IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, KOLKATA
EASTERN ZONAL BENCH: KOLKATA

Appeal No.E/76016/2015, CO-75888/2015

(Arising out of Order-in-Appeal No.05/KOL-III/2015 dated 08.05.2015 passed by the Commissioner of Central Excise (Appeal-II), Kolkata)

Commr. Of Central Excise, Kolkata-III
Applicant (s)/Appellant (s)

Vs.

M/s. NTC Industries Ltd. Respondent (s)

Appearance:
Shri S.S.Chottopadhyay,Suptd.(AR) for the for the Appellant/Applicant (s)
Shri D.K.Dutta, Consultant for Respondent (s)

CORAM:
Hon'ble Shri P.K.Choudhary, Member (Judicial)

Date of Hearing:- 26.02.2018

Date of Pronouncement:24.04.2018

ORDER NO. FO/75834/2018

Per Shri P.K.Choudhary

1. Briefly stated the facts of the case are that the assessee is engaged in the manufacture of Cigarette classifiable under Chapter 24 of the first schedule to the Central Excise Tariff Act, 1985. In the Budget 2012-13 vide Finance Bill 2012 the basic Excise duty on cigarette beyond 65 mm length was enhanced. By the Departmental clarification vide MF (DR)DO letter F No. 334/1/2012 TRU dated 01.06.2012, new rate was effective from 17.03.2012. Subsequently, CBEC vide Circular No. 981/05/2014-CX dated 10.02.2014 clarified that the enhanced rate of duty would be effective from 28.05.2012 and not 17.03.2012. Accordingly, the assessee claimed refund of duty on 15.07.14, relying upon the Board's Circular. The Adjudicating authority

rejected the refund claim in terms of Section 11B (1) of the Central Excise Act, 1944.

By the impugned Order, the Commissioner (Appeals) allowed the appeal by setting aside the Adjudication Order with consequential relief to the assessee. Hence, the Revenue filed this appeal.

2. Heard both sides and perused the appeal records.

3. The Adjudicating authority observed that the incidence of differential duty amount has not been passed on to the buyers of the assessee and the instant claim is not hit by unjust enrichment. But, the refund claim was rejected on the ground that the assessee have paid the excess duty from the Cenvat account on 30.06.2012 and 06.07.2012, whereas the claim has been submitted on 15.07.2014 i.e. beyond the period of one year.

4. I find that CBEC vide Circular dated 11.02.2014 clarified that the enhanced rate of duty was effective from 28.05.2012 and not from 17.03.2012. The refund claim was filed for the period from 01.04.2012 to 30.06.2012. I find that as per Board's Circular, old rate of duty is payable prior to 28.05.2012. The relevant portion of the findings of the Commissioner (Appeals) is reproduced below :

> *"6. Moreover, the period of time limit has to be reckoned with from the date on which 'cause of action' has arisen. In the instant case, the 'cause of action' has arisen on account of CBEC circular (supra) dated 11.02.2014 and consequentially refund claim was filed on 15.07.2014 which is well within time limit. The period of limitation has to be reckoned with only from the date of 'cause of action' is supported from the decisions in the case of Karnik Maritime Pvt. Ltd. v. CCE, Mumbai –IV [2007 (6) S.T.R. 314 (Tri.Mumbai) wherein it is held as under –*

"Limitation commences from date of discovery of error, as prescribed by Section 17 of Limitation Act, 1963 – Period of six months prescribed by Section 11 B of CEA, 1944 found inapplicable".

7. I also find that in the case of Jubilant Enterprises Pvt. Ltd. [2014(35) STR 430 (Tri.-Mumbai)] involving similar facts where the case of refund arose because CBEC's clarification that service tax not payable the Hon'ble CESTAT held that , "in this case, the appellant has paid service tax during the impugned period for which they are not required to pay service tax at all as clarified by C.B.E & C. As the payment made by the appellant is not of service tax, therefore, as held by this Tribunal in the case of Shankar Ramchandra Auctioneers (supra) the provisions of Section 11B of the Central Excise Act are not applicable. Therefore, the refund claim filed by the appellant is not time-barred. The case law relied upon by the ld. AR in Mafatlal Inds. (supra) is not relevant to the facts of this case."

8. Under the above facts and circumstances and following the case laws discussed hereinbefore, I am of the considered opinion that the refund application was filed in time and the provisions of Section 11B of the Central Excise Act, 1944 are not applicable to the facts of this case. Therefore, the refund application rejected as time-barred by the lower authority is not correct.

9. The appellant has raised a vital question that the lower authority has travelled beyond the scope of show cause notice by rejecting the refund on limitation which was not indicated in the impugned notice. I also find that in SCN only unjust enrichment issue was raised for rejection of refund but in OIO, the lower authority admitted in para 4 of 'Discussion and Findings' that there was no unjust enrichment and took a new stand on ground of limitation to reject the refund claim which was not proposed in SCN. I find that in the case of Commissioner of C.Ex, Mumbai-IV vs. Beekalene Fabrics Pvt. Ltd. [2008(229) ELT 659 (Bom.)] Involving refund the Mumbai High Court has held that when the ground of limitation is not indicated in the show cause notice, the adjudicating authority does not have the powers to reject the refund by travelling beyond the scope of Show Cause Notice. In this case the refund *claim was rejected on the limitation not indicated in the SCN and the Commissioner (Appeals) also remanded the matter to the original authority with the direction to dispose of only on the grounds indicated in the show cause notice issued to the assessee while holding that the adjudicating authority does not have the powers to travel beyond the scope of Show cause Notice. On remand the lower authority again rejected the refund on limitation and on appeal the same was confirmed. The Tribunal consideroing the entire facts has held that on the ground of limitation, the application could not have been rejected. The Mumbai High Court held that, "In our opinion, in view of the facts recorded by the appellate authority in the first round of litigation, which we have quoted above, it was not permissible for the authority to record contrary finding in relation to the limitation without challenging the order passed by the appellate authority at first round. Therefore, we do not find any fault with the order impugned in the appeal. Appeal is therefore, rejected".*

5. In view of the above discussions, I do not find any reason to interfere with the Order of the Commissioner (Appeals). It is seen that the appellant paid the amount by debiting their cenvat account. Hence, they are entitled to re-credit the refund amount to their cenvat account. In view of the above discussions, the impugned order, passed by the Commissioner (Appeals) is upheld subject to that the assessee would re-credit the refund amount in their cenvat account. The appeal filed by the Revenue is disposed of in the above terms. Cross Objection is also disposed of.

(Pronounced in the open court on 24.04.2018)

S/d.
(P.K.Choudhary)
MEMBER (JUDICIAL)

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