

**Customs, Excise & Service Tax Appellate Tribunal
West Zonal Bench At Ahmedabad**

REGIONAL BENCH- COURT NO.3

Service Tax Appeal No.10996 of 2021

(Arising out of OIA-AHM-EXCUS-003-APP-46-2021-22 dated 14/10/2021 passed by Commissioner of Central Excise, Customs and Service Tax-AHMEDABAD)

JOHN ENERGY LTD

220 Gidc Estate Mehsana Industrial Estate
Mehsana, Gujarat

.....Appellant

VERSUS

C.S.T.-SERVICE TAX – AHMEDABAD

7 Th Floor, Central Excise Bhawan, Nr. Polytechnic
Central Excise Bhavan, Ambawadi,
Ahmedabad, Gujarat-380015

.....Respondent

APPEARANCE:

Shri Sudhanshu Bissa, Advocate for the Appellant
Shri Ghanasyam Soni, Joint Commissioner (AR) for the Respondent

CORAM: HON'BLE MEMBER (TECHNICAL), MR. RAJU

Final Order No. A/ 11881 /2022

DATE OF HEARING: 30.11.2022
DATE OF DECISION: 08.12.2022

RAJU

This appeal is filed by M/s. John Energy Ltd. against rejection of refund claim on the ground of limitation.

02. Learned counsel for the appellant pointed out that they certain investigation was initiated against them and during investigation, they paid the service tax. The matter was contested by the appellant and the tribunal on the ground of limitation set aside the demand on 26.11.2018 vide Final Order No. A/12620/2018. The appellant consequently filed refund claim on 04.09.2020 which was received by the revenue on 09.09.2020. The said refund claim was rejected by the lower authorities on the ground of limitation. Aggrieved by the said Order, the appellants are before this tribunal. The arguments of the appellant is essentially based on the ground that the amount paid by them during investigation should be deemed to be duty paid under protest and consequently, the second proviso to Section 11B regarding limitation should be applicable to the claim of the refund and

limitation should not apply to the claim filed by the appellant. Learned counsel relied on the following decisions:-

- H.V. CERAMICS- 2019 (365) ELT 390 (Guj.)
- KISAN COOPERATIVE SUGAR FACTORY LTD.- 2018 (8) GSTL 365 (All.)
- ASHOK SHETTY & ASSOCIATES C.A.- 2017 (4) GSTL 53 (Tri.-Bang.)
- KVR CONSTRUCTION- 2012 (26) SR 195 (Kar.)
- DUGGAR FIBRE P.LTD.- 2021 (378) ELT 293 (Tri.-Del.)

03. Learned AR argued that the issue regarding limitation in such situation has been examined by hon'ble Gujarat High Court in the case of AJNI INTERIORS- 2019 (9) TMI 529- GUJARAT HIGH COURT and Hon'ble High court of Gujarat has held that in such circumstances limitation is applied and the amount paid cannot be treated as duty paid under protest. He further pointed out that the said decision of the Hon'ble High Court has been upheld by the Hon'ble Apex Court by dismissing the SLP filed by M/s. AJNI INTERIORS. Learned AR also relied on the decision of tribunal in the case of RATNAMANI METALS & TUBES LTD.- 2019 (366) E.L.T. 139 (Tri.-Ahmd.)

04. I have considered the rival submissions. I find that it is not in dispute that when the amount was paid during investigation no formal protest was launched at the time of the said deposit. It is also not in dispute that duty was otherwise leviable and it was not a tax collected under mistake of law or unconstitutionally. It is also not in dispute that refund claim has been filed beyond the period of limitation prescribed under Section 11B.

4.1 The main defence of the appellant is that the amount paid by them should be treated as amount paid under protest. He has relied on the decision of the hon'ble High court of Allahabad which in turn relied on the decision of the Hon'ble Apex Court in the case of MAFATLAL INDUSTRIES LTD.- 1997 (89) ELT 247 (SC) in para 10 as follows:-

We find the Supreme Court in the case of Mafatial Industries Ltd. v. Union of India (supra) has held as below:

"83. The second proviso to Section 118 (as amended in 1991) expressly provides that "the limitation of six months shall not apply where any duty has been paid under protest". Now, where a person proposes to contest his liability by way of appeal, revision or in the higher courts, he would naturally pay the duty, whenever he does, under protest. It is difficult to imagine that a manufacturer would pay the duty without protest even when he contests the levy of duty, its rate, classification or any other aspect. If one reads the second proviso to sub-section (1) of Section 11B along with the definition of "relevant

date", there is no room for any apprehension of the kind expressed by the learned counsel.

84.....

85. The rule no doubt requires the assessee to mention the "grounds for payment of the duty under protest" but it does not empower the proper officer, to whom the letter of protest is given, to sit in judgment over the grounds. The assessee need not particularise the grounds of protest. It is open to him to say that according to him, the duty is not exigible. according to law. All that the proper officer is empowered to do is to acknowledge the letter of protest when delivered to him and that acknowledgement shall be the proof that the duty has been paid under protest. A reading of the rule shows that the procedure prescribed therein is evolved only with a view to keep a record of the payment of duty under protest. It is meant to obviate any dispute whether the payment is made under protest or not. Any person paying the duty under protest has to follow the procedure prescribed by the Rule and once he does so, it shall be taken that he has paid the duty under protest. The period of limitation of six months will then have no application to him.

86. We may clarify at this stage that when the duty is paid under the orders of Court (whether by way of an order granting stay, suspension, injunction or otherwise) pending an appeal/reference/writ petition, it will certainly be a payment under protest, in such a case, it is obvious, it would not be necessary to lodge the protest as provided by Rule 233B..."

The said decision is not applicable to the instant case as in this case duty was not paid under orders of court.

4.2 I find that the decision of hon'ble High Court of Gujarat in the case of AJNI INTERIORS- 2019 (9) TMI 529- GUJARAT HIGH COURT also takes note of the decision of the Hon'ble Apex Court in the case of MAFATLAL INDUSTRIES LTD.(supra) in Para 22. The hon'ble High Court has observed as follows:-

14. Considering the arguments advanced by learned advocates of the parties and scanning the material on record, it is clear that the case of the petitioner that payment towards Excise Duty is in the form of pre-deposit is misconceived. Considering the annexures annexed with the petition i.e. Challans for deposit of Central Excise Duty in Form No.TR-6, that too, without protest is the payment towards the Excise Duty and can never be considered as pre-deposit. If any payment is made as a pre-condition for exercising the statutory right it can be termed as pre-deposit. However, it cannot be equated with voluntary deposit of Excise Duty paid even during the course of investigation and prior to show cause notice or adjudication to assert that it is pre-deposit.

The payment of duty was intended to prevent the incidence of interest and liability accruing from the non-payment of duty, and hence, it cannot be termed as deposit. Therefore, the payments made by the petitioner towards Excise Duty in Challans Form No.TR-6, can never

partake characteristic of pre-deposit as mentioned in Section 35F of the Act, as argued by learned advocate for the petitioner.

Under the circumstances, the contention that the amounts were paid involuntarily and, therefore, are deemed to be under protest and should be considered as deposits deserves to be rejected. Firstly as discussed hereinabove the payments made by the petitioner are in the nature of Central Excise Duty and hence, cannot be considered to be akin to or in the nature of pre-deposit as contemplated under Section 35-F of the Act; and secondly there is nothing on record to establish that the petitioner had paid the amount in question under protest, and hence the second proviso to sub-section (1) of Section 11B of the Act which provides that the limitation of one year shall not apply where duty and interest, if any, paid on such duty has been paid under protest would not be applicable. Once it is held that the payments made by the petitioner were in the nature of excise duty and were not deposits, the provisions of Section 11B of the Act would be attracted; and having regard to the fact that the amounts in question had not been deposited under protest, the petitioner would be liable to file the claim within the prescribed period of limitation and in the manner prescribed by the statute, viz. in the prescribed format. It is an admitted position that the petitioner has not filed the refund claim within the prescribed period of limitation and hence, the Tribunal was wholly justified in rejecting the claim as being time barred.

The decision of the Hon'ble Gujarat High Court in the case of AJNI INTERIORS has been approved by the Hon'ble Apex court as SLP filed in the said case has been dismissed.

4.3 In the case of KISAN COOPERATIVE SUGAR FACTORY LTD. (supra) relied by appellant there is clear finding of the tribunal that the duty has been paid under protest and therefore, the facts are different from the instant case. In the instant case there is no finding that duty has been paid under protest.

4.4 In the case of H.V. CERAMICS, it is not under dispute that the duty was indeed paid under protest therefore, the facts are distinguishable.

4.5 Decision in case of ASHOK SHETTY & ASSOCIATES C.A.(supra) has been relied by the appellant. The said decision has in turn relied on the decision of Hon'ble High Court in the case of KVR CONSTRUCTION. It is noticed that decision of Hon'ble High Court in the case of KVR CONSTRUCTION was passed in the writ jurisdiction. It is also noticed that in the case of KVR CONSTRUCTION, the duty was not payable at all, whereas in the instant case the duty was payable and the demand was set aside only on the ground of limitation. The facts in the instant case are different from the facts of KVR CONSTRUCTION as relied by the appellant and also relied

by the tribunal in the case of ASHOK SHETTY & ASSOCIATES therefore, both these decisions relied by the appellant are distinguished.

4.6 Learned counsel also relied on the decision of DUGGAR FIBRE P.LTD.(supra). In the said case the facts were such that the claim was filed within limitation period prescribed from the date of actual receipt of Order-in-Appeal on the basis of which the refund claim arose. It is also noticed that in the said case the demand was set aside on the merits and not merely on limitation. In the instant case, the demand has been set aside merely on the basis of limitation as otherwise the tax was legally payable and due.

05. In view of all the case laws relied by the appellant are distinguishable. Relying on the decision of Hon'ble High Court in the case of AJNI INTERIORS (supra) which has been approved by Hon'ble Apex Court, the appeal is dismissed.

(Pronounced in the open court on 08.12.2022)

(RAJU)
MEMBER (TECHNICAL)

Mehul