable value etc. The said show cause notice was adjudicated by the then jurisdictional Commissioner, Hyderabad-III vide OIO No. 88/97, dated 29.12.1997, who while rejecting the plea of the appellants about the existence of genuine gate sales, partially allowed their claims and the demand confirmed to Rs. 1,61,81,601/-, out of which certain amounts were already paid by the appellants and the remaining amount to be recovered worked out to Rs. 1,26,29,491/-. The Commissioner also imposed a penalty of Rs. 13,00,000/-. Aggrieved by the said OIO, the appellants appealed before Hon'ble CESTAT, along with waiver of pre-deposit and stay vide appeal No. E/ST/325/98 in E/459/98. While the stay applications were pending, the department resorted to coercive measures for recovery of the above demands. The appellants approached Hon'ble A.P. High Court by filing a writ petition No. 3148 of 1998 seeking stay of recovery of the above amounts. In their writ petition the appellants had also sought stay of coercive measures for recovery of another demand relating to a classification dispute which was also pending at the stay application stage before the CESTAT. The Hon'ble AP High

Court disposed the writ petition with a direction to pre-deposit Rs. 50,00,000/-, which was deposited by the appellants. Vide Final Order No. 1478/2000 dated 24.10.2000 the Hon'ble CEGAT in Appeal No. E/459/98 remanded the case back to the original adjudicating with a direction that he shall first come to a clear cut finding of absence of genuine ex-factory price on the basis of material produced by the appellants and material on record and apply such value. The Hon'ble CEGAT also ordered that in case the adjudicating authority comes to a finding that such a genuine ex-factory price is not available, then he can proceed to determine the value by granting deductions from the depot prices available and by applying the law on the subject of eligibility of various discounts. The Commissioner, Hyderabad – III in pursuance of Tribunal's order concluded the denovo adjudication and passed OIO No. 17/2002 dated 19.06.2002. The adjudicating authority while examining whether the sales of the said gods (decorative laminates) at factory gate exceeded at least 3% of the total sales (as ordered by the Hon'ble Tribunal), found that the percentage was extremely low and felt that it was not fair to adopt to factory gate sales price vis-a-vis total sale. He further held that the appellants claim to adopt such artificial price to gain advantage on the clearances of bulk sales to depots where majority sale happened, would not be acceptable in the usual course of business and held that from the difference in factory gate price and depot price and from the amount of duty difference, which was crores of rupees, it was quite evident that prices adopted at factory gate were much lower than depot prices. He further held that party failed to explain the unreasonable differences in the said prices which vitiated the genuineness of the factory gate sale price and hence the factory gate prices shown in the nominal gate sales appeared to be rigged and the difference could not be attributed to sound commercial reasons. He, therefore, confirmed the demand of Rs. 1,61,81,601/- towards duty short paid and adjusted the amount of Rs. 35,52,110/- already paid towards those arrears. The appellants had again preferred appeal before Hon'ble CEGAT against the Commissioner's order. The Hon'ble Tribunal in its final order No. 999/2005 dt. 23.6.2005 remanded the matter back to the original adjudicating authority considering the methodology adopted for refusing the genuineness of factory gate sales that they were less than 3% was without any basis or evidence. The case was taken-up for denovo adjudicating by Commissioner, Hyderabad –II as the appellants had fallen in his jurisdiction after re-organisation. The Commissioner vide his OIO No. 2/2008 dt. 12.9.2008 held that following the ratio of Hon'ble Supreme Court and Tribunal decisions, he was inclined to accept the contention of appellants and upheld that the ex-factory price would form the basis for assessment of the goods cleared from the depots. He however disallowed interest on inventories, interest on receivable and freight on sales as abatements from the depot prices so as to arrive at the assessable value. He confirmed the total duty demand of Rs. 1,61,81,601/- and imposed a penalty of Rs. 15,00,000/-. The appellants again preferred an appeal before Hon'ble CESTAT, Bangalore against this OIO. The Hon'ble CESTAT vide its Final Order No. 1490/2009 dt. 16.12.2009, set aside the order of the Commissioner by holding that when there is a clear cut finding by the Commissioner that ex-factory prices are genuine prices and there being no appeal filed by the revenue against such a finding, the adjudicating authority's exercise of confirming the demand has been raised in the show cause notice is clearly incorrect and liable to set aside. The Hon'ble CESTAT held that "In view of this findings, we set aside the impugned order to the extend it confirmed the duty liability on the appellant and imposed penalty and interest and seeks recovery interest." Consequent upon this order, the appellants filed a refund claim for Rs. 85,52,110/- with the respondent. The respondent has issued a deficiency memo dated 15.06.2010 asking the appellants resubmitted their refund claim on 25.6.2010 making goods some of the deficiencies pointed out. The respondent vide OIO No. 21/2010-C.Ex(R) dated 03.11.2010, sanctioned refund of only Rs. 35,52,510/- already paid by them towards appropriation of arrears arisen out of OIO Nos. 13/2008 & 14/2008 passed by the Assistant Commissioner of Central Excise, Hyderabad F division, Hyderabad and rejected the amount of Rs. 50,00,000/- holding it was liable for rejection as the appellants had failed to submit all the relevant data relating to the final disposal of OIO No. 88/97 and the status of other petitions relating to the said pre-deposit of Rs. 50,00,000/-.

3. Aggrieved by such an order, the appellants preferred an appeal before the First Appellate Authority. The First Appellate Authority after following due process of law, upheld the order of the Adjudicating Authority to the extent of adjustment of Rs. 35,52,510/- towards pending arrears and directed the sanctioned authority to pay amount of Rs. 50,00,000/-, he declined to pay interest to the appellant has prayed for.

4. Learned Counsel appearing for the appellant draws our attention to the facts of the case and submits that there is no dispute as to the fact that the amount of Rs. 85,52,110/- is claimed as a refund on the favourable decision by the Tribunal in their favour. It is her submission that in this appeal, they are praying for interest on the amount of Rs. 85,52,110/- and also to set aside the order of the adjustment of Rs. 35,52,510/- towards arrears. It is her submission that this adjustment towards arrears is totally incorrect as of now the Tribunal has held the matter in their favour and during the relevant period, the appellant had filed an appeal before the Higher Authority against the order of the confirmed the demands. She submits that interest is payable by the appellant from October, 2000 when first order of the Adjudicating Authority was set aside and matter was remanded. It is her submission that they have paid these amounts two times of Rs. 35,52,510/- during the investigations and Rs. 50,00,000/- as per the directions of the Hon'ble Andhra Pradesh High Court. It is her further submission that the Adjudicating Authority's order was set aside by the Tribunal on October, 2000 interest, accrues after three months from that date and Central Board of Excise & Customs by Circular Nos. 802/35/2004-CX., dated 8-12-2004 & F. No. 275/37/2K-CX. 8A, dated 2-1-2002 had categorically stated that pre-deposit shall be returned to the appellant after the disposal of the order in the appellant's favour. It is her submission when the first order of the Tribunal in October, 2000 is setting aside the Order-in-Original, but of course is a remand order. She submits that Hon'ble High Court of Andhra Pradesh in the case of *Afcons Infrastructure Ltd., Vs. Union of India* [2006 (193) ELT 278 (A.P.)] has categorically stated

that if an appeal is allowed and the case is remanded for denovo consideration matter is finally disposed insofar as appeal before the CEGAT is concerned, although being remand order, pre-deposit amount should be returned and if said amount is appropriated, interest has to be paid. It is her further submission that the same view has been taken by the Tribunal in the case of *Poly Printers* [2008 (221) ELT 285] *LML Ltd.,* [2014-TIOL-1524-CESTAT-Delhi], *Hawkins Cookers Ltd.,* [2017 (6) GSTL 308]. She keenly refers to the decision in the case of *Galaxy Entertainment Corpn. Ltd.,* [2013 (296) ELT 337] for the proposition that there is no requirement for filing application for refund claim once the appeal is disposed of in the assese's favour. It is her submission that they are eligible for the interest on the amount from three months after October, 2000. On specific query from the bench, she stated that they had filed the refund claims with the authorities on their persuasion and is not required to file the same.

5. Learned Departmental Representative on the other hand submits that the refund of the amount which is being sought by them is already sanctioned i.e. by the lower authorities but Rs. 35,52,510/- has been adjusted towards the arrears of the confirmed demand. On interest, it is his submission that interest is payable after the three months from the decision of the issue which, according to him, in this case was on July 14, 2016. In support of this submission he produces decision of the Tribunal in the same issue in appeal No. E/926/2008 & 3901/2008 as reported at [2016 (11) TMI 1209 CESTAT- Hyderabad]. It is his submission that Appeal No. E/926/2008 was the appeal which was decided by the Tribunal by Final Order No. 1490/2009 dated

3.12.2009 but the same was taken up for disposal by the Tribunal in the Final Order No. A/30833 to 30834/2016 dated 14.07.2016. He submits that why and when the appeal No. E/926/2008 of the assessee got restored and disposed is not mentioned in the said order.

6. On careful consideration of the submissions made by both sides and perusal of records, we find that the following two issues arise for reconsideration:

i) whether refund sanctioned amount can be adjusted towards the pending arrears in terms of Section 11 of the Central Excise Act, 1944.

ii) whether any interest is payable towards the delayed refund and if is yes from when.

7. It is undisputed and stated in the open court by the Learned Counsel that appellant had received the refund of Rs. 50,00,000/- and that there could a possibility that amount of Rs. 35,52,510/- may also be sanctioned but she unable to confirm the same during the process of hearing.

8. As regards the adjustment of refund claim towards the arrears which were construed by the Department as confirmed arrears, we find that Learned Counsel was correct in submitting that there were no arrears which are due to the Government, as the Order-in-Original which confirmed the demands raised against which the refund claims was adjusted towards arrears, was in appeal and appeal was held in favour of the appellant. In short, the issue on merits today is in favour of the appellant and there are no dues that arises from him. In

scenario, both the lower authorities have erred in adjusting the refund amount of Rs. 35,52,510/- as towards arrears and if the same is not refunded to appellant, the same should be refunded forthwith. The issue is no more res integra as Hon'ble High Court of Karnataka in the case of *CCE, Bangalore-III Vs. Stella Rubber Works (Unit –II)* [2012 (275) ELT 404 (Kar.)] has categorically recorded that amounts cannot be appropriated towards the Revenue dues unless the provisions are followed. In the case in hand, it is on record, that appellant's appeal against that orders confirmed the demands and the said demands were finally set aside by the Tribunal.

9. As regards the interest claim of the appellant's Counsel based upon the proposition that appellant's case was decided in their favour by the Tribunal in December, 2009. On perusal of the records, we find that vide Final Order No. 1490/2009 dated 03.12.2009, appeal No. E/926/2008 was allowed by the Tribunal Bangalore Bench (wherein one of us M. V. Ravindran was also a member). We find subsequently, the same of appeal No. E/926/2008 came to be heard and disposed of by in Final Order No. A/30833 to 30834/2016 dated 14.07.2016 and in the said order, the Tribunal specifically held that the said appeal No. E/926/2008 is allowed with consequential reliefs, if any, as per law. Nothing is recorded in the Tribunal's order as to why and when in appeal No. E/926/2008 came to be restored and disposed of on 14.07.2016. Be that as it may, we find appellant's claim for the interest, if any, could arise only after the three months from date of the disposal of appeal vide which, demands has been held as unsustainable held in their favour. Undoubtedly, the pre-deposit

amount needs to be returned by the lower authorities after the three months from date of the disposal of the appeal in their favour, as per Board circular (referred herein above). In the case in hand, date of disposal of appeal No. E/926/2008 against which pre-deposit was made by the appellant, in our considered view, should be three months from 14.07.2016, if the amount is pre-deposit if not paid within the three months after that date, interest liability arises and that needs to be paid to appellant. The appeal is disposed of as indicated herein above.

(Order pronounced on 02/01/2019 in open court)

P. VENKATA SUBBA RAO **MEMBER (TECHNICAL)**	**M.V. RAVINDRAN** **MEMBER (JUDICIAL)**

Lakshmi….