

(2021) 06 CESTAT CK 0030

Customs, Excise And Service Tax Appellate Principal Bench, New Delhi

Case No: Excise Appeal No. 52074 Of 2018

M/s Duggar Fibre Pvt. Limited

APPELLANT

Vs

Commissioner Of Central Excise
And Customs & Central Goods
And Service TaxRESPONDENT

Date of Decision: June 25, 2021**Acts Referred:**

- Central Excise Rules, 2002 - Rule 26
- Central Excise Act, 1944 - Section 11B, 11B(1), 35FF, 37C, 37C(1)(a)

Hon'ble Judges: Anil Choudhary, J**Bench:** Single Bench**Advocate:** G. K. Sarkar, P. Juneja**Final Decision:** Allowed

Judgement

1. The brief facts are that the appellant is a registered manufacturer of S.S. Ingots and S.S. Flats having their factory at C10, S.M.A. Industrial Area,

G. T. Karnal Road, Delhi-110033. A search was conducted on 19.11.2005 by the Officers of Anti Evasion Branch of Central Excise

Commissionerate, Delhi-I. Some excess stock of 484.944 MT of S.S. Ingots was found in the premises of another registered dealer namely M/s B. B.

Steels Private Limited (buyer /job worker). The Director of M/s B. B. Steel Private Limited, Shri P. K. Gupta stated that he has received the same

from this appellant - M/s Duggar Fibre Pvt. Limited, without cover of Central Excise invoice or challan and without payment of duty. The excess

stock of 484.944 MT of S. S. Ingots valued at Rs. 1,55,20,000/- was seized vide panchnama dated 19.11.2005. It was alleged that this appellant had

cleared 484.944 MT of S.S. Ingots valued at Rs.1,55,20,000/- with intent to evade payment of duty amounting to Rs. 25,32,864/-. This amount was deposited by appellant. Pursuant to contested show cause notice, vide order-in-original dated 08.03.2010, the Additional Commissioner (Adjudication), Delhi-I ordered confiscation of seized goods, with option to redeem on payment of fine amounting Rs.5 lakhs, and further confirmed duty amount of Rs. 27,51,154/- and appropriated the amount of Rs. 27,46,874/- deposited by the appellant Further, penalty of Rs. 27,51,454/- was imposed on M/s Duggar Fibre Pvt. Limited. Further, penalty of Rs. 5 lakhs was imposed on Shri P. K. Gupta (Director of M/s B. B. Steel Pvt. Limited) under rule 26 of Central Excise Rules, 2002.

2. In appeal filed by the parties, the Commissioner (Appeals) vide order-in-appeal No. 33-35/CE/DLH/2012 dated 28.05.2012, set aside the adjudication order, observing that actual weight of all S.S. Ingots was not done, Shri P. K. Gupta had retracted his statement next day after his statement was recorded each time, and further duty on 717 hot rolled strips can only be demanded from M/s B.B. Steel Pvt. Limited. This order-in-appeal was accepted by the Department on 12.03.2013. Thereafter, the appellant M/s Duggar Fibre Pvt. Limited filed refund claim for Rs.34,42,038/- (including penalty) on 03.02.2017. The refund sanctioning authority vide order-in-original No. R-27/2017-18 dated 02.05.2017 sanctioned the refund for Rs. 34,42,218/- to M/s Duggar Fibre Pvt. Limited, paid through RTGS.

3. Thereafter, Revenue filed appeal before Commissioner (Appeals) against refund order dated 02.05.2017 on the ground that the said refund was already time barred™. The application for refund was filed after expiry of one year from the relevant date i.e. date of order-in-appeal.

3.1 Vide Order-in-appeal dated 10.04.2018, the learned Commissioner (Appeals) observing that the order-in-appeal dated 28.05.2012 was despatched through speed post to all the parties at their address, and none of the despatch envelop were returned back by the Postal Department. Accordingly, service on the parties was presumed and the claim was held to be barred by limitation. It was further observed that M/s Duggar Fibre Pvt.

Limited vide letter dated 02.11.2016 requested the Commissioner (Appeals) for certified true copy of the order-in-appeal dated 28.05.2012. Further, the appellant has also claimed that the duty was deposited during investigation and under the facts and circumstances, it should be treated as payment under protest. The Commissioner (Appeals) observed that in absence of clear procedure of "under protest" having been followed, presumption of such payment under protest cannot be taken as correct.

4. Being aggrieved, the appellant " M/s Duggar Fibre Pvt. Limited is before this Tribunal on the grounds amongst others that the Commissioner (Appeals) have erred in presuming service of the order-in-appeal dated 28.05.2012, without there being any proof of service on the appellant. There is evidently no compliance of the requisite of Section 37C of the Central Excise Act, wherein clause (a) of subsection (1) provides that in case of service of any notice/ order by speed post/ registered post, the same has to be with proof of delivery. In other words, service by speed post is valid provided that, if there is proof of delivery. Admittedly, Revenue have not brought on record the proof of delivery at any stage in these proceedings. It is the specific case of the appellant that they had not received the notice of personal hearing too. Thus, it was incumbent upon the Revenue to furnish the proof of delivery. In absence of the proof of delivery, it cannot be said that there is effective service of notice, as contemplated under Section 37C(1) (a) of the Act. There is no such stipulation in the provisions of the Central Excise Act or the Rules thereunder. That in absence of proof of delivery the evidence of despatch cannot be presumed, as proof of service of any order/ notice. It is settled law that the period of limitation can only commence after the receipt or service of the order on the appellant. Admittedly, the appellant was served with a copy of the order dated 28.05.2012, only on 02.11.2016 after several communications with the office of Commissioner (Appeals) with regard to status of the appeal. Reliance is placed by the appellant on the ruling of the Hon^{ble} Supreme Court in the case of Saral Wearcraft Pvt. Limited vs. CCE&ST - 2015 (322) ELT 192 (SC). Reliance is also placed on the ruling of Privy Council in the case of Nazir Ahmad vs. King Emperor (1935-36) 63 IA 372, which has been

subsequently relied in catena of decisions by the Honâ€™ble Supreme Court, wherein it has repeatedly been held that where the law provides for a particular act to be done as prescribed, the act must be done in that manner or not at all.

5. Thus, the Commissioner have erred in presuming delivery of the order-in-appeal dated 28.05.2012, only on the basis of evidence of despatch, in absence of proof of delivery. Further, the learned Commissioner (Appeals) also erred in not appreciating that the amount was deposited during investigation under protest, as the appellant has contested the show cause notice and thereafter contested the demand in appeal. Thus, in the facts of the case, limitation of one year under Section 11B (read with 2nd proviso) of the Act is not applicable, as the duty is admittedly deposited under protest. Further, reliance is placed on the ruling in Prince Khadi Woollen Handloom Producers Cooperative Indl. Society vs. CCE -1996 (88) ELT 637 (SC) wherein it has been observed - if the State, has wrongly collected the tax from a person, and even if there is no specific provision, still is liable to refund the tax alongwith interest

6. Further urges, the Commissioner (Appeals) have erred in observing that in absence of clear procedure of payment having been made â€™under protestâ€™, presumption of such payment under protest cannot be taken as correct.

7. Learned Counsel appearing for the appellant urges that in the present scheme of the Central Excise Act read with the Central Excise Rules, 2002, no specific procedure is prescribed for payment â€™under protestâ€™. The procedure for protest was prescribed in the Central Excise Rules, 1944, which have been redeemed by the Central Excise Rules, 2001. Reliance is also placed on the ruling of Rajasthan High Court in the case of R. P.

Castings -2016 (344) ELT 168. As regards payment made â€™under protestâ€™ in view of the facts and circumstances, reliance is placed on the ruling of Honâ€™ble Bombay High Court in case of Suvidhe Ltd., vs. Union of India -1996 (82) ELT 177 (Bom.) which order was confirmed by the

Honâ€™ble Supreme Court as reported in 1997 (94) ELT A159. Learned Counsel also placed reliance on the ruling of Honâ€™ble Delhi High court

in the case of Konark Exim Pvt. Ltd., in WPC No. 4861/2015 wherein under similar facts and circumstances the duty was paid (under protest) during investigation before issue of show cause notice, the Honâ€™ble Delhi High court held as follows:-

â€œ11. This court is of the opinion that the facts of the present case clearly point to the petitionerâ€™s claim falling within the second proviso to Section 11B of the Act. Concededly, even during the pendency of the adjudication, the petitionerâ€™s letter indicating deposits were made (in unequivocal terms) under protest. The adjudication order took note of the earlier statement, which was retracted at the beginning of the adjudication proceedings and found that the retraction was genuine. The adjudication order is an exhaustive one and categorically rules that against all transactions which were stated to be taxed could not have fallen within the ambit of Service Tax.

12. In Mera Baba Realty associate (P) Ltd., vs. Commissioner of Service Tax, Delhi, SERTA No. 26/2016 (decided on 07.09.2016), the Court had set aside the findings of the CESTAT in somewhat similar circumstances, and held that if amounts were paid under protest, and ultimately the adjudication order held that the individual or entity concerned was not liable to be taxed at all, the amounts collected would be without authority of law. In the present case, the entire proceedings seeking recovery of amounts were without jurisdiction and the amounts, which were collected under ostensible authority of law, could not have been collected, because the transactions were not subject to levy at all. In these circumstances, the collection of duties was per se illegal. This Court, consequently holds on both, on that court as well as on the facts that the petitioners had lodged their protest during the pendency of the proceedings and before the adjudication order was made, the second proviso to Section 11B of the Act clearly apply.

13. For the above reason, the impugned order is hereby set aside. The concerned authorities are hereby directed to process the petitionerâ€™s refund claim and ensure that the amounts are remitted to it with applicable interest, in eight weeks.â€

(emphasis supplied).

Allowing the writ petition the Honâ€™ble Delhi High Court directed the Department to process the refund claim and disburse the same with applicable interest.

8. Learned Counsel also urges that they are entitled to interest under the provision of Section 35FF from the date of deposit till the date of grant of

refund, as the payment made by them was under protest and by way of pre-deposit. On this contention, he relies on the ruling in the case of Hitesh

Industries â€™ E/50171/2019 F.O. dated 07.12.2020 (Tri. Del.) and J. K. Cement- F.O. No. 51052/2021 (SM-Del.) dated 02.03.2021.

9. Learned Counsel also informs that during pendency of appeal by Revenue before Commissioner (Appeals), another show cause (on presumptive

basis) Notice C. No. V(87)18/Refund/Duggar Fiber/Div.I/202/2016-17 dated 24.01.2018 have been issued demanding the refund amount with interest

on the ground of limitation. This notice is bad on the principle of res-judicata. Also the same stands merged with the impugned order-in-appeal.

10. Opposing the appeal learned Authorised Representative for Revenue Shri P. Juneja urges that there is no â€™letter of protestâ€™ filed by the

appellant at any stage in the adjudication proceedings. In absence of such letter of protest, there can be no presumption that the amount in question

was deposited under protest. As regards proof of service of the order-in-appeal dated 28.05.2012 is concerned, he urges that the evidence of despatch

to the correct address of the appellant is sufficient proof of service, unless the despatch is returned back undelivered. When the despatch is not

returned undelivered, there is presumption of service, unless the parties so claiming not received, rebuts the same with sufficient evidence. Further,

states that this appellant had also approached Honâ€™ble High Court for grant of interest on refund, but the same was withdrawn with leave of the

Court to contest the adjudication proceedings before the Department.

11. Having considered the rival contentions, I find that the impugned order has been passed on the presumption by the Commissioner (Appeals) that

the order-in-appeal dated 28.05.2012 was served on the appellant, on the basis of evidence of despatch and the contention of the Department that

such despatch was not returned back by the Post Office. I find that the learned Commissioner have erred in making the presumption in absence of

proof of delivery produced by the Department. During the relevant time as per the provisions of Section 37C(1)(a), any order passed under the Act

was to be served through registered post or speed post to the person for whom it was entitled or his authorised agent with acknowledgement due or

proof of delivery. Thus it was incumbent upon the Revenue to produce evidence of delivery or service which is the mandate as per Section 37C(1)(a)

of the Act. In absence of proof of delivery, order dated 28.05.2012 cannot be deemed as served on the appellant, as has been held by the Honâ€™ble

Rajasthan High Court in the case of R. P. Casting Pvt. Limited -2016 (344) ELT 168 and also Gujarat High Court in Regent Overseas Pvt. Limited

vs. Union of India -2017 (6) GSTL (15) Guj., and also by the Honâ€™ble Supreme court in Saral Wearcraft vs. CCE&ST - 2015 (322) ELT 192

(SC). In absence of such proof of delivery, it is held that the presumption is not sustainable and accordingly I hold that the application of the appellant

for refund cannot be held time barred.

12. Alternatively, I find that the amount in question was collected by the Department without issue of show cause notice at the investigation stage, and

further the appellant have contested the show cause notice, as well as, has been constantly in appeal pursuant to adjudication, and thus the amount in

question is held to be deposited â€™under protestâ€™ ipso facto. Further, I take notice that the Assistant Commissioner in order-in-original dated

02.05.2017 (refund order) have accepted the fact of payment under protest in para 11 of his order. Thus, it is held that the limitation of one year as

prescribed under Section 11B (1) of the Act is not applicable in the facts and circumstances. I further take notice that Shri P. K. Gupta, Director of

M/s B.B. Steels Pvt. Limited, have retracted his statement soon after recording of his statement, every time, which was the basis of the whole

proceedings against this appellant. I further notice that Honâ€™ble Madras High Court in the case of CCE, Coimbatore vs. Pricol Ltd. - 2015 (39)

STR 190 (Mad) has held that any amount deposited by pre-deposit or during the course of investigation, is definitely in the nature of deposit â€™under

protestâ€™. It has also been so held in 2017- TIOL-549-HC-MAD-CUS, Calcutta Iron & Steel Company.

13. Accordingly, the impugned order is set aside and appeal is allowed. It is also held that the show cause notice dated 24.01.2018, issued by Revenue

have merged with impugned order-in-appeal dated 10.04.2018. I further take notice that Division Bench of this Tribunal in Parle Agro (P) Ltd., vs.

Commissioner, CGST-2021-TIOL-306- CESTAT-ALL, wherein interest on pre-deposit (made during investigation) have been enhanced from 6% to

12%, following the ruling of the Apex Court in Sandvik Asia Ltd., - 2006 (196) ELT 257 (SC). I further direct the Adjudicating Authority to grant

interest @ 12% per annum from the date of deposit till the date of refund. Such interest should be granted within a period of two months from the date

of receipt or service of the copy of this order.

(Pronounced on 25.06.2021).