IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, KOLKATA

REGIONAL BENCH – COURT NO.2

Excise Cross Objection No. 77242 of 2018
And
Excise Appeal No. 77404 of 2018

(Arising out of Order-in-Appeal No.236/SLG-CEX/2018 dated 28.03.2018 passed by Commissioner, Siliguri Appeals)

M/s. Strescon Industries Ltd.
(Chamagram Railway Station Yard, P. O. Chamagram, P. S. Baishnabnagar, Dist. Malda, W. B. 732139)

Appellant

VERSUS

Commr. of CGST & CX, Siliguri
(C. R. Building, Hakimpara, Haren Mukherjee Road, Siliguri-734001)

Respondent

APPEARANCE :
Mr. Sovantanu Bhattacharya, Advocate for the Appellant
Mr. P. K. Ghosh, Authorized Representative for the Respondent

CORAM:
HON'BLE MR. R. MURALIDHAR, MEMBER (JUDICIAL)

FINAL ORDER NO.75844/2024

Date of Hearing : 1st May 2024
Date of Decision: 1st May 2024

PER R. MURALIDHAR:

Before taking up this Appeal for disposal, I was informed that the issue as to whether refund can be claimed without opting of provisional assessment in such cases has been referred to the Larger Bench in the case of Super Auto (I) Ltd. Vs. Commr. of Central Excise, Faridabad-2019(370) E.L.T. 535 (Tri.-Chan.).

2. On going through the case law, I find that the matter has now been referred to the Larger Bench. However, on going through the Show Cause Notice and the Orders, I find that the refund was not rejected on the ground of the Appellant not having opted for provisional assessment. The sole ground on which the refund claim has been rejected is purely on account of

the delayed filing of the refund claim. Therefore, I do not find any reason to keep the present Appeal pending awaiting the LB decision in the case of Super Auto (I) Ltd. Accordingly, this Appeal has been taken up for final disposal with the consent of both the sides.

3. The Appellant has made supplies to Indian Railways. They have cleared their P.S.C. Sleepers in the month of April 2010. The relevant duty of Rs. 2,38,787/- was paid by them on 5th May 2010. On the ground that due to de-escalation, the Railways have paid less Excise Duty, the Appellants have claimed the Refund of Rs. 2,38,787/- vide their refund Application dated 07/07/2011. The Department issued Show Cause Notice on the ground that the refund claim was filed after more than one year from the date of payment and hence in terms of Section 11B of the CEA, 1944, they are not eligible for the refund claim. After due process, the lower authorities dismissed the refund claim on account of time bar in terms of Section 11B of CEA, 1944. Being aggrieved, the Appellant is before the Tribunal.

4. The Learned Advocate submits that as per the tender issued by the Indian Railways and the contract given by them, there is a price variation clause where the final price is either lower or higher depending on various factors which will be determined by Railways at a later date. In this case, they have cleared the goods on payment of duty adopting their normal assessable value. Subsequently, the Railways have decided that the prices/costs have come down for the raw materials used by the Appellant. Therefore, their bills were passed with a lower value both towards the basic price and towards the duty component. Therefore, the Appellant has paid excess Excise Duty of Rs. 2,38,787/-. After they have come to know about this de-escalation details from the Railways, immediately, they have filed the refund claim on 07/07/2011. The Learned Advocate submits that since there is a clear proof that the Railways have paid them less Excise duty for the clearance made in April 2010, the Department is in error in holding that the refund claim is hit by time bar.

5. The Learned AR submits that from the Show Cause Notice, OIO and OIA, it is clear that the Department has rejected the refund claim solely on account of time bar in terms of Section 11B. The Learned AR submits that since the Appellant has made the payment of Excise Duty of 5th April 2010, they should have filed the refund claim latest by 4th May 2011 whereas the Appellant has filed the refund claim only on 07/07/2011. Therefore, he justifies the orders passed by the lower authorities.

6. Heard both sides and perused the Appeal Papers, all the documentary evidence placed by the Appellant and the statutory provisions pertaining to the case.

7. The relevant portion of Section 11B reads as under:-

> ***SECTION [11B. Claim for refund of [duty and interest, if any, paid on such duty]****.* — (1) <u>*Any person claiming refund of any [duty of excise and interest, if any, paid on such duty] may make an application for refund of such [duty and interest, if any, paid on such duty] to the [Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise] before the expiry of [one year] [from the relevant date]*</u> *[[in such form and manner] as may be prescribed and the application shall be accompanied by such documentary or other evidence (including the documents referred to in section 12A) as the applicant may furnish to establish that the amount of [duty of excise and interest, if any, paid on such duty] in relation to which such refund is claimed was collected from, or paid by, him and the incidence of such [duty and interest, if any, paid on such duty] had not been passed on by him to any other person :*
>
> ***Explanation:***
>
> ***(B)*** *"relevant date" means, -*
>
> *(a) in the case of goods exported out of India where a refund of excise duty paid is available in respect of the goods themselves or, as the case may be, the excisable materials used in the manufacture of such goods, -*
>
> *(i) if the goods are exported by sea or air, the date on which the ship or the aircraft in which such goods are loaded, leaves India, or*
>
> *(ii) if the goods are exported by land, the date on which such goods pass the frontier, or*
>
> *(iii) if the goods are exported by post, the date of despatch of goods by the Post Office concerned to a place outside India;*

(b) in the case of goods returned for being remade, refined, reconditioned, or subjected to any other similar process, in any factory, the date of entry into the factory for the purposes aforesaid;

(c) in the case of goods to which banderols are required to be affixed if removed for home consumption but not so required when exported outside India, if returned to a factory after having been removed from such factory for export out of India, the date of entry into the factory;

(d) in a case where a manufacturer is required to pay a sum, for a certain period, on the basis of the rate fixed by the Central Government by notification in the Official Gazette in full discharge of his liability for the duty leviable on his production of certain goods, if after the manufacturer has made the payment on the basis of such rate for any period but before the expiry of that period such rate is reduced, the date of such reduction;

[(e) in the case of a person, other than the manufacturer, the date of purchase of the goods by such person;]

[(ea) in the case of goods which are exempt from payment of duty by a special order issued under sub-section (2) of section 5A, the date of issue of such order;]

[(eb) in case where duty of excise is paid provisionally under this Act or the rules made thereunder, the date of adjustment of duty after the final assessment thereof;]

[(ec) in case where the duty becomes refundable as a consequence of judgment, decree, order or direction of appellate authority, Appellate Tribunal or any court, the date of such judgment, decree, order or direction;]

(f) *in any other case, the date of payment of duty.]*

8. A careful reading of the above provisions would clarify that the refund claim is required to be filed within one year from the *"relevant date"*. In the present case, the relevant date would fall under Explanation "B" and "(f)". Admittedly the Excise Duty has been paid by the Appellant on 5th April 2010. Therefore, this date should be taken as the 'relevant date'. If this date is taken as the relevant date, then the one year period would expire on 4th May 2011.

9. The Learned Advocate submits that the word used in Section 11B is *"may"* make an application for refund. Therefore, It is not a compulsion on the part of the Appellant to file the refund claim within one year. Since the

word used is *"may"* and not *"shall"*, he submits that it is not a mandatory condition to file the refund claim within one year.

10. On going through the statutory provisions of the Act and Rules, it is seen that word *"may"* is used interchangeably with *"shall"* and does not necessarily mean that the word *"may"* used cannot be read as "*shall"*. If the Learned Advocate's contention is taken as correct, that would mean that the refund claim can be made even after many years since no specific mention has been made that the refund claim should be made within one year. This would make the time specified under Section 11B (1) otiose.

11. The Learned Advocate has also not brought in any specific case law wherein Tribunal/High Court or Supreme Court has held that the refund claim can be made even after one year just because the word used is *"may"* instead of *"shall".* Therefore, I am unable to accept this argument of Learned Advocate.

12. On going through the orders of the lower authorities, I find that they have passed a detailed and considered Order wherein they have rejected the refund claim solely on the ground of time bar. I do not find any reason to interfere with the same. Accordingly, the present Appeal is dismissed.

13. Cross Objection also stands disposed off.

(Dictated and pronounced in the open court.)

Sd/-
(R. Muralidhar)
Member (Judicial)

Pooja