Karnataka High Court Nestle India Limited vs Asstt. Commissioner Of C. Ex. on 7 March, 2003 Equivalent citations: 2003 (154) ELT 567 Kar, ILR 2004 KAR 1641 Author: R Gururajan Bench: R Gururajan ORDER R. Gururajan, J. 1. Petitioner Nestle India Limited is seeking for a direction directing the respondent to refund a sum of Rs. 77,10,277.00 made over by the petitioner as pre-deposit before the Tribunal. 2. Petitioner manufactures instant coffee powder falling under Chapter 21 of the Schedule to the Central Excise Tariff Act 1985. Petitioner had been filing price lists availing certain deductions from the sale price at depot for the purpose of determination of assessable value. Provisional assessments for the period 1991-1994 were finalised by the respondent by his order dated 29-3-1996/10-5-1996. Respondent allowed deductions claimed in the said order. Respondent also ordered that the jurisdictional Superintendent should finalise the assessment from January 1995 onwards in accordance with the said order. Total amount demanded worked out to Rs. 7,87,26,491. 00. Aggrieved by the same, petitioner filed an appeal before the Commissioner of Customs and Central Excise (Appeals) challenging the rejection of claims made by the petitioner for deduction towards interest on receivables and non-recoverable taxes, such as turnover tax, octroi, etc. Appellate Authority in terms of its order dated 16-9-1997 directed the petitioner to pay a sum of Rs. 7 crores as pre-deposit for taking up the appeal in terms of Section 35F of the Central Excise Act. Petitioner paid the entire sum of Rs. 7 crores in terms of the interim order. Appellate Authority in terms of his order dated 31-7-1998 allowed the deduction towards octroi as an abatement but rejected the appeal with regard to deduction on account of turnover tax and interest on receivables. Petitioner thereafter filed an appeal before the Customs, Excise and Gold (Control) Appellate Tribunal [CEGAT, for short). The Tribunal accepted the contention of the petitioner and remanded the case for de novo adjudication and re-determination. In terms of this order, re-quantification was taken up by the respondent on 15-7-1999. Petitioner gave necessary information to the respondent. Respondent by his order-in~original dated 28-12-1999 re-quantified the same and confirmed the demand for a sum of Rs. 6,22,89,723.00 being the differential duty payable by the petitioner. Petitioner had already made over Rs. 7 crores towards pre-deposit. Petitioner, therefore sought refund of the balance sum of Rs. 77,10,277.00 being the difference in the amount of pre-deposit of Rs. 7 crores and the demand of Rs. 6.22 crores. Respondent issued an endorsement at Annexure-E stating therein that the petitioner has to file regular refund claim under Section 11B of the Central Excise Act along with all relevant documents. Petitioner thereafter by a letter contended that Section 11B has no application to cases of pre-deposit since that was not a payment of excise duty. Respondent by his letter dated 3-5-2000 informed the petitioner that there is no provision of law other than Section 11B of the Central Excise Act under which money could be refunded. It is in these circumstances, petitioner is before me. 3. Notice was issued and the respondent has filed statement of objections. Respondent has referred to various facts and ultimately states that the contention of the petitioner that the pre-deposit is not an excise duty is not correct and that the pre-deposit made by the petitioner as a pre-condition to admit the appeal is

nothing but the duty demanded by the adjudicating authority. Except Section 11B there is no provision for refund of money under the Central Excise Act. Respondent has further contended that the petitioner has unnecessarily dragged the respondent to this Court. This affidavit is dated 23-1-2002. 4. Heard the learned Counsel for the parties. 5. Learned Counsel appearing for the petitioner would contend that the action of the respondent is unsustainable in law and requires reconsideration. According to the learned Counsel, pre-deposit cannot be equated to excise duty as understood in law. He refers to me Section 11B to contend that it is referable to a claim for refund of duty. Learned Counsel also refers to me the judgment of the Bombay High Court in Suvidhe Limited v. Union of India reported in 1996 (82) E.L.T. 177 (Bom). Learned Counsel also refers me to the judgment of the Madras High Court in the case of Oswal Agro Mills Limited v. Union of India, 1999"(XC2)-GJX-4666-MAD [WP No. 6283 of 1998 and WMF No. 9694 of 1998 disposed of on 13-10-1999 = 2000 (115) E.L.T. 302 (Mad.)]. Learned Counsel has also placed before me a recent notification dated 2-1-2002. In the said circular, according to the learned Counsel, it is categorically stated that Section 11B need not be insisted upon in the matter of refund application. It is also stated therein that a simple letter from the person who has made such deposit, requesting return of the amount, would suffice for the purpose. Per contra, learned Counsel for the respondent asserts that the endorsement is proper and legal. After hearing the learned Counsel, I have carefully perused the material on record. 6. Section 11B provides for claim for the refund of duty. It provides for an application being made for refund of such duty to the Assistant Collector before expiry of six months. Procedure is prescribed under Section 11B. Facts in the case on hand would show that the petitioner has made over Rs. 7 crores as pre-deposit. After protracted litigation, the authorities have arrived at a figure of Rs. 6,22,89,723.00, leaving behind the surplus of Rs. 77,10,277.00. This is not disputed. Petitioner made refund claim in terms of an application dated 28-3-2000. Instead of considering the same, they have chosen to issue an endorsement and by this endorsement they wanted certain orders/documents to be enclosed with the refund claim. Thereafter, the petitioner made one more letter on 20-4-2000. Endorsement is issued at Annexure-G by the Assistant Commissioner wherein it is stated that there is no provision under the excise laws other than Section 11B under which money could be refunded. Respondents have issued this endorsement treating the said refund claim as excise duty in the case on hand. This question has been considered by two High Courts, one is of Bombay High Court in Suvidhe Limited v. Union of India reported in 1996 (82) E.L.T. 177 (Bom), and the other one is of Madras High Court in Oswal Agro Mills Limited v. Union of India, 1999 -(XC2)-GJX-4666-MAD (WP No. 6283 of 1998 and MP No. 9694 of 1998 disposed of on 13-10-1999). In the case of Suvidhe Limited v. Union of India reported in 1996 (82) E.L.T. 177 (Bom), the Division Bench considered an identical question and ruled that the deposit under Section 35F is not a payment of duty, but is only a pre-deposit for availing a right of appeal. Such amount is bound to be refunded when an appeal is allowed with consequential relief. The Court also has allowed interest from the date of the order of the

Tribunal till payment. The said judgment was challenged by the Union of India in a Special Leave Petition (Civil) No..... /96 in CC No. 3522/96. The Supreme Court dismissed the said Special Leave Petition filed by the Union of India [1997 (94) E.L.T. A159 (S.C.)] thereby confirming the judgment of the Bombay High Court. The Madras High Court in somewhat identical circumstances has ordered refund along with 15 per cent interest. It is also to be noticed at this stage that the respondents themselves in the light of dismissal of SLP by the Supreme Court has chosen to issue circular instructions dated 2-1-2002. They have stated that such refund application under Section 11B(1) need not be insisted upon in the light of the judgment of the Supreme Court. In these circumstances, the endorsement at Annexure-H has no legs to stand and the same has to fail in the light of the judgment of the Supreme Court confirming the Bombay High Court judgment. Pre-deposit amount cannot be equated to excise duty as held by the Bombay High Court and confirmed by the Supreme Court. I have no hesitation in setting aside Annexure-G in the case on hand. I must also notice at this stage that both Bombay and Madras High Courts have chosen to order refund of the amount along with 15 per cent interest from the date of the order till the date of payment. Same order is to be made in this case also. Moreover, the Bombay High Court judgment is confirmed by the Supreme Court. In the circumstances, apart from setting aside Annexure-G, I deem it proper to issue a direction to refund forthwith the amount of Rs. 77,10,277.00 along with interest at 15 percent from the date of the order of the authorities till payment. 7. The Madras High Court in identical circumstances, apart from interest, has also chosen to order cost of Rs. 10,000.00 in its judgment. In the case on hand, I am satisfied that the respondent, without any authority of law, has chosen to unnecessarily keep money with them without refunding the same notwithstanding a reasonable request having been made by the petitioner. The attitude of the Department, in the circumstances, compel me to impose costs of Rs. 10,000.00 payable by the respondent to the Chief Ministers' Relief Fund within four 4 weeks from today. 8. It is also necessary for this court to make certain observations in the given set of circumstances. Petitioner's application for refund is pending right from 2000. The Bombay High Court on 3-2-1996 has ruled against the Department in identical circumstances. The Supreme Court has decided the Special Leave Petition on 7-8-1996. The Madras High Court has decided the case on 3rd October, 1999 in the identical circumstances. Inspite of these rulings, to my shock and surprise, respondent has chosen to assert the same ground which have been found to be unsustainable by courts of law in identical circumstances, and the apex court has confirmed the finding of the Bombay High Court. In the circumstances, I express my displeasure about the way in which an affidavit is filed in this court in respect of their stand. Such an affidavit as in the case on hand definitely misleads the courts. I deem it proper to deprecate filing of such affidavits particularly in the light of clear rulings of courts of law in identical circumstances. Moreover, the affidavit is filed by none other than the Deputy Commissioner of Central Excise (Legal) who, in my view, is supposed to know these case laws. The affidavit is dated 23-1-2002; whereas the notification of the Central Government in favour of the petitioner is dated

2-1-2002 i.e. earlier to filing of the affidavit. There is no reference even to this circular in the affidavit by the respondent. Courts act on the basis of submissions of the public authorities in such cases. He should be more careful in filing affidavit/s before courts for proper determination of cases by the Court. In the circumstances, I deem it proper to direct the Chief Commissioner to get hold of the entire records and hold a proper enquiry as to how this type of affidavits are being filed in this court notwithstanding two judgments and a circular of the Department itself, and, if he finds any lapse in the matter, he is directed to take action in accordance with law against the erring officials. 9. Writ Petition is allowed with the above directions and with costs of Rs. 10,000.00.