OD–7

IN THE HIGH COURT AT CALCUTTA
SPECIAL JURISDICTION (CENTRAL EXCISE)
ORIGINAL SIDE

CEXA/15/2010

M/S. LGW LIMITED
VS.
THE ASSISTANT COMMISSIONER OF SERVICE TAX

BEFORE :
THE HON'BLE JUSTICE T.S. SIVAGNANAM
And
THE HON'BLE JUSTICE HIRANMAY BHATTACHARYYA
Date : 31st January, 2023

<u>Appearance</u> :
Mr. Somnath Gangjuli, Adv.
Mr. Sukalpa Seal, Adv.
Ms. Priyamvada Singh, Adv.
...for appellant.

Mr. Bhaskar Prosad banerjee, Adv.
Ms. Ekta Sinha, Adv.
...for respondent

The Court : - This appeal by the assessee filed under Section 35G of the Central Excise Act 1944 (the Act) is directed against the order passed by the Customs, Excise and Service Tax, Appellate Tribunal, East Zonal Bench, Kolkata (Tribunal) dated 17.05.2010.

The appeal was admitted on 6th December, 2010 on the following substantial questions of law :

i) Whether the amendment notifications being Notification No. 32/2008 dated 18th November, 2008 and Notification No. 33/2008 dated 7th December, 2008 extending the time limit for making application for refund, clarifies Exemption Notification being no. 41/2007 dated 6th October, 2007 as sought to be explained in the circular being No. 112/06/09-ST dated 12th March, 2009 and, therefore, retrospective in operation if so, whether on the facts and circumstances of the case the application for refund made by the assessee can be said to be time barred?

ii) Whether on the facts and circumstances of the case the ratio laid down Miles India limited –vs- Assistant Collector of Customs (30 ELT 641) and CCE Chandigarh – Vs. Doaba Co-operative Sugar Mills (37 ELT 478) and Bombay Oil Industries – Vs. – UOI (77 ELT.32) relied on by the Ld. Tribunal or the ratio laid down in ONGC Ltd. – Vs. - Commr. Of Customs, Mumbai – (2001) 7 SCC 403 and Commissioner of Income Tax – 1, Ahmedbad – Vs.- Gold Coin Health Food Pvt. Ltd. – (2008)9 SCC 622 relied on by the assessee would be applicable ?

The short issue which falls for consideration is whether the application filed by the appellant/assessee for refund of duty paid on the export of goods was maintainable and was within the period of limitation. The benefit of exemption enures in favour of appellant/assessee pursuant to Notification No. 41/2007-ST dated 6/10/2007. The said Notification states that the claim for refund shall be filed on quarterly basis, within sixty days from the end of the relevant quarter during which the said goods have been exported. It is not disputed by the revenue that the appellant has exported goods between the period October 2007 to December 2007. Thus interim Notification No. 41/2007 – ST the refund claimed ought to have been made not later than 29.2.2008. However, the application for refund was made by the appellant/assessee only on 28.4.2008 which laid to the rejection of the application as being time barred.

The appeal by the appellant before the Commissioner also did not yield any result and the same was dismissed for the reason that the claim for refund was beyond the period stipulated in Notification No. 41/2007-ST. What is important to note is that the said Notification No. 41/2007, stood substituted by subsequent notification in Notification no. 32/2008-ST dated 18-11-2008. By the said notification in paragraph 2(e) of Notification No. 41/2007 the words "sixty days" were substituted by the words "six months". Subsequently, the Government issued another notification in Notification no. 17/2019-ST dated 7.7.2009 by which the time limit for filing the refund claim was fixed as one year from the date of export of the said goods. It appears that on account of these two successive notifications doubt arose in the mind of the officers and clarification was sought for from the Central Board of Excise & Customs (CBSE). Accordingly, a clarification was issued on 12.3.2009 in Circular No. 112/06/2009- ST. The relevant portion of the Circular is as follows :-

S. No.	**Issue Raised**	**Clarification**
	Notification No.41/07-ST has been amended by notification Nos.32/2008-ST, dated 18.11.2008 and 33/2008-ST, dated 7.12.2008 to (i) extend the limitation period from 60 days from the end of quarter to six month; (ii) to omit the condition of non-availment or drawback. Whether, in view of amended conditions refund for the quarter Mar-Jun 08 would be allowed to be filed till Dec 08 ?	It is clarified that consequent upon revision of limitation period, any refund claim that is filed within such revised limitation period would be admissible if it is otherwise in order. Therefore, refund claims of service tax on specified taxable services used for exports of goods made in the quarter Mar-Jun 08 could be filed till 31st Dec 08.

The above clarification pertained to quarter March-June 2008 and the query was whether the refund application could be filed till October, 2008. The CBEC clarified that the claim could be filed till 31st December, 2008. Subsequently, another clarification was issued by the Department dated 1st January, 2010, the operative portion of which reads as follows :-

> "2. The matter has been examined by the Board. In this regard, I am directed to state that though Notification No. 17/2009-ST dated 07.07.2009 simplifies the refund scheme, the nature of benefit given to the exporters remains as it was under Notification No. 41/2007-ST. Further, the new notification does not bar its applicability to exports that have taken place prior to its issuance. Therefore, the scheme prescribed under Notification No. 17/2009-ST would be applicable even for such exports subject to conditions that (a) refund claims are filed within the stipulated period of one year; and (b) no previous refund claim has already been filed under the previous notification."

As could be seen from the above clarification, which specifically pertained to refund claim under Notification No. 17/2009-ST, it was clarified that the new clarification does not bar its applicability to exports that have taken place prior to its issuance. Thus, the question is whether the application filed by the appellant/assessee claiming refund on 24th April, 2008 for the exports effected from October 2007 to December 2007 was maintainable.

As we have seen the Notification No. 32/2008-ST dated 18th November, 2008 is a notification substituting the time limited of sixty days with the time limit of six months. Thus, when a term or clause in the notification stands substituted, it means that for all purposes the time period fixed for filing the refund application shall be six months. This subsequently stood extended to one year by Notification No. 17/2009-ST dated 7th July, 2009 and this was clarified that this will apply to all exports prior to the notice of the said notification. Therefore, the application for refund made by the appellant/assessee was maintainable in law. It appears that the clarification issued by the Government of India dated 1st January, 2010 was not placed before the learned Tribunal when the case was heard before the learned Tribunal. Be that as it may, the Commissioner of Central Excise (Appeals) while rejecting the appellant's appeal misconstrued the scope of the clarification dated 12th March, 2009 in Circular No.112/2006-09/ST. The appellate authority failed to note the spirit behind the clarification or the crux of the issue which was clarified by the CBEC and was misguided by the period for which such clarification was sought for. The clarification which was sought for was whether the refund claim could have been entertained beyond the period of sixty days and this was clarified with reference to the case which was placed by the department and the substance of the clarification is that refund claim was maintainable till 31st December of the relevant period.

Therefore, we have no hesitation to hold that the appellant's application for refund was maintainable. For the above reasons, the appeal is allowed and the substantial questions of law are answered in favour of the appellant and the original authority, i.e., the concerned jurisdictional authority is directed to entertain the refund application of the appellant and sanction the refund as admissible in law. So far as the claim for interest is concerned, the appellant shall not be entitled for interest for the period from 23rd April, 2014 till 5th January, 2023 during the period when the appeal was dismissed for default and restored by this Court. For the remaining period the appellant will be entitled to interest at the statutory rate.

It will be well open to the concerned authority to verify all documents at the time when the refund claim is being processed.

(T.S. SIVAGNANAM, J.)

(HIRANMAY BHATTACHARYYA, J.)

Pkd/GH./SN/S.PAL