Collector of Central Excise Vs. Laldee Pvt. Ltd.

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Apr-28-1995

Reported in : (1995)(78)ELT717TriDel

Appellant : Collector of Central Excise

Respondent : Laldee Pvt. Ltd.

Judgement :
1. This is an appeal filed by Collector of Central Excise, New Delhi against Order-in-Appeal No. 567-C.E./DLH/90, dated 20-8-1990 passed by Collector of Central Excise, New Delhi allowing the appeal of M/s.

Laldee Private Ltd., respondents herein by annulling the order of the Assistant Collector and directing that their refund claim be sanctioned "if otherwise due, admissible and in order". The Assistant Collector held that their refund claim filed on 5-9-1985 for payment of duty during the period 1-4-1984 to 31-3-1985 was barred by limitation. He had rejected their contention that they could ascertain their eligibility to Notification 83/83 only at the end of the financial period 1984-85 and held their claim to be time barred prior to 5-3-1985 according to the provisions of Section 11B of Central Excises & Salt Act. He had also held that notwithstanding the said time bar provision, they were not eligible for refund as they had not applied for exemption under Notification 83/83 in their classification list. The Collector (Appeals) accepted their contention that unless the financial year closes, it is not possible to know whether they would or would not cross the total value limit of Rs. 25 lakhs. He then proceeded to observe that the question that arose was how the relevant date has to be taken. He noted that Government of India's order in Revision reported in 1980 Cen-Cus 1091 gave the guidline in such cases and the proper course would be to resort to provisional assessment during the financial year and then go by the relevant date. While remarking that in this case no formal order had been passed for provisional assessment, he held that this should be taken, in effect, as a case of provisional assessment as held in the said decision of the Government of India. Accordingly he held that the claim for refund should be taken as filed in time and ordered that the refund claim be sanctioned "if otherwise due, admissible and in order" as stated already.

2. In the appeal challenging this decision, it has been submitted that there is no deemed provisional assessment under Central Excise law.

There has to be a formal order under Rule 9B if the assessment is done provisionally. It would be wrong to treat the assessment as provisional and work out a new-relevant date as done by the Collector (Appeals) and he had thereby gone beyond the provisions of Section 11B of Central Excises & Salt Act.

3. Shri Sanjeev Sachdeva, learned Senior Departmental Representative argued in support of Collector's appeal and pleaded that the same be allowed. His plea was opposed by Shri Y.N. Chopra, learned Consultant who appeared on behalf of the respondents. He supported the order of the Collector (Appeals) which he submitted was correct in law and needed no interference. In support of the ground taken by the Collector (Appeals) that their refund claim was not barred by limitation as it was a case of provisional assessment, Shri Chopra added another argument that the assessment had not been finalised. This would be evident from the RT-12 returns which should be available with the department. In fact, this point had been made by Shri Chopra on an earlier date of hearing. It was reported by the Collector that the relevant documents were not available. It was, therefore, urged by the Collector that the appeal be decided on the basis of the position as reflected in the Order-in-Original and Order-in-Appeal.

4. We have considered the submissions. We find that the Collector (Appeals) has made a clear observation that in this case there was no formal order was passed for provisional assessment. He had, however, cited an order in Revision passed

by Government of India and come to the conclusion that this should be taken in effect as a case of provisional assessment. We have gone through the said decision. That was a case involving an exemption notification which had a condition that the sales in a year did not exceed Rs. 2 lakhs. It was observed by the Government that it is not possible on the part of the assessee to ascertain before the expiry of the financial year whether the exemption limit has been exceeded or not. Likewise the excise officers also cannot determine the duty liability due on the clearance of the goods for the purpose of finalisa-tion of assessment. The point of computation of time gets shifted to 1st April, the close of the financial year. The assessment for the year being considered as provisional until the close of the relevant financial year. These are thus two question decided by the Government in this case - We are not inclined to accept the former proposition which was followed by the Collector (Appeals) in his order. Provisional assessment is provided for in terms of Rule 9B of the Central Excise Rules. These conditions characterise provisional assessment. The normal procedure of clearance of goods on payment of duty without any case having been made out for provisional assessment and without an order passed by the proper officer for provisional assessment and without a bond executed by the assessee does not confer the status of provisional assessment on the assessment followed only because subsequently a refund claim is filed on the strength of an exemption notification which is linked to the value of clearances in the financial year. We, therefore, accept the plea raised in the appeal that the Collector (Appeals) fell in error in treating the case to be, in effect, one of provisional assessment. We are also not impressed with the plea made by Shri Chopra that as the assessment in the RT-12 returns had not been finalised, it would be a case of provisional assessment. If the assessments are not completed, it will be a case of non-assessment and not of provisional assessment. The latter has to be a deliberate and conscious action and not one arising from the inaction, leaving the RT-12 returns unassessed. This however does not complete the picture. The Collector (Appeals) has accepted the plea of the appellants before him (respondents herein) that limitation would start only from the close of the financial year. This was also the decision taken in the Revision Application by the Government, relied upon by the Collector (Appeals).

We find that this question has been the subject matter of a number of conflicting decisions of the Tribunal and of High Courts. Decisions holding that time limit for refund claims of Notifications granting exemptions based upon total value/quantity of clearances will commence from the end of the financial year and not from the date of payment of duty.

1. T.T. Pylunny Royal Smiths v. UOI (Kerala) - 1978 (2) E.L.T. (J 705) (Kerala) - The period of limitation for filing refund in the case of exemption notifications based on annual turnover will only commence from the last date of the year. (This judgment was reversed by the Divisional Bench of Kerala High Court vide 1983 (14) E.L.T. 2156.

2. Auric Engg. Pvt. Ltd. v. Asstt. Collector -1980 (6) E.L.T. 620 (A.P.) High Court.

3. Weikfield Products Company (India) Pvt. Ltd. v. Union of India -1991 (51) E.L.T. 323 Bombay High Court.

In this case the Honourable Bombay High Court observed that the exemption is available to the manufacturers provided the clearance of the goods during the financial year did not exceed 40 metric tons. The manufacturer can avail of the exemption only at the end of the financial year on realisation that the clearance has not exceeded 40 Metric Tons. In other words the right to claim exemption accrues only at the end of the financial year and in the present case on April 1,1974. It is not in dispute that the refund application was filed on November 30,1974 and therefore the application could not have been partly rejected on the ground of limitation.

4. C.C.E., Kanpur v. Tin Can Manufacturers -1995 (6) RLT 769. By a two to one majority refund claim filed on 27-4-1978 which was beyond a period of six months from the date of payment of duty but within that period from the close of the financial year was held to be within time. The department's appeal was dismissed.

Relevant date for computation of time limit for such refund claims will be the date of payment of duty are as follows :- 1. 1983 (14) E.L.T. 2156 Kerala High Court - Asstt. Collector v. T.T. Pylunny.Asian Bearing Ltd. v. Collector of Central Excise.

3. 1989 (41) E.L.T. 377 Bombay High Court - BTX Chemicals v. Collector of Central Excise.

In the first case, the Honourable Kerala High Court had observed as follows :- "There can be little doubt that the Rules which we have quoted place the period of a limitation of an application for refund in this case at a period of one year. The same is to start from the date of payment or adjustment of duty. Being a Rule or a provision providing for limitation in respect of claims for refund, considerations of hardship seem to be out of place although, if it is possible to give the rule a construction which would avoid hardship, we should gladly adopt the same. What is contended before us by counsel for the respondent is that unless the view taken by the learned Judge is endorsed, the practical working of the Rule would cause hardship and result in injustice. It was pointed out that an application for refund of excise duty, can having regard to the terms of Ext. P1 notification, be preferred only in respect of steel furniture whose total value does not exceed Rs. 50,000, and that too, only of if the total value of the furniture removed in the course of the year does not exceed Rs. 2 lakhs. It was argued that whether the limit of two lakhs had been exceeded or not, would be known only at the close of the year in question; and therefore, to insit on an application for refund or exemption being made with reference to the earlier point of time in the year on the mere ground that the duty had been paid during that period, would be inequitable and unjust; and would oblige the writ petitioner to make an application for refund irrespective of whether he was or was not hoping to fall within the limit for obtaining exemption for refund of duty. At the first blush, the argument did cause us some concern. But we are satisfied that there is no ground or scope for apprehension or uneasiness.

Although the realisation that the goods cleared do not exceed the two lakhs limit which alone would qualify for exemption may come only at the end of the assessment year, the claim for refund has to be limited to goods worth not more than Rs. 50,000. There is nothing in Rule 173J or Rule 11 which obliges a person to confine his claim for refund to the articles removed in the earlier part of the year rather than to the later portions thereof; so that, the hardship and the inequity of having to prefer a claim or application for refund with respect to the earlier purchases and removals of steel furniture are more imaginary than real, in the case of dealers regularly buying and clearing throughout the year. And, as for exceptional case of heavy concentration of clearance and removal in the early part of the year, with a rule of the type here involved, there is no reason why an application for refund should not be made each time clearance is made, up to the limit of Rs. 50,000 leaving the authorities to reject the same, if the ceiling of Rs. 2 lakhs for obtaining refund had been exceeded." This decision is dated 16-1-1979. It was not available before the Andhra Pradesh High Court as the Auric Engineering Pvt. Ltd. case had been decided by. them on 17-3-1978. It was also not brought to the notice of the Honourable Bombay High Court when they decided the Weikfield Products case on 10-9-1990. The BTX Chemicals judgment of the Honourable Bombay High Court needs a close examination at this stage.

This was taken note of by the Tribunal in the Tin Can Manufacturers case referred to earlier. Though in the said judgment which related to Notification 89/79 it was held that the period of limitation would begin from the date of payment of duty rejecting the contention of the learned counsel for the petitioners that the application for refund having been made within a period of six months from the end of the financial year ending 30th March, 1980 was within the period of limitation, the preceding observation in the said judgment concurring with the first Pylunny judgment of the Kerala High Court which had been reversed on appeal by the Divisional Bench of that Court. It was observed that the exemption notification involved was distinct from the one considered in the Pylunny case. That judgment was sought to be relied upon by the learned counsel for the petitioners and which was, as stated above, rejected. The relevant paragraphs of the BTX Chemicals judgment reported in 1989 E.L.T. 41 are extracted below :- "4. Shri Shah, the learned Counsel appearing on behalf of the petitioners, by placing reliance on the case of T.T. Pylunny Royal Smiths, Kunnakulam v. Union of India and Ors., decided by the Kerala High Court and reported in 1978 E.L.T. (J 705) sought to contend that the application for refund having been made within a period of six months from the end of the financial year ending 30th March, 1980 was within the period of limitation. The concerned authorities had, therefore, erred in holding that the application for refund was beyond the period of limitation as provided in Rule 11 of the Central Excise Rules.

5. In my judgment there is no merit in the aforesaid contention as the notification which was under consideration provided - "In exercise of the powers conferred by Sub-rule (1) of Rule 8 of the Central Excise Rules, 1944, the Central Government hereby exempts steel furniture falling under Item No. 40 of the First Schedule to the Central Excises and Salt Act, 1944 (1 of 1944) upto a value not exceeding rupees fifty thousand, cleared on or after the first day of April in any financial year by or on behalf of the manufacturer from one or more factories for home consumption from the whole of the duty of excise leviable thereon : (1) this exemption shall not be applicable to such manufacturer whose value of steel furniture so cleared during such financial year exceeds Rs. two lakhs." The proviso contained in the aforesaid notification makes it clear that in order to avail of the exemption contained in the said notification the manufacturer should not have cleared the steel furniture exceeding Rs. 2,00,000/- during the financial year. The entitlement for the exemption in that case can only be determined at the end of the financial year. Hence, if the application for refund is made within a period of six months from the end of the financial year, the same would be well within the period of limitation. The exemption notifications in the instant case are, however, distinct.

They give exemption in the case of first clearance of goods upto the aggregate value of Rs. 15,00,000/-. If the duty was paid at the time of clearance in respect of goods within the limit of Rs. 15,00,000/-, the period of limitation would begin from the date of the payment of the duty. This part of the contention of Shri Shah is, therefore, liable to be negatived." It will be seen from the above extract that while on the one hand the finding was against the petitioners that the period of limitation would begin from the date of payment of duty where duty was paid at the time of clearance in respect of goods within the limit of Rs. 15 lakhs.

While coming to this conclusion the Pylunny case of Kerala High Court was distinguished and not followed. It was not held to be incorrect.

The fact that the said judgment had been reversed on appeal by the Divisional Bench of the Kerala High Court was not also highlighted before the court. But from the reasoning in the judgment supporting the first Pylunny judgment of the Kerala

High Court indicates that his Lordship was of the view that where the Notification grants exemption subject to the condition that the value of the clearances in the year did not exceed the prescribed ceiling, the manufacturer will come to know about his eligibility for exemption only at the end of the year and hence limitation for refund claim in such a case will start from the close of the year and not from the date of payment of duty. We thus find that there is sharp conflict of views in the matter. The Tribunal decision in Asian Bearing Limited reported in 1991 (51) E.L.T. 532 was a majority judgment of two to one, the majority view being that the time limit will commence from the date of payment of duty. Contrarily, in the subsequent case of C.C.E. v. Tin Can Manufacturers, 1995 (6) RLT 769, the majority decision was that limitation will commence from the end of the year and not from the date of payment of duty. Taking into account all these judgments and decisions and examining the wording of Section 11B of Central Excises and Salt Act, 1944 which is the relevant provision governing refunds, we find that while the term relevant date has been defined differently for different situations there is no specific definition of the said term to regulate refund claims filed invoking exemption Notifications granting exemption subject to the condition that the value of clearances of goods does not exceed specified value ceilings. Thus, it has not been laid down that in such cases the relevant date will be the close of the year. The term relevant date has been defined in Explanation B under Section 11B as follows : (a) in the case of goods exported out of India where a refund of excise duty paid is available in respect of the goods themselves or as the case may be, the excisable materials used in the manufacture of such goods,- (i) if the goods are exported by sea or air, the date on which the ship or the aircraft in which such goods are loaded, leaves India, or (ii) if the goods are exported by land, the date on which such goods pass the frontier, or (iii) if the goods are exported by post, the date of despatch of goods by the post office concerned to a place outside India; (b) in the case of goods returned for being re-made, refined, reconditioned or subjected to any other similar process, in any factory, the date of entry into the factory for the purposes aforesaid; (c) in the case of goods to which banderols are required to be affixed if removed for home consumption but not so required when exported outside India, if returned to a factory after having been removed from such factory for export out of India, the date of entry into the factory; (d) in a case where a manufacturer is required to pay a sum, for a certain period, on the basis of the rate fixed by the Central Government by notification in the official Gazette in full discharge of his liability for the duty leviable on his production of certain goods, if after the manufacturer has made the payment on the basis of such rate for any period but before the expiry of that period such rate is reduced, the date of such reduction; (e) in a case where duty of excise is paid provisionally under this Act or the rules made thereunder, the date of adjustment of duty after the final assessment thereof; Refund claims relating to the present case type of situations do not come under any of the situations described in (a) to (e) and hence they will be covered by (f) only namely the date of payment of duty.

5. As was observed by the Divisional Bench of the Kerala High Court in the Pylunny case, the manufacturer is under no disability to file a refund claim in respect of payment of duty for goods within the exempted limit where he clears the goods on payment of duty. In the event of the value of goods cleared exceeds the overall maximum laid down which will render the notification inapplicable to him, it will be open to the department to disallow such a refund claim. It is only the decision to allow or reject a claim that will require the correct position about the aggregate value of clearances being within the overall ceiling to be known which will not be essential for filing the refund claim itself. In the absence of a suitable definition of the term relevant date to extend it from the date of payment of duty to the close of the year in such cases. We are inclined to fall in line with the view taken in the Pylunny case by the Divisional Bench of Kerala High Court and by the Tribunal in the majority decision in the Asian Bearing case. As, however, there is a conflict of view and the recent majority decision in the Tin Can Manufacturers case is to the contrary.

We feel the conflict requires to be resolved. A direct reference to the Honourable Supreme Court under Section 35H of the Central Excises & Salt Act, 1944 in view of the conflict in the decisions of the High Courts is provided for therein only on an application made under Section 35G which is not the case here. We are accordingly referring the matter to the Honourable Vice President of the Tribunal for constituting a Larger Bench to hear and dispose of the appeal.

While agreeing with learned Member (Technical) that the matter requires to be referred to a Larger Bench, I do not wish to associate myself with his findings in paragraph 5 of the order expressing concurrence with the view taken by the Kerala High Court in the Pylunny case and by the Tribunal in the Asian Bearing case, but would leave the conflict open for resolution by the Larger Bench.