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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 10.12.2019

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THE HON'BLE DR.JUSTICE ANITA SUMANTH

WP.No.8055 of 2018
WMP.No.10041 of 2018

M/s.3F Industries Limited
Rep.by its Vice President (Co-ordination)
and the authorized representative, AKS Moorthy

... Petitioner

/Vs/

The Assistant Commissioner of Customs
Nagapattinam Customs Division
No.4, First Line Beach
Nagapattinam-611 001

...Respondents

PRAYER: PETITION filed under Article 226 of the Constitution of India praying for the issuance of writ of Certiorarified Mandamus, calling for the records pertaining to the impugned order-in-original No.09/2018 dated 09.02.2018 on the file of the respondent herein, quash the same and consequently, direct the respondent herein to refund the already sanctioned amount, which was credited to the consumer welfare fund along with interest from the date of payment of duty till date to the petitioner company.

For Petitioner : Mr.J.V.Niranjana

For Respondents : Mr.A.P.Srinivas
Senior Standing Counsel

O R D E R

The petitioner is engaged in the manufacture and sale of bakery fats as well as a variety of other types of fats such as fatty acids, deoiled cakes and specialty fats. It is a regular importer of crude vegetable oils and Palmolein oil (in short products/products in question) that are used as raw material by the petitioner in its manufacturing as well as traded as such.

2. In July 2001, the petitioner imported 2800.662 metric



tonnes (MT) of RBD Palmolein (edible grade). Two bills of entry had been filed ex-bond on 03.08.2001 and 04.08.2001 for clearance of 2471.788 MT of the product for home consumption. There appears to have been a new rate of duty prescribed on 03.08.2001, as per Notification No.36 of 2001, published in the Gazette on 06.08.2001. The Customs Department re-assessed the ex-bond bills of entry on the basis that the revised rate would be applicable to the imports whereas, the petitioner contended that the original rate would be applicable as revision of duty will, according to it, come into effect only from date of publication of such revision, being 06.08.2001. Notwithstanding, the aforesaid submission, the differential duty amounting to a sum of Rs.1,09,11,275/- had been remitted under protest in September 2001 on various dates between 01.09.2011 and 06.09.2001.

3. The petitioner challenged the order of the Department in raising a demand for differential duty on the ground that the original rate would be applicable, since the revised rate had been published only on 06.08.2001, post the dates of import. This issue was decided in favour of the petitioner on 04.06.2015 in W.P.No.15635/01. This order has become final. Refund of the duty remitted was claimed by the petitioner on 03.02.2016. Though the refund was sanctioned, the same was credited to the Consumer Welfare Fund on the ground of unjust enrichment. The sole basis appears to have been that the amount claimed as refund was not charged to the profit and loss account but retained in 'receivables' account.

4. A first appeal was filed before the Commissioner (Appeals) that came to be rejected on 10.01.2017. In further appeal before the Central Excise and Sales Tax Appellate Tribunal (CESTAT), the petitioner partly succeeded, since by order dated 10.01.2017, the CESTAT remanded the issue to the file of the Assessing Authority in the following terms:

5. What is not in dispute is the eligibility of the refund claim. Both the lower authorities agree that the refund claim is sanctionable. However, they hold that the claim did not pass the test of unjust enrichment and accordingly, it requires credited to the Consumer Welfare Fund. One of the grounds for this stand is that the importer had not provided sufficient documents with regard to unjust enrichment. In fact, the original authority in his order, while sanctioning the amount ordering its credit to Consumer Welfare Fund, and rejecting the claim of the appellant for payment of interest and additional interest, has however ordered that the appellant shall submit the original documents pertaining to the subject refund claim as and when



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admittedly, been accepted by the Department as may be seen from the impugned order itself, at paragraph 15 thereof, where reference is made to communications of the Commissioner of Customs, Trichy dated 23.11.2017 and 01.12.2017 to such effect.

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6. The observations of the Full Bench of the Supreme Court in Union of India and Others Vs. Kamlakshi Finance Corporation (55 ELT 433), regarding judicial discipline would be applicable on all focus in the present case. The Bench at paragraph 8, states as follows:

8. We have dealt with this aspect at some length, because it has been suggested by the learned Additional Solicitor General that the observations made by the High Court, have been harsh on the officers. It is clear that the observations of the High Court, seemingly vehement, and apparently unpalatable to the Revenue, are only intended to curb a tendency in revenue matters which, if allowed to become widespread, could result in considerable harassment to the assesses-public without any benefit to the Revenue. We would like to say that the department should take these observations in the proper spirit. The observations of the High Court should be kept in mind in future and the utmost regard should be paid by the adjudicating authorities and the appellate authorities to the requirements of judicial discipline and the need for giving effect to the orders of the higher appellate authorities which are binding on them.

7. Be that as it may, and quite apart making the above unwarranted statements/observations the Assessing Officer has not adverted to the issue on hand as directed by the CESTAT. The CESTAT has, in conclusion, noted the submission of the petitioner that the entire sales of Palmolein oil had been completed in August 2001 itself, and the differential duty remitted, under protest, in September, 2001. It is in this context that the CESTAT states that documents in support of the aforesaid submission be examined by the Authority to convince himself that the incidence of duty has not been passed on to the consumer. Regrettably, the Assessing Authority has completely lost sight of this exercise and has proceeded merely on the basis of accounting entries, the methodology of accounting followed by the petitioner and as to whether the duty had been reflected in the 'receivables' or 'profit and loss' accounts.

8. Mr.Srinivas requests that the matter be remanded to enable the authorities to carry out this exercise now. However,



I am not inclined to accept this request in December 2019 in relation to transactions of the year 2001, particularly, when the officer is seen to have been remiss in his approach to the issue. The facts as noted by the Authority are itself clear to establish the position that incidence of duty has not been passed on to the customer. At paragraph 22, the officer sets out the facts as follows:

22. I have gone through the documents submitted by the importer. The main issue to be decided is whether the doctrine of unjust enrichment is applicable in respect of the amount of refund claimed by the importer. The imported quantity under Ex Bond Bills of Entry No.06 to 08/2001 dated 03.08.2001 and 09/2001 dated 04.08.2001 is 2471.788 MTs. The copy of the sale Register produced by the importer shows that a quantity of 2479.035 MTs of the imported Palmolein was sold during the month of August, 2001. The importer also submitted copies of the credit invoices issued during the month of August, 2001. The quantity of the credit invoices tallies with the sales register. On verification of the cost break of the imported Palmolein, it is noticed that the total sales value of the subject imported goods during August, 2001 works out to Rs.8,12,07,043/- and the sales cost of goods works out to 32,854/- per MT. The Assessable Value and the Duty of the disputed goods works out to Rs.6,16,94,366/- and Rs.24,959/- per MT without including the excess paid duty amount. The difference between the sales value and imported cost is Rs.7895/- per MT which works out to 31.63% which is incidentals and profit. The importer has informed that profit and incidentals are normal only as per his e mail dated 24.01.2018.

9. Thus, it is clear that the petitioner has produced (i) copy of sales register which shows that a quantity of 2479.03 metric tonnes of the product was sold in August (ii) Credit invoices issued during the month of August 2001, tally with the sales register (iii) the cost break-up of the product reveals the sale value, and the duty in relation to the goods, without inclusion of differential duty remitted and (iv) the profit and expenditure elements appear to be on par with the claim of the petitioner for previous and subsequent years.

10. Bearing in mind the aforesaid position as well as the fact that, admittedly, the sales had been completed in August 2001 whereas the differential duty was remitted only in September 2001, it appears clear to me as seen from the records of the Assessing Officer and his observations in the impugned order, that the incidence of duty has not been passed on in this



case. There is thus no necessity for remand as this exercise and the result thereof is quite apparent from the existing records and the observations of the officer himself.

11. In the light of the discussion as above the impugned order is set aside and the writ petition is allowed.

12. Now coming to the question of interest on the refund claim, the request for refund has been rejected by the authority invoking the provisions of Section 27A of the Act. According to the revenue, the provisions of Section 27A require interest to be paid on duty that has been ordered to be refunded under Section 27(2) but not refunded within three(3) months from date of receipt of application under Section 27(1) of the Act.

13. In this case the application was filed by the petitioner on 13.11.2017. Hence refund if sanctioned, ought to be paid before 13.02.2018 without interest and if the payment had been made after 13.02.2018, such refund would have carried interest. The claim has itself been rejected on 09.12.2018 and thus, according to the respondent, no interest is payable.

14. According to the petitioner, the provisions of Section 27A will not apply in this case since what has been refunded is not a duty but an amount that was not at all payable by the petitioner/liable to be collected by the revenue. Such payment does not, according to the petitioner, bear the character of duty and is hence not bound by the rigour of Section 27A.

15. Mr.Srinivas disagrees pointing out that every amount that is refunded would bear the character of duty for the purposes of Section 27A unless it had been extorted without the authority of law and without there being a charging mechanism/provision to support such levy.

16. The provisions of Section 27A read thus:

27A. Interest on delayed refunds

If any duty ordered to be refunded under sub-section (2) of section 27 to an applicant is not refunded within three months from the date of receipt of application under sub-section (1) of that section, there shall be paid to that applicant interest at such rate, not below 5% and not exceeding 30% 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 three months from the date of receipt of such application till the date of refund of such duty:

Provided that where any duty, ordered to be refunded



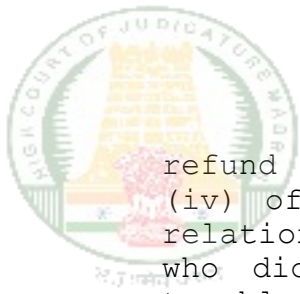
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under sub-section (2) of section 27 in respect of an application under sub-section (1) of that section made before the date on which the Finance Bill, 1995 receives the assent of the President, is not refunded within three months from such date, there shall be paid to the applicant interest under this section from the date immediately after three months from such date, till the date of refund of such duty.

17. The provisions of Section 11B of the Central Excise Act that are in pari material with the provisions of Section 27A of the Customs Act, were challenged in a batch of writ petitions and a Constitutional Bench of the Supreme Court in the case of Mafatlal Industries Ltd. And Others Vs. Union of India and Others [(1997) 5 SCC 536], considered various situations where refunds would lie under the provisions of the Central Excise and Salt Act, 1944 and the Customs Act, 1962. The nature and character of the refund claims were also specifically gone into and set out in detail at paragraph 108. Where a refund is claimed on the ground that the provision under which the duty was levied were unconstitutional, such claim would stand outside the purview of the relevant enactment and can be made by way of a suit or a writ petition. In the words of the Supreme Court:

(ii) Where, however, a refund is claimed on the ground that the provision of the Act under which it was levied is or has been held to be unconstitutional, such a claim, being a claim outside the purview of the enactment, can be made either by way of a suit or by way of a writ petition. This principle is, however, subject to an exception: Where a person approaches the High Court or the Supreme Court challenging the constitutional validity of provision but fails, he cannot take advantage of the declaration of unconstitutionality obtained by another person on another ground; this is for the reason that so far as he is concerned, the decision has become final and cannot be reopened on the basis of a decision on another person's case; this is the ration of the opinion of Hidayatullah, C.J. in Tilokchand Motichand and we respectfully agree with it.

18. Thus, only a refund that is claimed on the ground that a provision in terms of which it is levied is unconstitutional would stand outside the purview of Section 27A. This is also the basis of my order in the case of Enmas Andritz Pvt. Ltd. Vs. The Assistant Commissioner of Service Tax and Another in W.P.No.23664 of 2017 dated 06.09.2019, wherein I had occasion to consider the mandamus sought for by that petitioner directing



refund of service tax remitted by it in terms of Rule 2(1)(d) (iv) of the Service Tax Rules, 1994. The aforesaid Rule is in relation to taxable services provided by a person outside India, who did not have any office in India, the person receiving taxable service being situated in India. The aforesaid Rule had been challenged before the Bombay High Court in Indian National Ship Owners Association Vs. Union of India, [(2009) 13 STR 235] and had been struck down and the levy held to be unconstitutional till the enactment of Section 66A on 18.04.2006, that charged tax on a service recipient. The Court held that there was no authority to levy service tax on a service recipient that too by way of a Rule, in the absence of a charging provision. Such provision had been introduced only on 18.04.2006 and thus there would be no incidence of tax till 18.04.2006. The aforesaid decision was confirmed by the Supreme Court on 14.12.2009.

19. In those circumstances, I had held that where the collection of the tax is without the authority of law, then the refund of duty collected was also not bound by the rigour of any provision in that law and thus the provisions of Section 11B and the procedure set out therein would not stand attracted. Refund was thus, directed to be granted with interest from date of judgment of the Supreme Court, that is, from 14.12.2009 at the rate of 6 per cent per annum.

20. Reliance on this decision by the petitioner is of no avail in the light of the judgment in Mafatlal Industries Ltd. (supra) and the distinction made between a levy that is unconstitutional per se and one which is levied, but disputed by an assessee who succeeds thereafter in appeal.

21. The dispute in the present case is as to whether Notification dated 03.08.2001 enhancing the rate of tax would be effective from date of Notification or from date of publication thereof in the Official Gazette, which was 06.08.2001. The payment of duty is itself is not in question and it is only the rate thereof that is in dispute. Such difference in the rate of duty as between the period prior to date of Notification and thereafter, is only one of interpretation by the authorities.

22. A decision of the Division Bench of this Court in the case of Commissioner of C.Ex.Chennai-II Vs. UCAL Fuel Systems Ltd. in W.A.No.591 of 2011 dated 21.09.2011 and relied upon by the petitioner is also distinguishable since the amount, of which refund was sought in that case, did not bear the character of duty at all, but constituted a deposit made by the assessee during investigation.



23. The refund claim in this case was filed on 03.02.2016, the Application was returned as defective and the application re-presented on 14.03.2016. These dates are not in dispute. Thus, in the light of the discussion as above and the clear stipulation in Section 27B, interest at the rate of 6% shall be paid by the respondents on an amount of Rs.1,09,11,275/- (Rupees one crore nine lakhs eleven thousand two hundred and seventy five only) computed from 14.06.2016 till date of repayment within a period of four (4) weeks from date of receipt of this order. This writ petition is allowed in the aforesaid terms.

Sd/-
Assistant Registrar(CS V)

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Sub Assistant Registrar

To

The Assistant Commissioner of Customs
Nagapattinam Customs Division
No.4, First Line Beach
Nagapattinam-611 001.

+1cc to Mr.A.P.Srinivas, Advocate Sr.103026

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