

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON	08.02.2021
PRONOUNCED ON	18.02.2021

CORAM

THE HON'BLE MR.JUSTICE C.SARAVANAN

W.P.NOS.28589 & 28574 OF 2018

AND

W.M.P.NOS.33357 & 33341 OF 2018

(THROUGH VIDEO CONFERENCING)

M/s.Tamilnadu Newsprint and Papers Ltd
Represented by its General Manager (Finance)
M.S.Sridhar,
Kagithapuram, Karur District,
Tamil Nadu - 639 136.

...Petitioner
in both W.Ps

Vs

1. Customs, Central Excise &
Service Tax Settlement Commission
Represented by its Vice Chairman
Additional Branch, II Floor,
Narmadha Block, Custom House,
60, Rajaji Salai,
Chennai - 600 001.

2. The Commissioner of GST & Central Excise,
1, Williams Road, Cantonment,
Tiruchirapalli - 620 001.

...Respondents
in both W.Ps

Prayer in W.P.No.28589 of 2018: Writ Petition filed under Article 226 of the Constitution of India to issue a Writ of Certiorari, quashing the decision of the Settlement Commission in the File No C.No.V/15/62/2003-SC communicated vide letter dated 18.09.2018 on the file of the first respondent, rejecting the request to modify the Final Order No.12/2018 C.Ex dated 27.08.2018.

Prayer in W.P.No.28574 of 2018: Writ Petition filed under Article 226 of the Constitution of India to issue a Writ of Certiorarified Mandamus, calling for the records in File No C.No.V/15/62/2003-SC comprising the impugned Final Order

No.12/2018-C.Ex dated 27.08.2018 on the file of the first respondent, quash the same with a consequential direction to the First Respondent to refund the sum of Rs.3,87,657/- to the petitioner herein being excess amount paid by them.

For Petitioner : Mr.S.Muthuvenkataraman
in both W.Ps.
For Respondents : Mrs.R.Hemalatha
in both W.Ps.

C O M M O N O R D E R

By this common order, both the writ petitions are being disposed of.

2. The petitioner has filed the writ petitions to quash the decision of the Settlement Commission in C.No.V/15/62/2003-SC communicated vide letter dated 18.09.2018 on the file of the first respondent, rejecting the request to modify the Final Order No.12/2018 C.Ex dated 27.08.2018 and to direct the first respondent to refund a sum of Rs.3,87,657/- to the petitioner.

3. The petitioner is engaged in manufacture of Newsprint and Newspapers etc. It is the case of the petitioner that by oversight it had not paid duty on goods capitively consumed and had also wrongly availed Input Tax Credit, MODVAT Credit under the provisions of the Central Excise Rules, 1944 as it stood during the period in dispute. Under these circumstances, the officers of the second respondent/Commissioner of GST & Central Excise (Formerly Commissioner of Central Excise) visited the petitioner's premises and investigated the affairs of the petitioner on 08.08.2001. Thereafter, statements were recorded from the office of the petitioner on 24.09.2001.

4. During the course of investigation, the petitioner debited a total amount of Rs.28,00,923/- from their CENVAT account on 11.01.2002 and on 20.02.2002 towards paper core and bleach liquor consumption (Rs.7,95,239/- towards paper core capitively consumed and Rs.19,91,426/- towards bleach liquor capitively consumed and a differential duty is Rs.14,258/-). The petitioner debited amounts towards duty liability for the period from July 1996 to June 2001.

5. Thereafter, a Show Cause Notice was issued to the petitioner by the office of the second respondent/Commissioner of GST & Central Excise on 02.12.2002. The said Show Cause Notice called upon the petitioner to show cause as to why;

i) an amount of Rs.10,85,791/- (Rupees ten lakhs eighty five thousand seven hundred and ninety one only) being the wrong credit taken by the petitioner as detailed in Annexure A & B should not be disallowed and recovered from the petitioner under Rule 57AH of the Central Excise Rules, 1944 read with proviso to Section 11A(1) of Central Excise Act, 1944.

ii) an amount of Rs.14,76,987/- (Rupees Fourteen lakhs seventy six thousand nine hundred and eighty seven only) being the duty on the intermediate products paper core and bleach liquor, as detailed in Annexures C and D should not be demanded from the petitioner under proviso to Section 11A(1) of Central Excise Act, 1944.

iii) the amount paid by TNPL vide RG 23A Part II Sl.No.4886 dated 11.1.2002 and 5524/20.2.2002 should not be appropriated towards the demand at Para (ii) above

iv) a penalty should not be imposed on the petitioner under Rules 57AH and 173Q of Central Excise Rules, 1944 and under Section 11AC of Central Excise Act, 1944; and

v) interest at the applicable rate on the duty evaded should not be demanded from the petitioner under Rule 57AH of Central Excise Rules, 1944 and Section 11AB of Central Excise Act, 1944.

6. In the said Show Cause Notice, it was stated that the petitioner was also required to produce at the time of showing cause all the evidence upon which it intended to rely on in support of its defence and the petitioner was further required to indicate in its written explanation as to whether it wishes to be heard in person before the case is adjudicated. It was also stated that if no cause is shown against the action proposed to be taken within 30 days from the date of receipt of this notice or if they do not appear in person before the adjudicating authority when the case is posted for hearing, the case will be decided EXPARTE based on documents available on record. It was also stated that the said notice was issued without prejudice to any other action that may be initiated against the petitioner under the Central Excise Act and the Rules made there under or any other law for the time being in force in India.

7. Thus, the Show Cause Notice called upon the petitioner to

show cause why the amount debited by the petitioner on 11.01.2002 and on 20.02.2002, should not be appropriated towards duty liability of Rs.10,85,791/- and Rs.14,76,987/- alone.

8. Under these circumstances, the petitioner preferred an application before the first respondent/Settlement Commission on 22.08.2003 under Chapter V of the Central Excise Act, 1944 to settle the case. Before the first respondent/Settlement Commission, the petitioner admitted a tax liability of Rs.24,13,266/- and prayed for refund of Rs.3,87,657/- (Rs.28,00,923 - 24,13,266). However, by an order dated 29.12.2003, the first respondent/Settlement Commission dismissed the said application of the petitioner on the ground that the petitioner had failed to truly and fully disclose its tax liability and therefore the application was liable to be rejected.

9. Aggrieved by the same, the petitioner filed W.P.No.13736 of 2004 which came to be disposed by an order dated 02.08.2017. While setting aside the order 29.12.2003 of the first respondent/Settlement Commission, the Court also observed that as far as refund is concerned, it is upto the first respondent/Settlement Commission to consider whether to grant of such refund or not. However, that could not have been a ground to come to a conclusion that there was no full and true disclosure of duty liability by the petitioner.

10. The said order of this Court in W.P.No.13736 of 2004 has culminated in the impugned order of the first respondent/Settlement Commission, which is sought to be challenged by the petitioner in so far as the petitioner has been denied of the refund of amount paid by the petitioner in excess. Paragraph Nos.4.4, 4.5, 4.6 and 4.7 of the impugnd order of the first respondent/Settlement Commission read as under:-

"4.4. The applicant was heard on 10.07.2018. The applicant's advocate reiterated the same submissions already advanced during the hearing held on 29.10.2003. The applicant vide their letter TNPL/CEX/2018 dated on 20.07.2018 have enclosed two letters which were earlier addressed to the Range Officer, Karur I Range, TNPL/CEX2002 dated 11.01.2002 and TNPL/CEX/2002-610 dated 25.02.2002 respectively, detailing their Central Excise Duty payment of Rs.28,00,923/- towards 'Paer core and Bleach liquor' covering the periof from July 1996 to June 2001. On perusal of the letters it is observed that vide letter dated 11.01.2002, the applicant had stated that "For the paper core

and bleach liquor consumed in the above said exempted final products, inadvertently, we have not paid duty as we were new to the provisions at that time. The duty for the paper core consumed in the above supplies works out to Rs.7,95,239/- and the duty for bleach liquor consumed in the above supplies works out to Rs.19,91,426/-. We have made payment of these duty amounts by debiting in our RG23A Part II account under Sl.No.4886 dt:11.1.2002". Vide letter dated 25.02.2002 the applicant have stated that "we have made payment of the differential duty of Rs.14,258/- in our RG23A Part Ii account under Sl.No.5524 dt:20.2.2002". The applicant thus paid a total amunt of Rs.28,00,923/-.

4.5 From the above letters of the applicant addressed to Range, it is clearly evident that the appellants have accepted their duty liability for the period from July 1996 to June 2001 and have discharged only their Central Excise Duty liabilities in Jan, 2002 itself, towards the intermediate products used in the manufacture and clearance of the exempted goods.

4.6 In other words, the amount of Rs.28,00,923/- reversed by the applicant in their RG23A Part II account before the issue of the Show Cause Notice was legitimately due to the Government. Thus what was paid as duty cannot be again sought for payment of another duty demand or adjusted towards another liability as claimed by the applicant and also there was no provision in the Central Excise Act, 1944 to do so. If at all any amount which was paid in excess can be claimed only as refund under the provisions of Section 11B of the Central Excise Act, 1944 from the relevant date under Section 11(B)(5)(f) of CEA, 1944 as it existed during the material period for any excess payment made otherwise, the claim would be hit by time bar. The relevant date in the instant case is 11.01.2002, being the date of duty paid vide their Cenvat credit account, the applicant ought to have filed the refund claim on or before 11.01.2003. Case records also reveal that the applicant has not filed any refund claim on the excess amount paid on or before 11.01.2003. It is also pertinent to note

that the Settlement Applicatin was filed on 26.08.2003.

4.7 The Bench has also taken note of the fact that the applicant during the course of hearing held on 29.10.2003 agreed to pay Rs.9,36,279/- on account of admitted wrong availment of cenvat credit in addition to Rs.28 Lakhs already paid. Thus there is no dispute about the amount of Cenvat Credit to be reversed. In view of the aforesaid, it is observed that in as much as no adjustment is possible from thte duty already paid which was due to the Government as discussed above and also as the refund claim of the applicant is hit by time bar, the Bench considers it as a fit case to settle the differential duty liability at Rs.24,13,266/- and appropriates Rs.14,76,987 as proposed in the SCN. Further the Bench also holds that the applicant is not eligible for any refund for the reasons discussed above. Accordingly, the applicant is directed to pay Rs.9,36,279/- towards the wrong credit taken by them.

11. The learned counsel for the petitioner submits that the amount paid during the investigation was nothing but a deposit and therefore the first respondent/Settlement Commission was not justified in not ordering refund of the amount paid in excess.

12. The learned counsel for the petitioner relied on the following decision:-

- i. Commissioner of C.Ex., Bangalore Vs Brindavan Beverages (P) Ltd., 2007 (213) E.L.T. 487 (S.C.).
- ii. Commissioner of C.Ex., Coimbatore Vs Pricol Ltd., 2015 (320) E.L.T. 703.
- iii. 3E Infotech Vs CESTAT, Chennai, 2018 (18) G.S.T.L. 410.

13. Defending the impugned order, the learned counsel for the respondents submits that the petitioner had admitted the tax liability before the issuance of Show Cause Notice and had voluntarily paid the amount for the period between the July 1996 to June 2001 and therefore it is not open for the petitioner to ask for refund of the amount paid in excess.

14. It is further submitted that the order of the first respondent/Settlement Commission is the composite order and under Section 32M of the Act, it is not open for the petitioner to ask for refund of the amount as there is an admissibility of liability to an extent of Rs.28,00,923/-. The petitioner was obliged to pay differential amount of Rs.9,36,279/- on the second issue relating to Cenvat Credit availed on certain inputs as it was engaged in the manufacture of exempted goods.

15. Heard the learned counsel for the petitioner and the respondents.

16. The cumulative amount paid by the petitioner during the course of investigation on 11.01.2002 and 20.02.2002 was for a sum of Rs.28,00,923/-. This amount was paid by the petitioner towards its tax liability on captively consumed paper cone and bleach liquor on which the petitioner was liable to pay duty as the final product was exempted in the hands of the petitioner.

17. This amount was paid for the period commencing from July 1996 to June 2001. After the amount was paid by the petitioner, the office of the second respondent issued a Show Cause Notice dated 02.12.2002 to the petitioner and called upon the petitioner to pay a cumulative amount of Rs.25,62,778/.

18. The amounts paid by the petitioner on the two dates are nothing but a deposit and therefore were liable to be adjusted or refunded towards tax liability alone.

19. The demand that was proposed in the Show Cause Notice was towards the above two issues relating to non-payment of excise duty on the captively consumed paper cone and bleach liquor was confined to Rs.14,76,987/- (Rs.4,27,643 + Rs.10,49,344) and a sum of Rs.10,85,791/- towards wrong development of CENVAT credit as the petitioner was engaged in the manufacture of exempted goods.

20. The above demand was confined for the period commencing from November 1997 up to June 2001 as period prior to that was beyond the period of limitation prescribed under Section 11A read with Rule 57AH of the Central Excise Rules, 1944 as it stood then.

21. The Show Cause Notice issued by the office of the second respondent sought to appropriate only an amount of Rs.14,76,987/- out of the amount of Rs.28,00,923/- paid by the petitioner on 11.01.2002 and on 20.02.2002. Thus, the balance amount paid by the petitioner on these two dates for a sum of Rs.28,00,923/- was to be refunded or adjusted toward any other tax liability. There is no proposal for appropriation for the

same by the second respondent in the said Show Cause Notice.

22. The balance amount of Rs.13,23,936/- (Rs.28,00,923 - Rs.4,27,643 - Rs.10,49,344) was thus an excess amount which could be appropriated by the respondent only towards any other tax or duty liability or otherwise refunded. In the Show Cause Notice, the second respondent proposed a demand for a sum of Rs.10,85,791/- towards wrong development of input tax credit. Therefore, the balance amount of Rs.13,23,936/- was to be adjusted by the second respondent in the Show Cause Notice as otherwise the retention of the aforesaid amount would be contrary to law.

23. The petitioner approached the first respondent Settlement Commission and offered a sum of Rs.24,13,268/- as the amount due in respect of its case for being settled under Chapter V of the Central Excise Act, 1944.

24. Excess after adjustment of cumulative tax liability has to be refunded back. Question of invoking the limitation prescribed under Section 11B of the Central Excise act, 1944 is misplaced as the amount paid pending investigation are nothing but the amount paid "under protest" as has been held by the Hon'able Supreme Court in Mafatlal industries Ltd Vs. Union of India, 1995 (89) ELT 247 : (1997) 5 SCC 536. The court held as under:-

92. 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 11-B along with the definition of "relevant date", there is no room for any apprehension of the kind expressed by the learned counsel.

25. Thus, the observation of the first respondent Settlement Commission that the petitioner was required to file a refund claim within one year from 11.01.2002, i.e on or before 11.01.2003, cannot be countenanced. The amount that was paid by the petitioner was otherwise liable to be adjusted or refunded subject to outcome of the Show Cause Notice dated 02.12.2002. The petitioner opted to settle the case before the first respondent Settlement Commission by offering an amount of

Rs.24,13,268/- in full and final settlement of its tax liability under the case initiated by the second respondent.

26. Under the circumstances, the amount that was paid by the petitioner in excess of the amounts due for the period covered by the Show Cause Notice towards captive consumption of paper cone and bleach liquor was to be adjusted towards the tax liability towards input tax credit wrongly availed by the petitioner and balance if any was liable to be refunded to the petitioner.

27. Though the petitioner had voluntarily paid the aforesaid amount during the course of investigation, in absence of the appropriation of the excess amount towards any other tax/duty liability of the petitioner, it was to be refunded back from the date of the impugned order of the first respondent Settlement Commission. The first respondent Settlement Commission cannot artificially impose a new period of limitation especially when the proceedings were pending before it.

28. It is further noticed that after considering the conduct of the petitioner, the first respondent Settlement Commission has granted a complete waiver from payment of interest and penalty to the petitioner and also immunity from prosecution to the petitioner under Section 32K of the Central Excise Act, 1994. Having granted immunity and the waiver from payment of penalty, the amount paid in excess by the petitioner before the second respondent cannot be retained by the second respondent on the ground that the refund claim was time barred.

29. Under the circumstances, the impugned order directing the petitioner to pay a sum of Rs.9,36,279/- within 30 days and refusing to refund the balance amount is liable to be quashed. I therefore direct the respondents to appropriate the aforesaid sum of Rs.9,36,279/- from and out of the balance amount of Rs.13,23,936/- [Rs.28,00,923 - Rs.14,76,987] and refund the balance amount of Rs.3,87,657/- [Rs.13,23,936 - Rs.9,36,279] together with interest at the rates prescribed for refund of amount for pre-deposits made under Section 35FF of the Central Excise Act, 1944 after the expiry of three months of the first respondent Settlement Commission's order till the date of refund of such amount. The second respondent shall refund the balance amount together with interest thereon to the petitioner as per this order within a period of eight weeks from the date of receipt of a copy of this order.

30. In the result, W.P.No.28574 of 2018 stands allowed with

the above observations. Therefore, there is no necessity to pass a separate order in W.P.No.28589 of 2018. Consequently, connected Miscellaneous Petitions are closed. No cost.

Sd/-
Assistant Registrar(CS VI)

//True Copy//

Sub Assistant Registrar

arb / jen

To

1.The Vice Chairman,
Customs, Central Excise & Service Tax Settlement Commission
Additional Branch, II Floor, Narmadha Block,
Custom House, 60, Rajaji Salai,
Chennai - 600 001.

2.The Commissioner of GST & Central Excise,
1, Williams Road, Cantonment,
Tiruchirapalli - 620 001.

+1cc to Mr.R.Hemalatha, Advocate, S.R.No.9568

+1cc to Mr.S.Muthuvenkataraman, Advocate, S.R.No.9533

Pre- delivery common order
in

W.P.Nos.28589 & 28574 of 2018 and
W.M.P.Nos.33357 & 33341 of 2018

SR I (CO)
KKV/11/03/2021

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