

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON: 23.07.2019

DATED: 30.07.2019

CORAM

THE HON'BLE DR.JUSTICE VINEET KOTHARI  
AND  
THE HON'BLE MR.JUSTICE C.V.KARTHIKEYAN

C.M.A.No. 2071 of 2008

M/s. The Tiruttani Co.operative  
Sugar Mills Ltd.,  
Thiruvalangadu  
Tirutani - 631 210

... Appellant /Appellant

Vs.

The Commissioner of Central Excise  
Chennai III Commissionerate  
Chennai - 600 034.

... Respondent/Respondent

Civil Miscellaneous Appeals filed under Section 35(G) of the Central Excise Act, 1944 against the final Order No. 298/2008 dated 28.03.2008 passed by the Customs, Central Excise and Service Tax Appellate Tribunal, South Zonal Bench, Chennai, made in A.No.E/1241/2000 preferred by the appellant herein against the Order-in appeal No.88/2000 (M-III) dated 09.06.2000 against Order-in-original No.15/1999-Tech dated 28.04.1999.

\*\*\*

For Appellant : Mr. Hari Radhakrishnan

For Respondent : Mr. A.P.Srinivas

J U D G M E N T

(Delivered by C.V.KARTHIKEYAN, J)

The appellant M/s. The Tiruttani Co. operative Sugar Mills Ltd., has preferred this Civil Miscellaneous Appeal under Section 35G of the Central Excise Act 1944 calling into question the order passed by the Customs, Central Excise and Service Tax Appellate Tribunal, dated 28.03.2008 whereby the Tribunal had

negatived the claim for refund on the ground of limitation as prescribed under Section 11B of the Central Excise Act 1944.

2. The appellant is engaged in the manufacture of sugars. They have made refund claims to a total expenditure of Rs.9,61,704/- for the period 1984-1985 to 1986-1987 before the Assistant Commissioner of Central Excise. The details of the claims are as follows:-

| S.No. | Claim date | Amount (in Rs.) | Period covered     |
|-------|------------|-----------------|--------------------|
| 1.    | 2.2.88     | 3,00,624/-      | 1984-85            |
| 2.    | 2.2.88     | 1,94,448/-      | 1985-86            |
| 3.    | 13.7.87    | 4,66,632/-      | 19.2.87 to 30.5.87 |
|       | Total      | 9,61,704/-      |                    |

3. Both the Original Authority and the Appellate Authority had rejected the refund claims for the years 1984-1985 and 1985-1986 on the ground of limitation stating that they were well outside the prescribed period of one year of limitation as stipulated under Section 11B of the Central Excise Act, 1944. However, the claim for refund for the period 19.02.1987 to 30.05.1987 was granted holding that the said claim was within the period of limitation. The Tribunal also upheld the said orders. The relevant portion of the order of the Tribunal is extracted below for ready reference:-

"4. We have carefully considered the case records and the claims of both the parties. The issue to be decided is whether the three refund claims were filed in time and if so their sanction would entail unjust enrichment. We find from the order of the original authority that the refund claim relating to the period 19.02.1987 to 30.05.1987 was received by the department on 13.07.1987. Therefore, the refund claim relating to the said period was filed with the department in time as prescribed under Section 11-B. As regards the other two claims, they were filed long after the time allowed in the statute. Therefore, we hold that the refund claim for the period 19.02.1987 to 30.05.1987 alone is admissible and the other two are barred by limitation."

4. Mr. Hari Radhkrishnan, learned counsel for the appellant assailed the reasons given by stating that the Government of India had granted incentives to new sugar factories or those factories undertaking expansion projects. The scheme enabled sugar factories to become viable by utilising additional funds generated to such incentives for repayment of loans advanced to them by Central Financial Institutions. It was stated that the Incentive Scheme permitted sugar factories to have a higher free sale quota. The excise duty on the higher free sale quota sugar would be applicable to levy sugar and sugar factories were permitted to retain the difference in excise duty as incentives. It was stated that this was explained in Circular No. F.3(2)/86-PO-Vol.II dated 04.11.1987. Further Notification No. 130/1983 dated 27.04.1983 was also issued wherein certificate of eligibility from the Chief Director, Directorate of Sugar, was required to avail the exemption benefit of the notification. The learned counsel contended that the excise duty collected were paid to the department without deduction which was the incentive for sugar factories. It was stated that the amount was paid in full without deduction since the certificate was awaited from the Directorate of Sugar. The certificate was issued only on 05.01.1987 under the 1980 Scheme. A certificate was also issued on 11.01.1988 under the 1983 Scheme. Thereafter, the appellant had preferred the three refund claims as stated above. The learned counsel stated that the cause for claim of refund had arisen only from the date on which the certificate had been issued by the Directorate of Sugar and consequently, strict interpretation of the provisions of Section 11B of the Act should not have been adopted by the Tribunal and urged that the refund claims for the years 1984-1985 and 1985-1986 though preferred on 02.02.1988 should have been granted.

5. Per contra, Mr. A.P. Srinivas, learned counsel for the respondent supported the order of the Tribunal.

6. According to him, the period of limitation prescribed under Section 11B of the Central Excise Act, 1944 cannot be extended and since the refund claims in question were preferred much after the period of limitation, they were rightly rejected by the authorities below.

7. We have carefully considered the arguments advanced.

8. Section 11B of the Central Excise Act 1944 relates to claim for refund of duty. The relevant portion of Section 11-B is extracted below:-

"11B. Claim for refund of duty.-

(1) Any person claiming refund of any duty of excise may make an application for refund of such duty to the [Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise] before the expiry of [one year] [from the relevant date] [in such form and manner] as may be prescribed and the application shall be accompanied by such documentary or other evidence (including the documents referred to in section 12A as the applicant may furnish to establish that the amount of duty of excise in relation to which such refund is claimed was collected from or paid by him and the incidence of such duty had not been passed on by him to any other person: Provided that where an application for refund has been made before the commencement of the Central Excises and Customs Laws (Amendment) Act, 1991 (40 of 1991), such application shall be deemed to have been made under this sub-section as amended by the Act and the same shall be dealt with in accordance with the provisions of sub-section (2) as substituted by that Act:] [Provided further that] the limitation of [one year] shall not apply where any duty has been paid under protest.

2. ....

3. ....

4. ....”

9. A reading of the above provision shows that according to the first proviso wherein application for refund were made before the commencement of the Central Excise Customs Laws (Amendment Act 1991), then those applications shall be deemed to have been made under Section 11B of the Act as amended by the said Act and they shall be deal with in accordance with the provisions of sub-section (2) substituted by that Act. Under the second proviso, it had been provided that the period of limitation was not applied only when the duty had been paid in protest.

10. In the instant case, the claims had been preferred on 02.02.1988 with respect to the years 1984-1985 to 1985-1986.

They were clearly beyond the prescribed period of limitation of one year. They had also not been paid under protest to enable extension of period of limitation. However the contention of the learned counsel that the period of limitation would commence only when the certificates were actually issued by the Directorate of Sugars cannot be countenanced since they were only enabling certificates and even according to him, the Notification No. 130/1983 relating to the incentive certificate had been issued on 27.04.1983 itself. If thereafter, the appellant had paid the excise duty collected to the Department without deducting as per the notification then they should have paid the same under protest awaiting the certificate from the by Directorate of Sugar.

11. Reliance relating to interpretation of Section 11B had been placed on the Judgment reported in 1992 (61) E.L.T. 321 (S.C.) [Union of India Vs. Jain Spinners Limited.,]. The relevant portion of the said Judgment in paragraph 24 is extracted below:-

"24. It is difficult to appreciate the reasoning of the High Court that it was the Government which ought to have considered the application of the amended provisions of the Act to the present case. Under the Act, the duty is cast upon the specified statutory authority, viz., the Assistant Collector, Excise to consider the said question. It cannot be disputed that the amount which was deposited by the respondents in the court and was withdrawn by the appellant-Union of India was towards the duty which was assessed by the Assistant Collector, Excise. As pointed out earlier, when the amended provisions of the Act came into force on 20.9.1991, the respondents' application for refund filed on 31.5.1991 was pending before the Assistant Collector and, therefore, as provided in the Act, the amended provisions were applicable to the said application. Even if we disregard the said fact, on the ground, as urged vehemently on behalf of the respondents, that independently of the said application they were entitled to the refund by virtue of the order dated 19.2.1986 of the High Court, the amended provisions of the Act would still be operative and prevent the refund, since the provisions are retrospectively applicable, as stated in

Sub-section (3) of Section 11-B of the Act, to orders passed by the court as well. The said Sub-section reads as follows:

(3). Notwithstanding anything to the contrary contained in any judgment, decree, order or direction of the Appellate Tribunal or any Court or in any other provisions of this Act or the rules made thereunder or any other law for the time being in force, no refund shall be made except as provided in Sub-section (2).

The High Court's order of 19.2.1986 under which alone the refund was claimed could not be an exception to the said provisions nor could the High Court have made such order after 20.9.1991 directing the payment contrary to the said provisions. The Assistant Collector in his order of 13.4.1992 has discussed exhaustively the claim made by the respondents and has pointed out, for reasons recorded therein, that the respondents had failed to prove that they had not passed on the duty in question to others. Whether the reasons given by the Assistant Collector are valid or not is not for us to comment upon in these proceedings and we express no opinion on the same. The respondents have their remedies to challenge the said orders on merits and they may pursue the same. The only question before us is whether the impugned order dated 20.4.1992 of the High Court which is passed to give effect to its earlier order of 19.2.1986 is valid or not. Since we are of the view that the order of 19.2.1986 attracts the provisions of Sub-section (3) of Section 11-B of the Act which has come into force on 20.9.1991, the respondents are not entitled to take advantage of the said order unless they succeed in showing to the statutory authorities that they had not passed on the whole or any part of the duty in question to others."

12. As laid down, the amended provisions of the Act came into force on 20.09.1991. The application for refund duty filed on 02.02.1988 was pending before the Original Authority. In that case, the amended provisions of the Act would still be operative and this would prevent the refund since the provisions

are retrospectively applicable as stated under Sub-Section (3) of Section 11B of the Act, which had been extracted in the relevant portion referred above in the order of the Hon'ble Supreme Court.

13. In view of that fact, we have no hesitation in holding that the refund claim for the period 1983-1984 and 1984-1985 are clearly barred by limitation under Section 11-B of the Central Excise Act 1944 and we do not find any reason to interfere with the order passed by both the fact finding authorities and by the Tribunal. Consequently, this Civil Miscellaneous Appeal has to suffer an order of dismissal and is accordingly, dismissed. No order as to costs.

Sd/-

Assistant Registrar (CS-)

//True Copy//

Sub Assistant Registrar

vsg

To

1.The Commissioner of Central Excise  
Chennai III Commissionerate  
Chennai - 600 034.

2.Customs, Central Excise and  
Service Tax Appellate Tribunal,  
South Zonal Bench, Chennai.

+1cc to Mr.A.P.Srinivas Advocate, S.R.No.65076

+1cc to Mr.Hari Radhakrishnan Advocate, S.R.No.65343

PP (CO)  
CB(06/09/2019)

Pre-Delivery Judgement made in

C.M.A.No. 2071 of 2008

WEB COPY