

Indian Lpg Cylinders Vs. Cestat

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Court : Uttaranchal

Decided On : Dec-08-2009

Reported in : 2010(253)ELT393(NULL)

Judge : J.S. Khehar, C.J. and; B.C. Kandpal, J.

Appellant : Indian Lpg Cylinders

Respondent : Cestat

Disposition : Appeal dismissed

Judgement :

ORDER

J.S. Khehar, C.J.

1. In sum and substance, the order, sought to be impugned through the instant Appeal, is the one rendered by the Customs Excise and Service Tax Appellate Tribunal (hereinafter referred to as the 'Tribunal') dated 12-4-2005, whereby the appeal preferred by the appellant before the Tribunal, seeking refund of excise duty, allegedly deposited provisionally, was dismissed. A perusal of the impugned order reveals that the same was declined on account of the fact that the claim had been made by the appellant beyond the period stipulated therefor.

2. In view of the above, the solitary question that arises for our determination is, whether the appellant had really deposited excise duty provisionally, and, in case

the answer to the aforesaid is in the affirmative, whether the aforesaid refund claimed by the appellant was within the period of time stipulated there for under Section 11B of the Central Excise Act, 1944 (hereinafter referred to as the '1944 Act'). Section 11B of the 1944 Act is being extracted here-under for the facility of reference:

11B. Claim for refund of duty. - (1) Any person claiming refund of any duty of excise may make an application for refund of such duty to the Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise before the expiry of one year from the relevant date in such form and manner as may be prescribed and the application shall be accompanied by such documentary or other evidence (including the documents referred to in Section 12-A as the applicant may furnish to establish that the amount of duty of excise in relation to which such refund is claimed was collected from or paid by him and the incidence of such duty had not been passed on by him to any other person:

Provided that where an application for refund has been made before the commencement of the Central Excises and Customs Laws (Amendment) Act, 1991 (40 of 1991), such application shall be deemed to have been made under this sub-section as amended by the Act and the same shall be dealt with in accordance with the provisions of Sub-section (2) as substituted by that Act:

Provided further that the limitation of one year shall not apply where any duty has been paid under protest.(2) If, on receipt of any such application, the Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise is satisfied that the whole or any part of the duty of excise paid by the applicant is refundable, he may make an order accordingly and the amount so determined shall be credited to the Fund:

Provided that the amount of duty of excise as determined by the Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise under the foregoing provisions of this sub-section shall, instead of being credited to the Fund, be paid to the applicant, if such amount is relatable to-

(a) rebate of duty of excise on excisable goods exported out of India or on excisable materials used in the manufacture of goods which are exported out of India;

(b) unspent advance deposits lying in balance in the applicant's current account maintained with the Commissioner of Central Excise;

(c) refund of credit of duty paid on excisable goods used as inputs in accordance with the rules made, or any notification issued, under this Act;

(d) the duty of excise paid by the manufacturer, if he had not passed on the incidence of such duty to any other person;

(e) the duty of excise borne by the buyer, if he had not passed on the incidence of such duty to any other person;

(f) the duty of excise borne by any other such class of applicants as the Central Government may, by notification in the Official Gazette, specify:

Provided further that no notification under Clause (f) of the first proviso shall be issued unless in the opinion of the Central Government, the incidence of duty has not been passed on by the persons concerned to any other person.

(3) Notwithstanding anything to the contrary contained in any judgment, decree, order or direction of the Appellate Tribunal of any Court in any other provision of this Act or the rules made thereunder or any other law for the time being in force, no refund shall be made except as provided in Sub-section (2).

(4) Every notification under Clause (f) of the first proviso to Sub-section (2) shall be laid before each House of Parliament, if it is sitting, as soon as may be after the issue of the notification, and, if it is not sitting, within seven days of its re-assembly, and the Central Government shall seek the approval of Parliament to the notification by a resolution moved within a period of fifteen days beginning with the day on which the notification is so laid before the House of the People and if Parliament makes any modification in the notification or directs that the notification should cease to have effect, the notification shall thereafter have effect only in

such modified form or be of no effect, as the case may be, but without prejudice to the validity of anything previously done thereunder.

(5) For the removal of doubts, it is hereby declared that any notification issued under Clause (f) of the first proviso to Sub-section (2), including any such notification approved or modified under Sub-section (4), may be rescinded by the Central Government at any time by notification in the Official Gazette.

Explanation. - For the purposes of this section, -

(A) 'refund' includes rebate of duty of excise on excisable goods exported out of India or on excisable materials used in the manufacture of goods which are exported out of India;

(B) 'relevant date' means,-

(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 dispatch of goods by the Post Office concerned to a place outside India;

(b) in the case of goods returned for being remade, 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 the case of a person, other than the manufacturer, the date of purchase of the goods by such person;

(ea) in the case of goods which are exempt from payment of duty by a special order issued under Sub-section (2) of Section 5-A, the date of issue of such order;

(eb) in 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;

(ec) in case where the duty becomes refundable as a consequence of judgment, decree, order or direction of appellate authority, Appellate Tribunal or any Court, the date of such judgment, decree, order or direction;

(f) in any other case, the date of payment of duty.

The provision applicable for adjudicating the issues arising in the present controversy is Sub-clause (eb) of Clause (B) of the explanation under Section 11B of the 1944 Act. The aforesaid sub-clause stipulates that in a case, where duty of excise is paid provisionally, a claim for refund thereof can be made within one year after the final assessment of excise duty.

3. Admittedly, if the period of limitation is calculated from the date of payment of excise duty, the claim of refund at the hands of appellant would be time-barred. However, if the payment of excise duty was provisional, in which eventuality the period of limitation would be determinable from the date when the rate at which the goods were sold attained finality, then the claim of refund made by the appellant would be within the time prescribed.

4. During the course of hearing of the instant appeal, it was not a matter of dispute between the learned Counsel for the rival parties that the answer to the issue, whether the excise duty was paid provisionally or not, would emerge from the interpretation of Rule 9B of the Central Excise Rules, 1944 (hereinafter referred to as the '1944 Rules'). It is, therefore, that Rule 9B, aforementioned, is being extracted hereunder:

Rule 9B. Provisional assessment to duty:

(1) Notwithstanding anything contained in these rules:

(a) where the assessee is unable to determine the value of excisable goods in terms of Section 4 of the Act on account of nonavailability of any document or any information; or

(b) where the assessee is unable to determine the correct classification of the goods while filing the declaration under Rule 173B;

the said assessee may request the proper officer in writing giving the reasons for provisional assessment to duty, and the proper officer may direct after such inquiry as he deems fit, that the duty leviable on such goods shall be assessed provisionally at such rate or such value (which may not necessarily be the rate or price declared by the assessee) as may be indicated by him, if such assessee executes a bond in the proper form with such surety or sufficient security in such amount, or under such conditions as the proper officer deems fit, binding himself for payment of difference between the amount of duty as provisionally assessed and as finally assessed:

Provided that all clearances in respect of excisable goods covered under such request by the assessee submitted with the proper officer under the dated acknowledgement shall be deemed to be cleared as provisionally assessed to duty at such rate or at such value as declared by the assessee, till the date when the direction of the proper officer is issued and communicated to the assessee:

Provided further that the proper officer where he is satisfied that the self-assessment made by the assessee is not in order, he may direct him to resort to

provisional assessment and on receipt of such directions the assessee shall comply with such directions.

(2) ****

(3) The Commissioner may permit the assessee to enter into a general bond in the proper form with such surety or sufficient security in such amount or under such conditions as the Commissioner approves for assessment of any goods provisionally from time to time:

Provided that, in the event of death, insolvency or insufficiency of the surety or where the amount of the bond is inadequate, the Commissioner may, in his discretion, demand a fresh bond and may, if the security furnished for a bond is not adequate, demand additional security.(4) The goods provisionally assessed under Sub-rule (1) may be cleared for home consumption or export in the same manner as the goods which are so assessed.

(5) When the duty leviable on the goods is assessed finally in accordance with the provisions of these rules, the duty provisionally assessed shall be adjusted against the duty finally assessed, and if the duty provisionally assessed falls short of, or is in excess of the duty finally assessed, the assessee shall pay the deficiency or be entitled to a refund, as the case may be.

Provided that, if an assessee is entitled to a refund, such refund shall not be made to him except in accordance with the procedure established under Sub-section (2) of Section 11B of the Act.(6) Notwithstanding the provisions of self-assessment in this rule, in cases of provisional assessment, the final assessment shall be made by the proper officer.

5. A perusal of Rule 9B of the 1944 Rules leaves no manner of doubt in our minds, that provisional assessment of excise duty is permissible only in a situation, where the assessee makes a request to the proper officer in writing requiring him, for reasons to be recorded, why he desires to pay excise duty provisionally and thereupon, the proper officer authorises the assessee to pay excise duty provisionally. Insofar as the instant mode of payment of excise duty (provisionally)

is concerned, there is no material on the record of the instant appeal so as to demonstrate that the appellant made any such request in writing, depicting the reasons for claiming payment of excise duty provisionally. There is also no material on the record of the instant appeal depicting that the proper officer issued any direction authorising the appellant to deposit excise duty provisionally. Thus viewed, we have no hesitation in concluding that the claim of payment of excise duty provisionally, though could have been claimed by the appellant in writing, was never claimed by him, nor was any direction issued to the appellant by the proper officer authorising the payment of excise duty provisionally.

6. Rule 9B of the 1944 Rules envisages another situation, for payment of excise duty provisionally. The aforesaid situation is conceived of in the second proviso under Sub-rule (1) of Rule 9B. Herein, the situation conceived of is, when the proper officer is satisfied that the self-assessment made by the assessee was improper, he issues a direction to the assessee, requiring him to make a provisional assessment/deposit of excise duty. The second proviso under Sub-rule (1) of Rule 9B, therefore, requires a direction by the proper officer. There is no material on the record of this case so as to suggest, that the proper officer ever issued any such direction to the appellant, requiring him to resort to provisional assessment. We are, therefore, satisfied that the deposit of excise duty made by the appellant, in the facts and circumstances of this case, cannot be considered as provisional, under Rule 9B of the 1944 Rules.

7. Besides the two alternatives, wherein provisional assessment of excise duty is conceived of, under Rule 9B of the 1944 Rules, there is no other provision, whereunder the appellant could have been permitted to make a payment of excise duty provisionally. In fact, no other alternative, emerging from the aforesaid statutory provisions, was suggested even by the learned Counsel for the appellant.

8. It would be unfair to the learned Counsel for the appellant if one do not take into consideration a submission advanced by him based on a number of documents available on the record of this case. It would be pertinent to mention that reference was made to some documents available on the file of the instant appeal depicting that the price, on the basis of which excise duty was being paid by the appellant,

was provisional. Some other documents, on which reliance was placed, had been issued by the Excise Department, itself, while considering the claim of the appellant for refund. In the orders brought to our notice, the Excise Department had declined to consider the claim of the appellant for refund, asserting that, the price on the basis of which excise duty had been paid by the appellant, had not attained finality. Thus suggesting, that it was still provisional. Some other documents were brought to our notice, wherein, while assessing the claim of the appellant to differential excise duty, it was impliedly accepted in the columns of the proforma, that the deposit of excise duty by the appellant was provisional.

9. Having considered the legal proposition emerging from Section 11B of the 1944 Act, and Rule 9B of the 1944 Rules, we are satisfied that none of these documents are material for determining the issue whether excise duty deposited by the appellant was provisional or not, as there are only two contingencies, wherein under Rule 9B of the 1944 Rules, excise duty deposited by an assessee can be treated as provisional. Both the aforesaid contingencies have been deliberated upon and defined in the foregoing paragraphs. The submissions of the learned Counsel for the appellant and the documents relied upon by him, cannot have the effect of making the excise duty deposited by him provisional, because the assessee has not been able to bring his case within the statutory provisions so as to lead to the conclusion that the deposit of excise duty at the hands of the appellant was provisional.

10. Since Sub-clause (eb) of Clause (B) under the explanation to Section 11B of the 1944 Act relates to refund in a case where payment of excise duty has been made provisionally, and in the determination rendered by us herein above, it is apparent that the appellant did not avail of the facility of either suo motu paying excise duty provisionally, and alternatively, he was never under the directions of the proper officer to pay excise duty provisionally, we are of the view that the benefit of limitation in the present case cannot run from the date of final assessment, conceived of in Sub-clause (eb) of Clause (B) under the explanation to Section 11B. In the aforesaid view of the matter, the period from which a claim of refund of excise duty could have been made by the appellant, was a period of one year from the date the appellant had paid excise duty. Concededly, the

aforesaid claim was made by the appellant well beyond the period of one year from the date of payment of excise duty. Accordingly, we are satisfied that the Tribunal was fully justified in concluding that the claim of the appellant for refund of excise duty was barred by time.

11. In view of the conclusions recorded by us herein above, the instant appeal, being devoid of merit, is liable to be dismissed. The same is accordingly dismissed.

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