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IN THE HIGH COURT OF JUDICATURE AT MADRAS

Date : 23.08.2021

CORAM:

THE HON'BLE MR. JUSTICE S.M.SUBRAMANIAM

W.P.No.18538 of 2015

G.Mohanakrishnan

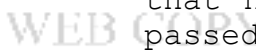
...Petitioner

Vs.

1. The Chairman,
Central Board of Excise and Customs,
North Block, New Delhi - 110 001.
2. The Member-Central Excise,
Central Board of Excise and Customs
North Block, New Delhi - 110 001.
3. The Chief Commissioner of Central Excise,
No.26/1, Mahatma Gandhi Road,
Nungambakkam, Chennai - 600 034.
4. The Director General of Central Excise
Intelligence, West Block-VII, Wing-VI,
First Floor, Section I, R.K. Puram,
New Delhi - 110 066.
5. The Commissioner of Central Excise,
Chennai - IV Commissionerate, No.26/1,
Mahatma Gandhi Road, Nungambakkam,
Chennai - 600 034.
6. The Additional Director General,
Directorate General of Central Excise,
Intelligence, Chennai Zonal Unit, C3,
"C" Wing, 2nd Floor, Rajaji Bhavan,
Besant Nagar, Chennai - 600 090.
7. The Assistant Commissioner of Central
Excise, Maduravoyal Division, Chennai - IV
Commissionerate, C48, TNHB Complex,
Second Avenue, Anna Nagar,
Chennai - 600 040.

...Respondents

Prayer : Petition filed under Article 226 of Constitution of India praying for issuance of a Writ of Mandamus directing the respondents herein to return the seized records, materials and



4. The learned counsel for the petitioner made a submission that no show cause notice has been issued or any order has been passed for appropriation of the said amount deposited by following the procedure as contemplated. The contention of the petitioner is that there is no manufacturing process involved and therefore, that amount deposited by the petitioner cannot be treated as 'central excise duty' and thus, the petitioner is entitled for the refund of the entire deposited amount with interest.

6. The learned counsel for the petitioner mainly contended that the procedure as contemplated under the provisions of the Central Excise Act has not been followed, no show cause notice has been issued nor an order appropriating the said amount was passed by the competent authority and therefore, the collection of money is illegal and in violation of the provisions of the Act and more so, it would offend Article 265 of the Constitution of India.

"There was the allegation of the petitioner that in order to compel the petitioners to pay the duties which the petitioners contended that they were not liable to pay, the licence was not being renewed for a period and the petitioners were constantly kept under threat of closing down their business in order to coerce them to make the payment. This is unfortunate. We would not like to hear from a litigant in this country that the government is coercing citizens of this country to make payment of duties which the litigant is contending not to be leviable. Government, of course, is entitled to enforce payment and for that



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purpose to take all legal steps but the government, Central or State, cannot be permitted to play dirty games with the citizens of this country to coerce them in making payments which the citizens were not legally obliged to make. If any money is due to the government, the government should take steps but not take extra-legal steps or manoeuvre. Therefore, we direct that the right of renewal of the petitioner of licence must be judged and attended to in accordance with law and the occasion not utilised to coerce the petitioners to a course of action not warranted by law and procedure"

8. In the case of Sanmar Foundaries Limited Vs. Commissioner of Central Excise and Customs, Tiruchirappalli reported in 2015 (325) E.L.T. 854 (Mad.), the Hon'ble Division Bench of this Court held as follows:

"20. In the case on hand, there was nothing except an inspection and verification. It was never the case of the respondents that they found out duty evasion in the course of investigation and that when they were ready to serve a notice under sub-section (5), the appellant made payment in terms of sub-section (6). Had this been their contention, the respondents ought to have shown the break-up of the amount of Rs. 7.53 crores into (i) duty; (2) interest; and (iii) penalty. In the absence of any of these details, the respondents cannot contend that the payment was in terms of sub-section (6). As a matter of fact, sub-section (7) is somewhat similar to sub-section (2) and it prohibits the Central Excise Officer from serving any notice in respect of the amount paid. But, in the case on hand, a notice has been served after the learned Single Judge disposed of the writ petition, with liberty to the respondents. Therefore, it is clear that the amount of Rs. 7.53 crores paid by the appellant, will not fall either under Section 11A(1) (b) or under Section 11A(6). If it will not fall under any of these two provisions, it cannot be taken to be a payment made in relation to any statutory provision. Therefore, irrespective of whether the amount was paid under coercion or voluntarily, the respondents have no business to retain the same. Hence the contention of the learned Standing Counsel for the respondents that the payment was authorised by law has to be stated only to be rejected."

9. Yet another judgment in the case of M/s.Shri NandhiDhall Mills India Private Limited Vs. Senior Intelligence Officer in



W.P.No.5192 of 2020 dated 07.04.2021, refund was granted and the writ petition was allowed based on the following observations made in paragraph 22 of the order, which reads as under:

"22. According to the revenue, the above decisions have been rendered in the context of the erstwhile Central Excise and Service Tax Enactments where there was no express statutory provision for collection of an amount during investigation whereas the present remittances have been made in line with Section 74(5) and are hence permitted statutorily. Prior to the inception of the GST Act, instances were rife when officials of DRI and Customs Department were infamous for collecting advance payments of tax from assessee, many a time under coercion, and in the course of investigation itself. There are several decisions of Courts wherein such acts have been frowned upon, with Courts consistently holding that 17 W.P. No.5192 of 2020 no amounts may be collected prior to an actual determination of an amount payable by an assessee. With the inception of Section 74(5), it is the case of the revenue that the collection of amounts in advance has attained statutory sanction, provided the same are voluntary in Form GST-DR03."

10. Relying on the above judgments, the learned counsel for the petitioner reiterated that the amount collected was an illegal collection and cannot be construed as 'duty amount' and therefore, the writ petition is to be allowed as prayed for.

11. Mr.A.P.Srinivas, learned Senior Standing Counsel appearing on behalf of the respondents 1 to 3, 5 and 7 disputed the contentions raised on behalf of the writ petitioner by stating that, an adjudication is required for the purpose of any refund in respect of the duty amount collected. In the present case, the allegation of coercive collection is far beyond the truth. It is a self assessment made by the petitioner under the provisions of the Act and therefore, the petitioner has to file an application in a prescribed format under Section 11B of the Act. Even at the first instance, the respondents have asked the petitioner to submit an application in a prescribed format enabling them to conduct an enquiry and take a decision regarding the entitlement of the writ petitioner for getting refund. In view of the fact that the petitioner had repeatedly sent representations to the Assistant Commissioner of Central Excise, Maduravoyal Division vide in his letter C.No.V/18/28/2014-Refund dated 09.10.2014 categorically stated that the payment of Central Excise duty for the past clearances in connection with ongoing investigation by DGCEI, Chennai Zonal Unit, Chennai-90, which indicates that amount has been paid towards Central Excise duty.



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Therefore, the claim is undoubtedly covered under Rule 11B of the Central Excise Act, 1944 and accordingly, the petitioner was asked to submit an application in the prescribed proforma for taking further necessary action in this regard. Instead of filing an application in the prescribed proforma, the petitioner has chosen to file the present writ petition seeking direction to refund the amount of Central Excise duty paid.

12. The learned Senior Standing Counsel is of the opinion that amount deposited based on the self assessment made by the petitioner. If at all the petitioner is of an opinion that he is not liable to pay such an amount, then, an enquiry is required for the purpose of making refund and therefore, submission of an application in a prescribed format is mandatory under the provisions of the Central Excise Act. Thus, the course adopted by the petitioner by submitting mere representation, in fact, is improper and based on such representation, the case of the petitioner cannot be considered by the respondents.

13. In support of the contention, the learned Senior Standing counsel relied on the judgment of the Hon'ble 9 Judges Bench of the Hon'ble Supreme Court in the case of Mafatlal Industries Limited Vs. Union of India, 1997 (89) E.L.T. 247 (S.C.) wherein the larger Bench of the Hon'ble Apex Court held that 'All claims for refund except where levy is held to be unconstitutional, to be preferred and adjudicated upon under Section 11B of the Central Excise Act, 1944 or under Section 27 of the Customs Act, 1962 and subject to claimant establishing that burden of duty has not been passed on to third party'. The Hon'ble Supreme Court held that 'though the writ petition is entertainable, Writ Court to have due regard to the provisions of Central Excises and Customs Act and to refuse grant of relief where burden of duty passed on to third party, therefore, there is no automatic refund of the amount deposited and an adjudication is required in respect of the disputed facts.

14. Mr.V.Sundareswaran, learned Senior Panel Counsel appearing on behalf of the respondents 4 and 6 relying on the counter statement made a submission that the petitioner himself calculated the duty liability on self assessment for clearances made during the year 2006-2007 and had remitted a sum of Rs.27,05,000/- in five installments on various states. The 7th respondent who is the jurisdictional Deputy Commissioner informed the petitioner that the application for refund must be submitted in a prescribed format under Section 11B of the Act. The petitioner instead of complying with the said direction rushed to the High Court by filing the present writ petition regarding the allegations that no show cause notice was issued to the writ petitioner.



15. The learned Senior Panel Counsel relied on ground (E) of the counter statement and contended that such a show cause notice is not required. The relevant ground (E) stands extracted hereunder:

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"As regards petitioner's contention in para 8, it is submitted that the petitioner has quantified the duty liability and paid the duty on various dates without any direction / compulsion from this Respondent and that the petitioner's allegation has no basis.

As per Section 11A 2(B), "Where any duty of excise has not been levied or paid or has been short-levied or short-paid, or erroneously refunded, the person, chargeable with the duty, may pay the amount of duty [on the basis of his own ascertainment of such duty or on the basis of duty ascertained by a Central Excise Officer] before service of notice on him under sub-section (1) in respect of duty, and inform the Central Excise Officer of such payment in writing, who on receipt of such information shall not serve any notice under sub-section (1) in respect of the duty so paid-"

"Provided that the Central Excise Officer, may determine the amount of short payment of duty, if any which in his opinion has not been paid by such person and, then, the Central Excise Officer shall proceed to recover such amount in the manner specified in this section, and the period of "one year" referred to in sub-section (1) shall be counted from the date of receipt of such information of payment."

Since, the duty liability had been quantified and paid by the petitioner, no show cause notice was necessary to be issued for appropriation of the duty paid in terms of the above provisions. The petitioner has never alleged that the payments were made under duress / compulsion but on the other hand are voluntarily made on various dates subsequent to the search conducted on 24/7/2007."

16. The learned Senior Panel Counsel relied on the judgment of the Hon'ble 3 Judges Bench of the Hon'ble Supreme Court of India in the case of Assistant Collector of Central Excise Vs. Kashyap Engineering & Metallurgicals Private Limited, 2002 (142) E.L.T. 518 (S.C.) wherein the Hon'ble Supreme Court held as follows:

"2. The assessee-respondent made a claim for refund of excise duty under the provisions of the Excise Act which was beyond the permissible period thereunder. The refund claim having been rejected by the authorities, a writ petition was moved and allowed.

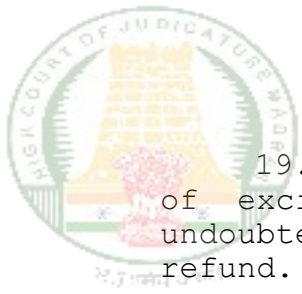


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The Revenue preferred a writ appeal, which was dismissed. The point now is covered by the decision of this Court in *Mafatlal Industries Ltd. v. Union of India* [(1997) 5 SCC 536 : (1997) 89 ELT 247] where it has been held that the court, in a writ petition, has to take note of the provisions of the Act and must exercise its discretion consistent with those provisions. Much the same view was earlier taken in the judgment of this Court in *CCE v. Doaba Coop. Sugar Mills Ltd.* [1988 Supp SCC 683 : 1989 SCC (Tax) 23 : (1988) 37 ELT 478]"

17. Considering the arguments as advanced by the respective learned counsels appearing on behalf of the parties to the lis on hand, this Court is bound to consider the provisions of the Act in the matter of refund and Section 3 of the Central Excise Act is a charging provision and Section 4 contemplates 'Valuation of excisable goods for purposes of charging of duty of excise'. Section 11B enumerates 'Claim for refund of [duty and interest, if any, paid on such duty]'. Therefore, claim for refund is to be made under Section 11B of the Central Excise Act. The Central Excise Rules, 2002 more specifically Rule 6 provides 'Assessment of duty'. Accordingly, the assessee shall himself assess the duty payable on any excisable goods; provided that in case of cigarettes, the Superintendent or Inspector of Central Excise shall assess the duty payable before removal by the assessee. Rule 7 denotes 'Provisional assessment'.

18. Perusal of the provisions stated above, it is apparently clear that self assessment is permissible under Rule 6 of the Central Excise Rules, 2002. In the event of self assessment, if any duty is paid excessively or erroneously, then, the assessee is entitled to claim for refund and such refund is to be made on receipt of any proper application under Section 11B of the Central Excise Act. In the present case, on 24.07.2007 the officers attached to the 6th respondent conducted search operations in the petitioner's premises and seized goods 'Polyguard - 999' material. Thereafter, the petitioner deposited Rs.27.05 lakhs on five installments on various dates. Therefore, such payments made are to be construed as 'self assessment made by the petitioner'. In the event of any such excess payment of excise duty, as rightly pointed out by the learned Senior Standing Counsel, an application in a prescribed format is to be submitted for consideration. In the present case, the respondents have directed the petitioner to submit an application in a prescribed format enabling them to consider the claim in an appropriate manner. However, the petitioner has not chosen to do so, instead the present writ petition is filed.



19. This Court is of the considered opinion that any payment of excise duty made excessively, erroneously or otherwise, undoubtedly the person, who deposited, is entitled to claim refund. However, such refund is to be made only after conducting an enquiry in the manner known to law. In other words, any funds deposited in the Government account, the refund is to be made by following the procedures as contemplated in the statute and rules. In the present case, Section 11B of the Central Excise Act provides procedures for claim of refund. Therefore, the petitioner is bound to file an application in a prescribed proforma for the purpose of claiming refund and admittedly, no such application in a prescribed proforma has already been filed by the petitioner and thus, the petitioner is at liberty to file such an application in a prescribed proforma for refund of the deposited amount. In the event of filing any such application, the authorities are bound to consider the same by following the procedures as contemplated and by conducting an enquiry and by affording an opportunity to the petitioner and dispose of the same as expeditiously as possible.

20. With these directions, this Writ Petition is disposed of. No costs.

Sd/-
Assistant Registrar(CS III)

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Sub Assistant Registrar

Sgl

To

1. The Chairman,
Central Board of Excise and Customs,
North Block,
New Delhi - 110 001.
2. The Member-Central Excise,
Central Board of Excise and Customs
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6. The Additional Director General, Directorate General of Central Excise, Intelligence, Chennai Zonal Unit, C3, "C" Wing, 2nd Floor, Rajaji Bhavan, Besant Nagar, Chennai - 600 090.
7. The Assistant Commissioner of Central Excise, Maduravoyal Division, Chennai - IV Commissionerate, C48, TNHB Complex, Second Avenue, Anna Nagar, Chennai - 600 040.

+1cc to M/s.B.Sathish Sundar, Advocate, S.R.No.42457
+1cc to M/s.V.Sundareswaran, Advocate, S.R.No.42113

W.P.No.18538 of 2015

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