Cce Vs. Crompton Greaves Ltd.

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Mumbai

Decided On : Feb-26-1999

Reported in : (1999)(83)LC329Tri(Mum.)bai

Judge : G B Deva, a T V.K.

Appellant : Cce

Respondent : Crompton Greaves Ltd.

Judgement :

1. The Revenue has preferred the present appeal being aggrieved by the order in appeal dated 13.9.1990 under which the Collector (Appeals) had allowed the claim of refund of duty to M/s. Crompton Greaves Ltd., Respondents.

2. Briefly stated the facts are that the Respondents manufacture Electric Motor and were availing proforma credit of duty paid on inputs, namely electrical stamping, under Notification No. 95/83. The Assistant Collector under order in original dated 16.9.1985, confirmed a demand amounting to Rs. 6,72,171.72 paise holding that the proforma credit of duty paid on inputs was not available to them since the final product was cleared at nil rate of duty under Notification No. 272/79 dt. 18.10.1979. The Collector (Appeals) vide order dt. 1.3.1986 directed the Respondents to deposit the amount demanded by the Assistant Collector as a pre-condition under Section 35F of the Central Excise Act. The Respondents deposited the said amount in R.G 23 Part II and P.L.A. on 31.3.1986. Subsequently the Collector (Appeals), under order dated 17.1.1989, allowed the

appeal filed by the Respondents holding that demand was hit by time limit. The claim for refund of amount deposited by them was rejected by the Assistant Collector, under adjudication order dated 31.1.1990 holding that procedure of payment under protest as specified in Rule 233B of the Central Excise Rules was not followed by the Respondents and as the amount had been recovered from the Customers, the refund was hit by the Doctrine of Unjust Enrichment in view of the judgment of the Bombay High Court in the case of Roplas (I) Ltd. v. UOI 1988 (28) ELT 27 : 1989 (22) ECR 449 (Bom).

On appeal, Collector (Appeals) vide impugned order dated 13.9.1990, set aside the adjudication order and allowed the appeal with consequential relief holding that question of applicability of Rule 233B did not arise in such cases and that theory of unjust enrichment could not be applied in the departmental proceedings as the departmental authorities were bound by the provisions of the statute and they could not go beyond the Act and Rules.

3. Mrs. Dolly Saxena, the Ld. J.C.D.R., submitted that the judicial proprietary (sic) demanded that Assistant Collector should follow the judgment of the Bombay High Court in Roplas' case while dealing with a claim for refund. As the Respondents had recovered the amount of duty from the Customers, any refund of the same to them would amount to undue enrichment. Moreover, now Section 11B of the Central Excise Act also provides that amount of refund will not be given to the claimant if he had passed on the incidence of duty to any other person. By virtue of proviso to Section 11B of the Central Excise Act, these provisions are applicable also to the refund claim which has been made before the commencement of Amendment Act, 1991. She also reiterated the grounds of appeal as contained in the memorandum of appeal and emphasized that payment of amount under protest was not mentioned in the PLA and the relevant R.T. 12 Return and as such the claim was hit by time limit specified in Section 11B of the Act.

4. Shri R.G. Sheth, Ld. Advocate, submitted that they were entitled to the refund of duty paid by them as a matter of right without having to make a refund application as per the provisions of Sub-section (3) to Section 11B of the Act; that it was

incumbent upon the Assistant Collector to have refunded the deposit amount without even their having to make a refund application; that in any case duty was paid by them under protest which was evident from their letter dated 31.3.1986 in which they clearly mentioned that they had debited the amount as a deposit under protest; that in any event Rule 233B(6) of the Central Excise Rules clearly provides that where a remedy of appeal is available, the same should be treated as under protest. Reliance was also placed on the decision the case of CCE v. Emzo Chem Laboratories Ltd. wherein it was held that appeal itself could be construed to be a protest against demand; that if the amount is required to be deposited as per the statutory requirements, that payment cannot be construed to be a voluntary payment and was to be construed only as a payment for fulfilling the statutory obligations.

The Ld. Counsel, further, submitted that the decision of the Collector (Appeals) had achieved the finality and refund had to be allowed to them as no appeal was filed by the department against the said order.

The Ld. Advocate referred to the decision in Ferinni Eleven Up v. CCE 1990 (46) ELT 247 : 1992 (42) ECR 374 (T), in which Tribunal held that if no appeal is filed, the order becomes final and cannot be subsequently reopened irrespective of whether such order was right or wrong. Supreme Court further observed that where the refund proceedings have finally terminated -in the sense that the period prescribed for filing the appeal against such order has also expired-before the commencement of the 1991 (Amendment) Act (September 19, 1991), they cannot be reopened and/or be' governed by Section/HB(3)...." He also referred to the decision in the case of Sandoz (India) Ltd. v. CCE in which the Tribunal held that if the Revenue felt that the order was not correct, they had a right to appeal against it, they cannot readjudicate the issue involved in the appeal in an ingenious manner that has, in effect, if not in law, nullified the Tribunal's order. Such readjudication apart from being subversive of judicial discipline, will bring the rule of law and administration of justice into ridicule and contempt. He also relied upon the decision in the case of Suvidhe Ltd. v. UOI 1996 in which it was held that in respect of refund of pre-deposit made under Section 35F of the Act, the doctrine of unjust enrichment will be inapplicable and provisions of Section 11B can never be

applicable as a deposit under Section 35F is not a payment of duty but only a pre-deposit for availing the right of appeal and such amount is to be refunded when the appeal is allowed with consequential relief. The ld. Advocate, therefore, submitted that the amount is refundable to them.

5. We have considered the submissions of both the sides. We observe that the amount was deposited by the appellants in pursuance of the order passed by the Collector (Appeals) under Section 35F of the Central Excise Act. They had filed claim for refund of the said amount after the order in original was set aside by the Collector (Appeals) vide order dt. 17.1.1989. In such a situation, the time limit of 6 months from the date of payment of duty, as specified in Section 11B of the Act, is not applicable as the amount was deposited in pursuance of direction of the appellate authority for the purpose of entertaining the appeal. In such a case, the refund cannot be denied on the ground of time limit. This was the view held by the Appellate Tribunal in the case of Harish Textile Engg. Ltd. v. CCE and CCE v.Emzo Chem Laboratories P. Ltd. . The Tribunal held in the earlier case that "when the assessee succeeds in the appeal and the amount paid in fulfilling the statutory requirements under Section 35F of the Act becomes refundable to them, the question of bringing in the time limit prescribed under Section 11B or insisting on a separate letter of protest before payment does not arise." 6. The second issue involved in the appeal is whether the provisions of amended Section 11B are applicable to the facts of the case or not. The Appellants have rereferred to Bombay High Court decision in Suvidhe Ltd. (supra), for contending that Section 11B cannot have application in case of refund of deposit of amount under Section 35F of the Act. In the case of Union of India v. Jain Spinners Ltd. disputed amount of duty was deposited with the Court instead of being paid to the Department as per court's order. The Supreme Court observed that the amount which was deposited by the Respondents in the court was towards the duty which was assessed by the Assistant Collector. The Court further held as under: Further, if the contention advanced by the learned Counsel is accepted it would defeat the amended provisions of the Act. It would then be open to the assessee to obtain orders from courts as in the present case, and instead of paying the assessed amount of duty to the authorities, deposit in court and raise a plea that what is deposited in court is not duty and the assessees are entitled to get the

refund...notwithstanding that they have passed on the duty to others. It would create two artificial classes of assessees, viz.

those who have paid the duty to the authorities and those who have obtained orders from the Courts for depositing the duties in courts.

The former will, and the latter will not, be governed by the amended provisions of the Act. This would result in a discriminatory and inviduous situation.

7. The judgment of the Apex Court was not brought to the attention of the Hon'ble Bombay High Court in Suvidhe case, supra. In the light of the judgment of the Apex Court, the doctrine of unjust enrichment is applicable to the amount of duty deposited as per orders of the court or appellate authority. The next point to be seen is whether the refund claim was pending at the time of commencement of the Amended Provisions of Section 11B in 1991. The Ld. Advocate, appearing on behalf of the Appellants, has emphatically argued that the Collector (Appeals) order dated 17.1.1989 had achieved finality as no appeal against the same was filed and as per provisions of Section 11B(3) of the Act at the relevant time, the department was bound to refund the duty even without their filing the refund claim. We find that the Collector (Appeals), in order dt. 17.1.1989 set aside the adjudication order dated 16.9.1985 holding that the demand was barred by time limit. The department has admittedly not filed any appeal against this order. However, the refund claim filed by the appellants was examined by the Assistant Collector in accordance with law and was rejected vide order dt. 31.1.1990 on the ground of time limit and unjust enrichment. This order of the Assistant Collector was also set aside by the Collector (Appeals) vide the impugned order against which the Department filed the present appeal in January, 1991 which was pending at the time of commencement of the Amended Provisions of Section 11B of the Act in September, 1991. It cannot therefore be claimed that the refund proceedings have finally terminated. The Supreme Court in paragraph 87 of the judgment in Mafatlal Industries case (supra) held that "Where the duty has been refunded under the orders of the court pending disposal of an appeal, Writ, or other proceedings, it would not be a case of refund finally and unconditionally, as explained in Jain Spinners and I.T.C." In Jain Spinners case, , the provisions of

amended Section 11B were held to be applicable notwithstanding the order dt. 19.2.1986 of the High Court for refund. The Appellate Tribunal also in the case of DRG Leather Cloth (P) Ltd. v. CCE 1996 (14) RLT 800 (T) : 1996 (65) ECR 263 (T) has held that so long as the claim was not finally settled and the actual disbursement had not taken place, it must be held that the claim for refund is still pending. Therefore, when the Tribunal is dealing with the matter, the amended section is in force and the Tribunal has to take note of the same. Accordingly, the bar of Unjust Enrichment as contained in the provisions of Section 11B of the Central Excise Act is applicable to the refund claim in question as the appeal of the Revenue was pending at the material time.

8. We find that the Assistant Collector observed in Adjudication order dated 31.1.1990 that the appellants had not denied the fact of recovery of duty from the Customers. On the other hand, the appellants have contended that they had not recovered any duty from their customer whom the impugned goods were supplied by them. We are of the view that the aspect of recovery of duty from the customers has not been examined in detail by the Assistant Commissioner. In the interest of justice, we remand the matter to the Assistant Collector with the direction to examine whether duty was passed on by the appellants to any other person and pass appropriate order after affording a opportunity of hearing to the appellants. The Appellants will be at liberty to produce any evidence before the Assistant Commissioner in support of their contention that they had not recovered the duty from their customer within 6 weeks of receipt of this order.