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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT

Decided On : Jul-20-2005

Judge : S Peeran, J T T.K.

Appellant : Glenview Plastic System Pvt. Ltd.

Respondent : Cce

Judgement :
The Commissioner of Customs and Central Excise Hyderabad-I Commissionerate passed an order-in-original demanding duty of Rs. 26,24,976/- for the period from April 1990 to July 1994 under Rule 9(2) of the Central Excise Rules 1944 read with Proviso to Section 1 lA(i) of Central Excise and Salt Act 1944 on account of clubbing of clearances. An amount of Rs. 9,62,500/- was demanded on account of clandestine clearance. Penalty of Rs. 7 lakhs was imposed under Rule 173Q of the Central Excise Rules. Interest amount under Section 11AB was also demanded. The appellants paid the duty, penalty and interest. The appellants did not challenge the order of the Commissioner at all. However, later they learned that the period of dispute is prior to 28th September 1996 and for the period prior to 20th September 1996, Section 11AB is not applicable, as the Section 11AB does not have retrospective effect. Since the interest is not legally payable, they filed a refund claim to the jurisdictional Assistant Commissioner Central Excise. The Assistant Commissioner of Central Excise Hyderabad-I rejected the refund of interest on the ground that they had not challenged the order of the Commissioner dated 25.10.1997. The appellants approached the Commissioner (Appeals) who

passed the impugned order confirming the OIO passed by the Assistant Commissioner. In the said order, the Commissioner (Appeals) held that the interest is payable. Further he held that the appellants did not appeal against the Commissioner's order demanding interest. Hence the order of the Commissioner has become final. The appellants strongly challenged the OIA.3. Shri G. Shivadas learned advocate appeared for the appellants and Shri R.N. Viswanath for the Revenue.

4. The learned advocate relying on the Supreme Court's decision in the case of CCE v. Elgi Equipments Ltd. 2001 (128) ELT 52 maintained that interest under Section 11AB is not payable for clearance effected prior to 28.9.1996. On this point, the issue is settled and the learned SDR also did not challenge this point. However the other contentions issue is whether the order of the Commissioner demanding interest has become final as no appeal was filed. Once it has become final, the same cannot be challenged indirectly by filing refund claim. This is the stand of the Revenue and the learned SDR relied on the Apex Court decision in the case of CCE Kanpur v. Flock India Ltd. 2000 (128) ELT 285 SC : 2000 (92) ECR 1 SC, wherein it was held that where an adjudicating authority has passed an order which is appellable under the statute and the party aggrieved did not choose to exercise the statutory right of filing an appeal, it is not open to the party to question the correctness of the order of the adjudicating authority subsequently by filing a claim of refund on the ground that the adjudicating authority had committed an error in passing his order. The learned SDR further relied on CESTAT's decision in JCT Ltd. v. CCE Ghaziabad , wherein it was held that there is no provision under the Central Excise Act and Rules for refund of interest. The learned advocate emphasized the difference between duty and interest. He said that for determination of duty under Section 11AC or penalty and fine under Section 33 of the Central Excise Act, the proper officer has to adjudicate whereas in the case of interest there is even no need for demanding the same and the interest liability under Section AB is automatic. That is why the word 'SHALL is used in Section 11AB. Only duty is assessed and there is no assessment of interest because the liability to interest is automatic. Interest becomes payable once duty is demanded as payable provided the interest provision is applicable. Conversely interest would not be payable if it is not applicable. It is not contingent

on a demand being made in the show cause notice or confiscation being made in the OIO. In view of the order issued by the Board, and as settled by the judicial for a that part of the order of the Commissioner demanding interest is void and does not exist in the eyes of law and it is not necessary that it be set aside to render it so. Further the illegality can be challenged even in a collateral proceeding. The learned Advocate relied on the following case laws: 5. The challenge to the validity of a void decree may be direct action or by way of collateral or indirect challenge. A direct action is one where the principal purpose of the action is to establish the invalidity. This will usually by way of an application for judicial review or by use of any statutory mechanism for appeal or refund.

Collateral challenges arise when the validity is raised in the course of some other proceedings, the purpose of which is not to establish invalidity but where questions of validity become relevant. An identical view has been taken by the Hon'ble High Court of Madras in the case of Commissioner of Income Tax Chennai v. Rane Brake Linings Ltd. 2004 TIOL 18-HC-MAD-IT.6. We have gone through the records of the case carefully. On the question of liability of interest prior to 20th September 1996, the issue is settled by the Apex Court in the Elgi Equipments case. The Board has also issued a circular on the subject on 26.6.2002. The Commissioner passed the order demanding duty and interest on 25.10.1997. The appellants did not challenge the Commissioner's order.

Hey paid the duty and interest under protest. As the appellants did not challenge the Commissioner's order, it has become final. The ratio of SC's decision in Flock India case, is clearly applicable. When an appellable order is passed, it is for the appellants to take necessary action for keeping the issue alive. Since no appeal was filed, the issue in the original order cannot be challenged indirectly. If this is allowed, there will be lack of certainty in the entire process of levy and collection of excess duty. In fact CESTAT Bangalore in the case of Westlake Packaging Innovations Pvt. Ltd. v. CCE, Hyderabad 2004 (178) ELT 839 (Tri-Bang.) has dealt with exactly the same issue. In that case, the Hon'ble Tribunal quoting para 10 of the SC's judgment in Flock India Case dismissed the party's appeal. In that case, the facts are exactly similar. No doubt in the case of Commissioner of Income Tax Chennai v. Rane Brake Linings Ltd., Hon'ble Madras High Court has held "the non-filing of an appeal against illegal order or an order which has become a nullity in our considered opinion and cannot in any way validate the same or render it unenforceable in law. Since the Apex Court's decision squarely covers the present issue and also in view of the decision of this bench in the case cited (supra), we are bound to follow the ratio of the Tribunal's decision in the interest of judicial discipline. Hence the appeal is rejected.