HON'BLE SRI JUSTICE RAMESH RANGANATHAN

AND

HON'BLE SRI JUSTICE M. SATYANARAYANA MURTHY

-

WRIT PETITION No.28868 OF 2015

-

ORDER: (*Per* Hon'ble Sri Justice M. Satyanarayana Murthy)

This writ petition, under Article 226 of the Constitution of India, is filed by the petitioners to issue an order or direction more particularly one in the nature of *Mandamus* directing the 2nd respondent to refund an amount of Rs.1,44,10,817/- to the petitioners and implement the order in OIA No.64/2014(G)CE, dated 29.10.2014, passed by the Commissioner (Appeals), Customs, Central Excise and Service Tax, Guntur alleging that the 1st petitioner is a manufacturer of mouth freshener, having its unit at Perecherla, Guntur and the 2nd petitioner is one of the partners of the said firm. During the period of October and December, 2013 when the petitioners firm was engaged in the business of producing goods like Indian Mouth Freshener, which is classified under sub-heading No.21069020 of the I Schedule of the Central Excise Tariff Act, 1985 the 1st petitioner did not clear the manufactured goods into the domestic market; in the normal course of business, the petitioners firm used to purchase various consignments of Indian Mouth Freshener in bulk and pay excise duty and, therefore, the petitioners firm availed CENVAT credit of duty paid on the goods and undertook process of manufacturing *i.e.,* repacking the goods from bulk to retail packs and label them under the brand 'Legend' for export purpose. Thus, the petitioners firm exported the goods under the said brand and, on submission of proof of exports, the said brand has been discharged *vide* acceptance of proof of export No.V/05/08/2012-Tech dated 17.04.2014.

The petitioners firm had an erstwhile unit engaged in the same activity at Vasai in Maharashtra; however, the petitioner firm is not entitled to claim refund of Rs.2,57,77,440/- CENVAT credit since the petitioners firm discontinued its production within the local area. Accordingly, applied for refund of CENVAT credit under Rule 5 of the CENVAT Credit Rules, 2004 read with Rule 19 of the Central Excise Rules, 2002 but the 1st respondent ordered for refund of Rs.1,13,66,623/- while rejecting part of claim to the extent of Rs.1,44,10,817/-. However, the petitioner preferred an Appeal before the Commissioner of Central Excise (Appeals), Customs and Service Tax, Guntur, who, after due enquiry, ordered for refund of Rs.1,44,10,817/-. Immediately, the petitioners had applied for refund of said amount but the 2nd respondent did not repay the amount on the pretext that the 2nd respondent preferred an Appeal before the 1st respondent at Delhi. Later, the petitioners made an attempt to know the stage of Revision by calling for information under R.T.I. Act both in the respondents offices but no purpose was served; even the petitioners moved an application for early hearing of the Revision before the 1st respondent and the same was rejected on the ground that no Revision Application or any other Petition was received in the office of 1st respondent from the office of the Guntur, challenging the order in OIA No.64/2014(G)CE before the 1st respondent.

Withholding huge amount of Rs.1,44,10,817/- without any reason is illegal and none of the provisions of the Central Excise Act, 1944 (for short, 'the Act') permits the 2nd respondent to withhold such huge amount without preferring any Revision and, even if any Appeal is preferred, in the absence of any stay of refund, the 2nd respondent is not entitled to withhold the same and finally prayed to allow the Writ Petition and pass the aforesaid reliefs.

The respondents filed counter denying the material allegations *inter-alia* contending that the Revision Application in

C.No.V/02/01/2015-Trib dated 13.01.2015 has been filed in the office of Joint Secretary (Revision) GOI, Ministry of Finance and Company Affairs, Department of Revenue, New Delhi and the Revision was sent to the office address mentioned in the preamble of the order attached to OIA No.64/2014(G) CE dated 29.10.2014 passed by the Commissioner *vide* letter in C.No.V/02/158/2014-Reviews dated 05.01.2015 dispatched the same by speed post on 13.01.2015. The 2nd respondent also moved an application on 03.02.2015 for early hearing of the Revision as huge amount of revenue was involved in the case. As there is a minor change in the office address of the Joint Secretary (RA) communicated in the preamble, letter dated 18.02.2015 was addressed to the new address of the office of Joint Secretary to ascertain as to whether any Revision Application has been received in the office. Subsequently, 2nd respondent filed another Miscellaneous Application on 19.02.2015 for early and out of turn hearing; however, there was no response from the office. Hence, another letter dated 09.09.2015 was addressed to the 1st respondent narrating the facts. The respondents denied the allegation that the 2nd respondent did not file any Revision Application before the 1st respondent against the order passed by Commissioner (Appeals) contending that the Revision Application has been filed *vide* letter dated 13.01.2015 before the Joint Secretary, New Delhi under Section 35 of the Central Excise Act.

In view of the letter correspondence by the 2nd respondent with the 1st respondent, the 1st respondent addressed a letter in DY.No.1295/15/-RA (CX), dated 13.10.2015 to the 2nd respondent and the same was received by the 2nd respondent on 26.10.2015 whereunder the 1st respondent informed the 2nd respondent that the said Revision Application was not received to their office. On receipt of the said letter, the 2nd respondent immediately submitted a copy of

Revision Application submitted to the address mentioned in the preamble of the order in OIA passed by the Commissioner (Appeals) to the address of the 1st respondent by another letter in C.No.I/10/54/2015-(Legal) dated 26.10.2015 explaining the entire events along with the correspondence with a request to consider the Revision Application filed by the 2nd respondent and decide the same on merits. Thus, the Revision Petition was sent within time to the address given in the preamble of the order passed by the Commissioner (Appeals) and, therefore, the contention that the 2nd respondent did not file any Revision before the 1st respondent is false and due to pendency of the Revision only the amount could not be paid and along with the Revision the Miscellaneous Application filed for early and out of turn hearing are pending, therefore, non payment of the amount is not due to any other reason and finally prayed to dismiss the Writ Petition.

During course of hearing, Sri G. Vidyasagar, learned senior counsel, appearing on behalf of the petitioners, contended that the Revision is required to be filed within 90 days or at least within the extended period of 180 days before the 1st respondent and sending of Revision Application to the wrong address does not amount to proper presentation; therefore, the Revision cannot be treated as pending before competent authority and drawn the attention of this Court to Section 35EE(2) of the Central Excise Act, which contemplates that an application under sub-section (1) shall be made within 3 months from the date of communication of the order against which an application is being made. However, the proviso thereby permits the concerned authority to condone delay of 3 months thereafter. Learned senior counsel also drawn the attention of this Court to several Circulars issued by the Central Board of Customs dated 22.02.2001 and 26.06.2014 to contend that mere filing of Revision by the 2nd respondent would not debar the petitioners to seek refund of the CENVAT credit of Rs.1,44,10,817/- immediately.

Whereas Sri B. Raj Kiran, learned Standing Counsel for the Central Excise and Customs, would contend that when a Revision along with stay petition is pending before the competent authority, refund of any amount would affect the Revenue of the Government and that sending of an Appeal by post to the address given in the preamble of the order dated 29.10.2014, passed by the Commissioner (Appeals), is proper filing within time. Mere change of the address, non receipt of the Revision Application due to change in the address is not a ground to reject the Revision. However, sending the Revision Application to the address mentioned in the preamble of the order amounts to filing of Revision within time, placed reliance on a decision of Kerala High Court in ***Ruby Rubber Works Limited, Kerala Vs. Assistant Collector of Central Excise, Kottayam***[1] and several orders of the Government of India and other Tribunals in support of his contention, contending that the 2nd respondent is taking steps to get the Revision disposed of as expeditiously as possible and prayed to dismiss the Writ Petition.

Passing an order dated 29.10.2014 by the Commissioner (Appeals), for refund of Rs.1,44,10,817/- towards part claim of CENVAT credit is not in dispute but filing of a Revision under Section 35EE of the Act before the Joint Secretary, Government of India is in dispute. As seen from the material available on record, Commissioner (Appeals) in the preamble of the order dated 29.10.2014 specifically stated that the aggrieved person may file a Revision under Section 35EE(1) in Form EA-8 (in duplicate) along with the prescribed fee under Section 35EE(3) to the Joint Secretary to the Government of India, Ministry of Finance and Company Affairs (Department of Revenue), Jeevan Deep Building, Sansad Marg, New Delhi within three months from the date of the communication of the order to the appellant. Accordingly, the 2nd respondent sent a Revision by post to the address mentioned in the preamble. Even the office of the Commissioner of Customs, Central Excise and Service Tax passed an order by the Committee of Commissioners of Customs, Central Excise and Service Tax dated 05.01.2015 directing the 2nd respondent to file a Revision, by exercising power under Section 35EE(2) of the Act, before the Joint Secretary to the Government of India, Ministry of Finance and Company Affairs Department of Revenue, Jeevan Deep Building, Sansad Marg, New Delhi. In the order dated 29.10.2014 passed by the Commissioner (Appeals) and in the order dated 05.11.2015 passed by the Committee of Commissioners there was a specific direction to the 2nd respondent to file a Revision only to the address mentioned in the preamble of the order dated 29.10.2014.

In view of the direction of the Committee of Commissioners, the 2nd respondent sent a Revision along with a covering letter dated 13.01.2015 to the Joint Secretary, Government of India, Ministry of Finance and Company Affairs, Department of Revenue, Jeeven Deep Building, Sansad Marg, New Delhi annexing the required copies of orders *etc.,* raising several contentions. Later, filed a miscellaneous application dated 03.02.2015 for early hearing of the Revision and later addressed letters dated 18.02.2015 and 19.02.2015 seeking confirmation of the receipt of the Revision. Finally, a letter dated 26.10.2015 was addressed by the Additional Commissioner to the Joint Secretary (Revision Jurisdiction) Ministry of Finance, 14 Hudco Vishal Buildings, Bhikhaji Cama Palace, New Delhi, referring Writ Petition No.28868 of 2015 filed by the petitioners but it was confirmed by the authorities concerned that no such Revision was received in the office of the 1st respondent. As seen from the material produced by the respondents, the Revision was sent by registered post, to the address mentioned in the preamble of the order, on 16.01.2015 *vide* registered letter along with acknowledgment due from Guntur, Collectorate Post Office bearing No.A RN610846349IN, *i.e.,* the Joint Secretary, Government of India, Ministry of Finance and Company, Department of Revenue, Jeevan Deep Building, Sansad Marg, New Delhi but the actual address of the 1st respondent is Joint Secretary (Revision Jurisdiction) Ministry of Finance, 14 Hudco Vishal Buildings, Bhikhaji Cama Palace, New Delhi. As the Commissioner of Appeals clearly stated that a Revision would lie to the office of Joint Secretary (Revision Jurisdiction) specifying the address therefore the 2nd respondent sent a Revision only to the address mentioned in the preamble of the order passed by the Commissioner of Appeals dated 29.10.2014; that apart, even the Committee of Commissioners of Customs, Central Excise and Service Tax, after review, by exercising power under Section 35EE(1A) of the Act, directed the 2nd respondent to file Revision before the Joint Secretary (Revision Jurisdiction) along with address. Later, it came to the notice of the respondents that office of Joint Secretary (Revision Jurisdiction), Ministry of Finance was not located in the address given in the preamble of the order, after addressing number of letters, came to know that it was located in 14 Hudco Vishal Buildings, Bhikhaji Cama Palace, New Delhi; thereupon, sent grounds of Revision along with requisite documents on 26.10.2015; thus, it is evident from the record that the 2nd respondent filed Revision within time allowed under Section 35EE(2) of the Act sending the same by registered post to the address mentioned in the preamble of the order passed by the Commissioner (Appeals) and as directed by the Committee of Commissioners of Customs, Central Excise and Service Tax. Therefore, without noticing the change in the address of the office of the 1st respondent, the authorities misdirected the 2nd respondent; consequently, the matter could not be taken up by the Revision Authority-1st respondent, immediately. However, sending of Revision Application to the address mentioned in the order is sufficient compliance of the direction and sending of Revision to the wrong address is not a ground to reject the Revision *in limini*. In support of his contentions, the 2nd respondent has drawn the attention of this Court to the decision of Kerala High Court in ***Ruby Rubber Works***[1], wherein the Kerala High Court held that if the Appeal had not been wrongly addressed, it would have in all probability reached the appellate authority well within time. Therefore, the Appeal is liable to be taken back on file by the appellate authority concerned and disposed of on merits after giving an opportunity of being heard to the petitioner even though received late in his office.

In the facts of the decision cited supra, the Revision Application was filed before the 3rd respondent in view of furnishing of wrong address. The letter therein was, unfortunately for the petitioner, addressed through inadvertence to the Appellate Collector of Customs, Cochin. It is stated by the petitioner therein that it was transmitted by that office to the correct address of the 2nd respondent at Madras.

Even in those circumstances, the Kerala High Court held that filing of a Revision is within time since it was remitted by the Appellate Collector of Customs, Kochin to the Revisional Authority. Persuaded by the principle laid down in ***Ruby Rubber Works***[1], we are of the prime-facie view that the Revision is filed within time; however, it is for the Revisional Authority to decide the limitation with reference to Section 35EE(2) of the Act. Therefore, we do not wish to express any opinion at this stage about the limitation.

One of the contentions of the petitioners is that the 1st respondent has no authority to condone the delay beyond three months under Section 35EE(2) of the Act. No doubt, the power conferred on the 1st respondent is limited. However, when the application was sent to the wrong address due to the misdirection of the Appellate Commissioner and the Committee of Commissioners, such filing of Revision cannot be said to be barred by limitation *prima-facie* and when it is filed within time, as directed by the committee of Commissioners and suggested by the Commissioner of Appeals, the same could have been considered by the 1st respondent as a good ground to entertain the Revision.

Learned counsel for the petitioners has drawn our attention to the Circulars issued by the Government of India, Ministry of Finance, where the Department clarified that no refund or rebate claim should be withheld on the ground that an Appeal has been filed against the order giving the relief, unless the stay order has been obtained. Taking advantage of this Circulars, learned counsel for the petitioners requested to pass an order afresh for refund of the CENVAT credit collected from the petitioners. Undoubtedly, those circulars directed the concerned authorities of the Central Excise Department to refund the claim in case no stay was obtained though appeal is filed but here the situation is peculiar and the respondents were disabled even to obtain a stay because of the misdirection of the appellate authority and the Committee of Commissioners *vide* their respective order.

No doubt, retention of huge amount would cause financial loss to the petitioners and at the same it will affect the Revenue of the Government. In such case, the Court has to strike a balance between the rights of both the parties and pass appropriate order by exercising jurisdiction under Article 226 of the Constitution of India.

The jurisdiction under Article 226 of the Constitution is discretionary and such discretion must be exercised judiciously, taking into consideration all the attending circumstances. In the present facts of the case, as directed by the Appellate Commissioner and Committee of Commissioners, the Revision was sent to the Joint

Secretary, Government of India, Ministry of Finance and Company Affairs, Department of Revenue, Jeevan Deep Building, Sansad Marg, New Delhi but the office address of the Joint Secretary (Revision Jurisdiction) Ministry of Finance, 14 Hudco Vishal Buildings, Bhikhaji Cama Palace, New Delhi was not repeated in the address given in the orders referred above. Curiously, the grounds of Revision and other documents sent along with the Revision were neither returned nor forwarded to the correct address but only after consistent consultation by letter correspondence, the Department could know shifting of the office even prior to sending the Revision along with the documents to the address given in the orders passed by the Appellate Commissioner and Committee of Commissioners directing the 2nd respondent to file a Revision; till then, the respondents are not aware about the change in the address of the office of the Joint Secretary. In those circumstances, to avoid loss to any one of the parties to this Writ Petition, we find that it is a fit case to direct the 1st respondent to dispose of the Appeal pending before them, as expeditiously as possible, in any event not later than two months from the date of receipt of a copy of this order, by exercising an equitable jurisdiction conferred on this Court under Article 226 of the Constitution.

The observations, if any, made with regard to the limitation will have no bearing on disposal of the Revision, pending before the 1st respondent, and the 1st respondent is requested to decide the Revision, if it is otherwise in order, uninfluenced by any of the observations made hereinabove, as expeditiously as possible, in any event not later than two months from the date of receipt of a copy of this order. .

Accordingly, with the above direction, the Writ Petition is disposed of.

In consequence, miscellaneous petitions, if any, pending in this writ petition, shall stand dismissed. There shall be no order as to costs.

RAMESH RANGANATHAN, J

M. SATYANARAYANA MURTHY, J

Date: 07-01-2016.
Dsh

HON'BLE SRI JUSTICE RAMESH RANGANATHAN

AND

HON'BLE SRI JUSTICE M. SATYANARAYANA MURTHY

4

007012016

WRIT PETITION No.28868 OF 2015

(Order of the Division Bench delivered by
Hon'ble Sri Justice M. Satyanarayana Murthy)

Date. 07-01-2016

DSH

---

[1] 1980 (6) ELT 615