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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

R-6.

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W.P.(C) 7033/2002

INDOSIN LTD.

..... Petitioner

Through: Mr. C. Hari Shankar, Senior Advocate
with Mr. S. Sunil, Mr. N. Jagdish and Mr. Ashly
Cherian, Advocates.

versus

UNION OF INDIA & ORS.

..... Respondents

Through: Mr. Pratap Singh, Advocate.

CORAM:

JUSTICE S. MURALIDHAR

JUSTICE NAJMI WAZIRI

ORDER

26.07.2016

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Dr. S. Muralidhar, J.:

1. The challenge in this petition by Indosin Ltd. is to the Order-in-Appeal dated 29th November 2001 passed by the Commissioner of Central Excise (Appeals) (Respondent No. 4) dismissing the Petitioner's appeal against an Order-in-Original dated 13th August 2001 of the Deputy Commissioner of Central Excise adjudicating a show cause notice ('SCN') dated 13th June 2001 issued to the Petitioner seeking to reject the claim of rebate by the Petitioner on the cigarettes exported by a shipping bill dated 11th December 2000. The subsequent order of the Joint Secretary to the Government of India dated 27th August 2002 dismissing the revision petition filed by the Petitioner against the Order-in-Appeal dated 29th November 2001 has also

been challenged in the present petition.

2. The facts in brief are that the Petitioner was purchasing cigarettes from M/s North East Tobacco Company Limited ('NETCL') located in the State of Assam. NETCL was clearing the cigarettes after availing of the benefit of area-based exemption from payment of central excise duty under Notification Nos. 32/99-CE and 33/99-CE dated 8th July 1999. In terms of the said notifications, NETCL was required to first pay duty on the clearances upfront and thereafter could claim refund on such amount of the said duty as had been paid through the Personal Ledger Account ('PLA').

3. On its part the Petitioner invoked Rule 12(1)(a) of the Central Excise Rules, 1944 ('CE Rules') and filed a refund claim of Rs.15,12,000 in the office of the Deputy Commissioner, Central Excise by a letter dated 29th December 2000 on an export of 100 cartons of Chancellor Harward FTR Luxury Kings 10's cigarettes of 84 mm length to United Arab Emirates ('UAE'). The said goods were exported by a shipping bill dated 11th December 2000. The Petitioner also invoked Notification No. 41/94-CE (NT) dated 12th September 1994.

4. The case of the Department is that the rebate scheme envisaged that proper duty on goods exported is 'paid'. It was stated that the refund claim filed by the Petitioner for Rs.15,12,000 was liable to be rejected as the goods exported were fully exempted from payment of duty. In the circumstances, a SCN was issued to the Petitioner on 13th June 2001 asking it to show cause why the refund claim should not be rejected.

5. By an order dated 13th August 2001, the Deputy Commissioner, Central Excise adjudicated the above SCN and rejected the refund claim filed by the Petitioner. This was affirmed by the Commissioner (Appeals) by the order dated 29th November 2001 and by the Government of India by dismissing the Petitioner's revision petition on 27th August 2002. The principal ground for rejection was that the duty paid by NETCL was refunded to NETCL under Notification Nos. 32/99-CE and 33/99-CE dated 8th July 1999 and, therefore, no duty was actually paid by NETCL which entitled the Petitioner to claim refund.

6. This Court has heard the submissions of Mr. C. Hari Shankar, learned Senior Advocate appearing for the Petitioner and Mr. Pratap Singh, learned counsel for the Respondents.

7. At the outset it is pointed out by Mr. Hari Shankar that on account of the enactment of Section 154 of the Finance Act, 2003 the benefit under Notification Nos. 32/99-CE and 33/99-CE stood withdrawn retrospectively from 8th July 1999 insofar as cigarettes were concerned. Further, since the recovery of the refund earlier granted to the cigarette manufacturers like NETCL had been initiated, there was no bar to the granting rebate to the Petitioner.

8. Indeed, the Notification No. 32/99-CE dated 8th July 1999 which granted the area-based refund to manufacturers of cigarettes located in the North-East stands withdrawn by Sections 154 (1) and 154(4) of the Finance Act, 2003 which read as under:

“154. Amendment of notifications issued under section 5A

of the Central Excise Act.

(1) The notifications of the Government of India in the erstwhile Ministry of Finance (Department of Revenue) Nos. G.S.R.508(E), dated the 8th July, 1999 and G.S.R.509(E), dated the 8th July, 1999, issued under sub-section (1) of section 5A of the Central Excise Act read with sub-section (3) of section 3 of the Additional Duties of Excise (Goods of Special Importance) Act, 1957 (58 of 1957) and sub-section (3) of section 3 of the Additional Duties of Excise (Textiles and Textile Articles) Act, 1978 (40 of 1978), by the Central Government shall stand amended and shall be deemed to have been amended in the manner as specified against each of them in column (3) of the Ninth Schedule, on and from the corresponding date specified in column (4) of that Schedule retrospectively, and accordingly, notwithstanding anything contained in any judgment, decree or order of any court, tribunal or other authority, any action taken or anything done or purported to have been taken or done under the said notifications, shall be deemed to be and always to have been, for all purposes, as validly and effectively taken or done as if the notifications as amended by this sub-section had been in force at all material times.

(4) Recovery shall be made of all amounts of duty or interest or other charges which have not been collected or, as the case may be, which have been refunded but which would have been collected or, as the case may be, which would have not been refunded if the provisions of this section had been in force at all material times, within a period of thirty days from the day on which the Finance Bill, 2003 receives the assent of the President, and in the event of non-payment of duty or interest or other charges so recoverable, interest at the rate of fifteen per cent, per annum shall be payable from the date immediately after the expiry of the said period of thirty days till the date of payment.

Explanation.- For the removal of doubts, it is hereby declared

that no act or omission on the part of any person shall be punishable as an offence which would not have been so punishable if the notifications referred to in sub-section (1) had not been amended retrospectively by that sub-section.”

9. The 9th Schedule to the Finance Act, 2003 sets out in column 2 the Notification No. 32/99 and the corresponding amended provision in column 3 which stated that the following proviso shall be inserted at the end namely:

“Provided that exemption contained in this notification shall not be applicable to-

(a) cigarettes falling under Chapter 24 of the First Schedule to the Central Excise Tariff Act, 1985 (5 of 1986); and...”

10. The net result of the above change is that the area based refund is no longer available to manufacturers of cigarettes in the North East and this includes NETCL as well. Under Section 154(4) of the Finance Act 2003, the Government is bound to recover all amounts of duty or interest which have not been collected or, as the case may be, which have been refunded but which would have been collected or, as the case may be, which would have not been refunded if Section 154 had been in force at all material times. The consequence is that the refund under Notification No. 32/99 is no longer available and with recovery proceedings having been initiated against NETCL, the cigarettes purchased by the Petitioner from NETCL will have to be considered as goods in respect of which duty was paid by NETCL. Thus the Petitioner cannot be denied the refund due to it in terms of Rule 12 (1)(a) of the CE Rules read with Notification No. 41/94-CE (NT) dated 12th September 1994.

11. Consequently, the very basis of the rejection of the Petitioner’s refund

application by the order dated 13th August 2001 of the Deputy Commissioner and the order dated 29th November 2001 passed by the Commissioner of Excise (Appeals), and order of the Government of India dated 27th August 2002 ceases to exist. The said orders are liable to be set aside.

12. There is yet another reason why the Petitioner cannot be denied rebate as has been claimed by it. As pointed out by the Gujarat High Court in *Welspun Corporation Ltd. v. Union of India* 2014 (301) ELT 33 (Guj.) which order has been affirmed by the Supreme Court in 2010 (256) ELT (A 161) (SC), the rebate in case of export of goods secured under area based exemption notification was denied by amending Notification No. 19/2004-CE, for the first time, vide Notification No. 37/2007-CE (NT) dated 17th September 2007. This amendment was prospective. However there was no corresponding amendment in Notification No. 41/1994-CE (NT) dated 12th September 1994 in terms of which the rebate was being claimed by the Petitioner. The Gujarat High Court has in the above decision held that the above amendment to Notification No. 19/2004-CE (NT) to be only prospective. As a result the exports already made prior to 17th September 2007 could not be denied rebate. Even on this basis the rejection of the Petitioner's refund application does not appear to be justified.

13. For the aforementioned reasons, the petition is allowed and the orders rejecting the Petitioner's refund application are hereby set aside. The Petitioner shall be granted the refund as claimed together with interest due in accordance with law within a period of eight weeks from today.

14. The petition is allowed in the above terms but in the circumstances with no order as to costs.

S. MURALIDHAR, J

NAJMI WAZIRI, J

JULY 26, 2016

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