

IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

Central Excise Appeal No. 10 of 2016 (O&M)
Date of decision: September 27, 2016

Commissioner, Central Excise, Ludhiana

.. Appellant

v.

M/s National Fertilizers Limited

.. Respondent

CORAM: HON'BLE MR. JUSTICE RAJESH BINDAL
HON'BLE MR. JUSTICE DARSHAN SINGH

Present: Mr. Saurabh Goel, Advocate for the appellant.
Mr. R. Krishnan, Advocate for the respondent.

...

Rajesh Bindal J.

1. The revenue is in appeal raising the following substantial questions of law arising out of the order dated 13.7.2015, passed by the Customs, Central Excise and Service Tax Appellate Tribunal, New Delhi (for short, 'the Tribunal') in Appeal No. 1150/2008:

- (i) Whether the Hon'ble Tribunal has committed an error while not accepting the contention of revenue that the relevant date for calculation of interest would be the date on which **“an amount of duty is first determined to be**

payable” as per the Explanation 1 to Section 11AA of the Central Excise Act, 1944, as existing during the relevant period ?

- (ii) Whether reduction in the amount of duty, whether made by the Tribunal itself or by the Original Adjudicating Authority on the directions of Tribunal, will affect the date of first determination of duty, but would only affect the quantum of duty payable by the party and the respondent is liable to pay the interest on delayed discharge of Central Excise liability under Section 11AA of the Central Excise Act, 1944 ?
- (iii) Whether the interest is chargeable from the date of original adjudication order or from the date of issuance of the adjudication orders in de-novo proceedings, once the demand of duty was upheld by the Tribunal but only the quantum of duty was ordered to be re-adjudicated in de-novo proceedings ?
- (iv) Whether the revenue is entitled to claim duty in the facts and circumstances of the present case?”

2. Learned counsel for the appellant submitted that while adjudicating the show cause notices issued to the respondent, vide Order-in-Original dated 30.9.1999, demand of ₹ 2,38,50,008/- was confirmed. The respondent preferred appeal before the Tribunal, however, during interregnum, the duty was deposited. The Tribunal, vide order dated 16.10.2003, remanded the matter back to the adjudicating authority.

Another set of show cause notices were disposed of by the adjudicating

authority vide order dated 7.10.1998 raising a demand of ₹ 97,57,049.63.

In that case also, in appeal filed by the respondent, the Tribunal remanded the matter back. After the remand, orders were passed on 27.2.2004 and 5.3.2004 re-determining the demand at ₹ 90,03,543/- and ₹ 2,31,12,248/- against ₹ 97,57,049.63 and ₹ 2,38,50,008/-, respectively.

3. It was further submitted that vide order dated 31.3.2008, the Commissioner, Central Excise Commissionerate, Ludhiana (for short, 'the Commissioner'), levied interest on delayed payment of the duty for the period from the dates when first Orders-in-Original were passed on 7.10.1998 and 30.9.1999, till its payment. The Tribunal has wrongly set aside the demand of interest placing reliance upon an earlier order passed by the Tribunal in Aeon's Construction Products Ltd. v. Collector of Central Excise, Chennai, 2007 (215) ELT 464. The submission is that the aforesaid judgment is not applicable in the facts of the case, where the order passed by the adjudicating authority was set aside and the matter was remanded back for fresh determination. In the case in hand, the levy of duty as such was not disputed by the respondent. The matter was remanded back only for some calculation purposes. In terms of the provisions of Section 11AA of the Central Excise Act, 1944 (for short, 'the Act'), the interest is leviable from the date demand was raised originally and not from a subsequent date. Period of three months is provided therefrom. In the case in hand, the fact that duty was payable is not even disputed by the respondent, as the same was paid before even the cases were decided after remand.

4. On the other hand, learned counsel for the respondent submitted that no substantial question of law arises in the present appeal, as Section 11AA of the Act provides for three months' time to pay the amount

of demand raised. In the case in hand, there was no delay in payment of the amount after the demand was raised after the remanded cases were decided. There is no justification for raising demand of interest. Explanation 1 to Section 11AA of the Act is not applicable in the present case as the duty was not finally determined by the Tribunal. Remand was made by the Tribunal with a direction to determine the amount of duty payable after affording opportunity of hearing to the respondent and factual aspects were required to be gone into. Part of the duty was not paid initially by the respondent, as there was a judgment of Patna High Court in its favour, as reported in Fertilizer Corporation of India Ltd. v. Collector of C. Ex., Patna, 2000 (122) ELT 343 (Pat.). After Hon'ble the Supreme Court in Gujarat Narmada Valley Fertilizers Co. v. Collr. of C. Ex., Vadodara, 2001 (128) ELT 13 (SC) opined that duty was payable, the same was deposited without even waiting for the out-come of appeal filed by the respondent. The bonafides are well established. The fact that even after remand, the amount of duty levied on the respondent was reduced from the orders initially passed itself shows that the facts were required to be gone into. The amount was, in fact, determined after detailed enquiry, which was got conducted through Assistant Commissioner and only then the assessment could be framed. Remand by the appellate authority would necessarily mean that the order under challenge had lost its significance. Then only a fresh order could be passed. There cannot be two enforceable orders for the same period passed in pursuance to the same show cause notices. In support of the plea, reliance was placed upon Blue Star Limited v. Union of India, 2010 (250) ELT 179 (Bom.) and Commissioner of Central Excise, Chennai-II v. Lucas TVS Ltd., 2016 (333) ELT 259 (Mad.).

5. Heard learned counsel for the parties and perused the paper book.

6. The undisputed facts are that in the Orders-in-Original passed initially on 30.9.1999 and 7.10.1998, demand of ₹ 2,38,50,008/- and ₹ 97,57,049.63, respectively was raised against the respondent. The orders were challenged by the respondent before the Tribunal. As claimed, initially part of the duty was not paid by the respondent as there was a judgment of Patna High Court in its favour in Fertilizer Corporation of India Ltd.'s case (supra). However, as during the pendency of appeal before the Tribunal, Hon'ble the Supreme Court in Gujarat Narmada Valley Fertilizers Co.'s case (supra) opined that duty on the transaction was leviable, the same was paid by the respondent before even the matters were decided by the Tribunal though that issue had been raised there. When the matters came up for consideration before the Tribunal, the respondent fairly did not dispute the fact that in view of the judgment of Hon'ble the Supreme Court in Gujarat Narmada Valley Fertilizers Co.'s case (supra), the duty was payable, however, there being other errors in the orders passed by the adjudicating authority, the Tribunal remanded the matter back to the adjudicating authority with a direction to determine the amount of duty payable after affording reasonable opportunity of being heard to the respondent. Thereafter, the duty was re-calculated. In the process, the adjudicating authority had to get an enquiry made through the Assistant Commissioner, who submitted its report and it was only on the basis thereof that amount of duty was finally determined at ₹ 90,03,543/- and ₹ 2,31,12,248/- against ₹ 97,57,049.63 and ₹ 2,38,50,008/-, respectively. Thereafter, vide order dated 31.3.2008, the adjudicating authority directed the respondent to pay interest

on the amount of duty from the dates the orders were passed in the first round of litigation till the amount was paid. The order was set aside by the Tribunal while relying upon its earlier order passed in Aeon's Construction Products Ltd.'s case (supra).

7. Section 11AA of the Act providing for interest on delayed payment of duty is reproduced below:

“11AA. Interest on delayed payment of duty.- (1) Subject to the provisions contained in Section 11AB, where a person chargeable with duty determined under sub-section (2) of Section 11A, fails to pay such duty within three months from the date of determination, he shall pay, in addition to the duty, interest at such rate not below ten per cent and not exceeding thirty-six per cent. per annum, as is for the time being fixed by the Central Government by notification in the Official Gazette on such duty from the date immediately after the expiry of the said period of three months till the date of payment of such duty.

Provided that where a person chargeable with duty determined under sub-section (2) of Section 11A before the date on which the Finance Bill, 1995 receives the assent of the President, fails to pay such duty within three months, from such date, then, such person shall be liable to pay interest under this section from the date immediately after three months from such date, till the date of payment of such duty.

Explanation 1.- Where the duty determined to be payable is reduced by the Commissioner (Appeals), Appellate Tribunal,

National Tax Tribunal or, as the case may be, the Court, the date of such determination shall be the date on which an amount of duty is first determined to be payable.

Explanation 2.- Where the duty determined to be payable is increased or further increased by the Commissioner (Appeals), Appellate Tribunal, National Tax Tribunal or, as the case may be, the Court, the date of such determination shall be,-

(a) for the amount of duty first determined to be payable, the date on which the duty is so determined;

(b) for the amount of increased duty, the date of order by which the increased amount of duty is first determined to be payable;

(c) for the amount of further increase of duty, the date of order on which the duty is so further increased.

(2) The provisions of sub-section (1) shall not apply to cases where the duty becomes payable on and after the date on which the Finance Bill, 2001 receives the assent of the President.”

8. Section 11AA of the Act provides that if an assessee fails to pay duty within three months from the date of determination, he is liable to pay interest thereafter. Explanation 1 and 2 thereof will not be applicable in the present case as in the case in hand the duty determined has not been reduced or increased by the appellate authority. Rather, it is a case where the Tribunal finding merit in the contention raised by the respondent remanded the matter back to the adjudicating authority for fresh determination of the amount of duty payable, which necessarily means that the impugned order had lost its significance and it is only the order passed

after remand, which would be applicable and enforceable. Once in terms of the order passed by the adjudicating authority after remand by the Tribunal, there is no delay in deposit of duty by the respondent in view of Section 11AA of the Act, the demand of interest is not justifiable.

9. Similar view was expressed by Bombay High Court in Blue Star Limited's case (supra). Earlier orders passed by the Tribunal on the issue were also referred to, including in the case of Aeon's Construction Products Ltd. (supra). Relevant paras thereof are extracted below:

“17. Section 11AA has two explanations. By virtue of the first explanation, if duty payable is reduced, then the date of determination of reduction shall be date on which the amount of duty is first determined to be payable. In other words interest would be payable on the duty as reduced not from the date of such reduction of duty but from the date of the first order. That is because even if the duty is reduced there is still an order of determination but a reduced amount. By Explanation 2 where duty payable is increased or further increased two situations are set out. For the amount of duty first determined to be payable it is the date on which the duty was first determined and in so far as the increase of duty is concerned, the date on which the increased amount of duty is payable. So also in the case of further increase the date of the order on which the amount is further increased. The Explanation, therefore, gives the intent of the Legislature. The intent of the Legislature appears to be that in a case of increase of duty, the increased tax becomes payable not from the original date, but from the date on which

it is increased and in the case of reduction it relates back to the first date.

!17. What is the effect of setting aside the original order and remanding the matter for *de novo* consideration. Setting aside an order would mean that there is no order and a party is relegated to fresh adjudication. The stage of an adjudication cannot be said to be a determination. An adjudication will culminate in an order. That order would be the determination and/or ascertainment of duty. The relevant date for commencement of time the interest would be from the date the duty is determined if not paid within three months. Once there be an order, setting aside the entire order of determination there is no ascertained duty payable. In the instant case, therefore, though there was original order passed on 14th June, 1993 that was set aside on 14th July, 2000. The matter was before the A.O., for fresh determination on which an order came to be passed on 22nd March, 2002 and subsequently the duty came to be ascertained on 22nd March, 2002. Duty was paid on 17th July, 2002. Once the duty was ascertained on 22nd March, 2002 no interest could have been demanded under sub-section (1) of Section 11AA in view of sub-section (2) as inserted in Section 11AA on 11th May, 2001.”

10. The aforesaid judgment was followed by Madras High Court in Lucas TVS Ltd.'s case (supra).

11. For the reasons mentioned above, we do not find any substantial question of law arises in the present appeal. The same is, accordingly, dismissed.

(Rajesh Bindal)
Judge

(Darshan Singh)
Judge

September 27, 2016
mk

Whether speaking/reasoned:	Yes/No
Whether reportable:	Yes/No