IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 04.09.2018

CORAM

THE HONOURABLE MR.JUSTICE T.S.SIVAGNANAM
and
THE HONOURABLE MRS.JUSTICE V.BHAVANI SUBBAROYAN

Civil Miscellaneous Appeal No.2955 of 2017

The Commissioner of Central Excise
and Service Tax, 1 Williams Road,
Cantonment, Tiruchirapalli-620 001. .. Appellant

-vs-

1.M/s.S.A.Safiullah& Co.,
T.S.No.9610, Rajagopalapuram Main Road,
Post box No.14, Pudukkottai.

2.The Customs, Excise & Service Tax
Appellate Tribunal,
South Zonal Bench, Chennai. .. Respondents

Civil Miscellaneous Appeal filed under Section 35G of the Central Excise Act, 1944 to set aside the order of the Customs, Excise & Service Tax Appellate Tribunal, South Zonal Bench, Chennai in Final Order No.1070-1071/2009 dated 19.08.2009.

For Appellant : Mr.A.P.Srinivas,
Senior Standing Counsel

For Respondent-1: Mr.J.Shankar Raman

JUDGMENT
[Delivered by T.S.Sivagnanam, J.]

This appeal, by the Revenue, is directed against the order passed by the Customs, Excise and Service Tax Appellate Tribunal, Chennai Bench in Final Order Nos.1070 and 1071 of 2009 dated 19.08.2009.

2.This appeal has been admitted, vide order dated 05.10.2017, on the following substantial questions of law:-

"(i) Whether on the facts and

circumstances of the case, the Tribunal is right in holding a view that the claim had been filed with a reasonable period of six months from the date of the Hon'ble High Court when the Hon'ble Supreme Court in the Mafatlal Industries Ltd., case cited supra held to the effect that all claims for refund, arising in whatever situations (except where the provision under which the duty is levied is declared as unconstitutional), has necessarily to be filed, considered and disposed of only under and in accordance with the relevant provisions relating to refund, as thy obtained from time to time?

(ii) Whether on the facts and circumstances of the case, the Tribunal is right in law holding a view that claim was not hit by limitation especially when the trader claimed refund in their capacity as buyers of duty paid packed supari received from the two job workers (packers) and not as manufacturers and therefore limitation applicable to them under Section 11B of CEA was six months from the date of purchase of the packed supari by them from their job workers and the claim was filed much beyond the period of limitation?

(iii) Whether on the facts and circumstances of the case, the Tribunal is right in law holding a view that claim was not hit by limitation especially when the trader claimed refund in their capacity as buyers of duty paid packed supari and that the buyer was not entitled to the benefit of exclusion of time limit of six monthly applicable for filing refund by a manufacturer paying duty under protest as provided under second Proviso to Section 11B(1) of the Central Excise Act, 1944, as has been held by the Hon'ble Supreme Court in the case of Commissioner of Central Excise, Mumbai II vs. Allied Photographic India Ltd. supra?”

3.The above three substantial questions of law, framed for consideration, are overlapping in the sense the question to be decided is whether the claim filed by the assessee claiming refund of the central excise duty paid by them is barred by limitation, as it has been filed beyond the statutory period of six months as provided under Section 11B of the Central Excise Act, 1944 (in short, “the Act”).

4.A short preview is required before we venture to answer the substantial questions of law.

5.The respondent herein was one among the writ petitioners in Writ Petition Nos.4265 to 4267 of 1994 wherein they have challenged the levy of central excise duty on the products dealt with by them viz., “scented supari”. The assessee and other group concerns filed the writ petitions praying for issuance of Writ of Declaration to declare that the betel nut powder (scented supari) are not excisable commodity under the Central Excise and Salt Act, 1944 and consequently, forbear the respondents from demanding any central excise duty from the petitioners pursuant to the notice dated 02.03.1994 in O.C.No.253/94.

6.The assessee contended that the scented betel nut cannot be considered as Pan Masala, as it does not contain tobacco. The Court, by common order dated 29.06.1999, held that the petitioners therein, which includes the respondent/assessee, are not liable to pay excise duty for the betel nut powder known as “supari”, treating the same as Pan Masala. In respect of the consequential relief sought for by the assessee, the matter was remanded to the authorities to consider whether or not the duty paid by the assessee had been passed on to the consumers and if the assessee had passed on the duty to the consumers, they are not entitled for any refund. The Court further observed that it is for the authorities to take an appropriate decision in the matter and partly allowed the writ petitions and remitted the matter to the authorities for a consequential relief. The operative portion of the order reads as follows:-

> “12.In my considered opinion, once the Central Excise Tariff clearly defines what is Pan Masala, namely as the product which contains betel nut and any one of the following, namely lime, katha, cardamom copra & menthol and tobacco, the betel nut powder known as supari, which do not contain tobacco, cannot be treated as Pan Masala, by inference, bringing the same under the category of Others. Therefore, I am of the considered opinion that the petitioners are not liable to pay the excise duty for the betel nut powder known as supari, treating the same as Pan Masala. However, with regard to the consequential remedy, I remit the matter to the authorities to consider whether or not the duty paid by the petitioner had passed on to the consumers. If the petitioners had passed on the duty to the consumers, they are not entitled for any refund. However, it is for the authorities

to take appropriate decision in the matter. Writ petitions are partly allowed and remitted to the authorities for the consequential remedy. WMP Nos.6815 to 1817 of 1994 and 23703 of 1995 are dismissed. No costs."

7.Subsequently, the matter was listed under the caption "for being mentioned", as there were some typographical errors. Nevertheless, the subsequent orders substantially remained the same except for certain clerical corrections. After the writ petitions were disposed of, the assessee filed an application for refund on 24.11.1999. This application was held to be time barred, as it has been filed after six months from the relevant date and there is no specific direction in the order passed by the High Court exempting the assessee from the limitation aspect stipulated under Section 11B(3) of the Act and therefore, the claim was held to be hit by limitation under Section 11B(1) of the Act. This order was put to challenge by the assessee before the Commissioner of Customs and Central Excise (Appeals), Trichirapalli. The appeal was allowed and the order passed by the adjudicating authority was set aside. The appellate authority pointed out that the Department having accepted the first part of the High Court order, with regard to the second part of the order, when the matter was remitted back to the lower authority with specific direction, cannot take such a plea that the claim is barred by limitation. The Revenue filed appeal before the Tribunal and the Tribunal, by the impugned order, held that the claim made by the assessee is not hit by limitation.

8.So far as the plea of unjust enrichment is concerned, the Tribunal remanded the matter to the adjudicating authority with certain directions. Subsequently, the Revenue filed an application for rectification of an alleged mistake. This application was disposed of by order dated 09.08.2010. The Revenue is on appeal as against the order passed by the Tribunal contending that the claim made by the appellant is hit by limitation.

9.In this regard, the learned Senior Standing Counsel appearing for the appellant/Revenue referred to the decision of the Hon'ble Supreme Court in the case of Commissioner of Central Excise, Mumbai II vs. Allied Photographic India Ltd. reported in 2004 (166) E.L.T. 3 (SC). Referring to the said decision, it is submitted that the benefit of the second proviso to Section 11B (1) of the Act, which inter alia states that the limitation of six months shall not apply where duty had been paid under protest, will not be applicable to the case of the assessee, as they are not a manufacturer. Thus, it is contended that the plea of limitation was erroneously decided in favour of the assessee by the Tribunal and therefore, the order passed by the Tribunal is liable to be set aside.

10.The learned counsel appearing for the respondent/assessee pointed out that the respondent cannot extend the scope of remand as directed by the High Court in the batch of writ petitions filed by the assessee and others. However, it is contended that the assessee, being a trader, is entitled to seek for refund, since they have challenged the very levy as being illegal and this was accepted by the Court and relief has been granted. In this regard, the learned counsel has drawn the attention of this Court to paragraph 83 of the decision of the Hon'ble Supreme Court in Mafatlal Industries Ltd. vs. Union of India [1997 (89) E.L.T. 247 (SC)], wherein it has been held as follows:-

> "83.It is then pointed out by the learned Counsel for the petitioners-appellants that if the above interpretation is placed upon amended Section 11B, a curious consequence will follow. It is submitted that a claim for refund has to be filed within six months from the relevant date according to Section 11B and the expression "relevant date" has been defined n Clause (B) of the Explanation appended to sub-section (1) of Section 11B to mean the date of payment of duty in cases other than those falling under Clauses (a), (b) (c), (d) and (e) of the said Explanation. It is submitted that Clauses (a) to (e) deal with certain specific situations whereas the one applicable in most cases is the date of payment. It is submitted that the appellate/revision proceedings, or for that matter proceedings in High Court/Supreme Court, take a number of years and by the time the claimant succeeds and asks for refund, his claim will be barred; it will be thrown out on the ground that it has not been filed within six months from the date of payment of duty. We thing that the entire edifice of this argument is erected upon an incomplete reading of Section 11B. The second proviso to Section 11B (as amended in 1991) expressly provides that "the limitation of six months shall not apply where any duty has been paid under protest". Now, where a person proposes to contest his liability by way of appeal, revision or in the higher courts, he would naturally pay the duty, whenever he does, under protest. It is difficult to imagine that a manufacturer would pay the duty without protest even when he contests the levy of

duty, its rate, classification or any other aspect. If one reads the second proviso to sub-section (1) of Section 11B along with the definition of "relevant date", there is no room for any apprehension of the kind expressed by the learned counsel."

11.Further, by referring to the following observations contained in paragraph 99 of the said judgment, it is submitted that the claim made by the assessee could not have been rejected on the ground of limitation, as they questioned the very levy before the High Court and succeeded. The said portion of the judgment reads as follows:-

> "99............Such a claim is maintainable both by virtue of the declaration contained in Article 265 of the Constitution of India and also by virtue of Section 72 of the Contract Act. In such cases, period of limitation would naturally be calculated taking into account the principle underlying Clause (c) of sub-section (1) of Section 17 of the Limitation Act, 1963. A refund claim in such a situation cannot be governed by the provisions of the Central Excises and Salt Act or the Customs Act, as the case may be, since the enactments do no contemplate any of their provisions being struck down and a refund claim arising on that account. In other words, a claim of this nature is not contemplated by the said enactments and is outside their purview.

12.After elaborately hearing the learned counsels for the parties and carefully perusing the materials placed on record, we are of the considered view that the first issue to be considered is whether the Revenue could have denied the claim made by the assessee as being barred by limitation. If the answer to this question is in favour of the Department, then we may be required to go into the aspect as regards the applicability of the decision in the case of Mafatlal Industries Ltd. (supra) and whether the subsequent decision of the Larger Bench in Allied Photographic India Ltd. (supra) should be made applicable to the case on hand.

13.After carefully going through the materials placed on record, we are of the view that such an exercise is uncalled for in view of the consequential direction issued by the Writ Court while partly allowing the Writ Petition Nos.4265 to 4267 of 1994. The respondent/assessee was the petitioner in W.P.No.4265 of 1994. In the previous part of this Judgment, we have extracted the direction issued by the Writ Court as contained in paragraph 12 of the order dated 29.06.1999.

14.On a reading of the said paragraph, it is evidently clear that the Court granted a declaratory relief in favour of the assessee holding that the assessee is not liable to pay excise duty for the betel nut powder known as "supari". The assessee also sought for a consequential relief before the Writ Court to forbear the respondents from demanding any excise duty from them.

15.So far as the consequential relief is concerned, the Court remanded the matter to the authorities to consider whether or not the duty paid by the assessee had been passed on to the consumers. If the assessee had passed on the duty to the consumers, they are not entitled for refund. However, it was left to the authorities to take an appropriate decision in the matter. In our view, the proper manner of interpreting the direction issued by the Court is to give relief to the order and not to render the order passed by the Court unworkable. The attempt of the Revenue in this appeal to do so, cannot be permitted.

16.As pointed out earlier, the Writ Court has granted declaratory relief holding that the assessee is not liable to pay excise duty on betel nut powder. The necessary consequence that has to follow from it is as to what would be the relief that the assessee is entitled to after it has been declared that they are not liable to pay excise duty. There is no need for interpretation or speculation in this regard, since the High Court itself has issued appropriate direction with regard to the consequential relief. The Writ Court, for such purpose, has remanded the matter to the authorities to consider whether or not the duty paid by the assessee had been passed on to the consumers and if the assessee had passed on the duty to the consumers, they are not entitled for the refund. Thus, the scope of remand is the directions as pointed above and what the authority has to look into for the purposes of the consequential relief has also been clearly circumscribed. The authorities of the appellant-Department cannot sit in judgment over the orders passed by the Writ Court. Thus, any interpretation, which makes the order passed by the Writ Court as unworkable, has to be construed as disobedience of order and consequently, may call for an action under the Contempt of Courts Act.

17.With regard to the aspect, which has convinced us to make the above observation is that the order passed by the Writ Court is an order of remand. The scope of remand cannot be altered by the Department. There is no requirement for the assessee to file an application for refund on the matter being remanded to the Assessing Officer. All that is required to be done is to issue a notice to the assessee calling upon him to establish that they have not passed on the duty to the consumers. Thus, the Department mis-directed itself in agitating the case as a fresh case. The assessee is also partly responsible for the same because, they made a claim for refund. Even this aspect can be condoned. If the Department did not take further action pursuant to the remand order, then obviously, the assessee will make a request to the Department. In any event, the attempt of the Department appears to be to overstep the directions issued by the High Court, which they are not entitled to the in facts and circumstances of the case.

18.Thus, for the above reasons, the substantial questions of law, which have been framed for consideration in this appeal, does not arise for consideration on the facts of the case as stated above. Thus, the appeal, filed by the Revenue, is dismissed. No costs.

Sd/-
Assistant Registrar(CS-VIII)

//True Copy//

Sub Assistant Registrar

abr

To

1.The Customs, Excise and Service Tax Appellate Tribunal,
South Zonal Bench, Shastri Bhawan Annexe, 1st Floor,
26, Haddows Road, Chennai-600 006.

2.The Commissioner of Central Excise
and Service Tax, 1 Williams Road,
Cantonment, Tiruchirapalli-620 001.

3.The Assistant Commissioner of Central Exicse,
Pon Nagar, Medical College Road,
Thanjavur-613 007.

4.The Commissioner of Customs of Central Excise (Appeals),
No.1, Williams Road, Cantonment, Trichirapalli-620 001.

+1cc to Mr.A.P.Srinivas, Advocate, S.R.No. 61099

C.M.A.No.2955 of 2017

MP(CO)
GN(03/10/2018)