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OSWAL AGRO MILLS LTD. AND ANR.

v.

ASSTT. COLLECTOR OF CENTRAL EXCISE DIVISION
LUDHIANA AND ORS.

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FEBRUARY 4, 1994

[YOGESHWAR DAYAL AND S.P. BHARUCHA, JJ.]

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Central Excises and Salt Act, 1944: Section 11B—Excise duty—Refund of—Furnishing of Bank Guarantee on Court's order towards disputed Excise duty—Whether amounts to payment of Excise duty—Meaning and intent of Section 11B—Applicability of the provision.

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Pursuant to interim orders passed by this Court in the appeals filed by the appellants against a decision of CEGAT, regarding the classification of toilet soap for the purposes of excise duty, 50% of the excise duty was paid by the appellants to the excise authorities and bank guarantees were furnished for the balance 50%. Though the appeals were allowed by this Court, the question of the refund of the money deposited by the appellants was left to be dealt with by the authorities concerned in accordance with law.

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On their failure to get a positive response to their refund application, the appellants filed a writ petition before the High Court seeking its expeditious disposal. The High Court issued a direction to the excise authorities to dispose of the claim of the appellants for 'refund/release of bank guarantees' within one month, and also directed the appellants to have the bank guarantees extended till the final disposal of the claim for refund. Against this order, a special leave petition was filed, and the appeal was allowed by this Court and the Respondents No. 1 and 2 were directed to refund the monies recovered by them in the meantime from the Bank upon encashment of the bank guarantees. Against this, the present review petition was filed in this Court.

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On behalf of the respondents 1 and 2 in the appeal, it was submitted that the provisions of Section 11B of the Central Excises and Salt Act, 1944 were attracted to the bank guarantees in question; that the bank guarantees, furnished under the interim orders of this Court as a condition of

stay of recovery of excise duty from the appellants, should be deemed to be equivalent to monies deposited in Court; and, therefore, it was for the appellants to establish before the excise authorities that they had not passed on the incidence thereof to their customers; and that, since the appellants had failed to establish this, the excise authorities were entitled to encash the bank guarantees and retain the amounts thereof.

Disposing of the matters, this Court

HELD: 1. Section 11B of the Central Excises and Salt Act, 1944 applies when an assessee claims refund of excise duty. A claim for refund is a claim for repayment. It presupposes that the amount of the excise duty has been paid over to the excise authorities. [655-B]

2.1. The bank guarantee is security for the Revenue that, in the event the Revenue succeeds, its dues will be recoverable, being backed by the guarantee of a bank. In the event, however unlikely, of the bank refusing to honour its guarantee it would be necessary for the Revenue or, where the bank guarantee is in favour of the principal administrative officer of the Court, that officer to file a suit against the bank for the amount due upon the bank guarantee. The amount of the disputed tax or duty that is secured by a bank guarantee cannot, therefore, be held to be paid to the Revenue. There is no question of its refund, and Section 11B is not attracted. [655-F-H]

2.2. In the instant case, the bank guarantees given by the appellants were not properly the subject matter of the writ petition before the High Court and the High Court was in error in directing the appellants to renew the same. The 1st and 2nd respondents should forthwith re-pay to the Bank the amount collected upon the bank guarantees. [656-A, B]

Union of India v. Jain Spinners Ltd., (1992) 61 E.L.T. 321 S.C., distinguished.

CIVIL APPELLATE JURISDICTION: J.A. No. 3 of 1993.

IN

Civil Appeal No. 7236 of 1993.

From the Judgment and Order dated 18.10.1993 of the Punjab and Haryana High Court in C.W.P. No. 10379 of 1993.

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AND

Review Petition No. 17 in CA No. 7236/1993.

Harish N. Salve, Rajiv Dutta and Vipin Nari for the Appellants.

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D.S. Mahra for the Respondents.

A.K. Ganguli, V.K. Verma and V.J. Francis for the Respondent/
(U.O.I.).

The following Order of the Court was delivered :

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1. This is a review petition filed by respondents 1 and 2 in S.L.P. (C) No. 18175/1993. By our order dated 26th November, 1993, we granted special leave and, having heard the appeal, we allowed it and directed respondents 1 and 2 to refund the monies recovered by them from the State Bank of Patiala upon certain bank guarantees.

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2. The appellants had filed an earlier appeal in this Court against a decision of CEGAT regarding the classification of toilet soap for the purposes of excise duty. Interim orders were passed in the appeal whereby stay of recovery of excise duty pursuant to the impugned order of CEGAT was granted on condition that 50% thereof was paid by the appellants to the excise authorities within 3 months and for the balance 50% the appellants furnished bank guarantees. The appeal was, ultimately, allowed. This Court then stated that it "did not propose to go into the question of the refund as it is matter to be dealt with by the authorities concerned in accordance with law. The appellants shall have to apply for refund and the authorities shall be required to deal with it in accordance with the law. It is for the authorities, therefore, to decide the question as per law".

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3. Accordingly, on 14th May, 1993 the appellants wrote to the 1st respondent and requested him "to refund the amount and the bank guarantees deposited from time to time under Supreme Court of India's interim orders during the pendency of the above-referred appeals". Since, in their view, the refund application was not being dealt with, the appellants filed a writ petition on 27th August, 1993 before the High Court of Punjab and Haryana seeking its expeditious disposal. On 18th October, 1993 the High Court issued a direction to the excise authorities to dispose of the claim of

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the appellants for "refund/release of bank guarantees" within one month. The High Court directed the appellants to have the bank guarantees extended till the final disposal of the claim for refund. Against this order of the High Court the special leave petition afore-mentioned was filed, on which leave to appeal was granted and the appeal was allowed by the order of which review is now sought.

4. The excise authorities passed an order on 15th November 1993 holding that the amount deposited by the appellants in court and withdrawn by the excise authorities and the amounts covered by the bank guarantees furnished by the appellants pursuant to the interim orders of this Court were not refundable to the appellants having regard to the provisions of section 11B of the Central Excises and Salt Act, 1944. The bank guarantees not having been renewed, the 1st respondent then issued upon the bank a demand, pursuant to which the bank guarantees were encashed on 17th November, 1993. By our order of 26th November, 1993, allowing the civil appeal as afore-stated, we held that the direction issued by the High Court in regard to the extension of the bank guarantees was bad because the bank guarantees were not the subject matter of the application for refund pending before the excise authorities. Once this court had decided the earlier appeal against the excise authorities they did not have the power to get the bank guarantees encashed. Accordingly, we directed the excise authorities to repay the amounts collected upon the bank guarantees to the bank.

5. Section 11B of the Act provides that "a person claiming refund of any duty of excise may make an application for refund of such duty to the Assistant Collector of Central Excise before the expiry of six months from the relevant date and in such form as may be prescribed and the application shall be accompanied by such documentary or other evidence as the applicant may furnish to establish that the amount of duty of excise in relation to which such refund is claimed was collected from or paid by him and the incidence of such duty had not been passed on by him to any other person".

6. Mr. A.K. Ganguli, learned counsel for respondents 1 and 2 submitted that the provisions of section 11B were attracted to the bank

A guarantees in question; that the bank guarantees, furnished under the
interim orders of this Court as a condition of stay of recovery of excise duty
from the appellants, should be deemed to be equivalent to monies
deposited in Court; that, therefore, it was for the appellants to establish
before the excise authorities that they had not passed on the incidence
thereof to their customers; and that, since the appellants had failed to
B establish this, the excise authorities were entitled to encash the bank
guarantees and retain the amounts thereof.

7. Mr. Ganguli relied upon the judgment of this Court in *Union of
India v. Jain Spinners Ltd.*, (1992) 61 E.L.T. 321 S.C. This was a case in
C which the High Court had, on a writ petition filed by the assessee, granted
interim stay of collection of a demand of excise duty on condition that the
assessee deposited in court stated sums and for further clearances gave
bank guarantees for the amounts of the disputed duty. By a subsequent
order the excise authorities were permitted to withdraw the amounts
D deposited by the assessee in court. The writ petition filed by the assessee
succeeded, and it applied to the High Court for refund of the amounts
which had been deposited by it and which had been withdrawn by the
excise authorities. The High Court allowed the application. The excise
authorities filed an appeal in this Court against the High Court's order.
E This Court held that under the provisions of the Act a duty was cast upon
the Assistant Collector of Excise to consider the question. It could not be
disputed that the amount which was deposited by the assessee in the High
Court and was withdrawn by the excise authorities was towards the excise
duty which was assessed. The provisions of section 11B were attracted and
the assessee was not entitled to take advantage of the order by which the
F deposit had been made unless it succeeded in showing to the statutory
authorities that it had not passed on the whole or any part of the duty in
question to others. This Court said that if the contentions advanced by
counsel for the assessee were accepted it would defeat the amended
provisions of the Act. It would then be open to assesseees to obtain orders
G from the courts, as had happened in the case before it, and, instead of
paying the assessed amount of duty to the authorities, deposit it in court
and raise the plea that what it had deposited in court was not duty and the
assessee was entitled to get a refund, either directly from the court or, if
it had been withdrawn, from the authorities, notwithstanding that it had
H passed on the duty to others.

8. The judgment in the case of *Jain Spinners* applies to a case where excise duty has been deposited in court pursuant to an interim order and has been withdrawn by the excise authorities. In such a case, clearly, the assessee had to make an application for refund and to such a case, therefore, the provisions of section 11B squarely apply.

9. Section 11B applies when an assessee claims refund of excise duty. A claim for refund is a claim for repayment. It presupposes that the amount of the excise duty has been paid over to the excise authorities. It is then that the excise authorities would be required to repay or refund the excise duty.

10. The question, therefore, is whether it can be said that the furnishing of a bank guarantee for all or part of the disputed excise duty pursuant to an order of the court is equivalent to payment of the amount of the excise duty. In our view, the answer is in the negative. For the purposes of securing the Revenue in the event of the Revenue succeeding in proceedings before a Court, the Court, as a condition of staying the demand for the disputed tax or duty, imposes a condition that the assessee shall provide a bank guarantee for the full amount of such tax or duty or part thereof. The bank guarantee is required to be given either in favour of the principal administrative officer of the Court or in favour of the concerned Revenue authority. In the event that the Revenue fails in the proceedings before the Court the question of payment of the tax or duty, the amount of which is covered by the bank guarantee, does not arise and, ordinarily, the Court, at the conclusion of its order, directs that the bank guarantee shall stand discharged. Where the Revenue succeeds the amount of the tax or duty becomes payable by the assessee to the Revenue and it is open to the Revenue to invoke the bank guarantee and demand payment thereon. The bank guarantee is security for the Revenue, that in the event the Revenue succeeds its dues will be recoverable, being backed by the guarantee of a bank. In the event, however unlikely, of the bank refusing to honour its guarantee it would be necessary for the Revenue or, where the bank guarantee is in favour of the principal administrative officer of the Court, that officer to file a suit against the bank for the amount due upon the bank guarantee. The amount of the disputed tax or duty that is secured by a bank guarantee cannot, therefore, be held to be paid to the Revenue, There is no question of its refund, and Section 11B is not attracted.

A 11. We find, therefore, no merit in the review petition. We reiterate our finding that the bank guarantees given by the appellants were not properly the subject matter of the writ petition before the High Court and the High Court was in error indirecting the appellants to renew the same. We reiterate our direction to the 1st and 2nd respondents forthwith to re-pay to the State Bank of Patiala, Overseas Branch, Millar Gang, Ludhiana, the amount of Rs. 1,18,00,000 collected upon the bank guarantees within two weeks.

B 12. The review petition is dismissed. The 1st and 2nd respondents shall pay to the appellants costs quantified in the sum of Rs. 5,000.

C This order will also dispose of I.A. No. 3 in the appeal.

N.P.V.

Petitions disposed of.