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

Appeal No. E/3012/2011
(Arising out of Order-in-Original No.16/2011 (CE) - Commr. dated 12.08.2011 passed by CCCE & ST, Hyderabad-I)

Nizam Sugars Ltd ….. Appellant(s)

Vs.

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

Appearance
Shri R. Muralidhar, Advocate for the Appellant.
Shri B. Guna Ranjan, Superintendent/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: 02.01.2019
Date of Decision: 29.01.2019

FINAL ORDER No. A/30136/2019

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

1. This appeal has been filed against Order-in-Original No. 16/2011 (CE) – Commr. dated 12.08.2011.

2. The facts of the case in brief are that the appellant are a Government of Andhra Pradesh undertaking engaged in manufacture of sugar. Sugar factories were given an incentive scheme by the Ministry of Food and Civil Supplies vide letter F.No.3(2)/86-PC/Vol-II dated 04.11.1987. During the period, there were two types of clearances of sugar. Levy sugar to be cleared at a lower rate fixed by the Government and free sale sugar which could be sold at a higher market determined price. As per the incentive scheme, sugar units were required to remit excise duty as per the rate applicable to levy sugar and were entitled to retain the difference in the excise duty between the levy and free sale sugar. The excise duty amount so retained was to be used for payment of term loans, etc. Corresponding

exemption notifications were issued for basic excise duty vide notification 14/89 dated 01.03.1989 and for additional excise duty as per notification 103/89 dated 01.03.1989. The appellants were collecting Rs.71 per quintal from their customers on free sale sugar and were paying only Rs.38 per quintal to the excise department. The provisions of Sec.11D were introduced in 1991 and for the period in question viz., September, 1991 to August, 1993, the department issued a show cause notice on 27.02.1996 demanding that the amounts collected from their customers as excise duty and by them may be remitted to the Government as per Sec.11D. There was no allegation in the show cause notice that the conditions of the scheme formulated by the Government were not fulfilled or the amounts so retained were not used for the purpose for which the scheme was intended. After due process the adjudicating authority confirmed the demand vide Order-in-Original No. C Ex 22/97 dated 22.10.1997 and the appellant appealed against the same. CESTAT vide Final Order No.1511/1999 dated 18.06.1999 remanded the matter to the original authority holding as under:

> *"We set aside the order in original impugned and remand the matter to the original authority for being <u>kept in abeyance till recovery mechanism is enacted by competent authority under law</u>. Thus the appeal is allowed by remand."*

3. Thereafter, in Finance Act, 2000 a recovery mechanism under Sec.11D was provided w.e.f. 20.09.1991. The jurisdictional Asst. Commissioner initiated denovo proceedings on 06.04.2011 i.e., after 11 years by citing the provisions of the amended Sec.11D. After due process, the Commissioner, vide impugned order dated 12.08.2011, confirmed the demand for recovery of the differential amount under Sec.11D. Learned counsel for the appellant submits that in the case of Kisan Sahakari Chini Mills Ltd [2011 (273) ELT 289] the Tribunal-Delhi has, in an identical case, held that once it is not in dispute that whatever amount was collected by the appellant was in terms of

the said scheme, one fails to understand how the said amount can be considered as an amount of duty in excess and recovered under Sec.11D. He submits that this decision was subsequently affirmed by the High Court of Allahabad. He fairly submits that there were also contrary decisions of High Courts. On an identical case in the case of Jalna Sahakari Sakhar Karkhana Ltd [2017 (356) ELT 552 (Bom.) with regard to the exact same scheme by a sugar factory the Hon'ble High Court of Bombay held that the assessee was bound to deposit excess amount with the Government under Sec.11D. Similarly, in the case of K. Sahakari Ch. Mills [2014 (299) ELT 275 (Allahabad)] the Hon'ble High Court of Allahabad while referring to the exact same scheme held that assessee cannot retain the differential amount and is bound to deposit the same under Sec.11D. Both these judgments of the Hon'ble High Court of Bombay and Hon'ble High Court of Allahabad relied on the judgment of the Hon'ble Apex Court in the case of Kisan Sahakari Chini Mills [2005 (182) ELT 26 (SC)].

4. Learned counsel for the appellant submits that in a similar though not identical case of New Holland Tractors India Pvt Ltd [2017 (347) ELT 7 (All.)] the Hon'ble High court of Allahabad held that where the assessee was collecting the excise duty more than it had paid from the customers due to incentive granted to it, they are not bound to deposit such amount under Sec.11D of the Central Excise Act.

5. Learned departmental representative takes us though the provisions of Sec.11D and submits that these provisions were introduced on 20.09.1991 and the demand is for the period post the introduction of Sec.11D. In the first round of litigation Sec.11D did not have provisions for recovery of the amounts if the amounts collected as representing excise duty from the buyer were not deposited by the assessee. These were introduced in 2000 and

were made applicable w.e.f. 1991. Therefore, in the first round of litigation the original authority was asked to keep the proceedings till the provisions of recovery were set up. However, the provisions of Sec.11D did not specify time within which the demand has to be raised.

6. We have considered the arguments on both sides and perused the records and we find that with regard to the applicability of the provisions of Sec.11D where the incentive was given to the assessee as per some scheme under which they could collect excise duty at higher rate and deposit a similar amount with the department, we find that there are judgments and decisions holding both views. In this very case, in the earlier round of litigation, CESTAT remanded the matter to the adjudicating authority only to wait for introduction of a recovery mechanism under Sec.11D. In a similar case of New Holland Tractors India Pvt Ltd (supra) the Hon'ble High Court of Allahabad held that the differential amount need not be deposited under Sec.11D. On this exact scheme of sugar factories both the Hon'ble High Court of Bombay in the case of Jalna Sahakari Sakhar Karkhana Ltd (supra) and the Hon'ble High Court of Allahabad in the case of K. Sahakari Ch. Mills (supra) held that the applicant is liable to deposit the entire sum collected from the purchasers and cannot be permitted to retain the differential amount of duty. We have also considered the argument of the learned counsel that the Asst. Commissioner has given them a letter almost 11 years after the amendment to Sec.11D was made providing for recovery of differential amounts. This, indeed, is a very long time. We, however, find that this was not the original demand for recovery under Sec.11D. The period in question is September, 1991 to August, 1993 and the show cause notice was issued on 27.02.1996. Thus, it cannot be said that there is inordinate delay in issuing the demand. There certainly was delay in deciding

the case in the remand proceedings after the provisions of Sec.11D were amended retrospectively from 1991. Delays in adjudication either in the original or in the remand proceedings itself will not amount to delay in issuing the demand. There is no time limit prescribing within which an adjudication, after denovo proceedings has to be completed. Similarly, there is no time limit within which the appeals have to be disposed of. Such delays are certainly highly undesirable but they do not vitiate the proceedings of the adjudication nor do they override the statutory provisions of Sec.11D. We, therefore, are unable to accept the contentions of the appellant that delay in taking up the adjudication proceedings denovo would vitiate the demand under Sec.11D. In view of the above, we find that the demand under Sec.11D in the impugned order is liable to be upheld and we do so.

7. The impugned order is upheld and the appeal is rejected.

(Pronounced in the Open Court on 29.01.2019)

(P.VENKATA SUBBA RAO)
MEMBER (TECHNICAL)

(M.V. RAVINDRAN)
MEMBER (JUDICIAL)

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