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

Appeal No. E/1135/2009
(Arising out of Order-in-Appeal No.28/2009 (H-III) CE dated 29.08.2009 passed by CCCE & ST (Appeals-I), Hyderabad)

ITC Ltd ….. Appellant(s)

Vs.

CCCE & ST, Hyderabad - III ….. Respondent(s)

Appearance
Shri Karan Talwar, Advocate for the Appellant.
Shri Arun Kumar, Dy. Commissioner/AR for the Respondent.
Coram:
HON'BLE Mr. M.V.Ravindran, MEMBER (JUDICIAL)
HON'BLE Mr. P. Venkata Subba Rao, MEMBER (TECHNICAL)

Date of Hearing: 01.01.2019
Date of Decision: 01.01.2019

FINAL ORDER No. A/30123/2019

[Order per: P.V. Subba Rao.]

1. This appeal is directed against Order-in-Appeal No. 28/2009 (H-III) CE dated 29.08.2009.

2. The appellants are manufacturers of paper board falling under Chapter 48 of the Central Excise Tariff Act, 1985 and claimed refund of Rs.47,59,801/- being the difference between duty paid and the duty payable on the basis of concessional rate of duty at 50% available in terms of Notification No.108/81-CE dated 24.04.1981. The appellants paid the duty for the period 19.08.84 to 08.11.84 under protest on denial of the benefit by the department. On an appeal, the Tribunal vide its Order No. 1018/90-C dated 12.09.90 decided in favour of the appellants and held that appellants are entitled to refund. The appellant filed the refund claim on 01.11.90. Meanwhile, the department filed the appeal before the Supreme Court which was dismissed by the Apex Court in C.A.No.640/1991 dated 20.02.91. The

Asst. Commissioner sanctioned refund of Rs.46,67,329/- and credited it to the consumer welfare fund on the ground of unjust enrichment and the balance amount was ordered to be credited as it was debited under RG-23A (Part-II). On appeal, the first appellate authority upheld the Asst. Commissioner's Order. On further appeal, the Tribunal vide Order No.1252/2002 dated 27.09.2002 allowed the appeal with consequential relief to the appellant. The department appealed to Hon'ble High Court of Andhra Pradesh and the appeal was dismissed. Further, appeal to the Supreme Court by the department is in C.A.No.1351 of 2005 which was admitted but no stay was granted. Hence, the Asst. Commissioner granted refund of Rs.46,67,329/- and ordered the balance of Rs.92,472/- to be credited to CENVAT account of the appellant. The appellant thereafter claimed interest on this amount for the period 26.08.1995 to 17.07.2006 vide their letter dated 31.08.2007 which was rejected by the Asst. Commissioner vide Order No. C. No. V/48/18/03/2002 - Refunds dated 13.11.2007. On an appeal, the first appellate authority remanded the matter to the Asst. Commissioner who, again rejected the interest on the ground that department's appeal is pending before the Supreme Court.

3. Aggrieved, the appellant preferred an appeal before the first appellate authority who, vide the impugned order, sanctioned refund from the date of the Tribunal's order holding unjust enrichment would not apply i.e., 27.09.2002 only and has rejected interest from 26.08.1995 to 27.09.2002. Hence, this appeal. Learned counsel takes us through the provisions of Section 11BB which are as follows:

> "***Section 11BB. Interest on delayed refunds*** *--- If any duty ordered to be refunded under sub-section (2) of section 11B to any applicant is not refunded within three months from the date of receipt of application under sub-section (1) of that section, there shall be paid to that applicant interest at such rate, not below five per cent and not exceeding thirty per cent per annum as is for the time being fixed by the Central Government, by Notification in the Official*

Gazette, on such duty from the date immediately after the expiry of three months from the date of receipt of such application till the date of refund of such duty :

Provided that where any duty ordered to be refunded under sub-section (2) of section 11B in respect of an application under sub-section (1) of that section made before the date on which the Finance Bill, 1995 receives the assent of the President, is not refunded within three months from such date, there shall be paid to the applicant interest under this section from the date immediately after three months from such date, till the date of refund of such duty."

4. He submits that their application was made prior to the introduction of Section 11BB and therefore, in terms of the proviso to Section 11BB, the interest gets payable after 3 months of the date on which the Finance Bill 1995 was assented by the President of India, i.e., 3 months after 26.05.1995. Therefore, the refund is payable from 26.08.1995 onwards.

5. Learned departmental representative reiterates the findings of the impugned order.

6. We have carefully examined the records of the case and the submissions on both sides. The short point to be decided is whether the appellant is entitled to interest on refund from 26.08.1995 (i.e., three months after the Finance Bill 1995 was assented to by the President) or from 27.09.2002 when the CESTAT ruled that the appellant is entitled to refund and the provisions of unjust enrichment would not apply. The findings of the first appellate authority in Paragraphs 5 & 6 of the impugned order are as follows:

"5. I have carefully gone through the case records and submissions made. I find that the duty was paid under protest during August, 1984 to November, 1984 and the CESTAT's decision was given in September, 1990 in their favour. The refund had been considered consequent to the decision of the CESTAT but was credited to the Consumer Welfare Fund on grounds of unjust enrichment. Subsequently, again they had to approach the CESTAT which allowed their claim vide Order dated 27.09.2002 and the refund of Rs.47,59,801/- was sanctioned in July, 2006. The provision for payment of interest is contained in Section 11BB which was enacted vide amendment dated 26.05.1995. Therefore, the jurisdictional officer had to look into the statutory provisions for sanction of such interest. Further, the CESTAT has given their order in September, 2002 and payment of interest if any becomes due for consideration after three months from the date of CESTAT's order dated 27.09.2002. It cannot go back to 1984 in the absence of any statutory backing. Therefore, I am of the view that the claim needs to be considered for payment of interest with reference to the date of order of the CESTAT, i.e., 27.09.2002 in terms of the provisions of section 11BB read with Board's Circular relied in their appeal memorandum.

6. The fact that an appeal has been filed before the Apex Court, in my view, will not debar them from claim of interest once the original claim of refund has been sanctioned and paid. Therefore, I dispose of the appeal with a direction to the jurisdictional Assistant Commissioner to consider their claim for interest, with reference to the date of CESTAT's order dated 27.09.2002. Their claim for earlier period is rejected."

7. Clearly, the above findings of the first appellate authority are a clear violation of the proviso to Section 11BB which requires the interest to be paid from 26.08.1995. Interest is payable with reference to the date of application for refund. It does not matter if they were denied refund initially and succeed at some appellate stage. The relevant date will still be the date of application for applications made post 1995. For applications made before, it becomes payable from 26.08.1995 as per the proviso to Section 11BB. The learned first appellate authority has clearly erred in violating the statutory provisions and sanctioning refund from the date he considered fair. The appellant is entitled to interest on refund from 26.08.1995 till the date of payment of refund.

8. The impugned order is set aside and the appeal is allowed.

(Operative part of this order was pronounced in the open court
on conclusion of hearing)

(P.VENKATA SUBBA RAO)
MEMBER (TECHNICAL)

(M.V. RAVINDRAN)
MEMBER (JUDICIAL)

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