IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 26.07.2017

CORAM

THE HONOURABLE MR.JUSTICE T.S.SIVAGNANAM

W.P.No.40071 of 2002

M/s.Rexin Sea (India) Ltd,
rep.by its Proprietor: M.S.Hameed,
Mudhukulathur Road,
Kamudhi Fort,
Kottaimedu - 623 604. ... Petitioner

Vs.

The Assistant Commissioner of
Central Excise,
130/8-1, Katcheri Road,
Virudhunagar - 626 001. ... Respondent

Prayer: Petition filed under Article 226 of the Constitution of India to issue a Writ of Certiorarified Mandamus, to call for the records relating to the proceedings of the respondent in C.No.4/20/2002-TRC(Notice of Demand to Defaulter) dated 16.10.2002 and to quash the same as illegal, unsustainable and further forbear the respondent from proceeding to recover the refunded amount of Rs.26,34,769.21, without due process of law as laid down by the Hon'ble Supreme Court in its decision reported in 1996(86) ELT 460 and as per the circular of the Central Board of Excise and Customs, in Circular No.423/56/98-Cx.dated 22.9.98

For Petitioner : Mr.M.A.Mudimannan
For Respondent : Mr.T.Pramod Kumar Chopra

O R D E R

Heard Mr.K.Jayachandran, learned counsel for the petitioner, and Mr.Pramod Chopra, learned senior standing counsel appearing for the respondent department.

2. The petitioner has filed this writ petition challenging the proceedings dated 16.10.2002 by which the respondent has issued a notice of demand for recovery of an amount of Rs.26,34,769.21/-with interest. The above demand is on account of the orders passed by the Hon'ble Supreme Court in Civil Appeal Nos.5494 and 5495 of 1990 dated 30.07.1997 and as per the undertaking executed by the petitioner before the Assistant Commissioner of Central Excise, Virudhunagar Division on 13.08.1990. The petitioner

has challenged the impugned order by contending that the demand has been issued after the period of 3 years and it is beyond the period of limitation prescribed U/s.11(A) of the Central Excise Act and therefore, it is not sustainable.

3. The said contention deserves to be rejected on account of the decision of the Hon'ble Supreme court in Commissioner of Central Excise Shillong Vs.Woodcraft Products Ltd, 2002 (143) E.L.T 247 (S.C). In the said case, which is identical to the case on hand, an objection was raised that the demand was beyond the period of limitation U/s.11(A) of the Act. The said contention was rejected by Hon'ble Supreme Court stating that the assessee is obliged to make the restitution of the refund granted based on the undertaking and accordingly, set aside the impugned order passed by the CESTAT. The entire order passed by the Hon'ble Supreme Court in the case of Commissioner of C.Ex., Shillong Vs. Woodcraft Prodcuts Ltd reported in 2002(143) E.L.T.247 (S.C) is quoted as herein below:

> "2. The assessee manufactures block board. It submitted a classification list classifying block board under Tariff Entry 4410.90 attracting 'nil' rate of duty. The Assistant Commissioner did not accept that classification, he classified it under Tariff Entry 4408.90 attracting excise duty, which the assessee paid. The respondent's appeal against such classification was dismissed. The assessee then filed an appeal before the Tribunal. The Tribunal upheld the respondent's contention and allowed the appeal. The Revenue preferred an appeal to this Court. Stay having been refused in that appeal, the Revenue refunded to the assessee the duty that it had paid. In repect thereof, the respondent gave an undertaking that the amounts refunded would be repaid within seven days in the event of this Court reversing the Tribunal's order. This Court, on 20th March, 1995, reversed the Tribunal's order [reported in 77 E.L.T.23]. On 22nd June and 26th August, 1995, the Revenue called upon the assessee to repay the amounts which had been refunded as aforesaid, referring to the undertaking that the assessee had given. The assessee contended that the Revenue's claim for repayment of the refund was barred by limitation. This having been rejected, appeals were filed, which the Commissioner (Appeals) dismissed. Thereupon the assessee preferred appeals to the Tribunal, the order whereon is the subject matter of these appeals. The Tribunal said that the question that was required to be decided was "Whether the refunds of duty paid on the block boards and already granted to the appellants can be recovered from them beyond a period of six months as envisaged Under Section 11A of the Act". The only provision, in its view, for

recovery of "alleged erroneous refund" was Section 11A which envisaged service of show cause notice within six months from the date of refund. The demand for return of the refunds was, therefore, held to be not justified and was set aside.

3. Learned Counsel for the assessee drew our attention to the notice requiring the assessee to make repayment of the amounts refunded. That notice was issued under Section 11 and, in learned Counsel's submission, was out of time. We asked learned counsel whether the reversal by this Court of the Tribunal's order on classification would not, by itself, require the assessee to make restitution of the sums that the Revenue had refunded to it pursuant to the Tribunal's order. Learned Counsel fairly stated that such restitution was requisite.

4. Plainly, the assessee is obliged to make restitution. The Revenue honoured the Tribunal's order and made the refund. Upon the reversal by this Court of the Tribunal's order, the assessee was bound in law to restitute the amounts of such refund to the Revenue.

5. The approach of the Tribunal, we must say, was quite misconceived, more so, in the light of the undertaking which the assessee had given.

6. The civil appeals are allowed. The assessee shall pay to the Revenue the amounts refunded to it pursuant to the orders of the Tribunal within twelve weeks, with interest thereon at the rate of twelve percent per annum from 1st September, 1995 till payment or realisation. The assessee shall also pay to the Revenue the costs of these appeals."

4. It is seen that prior to the issuance of the impugned demand, the respondent had sent the first demand on 03.09.2001, calling upon the petitioner to put back the entire amount of Rs.26,34,769.21/- refunded to him based on the undertaking. However, in the impugned demand , the respondent seeks to claim interest. The Hon'ble Supreme Court while considering the same issue in the case of Wood Craft Products Limited has used the expression that the assessee was bound in law to restitute the amount in such refund to the revenue. In my considered view, the restitution would mean to put back in its original place. Therefore, there is no room for claiming interest from the petitioner on the amount refunded. One more reason to support such finding is that the refund was ordered on account of the fact that the petitioner assessee succeeded before the Tribunal. The Revenue agreed to refund, subject to the undertaking that the assessee will restitute the amount refunded, if the revenue succeeds in the appeal before the

Supreme court. The Revenue having succeeded, have now come forward with the plea of restitution which undertaken has to be honoured by the petitioner/assessee. In that process, the revenue cannot seek to take advantage of the interregnum period and claim interest, as the petitioner/assessee cannot be blamed for the delay caused by the Court in taking a final decision. Therefore, the claim for interest is not sustainable. In the result, writ petiton is partly allowed and the demand for interest on Rs.26,34,769.21/- is set aside and it is held that the respondent is entitled to recover the refunded amount of Rs.26,34,769.21/-.

5. It is submitted by the learned counsel for the petitioner that the petitioner Industry has been closed down and therefore, reasonable time may be granted to repay the amount which was refunded to the petitioner/assessee. Considering the the said submission, the petitioner is granted six months time to pay the amount of Rs.26,34,769.21/- in six equal installments and such installments shall commence from September, 2017. No Costs.

Sd/-
Assistant Registrar(CS V)

//True Copy//

Sub Assistant Registrar

kak/sli

To
The Assistant Commissioner of Central Excise,
130/8-1, Katcheri Road,
Virudhunagar - 626 001.

+ 1 cc to Mr.K. Jayachandran, Advocate Sr.53146
+ 1 cc to Mr.T. Promod Kumar Chopda, Advocate Sr.54009

W.P.No.40071 of 2002

CS-V
EU 7.09.17