Smt. Madhu Bala Dhawan vs Principal Commissioner Of Customs ... on 12 August, 2024

Author: Yashwant Varma

Bench: Yashwant Varma

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* IN THE HIGH COURT OF DELHI AT NEW DELHI
+ W.P.(C) 4861/2024
SMT. MADHU BALA DHAWAN
Through:

versus

PRINCIPAL COMMISSIONER OF CUSTOMS
PREVENTIVE AND ANR .....Responden
Through: Mr. Aditya Singla, SSC,CBIC
with Ms. Charu Sharma,
Advocate.

CORAM:
HON'BLE MR. JUSTICE YASHWANT VARMA
HON'BLE MR. JUSTICE RAVINDER DUDEJA
ORDER

% 12.08.2024

1. The writ petitioner was constrained to approach this Court by way of the instant writ petition consequent to a failure on the part of the respondents to refund an amount of INR 34,72,909/- along with applicable interest pursuant to the termination of proceedings in terms of a final order framed by the Customs Excise and Service Tax Appellate Tribunal ["CESTAT"] on 13 September 2019.

2. The proceedings themselves emanated from a notice which was issued to the sole proprietorship firm by the Commissioner of Customs on 6 May 2011. The said notice was ultimately adjudicated and an Order-in-Original passed on 27 November 2012. In terms thereof, the adjudicating authority confirmed the demand of differential duty along with interest and penalty.

3. This led to the sole proprietorship, M/s Decent Overseas, This is a digitally signed order.

 preferring an appeal before the CESTAT and which came to be allowed along with consequential reliefs.

4. Pursuant to the closure of the aforesaid litigation, a refund claim is stated to have been filed on 14 October 2019. It is the aforesaid application which remained undisposed constraining the writ petitioner to approach this Court by way of the present writ petition.

5. We are also informed that the present claim of refund is being prosecuted by the widow of the erstwhile sole proprietor and who is survived by family members whose details are duly recorded in the certificate dated 12 July 2023 issued by the Government of NCT of Delhi.

6. From the affidavit which has been filed by the respondents in the present proceedings, it is contended that a deficiency memo was issued to the writ petitioner on 12 July 2024 requiring further documentation. It is their case, that subject to the aforesaid compliance being affected, they would be "willing to proceed with the refund".

7. We find ourselves unable to appreciate the stand as struck bearing in mind the undisputed position that the claim for refund had been made as far back as in September 2019. The order of the CESTAT itself had been passed on 30 September 2019 and which had then been followed by a formal application for refund being made on 14 October 2019.

8. We note that the deficiency memo has come to be issued for the first time in July 2024. Although, the aforesaid deficiency memo was also duly replied to on 29 July 2024, no further action appears to have been taken by the respondents, at least till we had taken up the writ petition for consideration today.

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9. We take note of Section 129EE of the Customs Act, 1962 ['Act'] and which reads as under:

> "129-EE. Interest on delayed refund of amount deposited under Section 129-E.--Where an amount deposited by the appellant under Section 129-E is required to be refunded consequent upon the order of the appellate authority, there shall be paid to the appellant interest at such rate, not below five per cent and not exceeding thirty-six per cent per annum as is for the time being fixed by the Central Government, by notification in the Official Gazette, on such amount from the date of payment of the amount till, the date of refund of such amount:
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> Provided that the amount deposited under Section 129-E, prior to the commencement of the Finance (No. 2) Act, 2014 (25 of 2014), shall continue to be governed by the provisions of Section 129-EE as it stood before the commencement of the said Act"

10. We also take note of the reliance which the writ petitioner places on the Circular dated 16 September 2014 issued by the erstwhile Central Board of Excise & Customs and which in our considered opinion would have been applicable keeping in mind the undisputed position that the amount for which the refund was claimed represented a pre-deposit which had been made for the purposes of pursuing the appeal remedy.

11. At this juncture we also take note of the decision of this Court in Flipkart India Private Limited vs. Value Added and where the legal position with respect to pre-deposit not constituting a deposit of tax or duty' was highlighted in the following terms:-

> "24. Turning then to the question of whether the pre-deposit as made before the OHA could have been adjusted against any other tax dues, it was the submission of Mr. Gulati that a pre-deposit has never been understood to constitute a deposit of tax or duty which could be utilized for the purposes of adjustment. According to Mr. Gulati, the aforesaid position is no longer res integra and stands duly settled in light of the judgment of the court in MRF Ltd. v. Commissioner of Trade and Taxes [2019] 66 GSTR 313 (Delhi) ; [2018] SCC OnLine Del 10624. Mr. Gulati referred to the following passages from that decision (pages 316-319 in 66 GSTR) :
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> The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 30/08/2024 at 21:11:42 "3. The learned counsel for the Revenue contends that the local sales tax authorities' decision not to grant interest on refund amount is justified because the provision of section 30 of the Delhi Sales Tax Act, 1975 requires that the assessee who wishes to claim refund of tax paid should approach the authority in a particular manner (by filing form ST 21). It is submitted that the interest amounts would be due only from the time that procedure was followed and not before and that interest would be permissible only in accordance with that provision, i.

e., section 30(4) in the event the 90 days elapse. In this case, the judgment of the court was delivered on May 14, 2015 and the petitioner approached the Sales Tax Department on July 22, 2015 and November 20, 2015. The Delhi Sales Tax authority's appeal by way of special leave before the Supreme Court was disposed of on November 28, 2016. In this background, the Revenue's burden of the song as it were is that since the 21 form was only filed on May 25, 2018 (as without prejudice measure) by virtue of this court's order dated May 9, 2018, the interest on the refund can be granted having regard to the express provisions of section 30 of the Delhi Sales Tax Act with reference to the date concerned, i. e., May 25, 2018. The Revenue's contention, in this court's opinion, is untenable. The judgment in Suvidhe (supra) emphasized-although in the context of section 11B (of the Central Excise Act) where the assessee had to approach and make a pre-deposit to the appellate authority-that such deposit sums would not amount to depositing or paying excise duty but rather to avail remedy of an appeal. The Bombay High Court observed as follows in Suvidhe Ltd. v. Union of

India (1996) 82 ELT 177 (Bom) :

> '1. Rule. By consent rule is made returnable forthwith. Heard parties.
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> 2. Show-cause notice issued by the Superintendent (Tech.) Central Excise to the petitioner to show-cause why the refund claim for excise duty and redemption fine paid in a sum of Rs. 14,07,410 should be denied under section 11B of the Central Excise Rules and Act, 1944 (sic) is impugned in the present petition. The aforesaid amount is deposited by the petitioners not towards excise duty but by way of deposit under section 35F for availing the remedy of an appeal. Appeal of the petitioners has been allowed by the Appellate Tribunal by its judgment and order passed on 30th of November, 1993 with consequential relief. The petitioners' prayer for refund of the amount deposited under section 35F has not received a favourable response.

On the contrary the impugned show-cause notice is issued why the amount deposited should not be forfeited. 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.

3. 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 per cent. p. a. from the date of the order of the Appellate Tribunal, i. e., from November 30, 1993 till payment.

4. Rule is made absolute in the aforestated terms. Respondents will pay the petitioners the cost of the petition.'

4. The Supreme Court endorsed the view of the Bombay High Court. In Nestle India Limited (supra), the Karnataka High Court following the same thread of reasoning, held that the pre-deposit amount was not towards tax but rather to avail the remedy of an appeal. The subsequent judgment in W. S. Retail (supra) was rendered especially in the context of the provisions of the Karnataka VAT Act and other enactments. It relied upon the logic in Suvidhe (supra) and Nestle (supra) and stated as follows :

> '42. To the same effect, the Division Bench of the Delhi High Court in Voltas Limited v. Union of India (1999) 112 ELT 34 (Delhi), also held that the pre-deposit under

section 35F of the Act is a deposit pending appeal and it is not available for appropriation or disbursal by the Revenue Department.

Paragraph-7 of the said judgment is also quoted below for ready reference :

"7. It cannot be denied that the demand against the petitioner was raised consequent to the order of adjudication. Section 35F of the Act under which the petitioner was required to deposit the amount of Rs. 50 lakhs speaks of 'deposit pending appeal.' It is clear that the amount so deposited remains a deposit pending appeal and is thereafter available for appropriation or disbursal consistently with the final order maintaining or setting aside the order of adjudication."

43. The learned Single Judge of the Kerala High Court in Alwaye Sugar Agency v. Commercial Tax Officer, Alwaye [2011] 42 VST 517 (Ker) also dealt with a similar controversy as is involved in the present case and under the provision of "Amnesty Scheme" announced in Kerala in the Budget Speech of 2010, the learned Single Judge directed that a sum of Rs. 75,000 deposited by the petitioner-assessee under the said scheme, cannot be adjusted against the interest portion under section 55C of the Act, which is also akin to section 42(6) in KVAT Act and the court allowed the writ petition with the following observations (pages 525 and 526 in 42 VST) :

"More so since, once the Scheme is announced and specified to be commenced from the first day of the relevant financial year, for a specified period, it may not be proper for the State/Department to augment the revenue collection by resorting to coercive steps before the defaulters get an opportunity to apply for and obtain the benefit of the Scheme, which otherwise can only defeat or frustrate the scheme This is a digitally signed order.

The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 30/08/2024 at 21:11:42 itself and in turn, the 'Policy' of the Government. In the above circumstances, this court finds that the course pursued by the respondents ; issuing exhibit PA rejecting exhibit P2 preferred by the petitioner seeking the amount deposited as a token of willingness to clear the liability availing the benefit of the scheme proposed in exhibit P1 and consciously appropriating the said amount against 'interest' portion under the cover of section 55C, is not correct or sustainable. Accordingly, exhibit P4 is set aside. The respondents are directed to pass fresh orders quantifying the liability of the petitioner, in the application preferred for extending the benefit under the 'Amnesty Scheme', giving credit to a sum of Rs. 75,000 paid by him vide exhibit P2, as payment towards a portion of the liability under the scheme, and effect appropriation, in tune with the terms of the Scheme".'

5. It is clear from the above discussion that pre-deposit sums which the assessee is compelled to pay to seek recourse to an appellate remedy, do not necessarily bear the stamp or character of tax, especially when it succeeds on the particular plea. That

being the case, the insistence upon a procedural step, i. e., filing of a form which is purely for the purpose of administrative convenience cannot in any manner fix the period or periods of limitation when the amounts became due on the question of interest. The fact that the amounts were due and payable from the date the appeal was allowed is not in dispute. In these circumstances, the postponement of the period from when interest became calculable is incomprehensive and illogical. For these reasons the petitioner is entitled to interest calculable from the date when its appeal was allowed by this court by order dated May 14, 2015 (MRF Limited v. Commissioner of Trade and Taxes [2015] 81 VST 461 (Delhi)). The respondents shall ensure that the amounts are processed and credited to the petitioner's account within four weeks. The petition is allowed in these terms."

25. It was further pointed out that the principles laid down in MRF Ltd. were again reiterated in Rakesh Kumar Garg v. Deputy Commissioner of Central Excise, Division-I* where the court had held as under :

"3. The two-fold submissions have been made on behalf of the petitioners. Firstly, that the amounts paid as pre-deposit (before CESTAT) and pursuant to the directions of this court, while pursuing the appeals under section 35G, did not bear the character of 'tax' and consequently, when relief was finally granted, interest had to be paid from the date of deposit. The other submission is that if the amended section 35FF (i. e., amended with effect from August 6, 2014) were to be treated as prospective, it would be arbitrary as it would deny the benefit of interest upon amounts which never bore the character of tax. * Order dated September 26, 2018 passed in W. P. (C) No. 11757/2016.

4. This court is of the opinion that the petitioners are entitled to relief in view of the consistent view taken in this regard by the courts.

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> 5. We notice that recently in MRF Ltd. v. Commissioner of Trade and Taxes [2019] 66 GSTR 313 (Delhi) (W. P. (C) No. 3118/2018 decided on August 10, 2018), this very Division Bench had taken a similar view-in the context of pre-deposits made under the Delhi VAT Act.
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> 6. In view of the above discussion, the petitioners' contention that they are entitled to interest from the date of the final order of the CESTAT, is justified and warranted. As to the second submission made with respect to the invalidity of section 35FF on account of its prospective nature, the court recollects that the provisions of law ought not to be read in a manner so as to invalidate them. In view of the interpretation preferred by the above judgment, the alleged unconstitutionality no longer subsists."

26. Our attention was also drawn to a recent decision rendered by this court in Otis Elevator Company (India) Ltd. v. Commissioner of Value Added Tax [2023] 119 GSTR 343 (Delhi)* where upon noticing MRF Ltd., we had held as follows (pages 350 and 352-355 in 119 GSTR) :

> "11. MRF Limited has unequivocally held that a deposit made in terms of a provision connected with the preferment of an appeal cannot be treated to be tax or duty. In fact that is the position which has been consistently held by various courts as would be evident from the discussion which follows. It thus remains undisputed that a pre-deposit cannot partake the character of a tax or duty. This since, it would clearly be connected only with the right of the assessee to pursue an appeal.. ..
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> * Order dated August 7, 2023 passed in W. P. (C) No. 2859/2022.
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> 13. As is manifest from a clear reading of sub-section (1), the said provision relates to a claim made by a person for refund of an amount of tax paid by him. The express language as employed in section 30(1) itself takes the case of refund of pre-deposit out from the rigours of the procedural formalities which are contemplated therein. We further note that as in the present case, claims for refund which may arise as a This is a digitally signed order.
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> The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 30/08/2024 at 21:11:42 consequence of an order passed by the appellate authority or a court would be governed by section 30(4) of the Act.. ..
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> 15. In our considered opinion a pre-deposit would become refundable the moment an appellate authority comes to hold in favour of the assessee and demands come to be annulled. This principally since pre-deposit is not tax or duty and the refund of which alone is regulated by section 30(1) of the Act. We note that the decision of the Bombay High Court in Suvidhe Limited was assailed before the Supreme Court. While dismissing the appeal of the Union, the Supreme Court in Union of India v. Suvidhe Ltd. (2016) 11 SCC 808 held as follows :

> '3. The show-cause notice issued by the Superintendent (Tech.), Central Excise to the petitioner to show-cause why the refund claim for excise duty and redemption fine paid in a sum of Rs 14,07,410 should not be denied under section 11-B of the Central Excise Act, 1944 is impugned in the present petition. The aforesaid amount is deposited by the petitioners not towards excise duty but by way of deposit under section 35-F for availing the remedy of an appeal. Appeal of the petitioners has been allowed by the Appellate Tribunal by its judgment and order passed on November 30, 1993 with consequential relief. The petitioners' prayer for refund of the amount deposited under section 35- F has not received a favourable response. On the contrary, the impugned show-cause notice is issued as to why the amount deposited should not be forfeited. 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 35-F, provisions of section 11-B can never be applicable. A deposit under section 35-F 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.
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> 4. 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 15 per cent. p.a. from the date of the order of the Appellate Tribunal, i. e., from November 30, 1993 till payment.
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> 5. Rule is made absolute in the afore-stated terms. The respondents will pay the petitioners the costs of the petition.'
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> 16. We further find that the Supreme Court in Commissioner of Customs v. Finacord Chemicals P. Ltd. [2015] 32 GSTR 370 (SC) ;

(2015) 15 SCC 697 reiterated the aforesaid position as would be evident from paragraphs 17 and 18 of the report which are extracted hereinbelow (pages 378 and 379 in 32 GSTR) :

> '17. It is the order dated August 7, 1996 which was passed by this court in Union of India v. Suvidhe Ltd. (Union of India v. Suvidhe Ltd. (2016) 11 SCC 808 ; [1997] 94 ELT A-159 (SC)) dismissing the This is a digitally signed order.

The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 30/08/2024 at 21:11:42 special leave petition which was filed by the Union of India against the judgment of the High Court of Bombay in Suvidhe Ltd. v. Union of India (Suvidhe Ltd. v. Union of India, (1996) 82 ELT 177 (Bom)). Since the special leave petition was dismissed in limine, we would like to reproduce paragraph 2 of the judgment of the High Court wherein the High Court had observed that in case of such deposits, provisions of section 11B of the Customs Act (sic Central Excise Act, 1944) will have

no application. This paragraph reads as under : (Suvidhe Ltd. case (Suvidhe Ltd. v. Union of India (1996) 82 ELT 177 (Bom)), ELT p.

178) "2. Show-cause notice issued by the Superintendent (Tech.) Central Excise to the petitioner to show-cause why the refund claim for excise duty and redemption fine paid in a sum of Rs 14,07,410 should be denied under section 11B of the Central Excise Rules and Act, 1944 (sic) is impugned in the present petition. The aforesaid amount is deposited by the petitioners not towards excise duty but by way of deposit under section 35F for availing the remedy of an appeal. Appeal of the petitioners has been allowed by the Appellate Tribunal by its judgment and order passed on November 30, 1993 with consequential relief. The petitioners' prayer for refund of the amount deposited under section 35F has not received a favourable response. On the contrary the impugned show-cause notice is issued why the amount deposited should not be forfeited. 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." (emphasis in original)

18. By another Circular No. 802/35/2004-CX dated December 8, 2004 issued by the Board, the Board emphasised that such amounts should be refunded immediately as non-returning of the deposits attracts interest that has been granted by the courts in a number of cases.'

17. A Division Bench of our Court in Xerox India Ltd. v. Assistant Commissioner, Ward-114 (Special Zone) Department of Trade and Taxes, Government of NCT [2018] SCC OnLine Del 13447 as well as in Rakesh Kumar Garg v. Deputy Commissioner of Central Excise, Division-I* have taken an identical position. We further find that the issue of pendency of the special leave petition against the judgment in MRF Limited was duly noted by the court in Jiwand Singh and Sons v. Special Commissioner of Trade and Taxes [2023] 119 GSTR 336 (Delhi) ; [2023] SCC OnLine Del 463. However, the legal character of a pre-deposit was again held not to be that of a duty or tax. We thus find that the petitioner is clearly justified in seeking refund of the amount of pre-deposit together with interest computed from the date of the order passed by the Tribunal."

12. We consequently allow the writ petition and direct the respondents to release amount of INR 34,72,909/- within a period of four weeks from today. The said refund shall be made along with interest payable from the date of deposit till the date it is finally disbursed as contemplated under Section 129EE of the Act.

YASHWANT VARMA, J.

RAVINDER DUDEJA, J.

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