

Afcons Infrastructure Ltd. Vs. Union of India (Uoi)

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Court : Andhra Pradesh

Decided On : Feb-10-2005

Reported in : 2006(193)ELT278(AP); 2007[7]STR615

Judge : M.H.S. Ansari and ;T. Ch. Surya Rao, JJ.

Acts : [Central Excise Act, 1944](#) - Sections 11B, 11B(1), 11B(2) and 35F; Central Excise (Amendment) Act, 1985

Appeal No. : Writ Petition No. 7906 of 2004

Appellant : Afcons Infrastructure Ltd.

Respondent : Union of India (Uoi)

Advocate for Def. : A. Rajasekhar Reddy, CGSC

Advocate for Pet/Ap. : Kishore Rai, Adv.

Judgement :

ORDER

M.H.S. Ansari, J.

1. The short question arising for consideration in the instant writ petition is as to whether the petitioner is entitled to a direction as prayed for upon the respondents to pay interest from the date of pre-deposit made by the petitioner till 11-12-2003

consequent to the order passed by the Customs, Excise and Gold (Control) Appellate Tribunal (for short 'CESTAT').

2. The said relief is founded on the averments inter alia as under.

Learned Collector of Central Excise passed an order dated 2-6-1989 holding that the structural fabricated by the petitioner which went to the erection at Visakhapatnam are exigible and thereby confirmed the demand of excise duty. In the appeal filed by the petitioner before the learned CESTAT, aggrieved by the said adjudication order, Stay Order No. 65/1990-BT, dated 18-1-1990 (T) was passed directing the pre-deposit of Rs. 28,00,000/- under proviso to Section 35F of the Central Excise Act (for short 'the Act') staying the balance demand and the penalty. The petitioner complied with the said order. The appeal was disposed of by order dated 3-3-1997 setting aside the order of the learned Collector and remanding the matter 'to the adjudication Commissioner of Central Excise for de novo consideration.' The petitioner applied for refund of the said sum of Rs. 28,00,000/- with interest.

3. The grievance of the petitioner is that the respondent authorities have adjusted the pre-deposit of Rs. 28,00,000/- against re-adjudication demand of Rs. 85,00,000/-, but interest payable on the said refund of Rs. 28,00,000/- has not been sanctioned. With regard to the payment of interest, it is averred in the writ petition, that the respondents have formed opinion that the question of payment of interest will be decided as per the re-worded circular and also taking the stand that claim for interest cannot be acceded to as there is no provision in the Act for payment of interest.

4. In the counter affidavit filed on behalf of the respondents, the stand taken is that on the one hand the petitioner has been requesting for consideration of the existing pre-deposit as pre-deposit for the present appeal and on the other hand, the assessee has been pressing the Department for refund of the said pre-deposit. The respondents have considered the existing pre-deposit as pre-deposit for the present appeal furnished by the assessee. It is further averred that as the matter has been remanded with certain directions for de novo proceedings, the petitioner cannot seek directions as prayed for without availing the alternative remedy. It is

also contended that the application has not been made for granting refund in terms of Section 11B of the Act and that the petitioner failed to approach the proper authority.

5. Before we take up for consideration, the rival contentions, it would be appropriate at this juncture to refer to the judgments cited at the Bar, by Sri Kisore Rai, learned Counsel for the petitioner.

6. Delhi High Court in *Elephanta Oil and Vanaspati Industries Ltd. v. Union of India* : 1994(73)ELT43(Del) considered the question with regard to the payment of interest on the amount of redemption fine refunded pursuant to the order of CESTAT. Interest was awarded in that case on the amount of refund.

7. Bombay High Court in *Suvidhe Ltd. v. Union of India* : 1996(82)ELT177(Bom) dealt with the question of refund of pre-deposit made under Section 35F of the Central Excise Act. In its said judgment, Bombay High Court, after observing that the amount was deposited not towards excise duty, but by way of deposit under Section 35F for availing the remedy of an appeal and further noticing that the appeal had been allowed, held thus:..In our judgment, the claim raised by the Department in the show cause notice is thoroughly dishonest and baseless. In respect of a deposit made under Section 35F, provisions of Section 11B can never be applicable. A deposit under Section 35F is not a payment of duty but only a pre-deposit for availing the right of appeal. Such amount is bound to be refunded when the appeal is allowed with consequential relief.... In respect of such a deposit the doctrine of unjust enrichment will be inapplicable. In the circumstances, the petition succeeds. The impugned show cause notice, which is annexed at Exhibit-F to the petition, is quashed and the respondents are directed to forthwith refund the aforesaid amount of Rs. 14,07,410/- along with interest thereon at the rate of 15% p.a. from the date of the order of the Appellate Tribunal i.e. from 30th November, 1993 till payment.

8. The Supreme Court in *Mahavir Aluminium Ltd. v. Collector of Central Excise, Jaipur* : 1999(114)ELT371(SC) observed that:..that when the matter was filed before the CESTAT, a conditional stay order had been granted directing the appellant to pre-deposit an amount of Rs. 4,44,000/- and on compliance thereof,

the balance amount of duty shall stand waived till the disposal of their appeal and that amount should not be released to the appellant until he establishes that he has not wrongly enriched himself by collecting duty from his customers. It is not clear that the amount paid is a condition for waiving of payment for grant of stay by the appellate authority and not duty which is to be refunded. In that view of the matter, we do not think that there is any reason to accede to the contention advanced by the respondent.

9. The judgment of the Delhi High Court in *Sanita Arora v. Union of India* : 2002(142)ELT554(Del) is relied upon by the petitioner in support of its contention that as held therein, writ petition for refund is maintainable and Court is competent to issue appropriate directions in exercise of its writ jurisdiction.

10. In *Killick Caribonium v. Union of India* : 2002(143)ELT491(Bom) , Bombay High Court has considered the question of refund of deposit made under Section 35F of the Act in the light of the doctrine of unjust enrichment. In that judgment, the contentions of Excise authorities, as in the case on hand, with respect to applicability of Section 11B of the Act have also been considered. Insofar as refund is concerned, it was held that since the Tribunal had decided the appeal filed by the Revenue, there was no impediment in the way of the respondents in granting refund.

11. With regard to the objections of the Excise authorities based on Sub-section (2) of Section 11B of the Act, it was observed as under :

. Contention seems to be that application under Section 11B of the Act for refund has to be filed and it would be necessary for the respondents to examine whether the amount has been collected from the customers by the petitioners. In this case this question does not arise because the amount was paid as a security deposit during the pendency of the appeal. The petitioner is entitled to get back its security deposit. Section 11B has no application to the facts of this case. In this view of the matter, we quash and set aside the impugned order at Ex. G dated 28th December, 1987 and hold that the petitioners are entitled to the refund....

12. Nestle India Limited v. Asst. Commissioner of C. Ex., Mysore-II : 2003(154)ELT567(Kar) is a case where CESTAT remanded the case for de novo adjudication and re-determination. In terms of that order, re-quantification was taken up and differential duty payable by the petitioner in that case was determined. The petitioner applied for refund of the excess amount which he had deposited by way of pre-deposit. The claim was resisted inter alia on the ground that regular refund claim was required to be made under Section 11B along with all relevant documents. Their Lordships of the Karnataka High Court observed that the question has been considered by two High Courts, one is Bombay High Court in Suvidhe Limited v. Union of India (supra) and the other is Madras High Court in Oswal Agro Mills Limited v. Union of India 2000 (115) E.L.T. 302 (Mad.). It was further noticed that the judgment of the Bombay High Court in Suvidhe Limited was challenged by the Union of India in Special Leave Petition (Civil) No. 96 in C.C. No. 3522/96. The Supreme Court dismissed the Special Leave Petition. [1997 (94) E.L.T. A159 (S.C.)]. It was further noticed that the Madras High Court in somewhat similar circumstances, ordered refund along with 15% interest. Reference was also made to the circular instructions dated 2-1-2002 wherein it is stated that such refund application under Section 11B(1) need not be insisted upon in the light of the judgment of the Supreme Court. Our attention has also been drawn by the learned Counsel for the petitioner to the strictures passed by Karnataka High Court about the way in which affidavit was filed in respect of their stand asserting grounds which have been found to be unsustainable by the Courts of law in identical circumstances.

13. Lastly, the attention of this Court has been drawn to the judgment of the Supreme Court in Commissioner of Central Excise, Hyderabad v. I.T.C. Ltd 2005 (179) E.L.T. 15 (S.C.). We consider it appropriate to extract the relevant portion of that judgment, which reads as under :

The issue in this appeal and in several other appeals is whether the pre-deposit made as a pre-condition for the hearing of the appeal under the Central Excise Act, 1985 was, on the assessee being ultimately successful, refundable to the assessee with interest. The learned Solicitor General has taken instructions and has stated before this Court that the Central Board of Excise & Customs proposes

to issue a circular in connection with the payment of interest on all such pre-deposits. A draft copy of the proposed circular has been handed over to this Court. Having regard to the contents of the draft circular we direct compliance with the final order impugned before us and payment of interest in terms of the draft circular. The draft circular shall be appended to and the contents form part of this order. The appeal is disposed of. In view of this order any judgment of any High Court holding to the contrary will no longer be good law.

14. The observations, extracted supra, in the judgment of the Supreme Court put the controversy beyond doubt. Reference has been made to the circular, which, it was directed, shall form part of the order. In terms of the said judgment, pre-deposit made as a pre-condition for hearing of the appeal under the Central Excise Act, 1985 is refundable to the assessee with interest on the assessee being ultimately successful. The law relating to refund of pre-deposit has thus attained finality.

15. In the light of the above, the contentions raised by the respondents relying upon the procedure laid down under Section 11B of the Act cannot be countenanced and are to be rejected.

16. The question, however, is whether the petitioner is entitled to the refund of the money deposited under Section 35F of the Act with interest consequent to the order as passed by the learned CESTAT, in the matter on hand.

17. As noticed supra, on the authority of the judgment of the Supreme Court in Commissioner of Central Excise, Hyderabad v. LT.C. Ltd. (supra), the assessee is entitled to refund of the pre-deposit made as a pre-condition for hearing of the appeal on the assessee being ultimately successful. In the case on hand, it is contended that final orders have not been passed by the CESTAT as an order of remand has been passed by it. As a matter of fact, the order dated 3-3-1997 passed by the learned CESTAT has not been placed before us. However, operative portion of the order has been extracted in Paragraph 5 of the affidavit filed in support of the writ petition. A perusal thereof would show, a fact, which is not in dispute, that while allowing the appeal, learned CESTAT remanded 'the matter to the adjudication Commissioner of Central Excise for de novo

consideration'. The order of the learned Collector was set aside. Though it is a remand order for de novo consideration by the Commissioner of Central Excise, insofar as the appeal before the learned CESTAT is concerned, the matter can be said to have been finally disposed of setting aside the order of the learned Collector. The pre-deposit made by the petitioner under Section 35F is thus liable to be refunded with interest. A deposit under Section 35F is for availing the remedy of appeal. Such amount has to be returned when the appeal is allowed, as in the case on hand. As already noticed, pre-deposit amount of Rs. 28,00,000/- has been adjusted against re-adjudication demand. The question of interest and payment thereof alone has to be considered by the respondent authorities. Accordingly, the writ petition is allowed in part with a direction upon the respondents to pass orders for payment of interest in accordance with the concerned Circular referred to in the order of the Supreme Court in Commissioner of Central Excise, Hyderabad v. LT.C. (supra) within a period of one week from the date of communication of a copy of this judgment and order.

18. In the facts and circumstances of this case, there shall be no order as to costs.

Rule Nisi is made absolute as above.

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