

(2002) 01 BOM CK 0108

Bombay High Court

Case No: Writ Petition No. 3063 of 1988

Killick Caribonium

APPELLANT

Vs

Union of India (UOI)

RESPONDENT

Date of Decision: Jan. 25, 2002

Acts Referred:

- Central Excises and Salt Act, 1944 - Section 11B, 35F

Citation: (2002) 143 ELT 491

Hon'ble Judges: V.C. Daga, J; J.P. Devadhar, J

Bench: Division Bench

Advocate: H.C. Daruwala, instructed by Crawford Bayley and Co, for the Appellant; R. Asokan, for the Respondent

Judgement

V.C. Daga, J.

Heard parties.

This petition is directed against the order dated (Ex. G.) (Page 42) passed by the Assistant Collector of Central Excise, Bombay Division, Bombay, dated 28th December 1987, whereby refund claim of Rs. 2,71,835.05 has not been granted to the petitioner on the ground that the appeal against the order passed by the Collector (Appeals) was pending before the Tribunal for adjudication on merits.

2. The factual matrix is that the petitioners after having suffered order-in-original passed by the Assistant Collector, Bombay, on 19th October 1984, whereby demands in the sum of Rs. 3,09,266.26 and Rs. 1254.42 were confirmed against the petitioners with direction to pay the said amounts within 10 days from the date of receipt of the order, the petitioners preferred appeal on 2nd January, 1985 before the Commissioner (Appeals), Mumbai. During the pendency of the said appeal, with a view to comply with the provisions of Section 35F of the Act, the petitioners deposited an amount sought to be claimed by way of refund as per the details given hereunder :

The aforesaid appeal filed by the petitioner came to be allowed.

3. Being aggrieved by the aforesaid order-in-appeal, the Revenue invoked appellate jurisdiction of CEGAT. The appeal filed by the Revenue came to be rejected on 16th March, 1993 during the pendency of this petition. In view of the above, the demand which was confirmed by the Assistant Collector of Central Excise vide order dated 19th October, 1984 came to be set aside.

4. The learned Counsel for the petitioner submitted that the ground on which refund application was rejected now does not hold good in view of the order-in-appeal by CEGAT. He, therefore, submits that the petitioners are entitled for refund. He placed reliance on the judgments of this court in the case of *Nelco Co. Ltd. v. Union of India*; dated 22nd January, 2001, wherein the Division Bench of this Court relied upon two earlier judgments in the case of [Suvidhe Ltd. Vs. Union of India](#), and in *Philips (India) Ltd. v. Union of India* in Writ Petition No. 7162 of 1999 and submits that in all these judgments it is clearly laid down that the amount deposited u/s 35F of the Act, as a condition precedent for hearing of an appeal does not bear the character of duty but bears the character of a security deposit, being a statutory condition precedent for hearing of the appeal.

5. In this view of the law laid down by this court the learned Counsel for the petitioners urged that the petitioners are entitled to refund of amount. Since the Tribunal has decided the appeal, filed by the Revenue. Now, there is no impediment in the way of the respondents in granting refund.

6. The learned Counsel for the respondents, based on Sub-section (2) of Section 11B of the amended Act objected for grant of relief of refund. Contention seems to be that application u/s 11B of the Act for refund has to be filed and it would be necessary for the respondents to examine whether the amount has been collected from the customers by the petitioners. In this case this question does not arise because the amount was paid as a security deposit during the pendency of the appeal. The petitioner is entitled to get back its security deposit. Section 11B has no application to the facts of this case. In this view of the matter, we quash and set aside the impugned order at Ex. G dated 28th December, 1987 and hold that the petitioners are entitled to the refund. Since petitioners have already been permitted to withdraw the amount of refund on furnishing undertaking to re-pay the same in the event of an adverse judgment, no further reliefs needs to be granted except the declaratory relief that the petitioners are entitled to have the refund. No further directions for payment are necessary. Undertaking furnished by the petitioners stands discharged.

Writ petition stands disposed of with no order as to costs.