CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, MUMBAI

REGIONAL BENCH - COURT NO. I

Excise Appeal No. 85837 of 2015
&
Excise Cross Objection No. 91090 of 2015

(Arising out of Order-in-Appeal No. NGP/EXCUS/000/APPL/227/14-15 dated 22.12.2014 passed by the Commissioner of Central Excise & Customs (Appeals), Nagpur)

Commissioner of Central Excise & Customs, Nagpur-I **.... Appellant**
Telangkhedi Road, Civil Lines, Nagpur – 440 001

Versus

M/s Metalfab Hightech Pvt. Ltd. **.... Respondent**
E 21-25, 33/B-2, MIDC, Industrial Area,
Hingna Road, Nagpur – 440 028

Appearance:

Shri C.S. Vinod, Authorized Representative for the Appellant
Shri Rajesh Ostwal, Advocate for the Respondent

CORAM:

HON'BLE MR. S.K. MOHANTY, MEMBER (JUDICIAL)
HON'BLE MR. M.M. PARTHIBAN, MEMBER (TECHNICAL)

FINAL ORDER NO. A/85620/2024

Date of Hearing: 14.06.2024
Date of Decision: 14.06.2024

PER: S.K. MOHANTY

Briefly stated, the facts of the case are that the respondents herein are, *inter alia*, engaged in the manufacture of Boiler supporting structures, parts of rolling mill, parts of turbine, parts of cement machinery etc., falling under Chapter 84 of the First Schedule to the Central Excise Tariff Act, 1985. The respondents avail CENVAT Credit of duty paid on the inputs used in the manufacture of such finished goods. In the present case, the respondents had cleared the finished goods without payment of central excise duty under the International

Competitive Bidding (ICB) in terms of Sr. No. 336 of Notification No. 12/2012-C.E. dated 17.03.2012. Clearance of goods under ICB does not attract payment of central excise duty. The Directorate General of Foreign Trade (DGFT) under the Ministry of Commerce and Industry vide Circular No. 16(RE-2012/2009-2014) dated 15.03.2013 has clarified that supply of goods under ICB should be treated as deemed export. Since, the goods supplied by the respondents were exempted from payment of central excise duty, the respondents were not in a position to utilize the CENVAT Credit taken by them on the inputs and input services received in their factory premises. Therefore, they had filed an application under Rule 5 ibid claiming refund of accumulated CENVAT Credit available in the Books of Account. The refund application filed by the respondents was rejected by the original authority vide order dated 02.05.2014 on the ground that as per Notification No. 27/2012-C.E. (NT) dated 18.06.2012, the refund application was not filed on a quarterly basis and as such, the same is not in consonance with the guidelines provided in the Notification dated 18.06.2012. On an appeal against the said original order, the learned Commissioner (Appeals) vide the impugned order dated 14.12.2014 has set aside the said order and allowed the appeal in favour of the respondents, holding that as per the requirement of Notification dated 18.06.2012, for filing of the refund application on quarterly basis is merely a directory and not mandatory in nature and since the said notification has referred to the provisions of Section 11B *ibid*, the refund claim filed within a period of one year from the relevant date should be considered as proper for the purpose of grant of refund under Rule 5 *ibid*. In support of such observation, the learned Commissioner (Appeals) has relied upon the decision of this Tribunal in the case of *Western Can P. Ltd. Vs. CCE, Mumbai-I, reported in 2011*

(270) ELT 101 (Tri-Mumbai). Feeling aggrieved with the impugned order dated 22.12.2014, the Revenue has filed this appeal before the Tribunal.

2. The present appeal was preferred by Revenue *inter alia,* on the ground that Rule 5 ibid deals with the situation for grant of refund in case of export of goods and the said rule does not provide any benefit with regard to the deemed export. It has further been contended by Revenue that the refund claim is to be lodged by the claimant on quarterly basis and since the learned Commissioner (Appeals) has held that the refund claim can be lodged on yearly basis, such observation are contrary to the statutory provisions.

3. Heard both sides and examined the case records.

4. On perusal of the case records, more specifically the show-cause notice issued by the Department, we find that there is no specific allegation being made that the benefit of refund shall not been available in the case of deemed export. Both the authorities below i.e. the original as well as the first appellate authority have also not dealt with such aspect in their respective orders passed by them. We find that for the first time, Revenue has agitated such issue before the Tribunal. With regard to consideration of a particular point, which was not canvassed before the original stage, this Tribunal in the case of *Commissioner of Central Excise & Customs, Nagpur-I Vs. Fabrimax Engineering Pvt. Ltd. – 2016 (344) ELT 920 (Tri-Mumbai)* has held that if certain allegations have not been raised in the show-cause notice, the same cannot be raised at the subsequent stage by the Revenue. The relevant paragraph recorded in the said order is extracted herein below: -

> *"6.3 Firstly, we find that the learned Counsel appearing for the respondent assessee, was correct in bringing to our notice that the show cause notice did not require the respondent assessee to show cause for rejection of the claim on the ground that clearances made to International*

> *competitive bidding cannot be considered as exports. In the absence of such allegation, revenue cannot take this as a ground for setting aside the impugned order. This law is now fairly settled by the Hon'ble High Court of Bombay in the case of Bajaj Auto Limited - 2003 (151) E.L.T. 23. In the said judgment, their Lordships held that Ground in Appeal cannot go beyond the show cause notice."*

We find that the said order of the Tribunal was assailed by Revenue before the Hon'ble High Court of Bombay and the Hon'ble High Court has dismissed the Central Excise Appeal filed by Revenue holding as under: -

> *"3. There is no merit in both the submissions made on behalf of the appellant-department. On a reading of the Notification No. 27/2012, dated 18-6-2012 on which great reliance has been placed by the appellant-department while canvassing that the claim should have been made at the end of the relevant quarter only, it appears that the submission is ill-founded. The procedure for filing the refund claims is prescribed in Clause 3 of the notification, dated 18-6-2012. Clause 3(b) of the notification clearly provides that the refund claim could be filed by the claimant before the expiry of the period specified in Section 11B of the Central Excise Act. We have perused the provisions of Section 11B of the Act. Section 11B of the Act provides that a refund claim could be made by an assessee before the expiry of one year from the relevant date. It is not disputed that in the present case, the refund claim was made by the respondent-assessee before the expiry of one year from the relevant date. The relevant provisions of the notification, especially Clause 3(b) were not considered by the department before raising the said ground. It is apparent from a reading of the notification, dated 18-6-2012 and the provisions of Section 11B of the Act that the refund claim could have been made before the expiry of one year from the relevant date. The finding of the Tribunal that the refund claim made by the respondent-assessee was not time barred is just and proper and cannot be interfered with.*
>
> *4. So also, there is no merit in the submission made on behalf of the appellant-department that the Tribunal was not justified in coming to the conclusion that the clearances made by the assessee to international competitive bidding could be considered as exports. The appellate authority as well as the Tribunal have held that by the show cause notice, the respondent-assessee was not asked to show cause why the clearances made to international competitive bidding cannot be considered as exports. Since the assessee was not asked to show cause on the aforesaid question, the appellate authority and the Tribunal rightly held by relying on the judgment of this Court in the case of Bajaj Auto Limited, reported in [2003 (151) E.L.T. 23] that the grounds in appeal cannot travel beyond the show cause notice."*

5. In view of the fact that the aspect of deemed export for the purpose of benefit under the Rule 5 was not raised at the show-cause notice stage, we are of the view that in terms of the judgement relied upon by the learned Advocate for the respondents, the Revenue's appeal on such ground is liable to be dismissed and accordingly, we dismiss the appeal on such ground.

6. With regards to other aspects raised in the grounds of appeal that the refund application should be filed on quarterly basis and not on yearly basis, we find that the notification at paragraph (2) has stated that the manufacturer shall submit not more than one claim of refund under this Rule for every quarter. On a plain reading of the procedure laid down in the said notification, it transpires that there is no specific restriction having been made that the refund application is to be filed on quarterly basis. On the contrary, reading of paragraph 3(b) in the said notification, it transpires that the refund application shall be filed before expiry of period mentioned in Section 11B *ibid*. Since, Section 11B *ibid* clearly provides that the refund application has to be filed within one year from the relevant date, in our considered view, the condition regarding the time line, has been complied with by the appellant in the present case. We find that the said issue arising out of the present dispute is no more *res integra,* in view of the order passed in the case of *Western Can P. Ltd. (supra)* and the decision of this Tribunal relied upon by the respondents in the case of *Fabrimax Engineering Pvt. Ltd. (supra).*

7. In view of the foregoing discussions, we do not find any merits in the appeal filed by the Revenue. Therefore, the same is dismissed.

8. Cross objection filed by the respondents stand disposed off.

(Dictated and pronounced in open court)

(S.K. Mohanty)
Member (Judicial)

(M.M. Parthiban)
Member (Technical)

Sinha