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

REGIONAL BENCH - COURT NO.2

Excise Appeal No.83 of 2011

(Arising out of Order-in-Appeal No.08/SH/CE(A)/GHY/10 dated 25.11.2010 passed by Commissioner(Appeals) of Customs & Central Excise, Guwahati.)

Commissioner of Central Excise, Shillong
(Morello Compound, Shillong, Meghalaya.)

...Appellant

VERSUS

M/s. Numaligarh Refinery Limited
.....Respondent
(P.O.NRL Complex, Dist:- Golaghat, Assam-785699.)

APPEARANCE

Shri K.Chowdhury, Authorized Representative for the Appellant (s)

Shri Arvind Baheti, Chartered Accountant for the Respondent

CORAM: HON'BLE SHRI P.K.CHOUDHARY, MEMBER(JUDICIAL)
HON'BLE SHRI P.V.SUBBA RAO, MEMBER(TECHNICAL)

FINAL ORDER NO. 75807/2021

DATE OF HEARING : 14 September 2021
DATE OF DECISION : 16 December 2021

P.K.CHOUDHARY :

The Instant appeal has been filed by the Revenue against 'Order-in-Appeal' ('OIA') dated 25 November 2010 passed by the Commissioner (Appeals), Guwahati, setting aside the 'Order-in-Original' ('OIO') dated 10 January 2008 and dropping the demand for interest of Rs. 73,15,99,057/- under Section 11AB(1) of the Central Excise Act, against M/s. Numaligarh Refinery Limited, the respondent herein.

2. Briefly stated, the facts of the case are that the Respondent is a Public Sector Undertaking engaged in the manufacture of Petroleum products having its refinery at Golaghat, Assam. The Respondent was erroneously refunded the Additional Excise Duty (AED) of Rs.111,51,58,051/- levied on HSD under Section 133 of the Finance Act, 1999 amongst other duties of excise, pursuant to Notification No.33/1999 dated 8 July 1999 for the period 1 May 2000 to 31 May 2001. Subsequently, proceedings were initiated for recovery of the said erroneous refund vide 12 (Twelve) nos. of Show-cause Notices and these were confirmed by the Jurisdictional Commissioner vide Order Nos. 8/2002 to 19/2002 all dated 28 February 2002. The respondent did not get clearance from the committee on disputes to contest the Order dated 28 February 2002 and consequently the respondent made good the entire amount of erroneous refund in two tranches – Rs. 9,20,01,837/- was paid on 07-08-2001 & 17-09-2001 and Rs. 102,31,56,214/- was paid on 30-05-2005. Thereafter, proceedings were initiated against the Respondent for recovery of interest aggregating Rs. 73,15,99,057/- under Section 11AB of the Central Excise Act on the erroneously refunded amount vide Show-cause Notice dated 23 October 2007. The adjudicating authority vide 'OIO' dated 10 January 2008 confirmed the demand for interest under Section 11AB of the Central Excise Act. The said 'OIO' dated 10January 2008 was carried in appeal by the respondent.The Ld. Commissioner (Appeals) allowed the appeal in entirety on the point of non-applicability of Section 11AB as it existed upto 10 May 2001, in the absence of any intent to evade. The operative part of the 'O-I-O' set out below, for ready reference.

> *"17. I find that the interest as demanded in the present case under Section 11AB of*

> *Central Excise Act, 1944 is arising out of the amount of AED on HSD erroneously refunded to the Appellant under Notification No. 33/99-CE and subsequently recovered which pertains to the goods cleared during the period May 2000 to May 2001. As there was no fraud/collusion/suppression of facts etc., with intent to evade payment of duty hence there was no proposal in the Show-cause Notice for imposing penalty, hence Section 11AB as it stood on or before 11.05.2001 is not applicable in this case."*

3. The learned Authorized Representative appearing for the Revenue has assailed the 'OIA' dated 25 November 2010 by reiterating the following grounds of appeal urged in the appeal memo.

(a) The issue of grant of erroneous refund was decided by the Commissioner vide Order dated 28 February 2002. Since the erroneous refund became payable only after amendments were made to Section 11AB (effective 11 May 2001), the limitation placed under the amended Section 11AB(2) does not bar the department from demanding interest under the amended Section 11AB(1).

(b) The expression "duty has become payable" or "ought to have been paid" as appearing in amended Section 11AB(2) only refers to short levy or short payment or non-levy or non-payment but does not cover erroneous refund.

(c) Two nos. of refund claims for the month of April 2001 and May 2001 were sanctioned to the respondent only on 15 May 2001 and 15 June 2001 therefore, the recovery of the erroneous refund was in any event covered by the amended Section 11AB by drawing support from the decision of the Tribunal in **Man Structurals Ltd. reported in 2004 (163) ELT 392**.

(d) The Commissioner (Appeals) did not take into consideration the Board Circular No. 655/46/2002 dated 26 June 2002.

It is also contended by the Revenue that the provision pertaining to the Central Excise Act, including those relating to levy of interest i.e. Section 11AB applies *mutatis mutandis* in the matter of refund of 'AED' by virtue of Section 133(3) of the Finance Act, 1999.

4. Per contra, the learned Counsel for the Respondent had made the following alternate submissions in their written notes of arguments, to counter the grounds urged in the departmental Appeal.

(a) It is a settled law that judicial decisions/orders take effect retrospectively only [Refer – 2008 (230) ELT 385 (SC)]. Therefore, although, the adjudication orders declaring the refund of 'AED' as erroneous were passed on 28 February 2002, it takes effect from the date of grant of such erroneous refund as the refund was never due to the respondent at the first place.

(b) The amended Section 11AB(2) carves out an exception from the applicability of whole of Section 11AB(1). Refund under the Act is also of duties paid and therefore, covered by the scope of Section 11AB(2) by drawing support from the decision of the Tribunal in the Case of **Ford India Vs. CCE reported in 2007 (209) ELT 230**.

(c) The expression "duty become payable" or "ought to have been paid" under the amended Section 11AB(2) does not refer to the actual date of payment to determine whether the interest can be charged, by placing reliance on the decision of the Tribunal in the case of **Narmada Chematur Petrochemicals Ltd. Vs. CCe reported in 2004 (178) ELT 929**. Reference was also invited to the decision of the Karnataka High Court in the case of **CCE Vs. Scorpio Engineering – 2015 (322) ELT 667** to contend that the amended Section 11AB is not applicable to the disputed period prior to the amendment. Therefore, the amended Section 11AB could at best apply only to erroneous refund for the month April 2001 and May 2001, which were granted only after 11 May 2001.

(d) The Circular dated 26 June 2002 clarifies that the provision of Section 11AB, cannot be given a retrospective effect based on the date of passing of adjudication orders although pertaining to clearances made prior to the amendment. Therefore, the said Circular does not support the case of the revenue.

(e) In the alternative, it has also been contended that in the absence of any substantive provision for recovery of interest in the statute charging 'AED', no demand for interest can sustain by invoking the provision of Section 11AB of the Central Excise Act not specifically adopted or incorporated under the Finance Act, 1999 whereby 'AED' was imposed. Reference in this regard has been invited to the decision of the Hon'ble Supreme Court in Orient Fabrics - 2003(158) ELT 545.

5. Heard both sides through video conferencing and perused the case records.

6. The crux of the issue before us relates to applicability of amended Section 11AB (effective 11 May 2001)on account of an erroneous refund of the 'AED' for the period April 2000 to May 2001. Section 11AB was inserted in the statute book only with effect from 28 September 1996. Intention to evade was an essential concomitant under the pre-amended Section 11AB(1), however, the said requirement was done away with under the amended Section 11AB(1). In the instant case, it is an undisputed position clearly forthcoming from the case records that the erroneous refund of 'AED' to the respondent was not attributable to any mala fide or intent to evade on the part of the respondent thereby ruling out the applicability of the pre-amended Section 11AB(1). Further, the amended Section 11AB(2) (effective 11 May 2001) conspicuously provides as under:

> *"The provisions of sub-section (1) shall not apply to cases where the duty had become payable or ought to have been paid before the date on which the Finance Bill, 2001 receives the assent of the President."*

7. The Board vide Circular dated 26 June 2002 taking note of the decision of the Hon'ble Supreme Court in the case of MP Tapesrendered in the context of Section 11AB, clarified that the date of passing of the adjudication orders have no bearing in the matter of interpretation of the expression duty become payable or ought to have been paid. Similarly, the Tribunal in **Narmada Chematur case** while interpreting the expression duty became payable or ought to have been paid took a view that this expression cannot be stretched upto the point of time when the duty which remained payable was actually paid. In other words, the actual date of payment of duty was not relevant for interpreting the expression duty became payable or ought to have been paid, which is to be determined with reference to the date of arising of the duty liability. Conversely in the matter of grant of erroneous refund, the duty liability can be said to arise on the date

of grant of such refund itself as has been observed by the Tribunal in **Ford India case (supra)**. Therefore, the contentions of the revenue as regards passing of the adjudication orders holding the refund as erroneous in February 2002 does not allow them to take recourse to amended Section 11AB(1) in view of the restrictions contained in the amended Section 11AB(2). The proposal in the Notice to recover interest from the date of grant of erroneous refund as evident from the annexure thereof itself militates against the revenue's contention of the interest liability accruing under the amended Section 11AB basis the date of the adjudication order.

8. The other contention of the Revenue that the amended Section 11AB(2) does not extend to erroneous refund also cannot be accepted as the amended Section 11AB(2) circumscribes the whole of 11AB(1) including grant of erroneous refund and refund under the Central Excise Act is also of duties paid only. However, we observe that the refund of 'AED' for the month of April 2001 and May 2001 was granted to the Respondent only after 11 May 2001. Therefore, the liability to pay back such erroneous refund also arose only after 11 May 2001. Consequently, the amended Section 11AB(1) shall apply in the matter of recovery of interest on such erroneous refund in respect of April 2001 and May 2001 and to that extent the 'OIA' dated 25 November 2010 deserves to be modified.

9. We are not inclined to accept the alternate contention of the Respondent as regards lack of any substantive provision for recovery of interest in the statute charging 'AED'. The provision of Section 133(3) of the Finance Act, 1999 incorporates by reference, all such provisions of the Central Excise Act in relation to levy and collection of 'AED'. The expression collection is wide enough to include collection of erroneous refund of 'AED'. The decision cited by the Respondent does not deal with 'AED' levied under Section 133 of the Finance Act, 1999 and therefore, does not have any application to the issue at hand.

In view of the above discussions, the Appeal filed by the Revenue is partly allowed.

(Order pronounced in the open court on 16 December 2021.)

Sd/
(P.K.CHOUDHARY)
MEMBER (JUDICIAL)

Sd/
(P.V.SUBBA RAO)
MEMBER (TECHNICAL)

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