(2024) 11 CESTAT CK 0026

Customs, Excise And Service Tax Appellate, New Delhi

Case No: Service Tax Appeal No.50072 of 2024

M/s. Rishabh Laboratories Limited		APPELLANT
	Vs	
Commissioner of CGST & Central Excise		RESPONDENT

Date of Decision: Nov. 27, 2024

Acts Referred:

- Central Excise Act, 1944 - Section 11B, 35F, 35FF, 35G
- Customs Act, 1962 - Section 27, 129EE

Hon'ble Judges: Binu Tamta, Member (J)

Bench: Single Bench

Advocate: Parul Sachdeva, Rohit Issar

Final Decision: Allowed

Judgement

Binu Tamta, J

1. The appellant is aggrieved by rejection of the refund claim filed by them pursuant to the Final Order No.50780/2019 dated 01.05.2019, whereby the

demand of duty confirmed by the Authorities below was set aside and the appeal filed by the appellant was allowed with consequential benefit, if any.

2. The appellant is engaged in service of â€œClearing and Forwardingâ€ (C&F). A dispute had arisen regarding the inclusion of certain

reimbursement expenses such as freight, stationery, printing charges, telephone charges, asset hire, courier, insurance and other taxes while providing

Clearing and Forwarding agency services. Show cause notice dated 22.10.2007 was issued raising a demand of Rs.6,95,965/- and education cess

amounting to Rs.7,951/-, which was confirmed by the order-in-original dated 30.03.2009 and was thereafter re-affirmed vide order-in-appeal dated

10.12.2009.

3. The appellant filed the appeal before the Tribunal along with application for stay of the statutory requirement of pre-deposit, which was rejected

vide order dated 03.12.2010. The appellant had taken-up the matter to the Chattisgarh High Court by filing the writ petition, which was withdrawn

with liberty to approach the Tribunal once again by filing an appropriate application. The said application was decided by the Tribunal vide order dated

30.05.2009 directing the appellant to deposit the entire service tax demand within a period of 4 weeks. The said order was again challenged by the

appellant before the Chattisgarh High Court by filing a writ petition, however, the same was withdrawn and an appeal was preferred before the

Chattisgarh High Court, which was decided vide Order dated 06.08.2018 granting liberty to the appellant to approach the Tribunal and satisfy on

relevant consideration for full waiver of pre-deposit. The appellant, accordingly made an application before the Tribunal with appropriate reliefs.

However, in the meanwhile, the appellant had deposited 10% of the amount on 16.10.2018 in view of the amendment made to Section 35F of the Act

on 6.8.2014, which required an amount of 10% of the amount appealed against to be deposited. The said miscellaneous application was disposed of

vide order dated 18.02.2019, inter alia, observing as under:-

â€œWe also consider it appropriate, in the circumstances of the case, to direct that the amount of 10% which the appellant has already

deposited on 16th October, 2018 be considered as sufficient towards the requirement of pre-deposit as the appellant does have a prima facie

case, in view of the decision of the Supreme Court in Inter Continental referred above. The application is disposed of accordingly.â€

4. The appeal was finally disposed of vide Final Order dated 01.05.2019, whereby the demand towards re-imbursement expenses was held to be un-

sustainable in view of the decision of the Supreme Court in Union of India Vs. Intercontinental Consultant and Technocrats Pvt. Ltd., 2018 (10) GSTL

401 (SC). The appeal was, accordingly allowed with consequential benefits.

5. In terms of the aforesaid final order of the Tribunal, which remained un-challenged by the Revenue, the appellant made an application for refund

dated 04.09.2020 claiming refund of Rs.70,400/- as deposited vide challan no.00213 dated 16.10.2018 of Rs.52,800/- and vide challan no.00121 dated

17.10.2018 of Rs.17,600/- along with interest @6% to be computed from the date of deposit to the date of refund in terms of Section 35 FF of the

Central Excise Act, 1944 read with Circular No.984/08/2014-CX dated 16.09.2014. The said application has been rejected by the Adjudicating

Authority vide order dated 20.10.2020 holding that the amount deposited prior to the date of the stay order dated 8.2.2019 of Rs.52,800/- + Rs.17,600/-

totalling Rs.70,400/- is in fact the payment of service tax under the category of C & F Agents of earlier period. The appeal preferred by the appellant

has also been rejected on similar grounds, though surprisingly the Commissioner (Appeals) categorically taking note of the observations made by the

Honâ€™ble CESTAT at para7 of its Misc. Order No.50169/2019 dated 18.02.2019 held that :-

â€œOnce the Honâ€™ble CESTAT has considered the amount deposited on 16.10.2018 as pre-deposit, there cannot arise any question

wherein an authority subordinate to the Honâ€™ble CESTAT can hold otherwise concluding the said amount to be not paid under Section

35F.

Thus, the amount of 10% deposited by the Appellant was nothing but a pre-deposit in terms of Misc. Order dated 18.02.2019. Held

accordingly.â€

6. The issue, whether the amount deposited by the appellant was towards pre-deposit is emphatically clear from the observations made by the Tribunal

vide Miscellaneous Order dated 18.02.2019, whereby considering the backdrop of the circumstances of the case, it was directed that the amount of

10%, which the appellant had deposited on 16.10.2018, be considered as sufficient towards the requirement of pre-deposit as the issue on merits is

prima facie in favour of the appellant in view of the decision of the Supreme Court in the case of Union of India Vs. Intercontinental Consultant and

Technocrats Pvt. Ltd. (supra). Thereafter when the final order was passed, the entire demand was held to be unsustainable. The amount deposited by

the appellant was ipso facto pre-deposit and was liable to be refunded along with interest in view of the same having been settled in catena of

decisions.

7. The sole ground, on which the Authorities below have held against the appellant is that the amount deposited by the appellant was prior to the stay

granted by the Tribunal on 18.02.2019, and, therefore, the same is not to be treated towards pre-deposit but was in the nature of tax. I am of the

considered opinion that such observations is un-sustainable, particularly, in view of the facts in the present case, where the appellant had approached

the Chattisgarh High Court and the matter has been pending and was finally decided on 06.08.2018 with liberty to approach the Tribunal, by which

time the amendment was made under Section 35 F of the Act, requiring 10% of the amount appealed against to be deposited. The appellant availing

the liberty granted by the Chattisgarh High Court bonafidely approached the Tribunal by depositing 10% of the demand of tax and sought to recall

/modify the earlier order dated 13.05.2011 directing pre-deposit of the entire service tax demand as pre-condition for hearing the appeal.

8. The issue of refund of pre-deposit has been clarified in the Circular dated 16.09.2014 issued by the Central Board of Indirect Taxes and Customs

(CBIC) that the pre-deposit for filing the appeal is not payment of duty. The relevant paras are quoted below, which are self-explanatory:-

â€œ5. Refund of pre-deposit

5.1 Where the appeal is decided in favour of the party/assessee, he shall be entitled to refund of the amount deposited along with the

interest at the prescribed rate from the date of making the deposit to the date of refund in terms of Section 35FF of the Central Excise Act,

1944 or Section 129EE of the Customs Act, 1962.

5.2 Pre-deposit for filing appeal is not payment of duty. Hence, refund of pre-deposit need not be subjected to the process of refund of duty

under Section 11B of the Central Excise Act, 1944 or Section 27 of the Customs Act, 1962. Therefore, in all cases where the appellate

authority has decided the matter in favour of the appellant, refund with interest should be paid to the appellant within 15 days of the receipt

of the letter of the appellant seeking refund, irrespective of whether order of the appellate authority is proposed to be challenged by the

Department or not.

5.3 If the Department contemplates appeal against the order of the Commissioner (A) or the order of CESTAT, which is in favour of the

appellant, refund along with interest would still be payable unless such order is stayed by a competent Appellate Authority.â€

In view of the contents above, it is clear that Revenue has accepted that once the appeal is decided in favour of the assessee, he shall be entitled to

refund of the amount deposited along with interest at the prescribed rate from the date of making the deposit to the date of refund, irrespective

whether the order of the Appellate Authority is proposed to be challenged by the Department or not.

9. Learned counsel for the appellant has placed on record the decision of the Jurisdictional High Court of Delhi in Smt. Madhu Bala Dhawan Vs.

Principal Commissioner of Customs Preventive & Anr. W.P.(C)4861/2024 Order dated 12.08.2024, where the learned Division Bench took note of

the aforesaid circular and also the earlier decision in Flipkart India Private Limited Vs. Value Added, where the legal position with respect to the pre-

deposit not constituting a deposit of tax or duty was highlighted and the relevant portion quoted from the decision is as under:-

â€œ24. 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 submission of Mr. Gulati that a pre-deposit has never been understood to constitute a deposit of tax or duty which could be

utilised for the purpose of adjustment. According to Mr. Gulati, the aforesaid position is no longer res integra and stands duly settled in

light of the judgement of the court in MRF Ltd. Vs. Commissioner of Trade and Taxes [2019] 66 GSTR 313 (Delhi); [2018) SCC Online Del

10624.â€

.....

â€œ25. 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.

In Suvidhe Ltd. v. Union of India (1996) 82 ELT 177 (Bom), it was held that the amount paid as pre-deposit, for pursuing the appellate

remedy or for any other reason mandated by law, cannot be treated as a tax as that is only a condition for pursuing the appellate remedy.

This view was affirmed by the Supreme Court in Union of India v. Suvidhe Ltd. (2016) 11 SCC 808. In Nestle India Limited v. Asstt.

Commissioner of C. Ex (2003) 154 ELT 567 (Kar) also, a similar view was adopted. The latest judgment of the Karnataka High Court in

WS Retail Services Private Limited v. State of Karnataka [2018] 48 GSTR51 (Kar), W. P. (C) No. 33176/2017 and connected cases

(decided on November 14, 2017) referred to all these decisions as well as the decision of this court in Voltas Limited v. Union of India

(1999) 112 ELT 34 (Del).

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.

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.

After quoting the decision in extenso, the High Court directed to release the refund amount with interest payable from the date of deposit till the date it

is finally disbursed as contemplated under Section 129EE of the Act. The learned counsel has also placed on record certain other decisions of the

Tribunal as under:-

(1) M/s.India Yamaha Motor Pvt. Ltd. Vs. Commissioner of Central Goods & Service Tax, Excise Appeal No.70103 of 2021 dated 2.09.2024

(2) Pr. Commissioner of CGST, New Delhi Vs. Emaar MGF Construction Pvt. Ltd., 2021(55) GSTL 311 (Tribunal-Delhi)

(3) M/s.Niranjan Lal Agarwal Vs. Commissioner of Central Excise, Raipur, 2018-TIOL-1870-CESTAT-Del.

10. Thus, following the principles of law, I am of the considered opinion that the amount of 10% of the tax amount deposited by the appellant had

become refundable as with the passing of the final order dated 1.5.2019 in their favour by the Tribunal, the entire demand had become annulled. I,

therefore, conclude that the deposit made by the appellant is not a payment of duty but only a pre-deposit for availing the right of appeal and such

amount is bound to be refunded when the appeal is allowed with consequential relief.

11. The impugned order is unsustainable and is hereby set aside. The appellant is entitled to refund of Rs.70,400/- along with interest @6% from the

date of deposit till the date of actual refund is made. The Department is directed to release the amount within a period of 4 weeks. The appeal is,

accordingly allowed.

[Order pronounced on 27th November, 2024]