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

Appeal No. E/30487/2018 & E/30736/2018

(Arising out of Order-in-Appeal No. HYD-EXCUS-SC-AP2-0139-17-18 dt. 15.12.2017 passed by Commissioner of GST & Central Excise (Appeals – II), Hyderabad)

M/s Sowbhagya Biotech Pvt. Ltd., ...Appellant(s)

Vs.

Commissioner of Central Tax,
Secunderabad - GST .....Respondent(s)

Appeal No. E/30736/2018

(Arising out of Order-in-Appeal No. HYD-EXCUS-SC-AP2-0271-17-18 dt. 22.03.2018 passed by Commissioner of GST & Central Excise (Appeals – II), Hyderabad)

M/s Sowbhagya Biotech Pvt. Ltd., ...Appellant(s)

Vs.

Commissioner of Central Tax,
Secunderabad - GST .....Respondent(s)

Appearance
Shri Y. Sreenivasa Reddy, Advocate for the Appellant.
Shri Arun Kumar, Shri A.V.L.N. Chary, (ARs) for the Respondent.

Coram:
Hon'ble Mr. P. Venkata Subba Rao, Member (Technical)

Date of hearing: 13/02/2019
Date of decision: 28/03/2019

FINAL ORDER No. A/30439-30440/2019

[Order per: P. Venkata Subba Rao]

These two appeals are filed by the appellant on same issues and hence are being disposed of together.

2. Heard both sides and perused the records.

3. The facts of the case in these two appeals are as follows: Appeal No. E/30487/2018 has been filed against the rejection of refund claimed by the appellant amounting to Rs. 7,10,541/- paid by them during the period February and March, 2016 in respect of which they filed a refund claim on 12.05.2017. The facts of the case in brief are that the appellants are manufacturers of Natural Fertilizers, Microbial based Bio-Fertilizers and were manufacturing a product called Cereal Protein Hydrolysate liquid for use in agriculture. An investigation was initiated by the anti-evasion wing of the Commissionerate who were of the opinion that product deserved to be classified under chapter 38 and accordingly the differential duty needs to be collected from them. During the course of investigation itself, the appellant paid the entire amount of excise duty along with interest and penalty. Thereafter, the anti-evasion wing of the Department issued a letter confirming that on being satisfied about the payments made by the appellant, the competent authority was pleased to close the issue for the period, without show cause notice, under the provisions of Section 11AC of the Central Excise Act, 1944 read with

Para 3.1 of the Board's Instructions File No. 137/46/2015-ST dated 18.08.2015. In other words, the entire investigation and subsequent proceedings have concluded with the appellant paying the differential duty interest and penalty and the department accepting it without issuance of show cause notice under Section 11AC. Thereafter, the appellant filed a refund application on 12.05.2017 arguing that their products deserve to be classified under Central Excise Tariff Heading 3101 and that this issue was earlier taken up by the department and decided in their favour and during enquiry, they paid the entire amount of duty interest and penalty during the investigation to avoid litigation and the same may be refunded to them. Learned Counsel for the appellant would argue that any amount paid during the investigation should be treated as a deposit and the same needs to be refunded to them. Therefore, the entire amount should have been refunded to them.

4. After following due process, the lower authority rejected the refund claim on three grounds:

i) The differential Excise duty, interest and penalty have been correctly paid in accordance with the provisions of Central Excise Law.

ii) The same were not paid under protest and were hit by limitation of time under Section 11B of the Central Excise Act.

iii) No evidence was submitted, along with the refund claim to prove that the burden of duty, interest and penalty claimed as refund is not passed on to any other person.

5. Aggrieved, the appellant preferred an appeal before the First Appellate Authority who upheld the order of the lower authority and rejected the appeal. Hence this appeal on the following grounds:

The Micro Nutrient Fertilizers which they manufacture would fall under Central Excise Tariff Heading 3101. During the year 2005, a notice was issued proposing to re-classify the goods under CETH 3105 which was dropped by the Adjudicating Authority. Again in the year 2016, another show cause notice was issued proposing to classify the goods under CETH 3105 in respect of fertilizers and under CETH 3002 in respect of micro organisms. During the intermittent period, the anti-evasion officers made the appellant pay duty on the same fertilizers on the ground that they fall under Central Excise Tariff Heading 3808. Thereafter, the department issued a letter dated 08.08.2016 (referred to above). Since the amounts were wrongly collected, the appellant they have filed the refund claims which were rejected wrongly in view of the following:

i) The amounts were paid by them during investigation and the same are to be treated as deposit and limitation does not apply for such cases.

ii) The refund was claimed in respect of payments made on micronutrient fertilizers which attract 1% of duty under CETH 3105 whereas the department collected duty at 10.3%. Therefore, they entitled to refund on merits.

iii) The tax liability of limitation under Section 11B does not apply to the cases wherein the duty was paid under mistake of law.

6. Regarding this appeal Learned Departmental Representative reiterates the findings of the lower authority and clarifies that the differential duty was not paid under protest by the appellant. It was paid during investigation, it was not paid as a deposit but the entire amount of differential duty, interest and penalty were paid without protest. There is nothing on record to show that the officers had pressurized them to pay the excise duty nor have they filed a letter of protest. In view of Section 11AC, where the assessee agrees with the investigation and pays the differential duty and interest and penalties during investigation itself the proceedings are concluded and therefore no show cause notice can be issued or is required to be issued to the appellant. Had the appellant, at any stage, refused to pay the excise duty or paid it under protest or issued a letter to this effect, a show cause notice could have been issued and subsequent proceedings would have been completed. Even when they were issued a letter by the anti-evasion wing on 08.08.2016 stating that the proceedings in respect of classification is closed in view of them payment of the differential duty, interest and penalty, the appellant has not written any letter stating that the duty was paid under protest or that they dispute the classification and require a show cause notice to be issued. Therefore, the entire issue of classification and differential duty came to a conclusion. Thereafter, after more than one year, they filed refund claim of the duty and other amounts paid by them which is not refundable under the law.

7. <u>E/30736/2018</u>: This appeal is in respect of the amount of Rs. 9,01,404/- paid by the appellant with respect to their Cherlapally

Unit. The amount was paid relating to bio-fungicides which, according to the appellant, are classifiable under 3002 but which according to the department are classifiable under 38089290. During investigation they have paid the duty interest and penalty accepting the department's contention and without issuing any letter of protest. Accordingly, this issue also came to a closure and in terms of the letter dated 08.08.2016 issued by the department (referred to above), the proceedings being concluded under Section 11AC. Even in this case, there is nothing on record to show that the appellant have filed a letter of protest or refuted the letter of the department regarding the conclusion of proceedings under Section 11AC. The amount was paid in February, 2016 and thereafter the refund claim was filed on 13.02.2017. This application for refund was also rejected by the lower authority holding that the payments made by the appellant are not under protest, nor have they refused closure of the case under Section 11AC without issuance of show cause notice. In view of the above, the adjudicating authority held that they are not eligible for any refund of payments made by them voluntarily requesting closure of the case under Section 11AC of the Central Excise Act, 1944.

8. Aggrieved, the appellant appealed before the First Appellate Authority who agreed with the finding of the lower authority and rejected the appeal. Hence this appeal on the following grounds:

i) The refund was rejected holding that the amount paid was relating to bio-fungicides which fall under CETH 3808 and that they had admitted the liability on bio-fungicides and voluntarily paid the amount.

ii) This observation is not correct.

iii) There is no estoppel in the case of taxation. Amounts voluntarily paid can be claimed by the assessee as held in the following cases:

a) [2018-TIOL-1322-HC-MAD-ST]

b) APHC decision dated 12.03.2018 in CRL P No. 2283/2018.

In view of the above, the appeal may be allowed.

9. Learned Departmental Representative reiterates the findings of the lower authority and prays that the appeal may be rejected.

10. I have considered the arguments on both sides and perused the records. As far as appeal No. E/30487/2018 is concerned, the application for refund was filed beyond the period of one year laid down in Section 11B of the Central Excise Act, 1944. The appellant's first contention is that the amounts were paid during the investigation and they should be treated only as deposits and not as payment of duty. This is true as long as the payments were made during the investigation and the show cause notice is issued thereafter under Section 11A. If no show cause notice is issued under Section 11A the amounts deposited need to be refunded to the person who deposited to them. However, an exception has been made under Section 11AC. The purpose of this provision is to avoid unnecessary litigation when the assessee agrees with the department's point of view at the stage of investigation itself. In such a case, the assessee can pay the duty interest and penalty and no show cause notice needs to be issued in terms of Section 11AC. In this case, the appellant had voluntarily paid the amounts during the investigation and without protest. Therefore,

a letter was issued by the department confirming the payments made by the appellant and stating that the proceedings are need to have been concluded under Section, 11AC.

11. The Learned Counsel for the appellant would assert that the dues were paid as they were made to pay. I do not find any evidence to substantiate this. Duties, penalties, interest etc., cannot be simply collected from the appellant; they have to be paid by them. Assuming that the officers investigating the case had pressurized the appellant to pay the amounts during investigation, the assessee could have immediately, sent a letter of protest to the officers or to the Commissioner or CBEC stating that they do not agree with the investigation and therefore Section 11AC would not apply and they need a show cause notice. They would have been issued a show cause notice and the normal Adjudicating proceedings would have followed. They have done none of these. Even after the department issued a letter under Section 11AC there is nothing on record to show that the assessee has protested or indicated that they require a show cause notice or contested the amounts paid. In view of these facts, the entire proceedings have concluded in terms of Section 11AC the assessee having paid the amounts. If the assesee felt, thereafter, that the amounts were wrongly paid and the same should be refunded, they could have filed a refund claim under Section 11B. In Appeal No. 30487/2018, they filed a refund claim under Section 11B well beyond the expiry of one year. Therefore, the refund application is hit by time bar. The assessee pleads that when duty which is not supposed to be paid was under Section 11B limitation of time bar should not apply. In

this case, the appellant was liable to pay duty at a lower rate as per their classification and were liable to pay duty at higher rate as per the department's classification. It is not a case where the assessee is not manufacturing excisable products and were made to pay excise duty. Section 11B is meant precisely meant for cases where duty of excise and interest were paid in excess and the same has to be claimed as refund. If the Learned Counsel's argument is stretched further, there would not be a single case of refund admissible on merits which will be hit by time bar because the admissibility of refund on merits would arise only when duty was paid which was not required to be paid or was paid in excess is the amount which was required to be paid. Section 11B is a counter part of Section 11A where duty was required to paid but was not paid and department can issue a demand notice. In both cases, despite merits of the case (refund or demand, as the case may be) a time limit has been prescribed by the Parliament under the relevant sections of the Act which must be adhered to. The cases relied upon by the appellants covered those cases where the refund outside payable at the ambit of Central Excise Act itself. Further, if Section 11B does not apply to the appellant's case then an application under Section 11B is not the means of claiming the refund and the officer has no powers to sanction the claim under Section 11B. In conclusion, wherever the duty has been paid in excess of what was required to be paid or has been claimed to be paid in excess of what have been required to paid, the provisions of Section 11B apply in full force. Therefore, the refund in appeal No. E/30487/2018 does not survive as it is hit by time barred. As far as appeal No. E/30736/2018 as far as this appeal is concerned, the refund application was filed within one year but it was rejected on the ground that the appellant has agreed to the classification made during investigation and hence same cannot be reopened. There is no decision on merits of the claim of the appellant regarding the classification of products. In view of the above, I find this is a fit case to be remanded back to the adjudicating authority for deciding the claim of the appellant on merits. In view of the above, I pass the following order:

i) Appeal No. E/30487/2018 is rejected and the impugned order is upheld.

ii) Appeal No. E/30736/2018 is remanded to the Original Authority to decide the application for refund on merits including the classification of the product.

12. The appeals are disposed of as indicated herein above.

(Order pronounced in open court on 28/03/2019)

(P. VENKATA SUBBA RAO)
MEMBER(TECHNICAL)

Lakshmi….