

S. Kumar Ltd. Vs. Commissioner of Central Excise,

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Apr-16-2002

Reported in : (2002)LC902Tri(Delhi)

Judge : P Chacko

Appellant : S. Kumar Ltd.

Respondent : Commissioner of Central Excise,

Judgement :

The appellants were job workers for M/s. Dhvani Terrifabs Export Pvt. Ltd. (for short, M/s. DTE). They received raw material (grey fabrics of cotton) from M/s. DTE, processed the same and supplied the processed fabrics (falling under Chapter 60 of the Schedule to the Central Excise Tariff Act, 1985) to them. During the period 5-3-1997 to 30-8-1997, they cleared processed fabrics (CSH 6001.21) to M/s. DTE on payment of Additional Excise Duty (AED) in lieu of Sale Tax @ 8% adv. under the Additional Duties of Excise (Goods of Special Importance) Act, 1957. The total duty so paid was Rs. 8,43,041/-. Later they found that, under Notification No. 9/96-C.E., dated 23-7-1996, the goods were exempt from such duty. Upon realizing the mistake, the appellants sent to M/s. DTE a cheque dated 3-9-1997 for Rs. 7,08,520/- (which amount of duty the appellants had collected from M/s. DTE at the time of clearance of the goods) as refund of duty wrongly collected. They had not collected the differential amount of Rs. 1,34,521/- from M/s. DTE at the time of clearance of the goods. Hence there was no question of return of this amount to M/s. DTE. However, the appellants had paid the entire

amount of Rs. 8,43,041/- to the exchequer. The appellants filed a refund claim with the Assistant Commissioner for this amount on 4-9-1997. The department, by show cause notice, proposed to reject the claim on the ground that M/s. DTE, to whom the incidence of duty had been passed on at the time of clearance of the goods, were not a 'buyer' in terms of Section 11D read with Section 11B of the Central Excise Act and on the further ground that the refund of any duty amount by the appellants to M/s. DTE subsequent to clearance of the goods was inconsequential for purposes of Section 11B and the refund claim was hit by unjust enrichment as the incidence of duty had passed on, at the time of clearance of the goods, to M/s. DTE. The show cause notice relied on the Tribunal's decision in CCE v. Addison & Company [1997 (93) E.L.T. 429 (Tribunal)]. The appellants contested the department's stand. The adjudicating authority rejected the refund claim, upholding the department's view stated in the show cause notice. In the appeal preferred by the aggrieved party against the order of the Asstt.

Commissioner, the Commissioner (Appeals) held that since the appellants as job worker cleared the goods to M/s. DTE, who had supplied the raw materials and were the owners of the goods (processed fabrics), M/s. DTE were not 'buyers' of the goods. He further held that, in view of the Tribunal's decision in CCE, Jaipur-II v. Adarsh Guar Gum Udyog [2000 (120) E.L.T. 138 (Tribunal)] as well as Board's Circular No. 317/33/97-CX., dated 18-6-1997, the refund claim was hit by unjust enrichment under Section 11B. The lower appellate authority, accordingly, upheld the order of the adjudicating authority. Hence the present appeal.

2. Ld. Advocate, Shri B.L. Narasimhan for the appellants submitted that the Board's Circular relied on by the lower appellate authority was based on the decision of the Tribunal's South Zonal Bench in CCE, Madras v. Addison & Company, Madras - 1997 (93) E.L.T. 429 wherein it had been held that refund claim was not admissible if the duty burden had been passed on to buyer at the time of clearance of the goods and no post-clearance transaction like issuance of credit notes to the buyer was relevant under Section 11B of the Central Excise Act. Ld.

counsel submitted that the above decision was no longer good law as it was reversed by the Madras High Court by its judgment in Addison and Company v. CCE, Madras [2001 (129) E.L.T. 44 (Madras)]. Referring to the Tribunal's decision in Adarsh Guar Gum Udyog (supra), Id. Counsel submitted that the decision was rendered by this Bench relying on an earlier decision of a Two Member Bench in Sangam Processors (Bhilwara) Ltd. v. CCE, Jaipur [1994 (71) E.L.T. 989] wherein it had been held that, once the duty burden was passed on to the customer at the time of clearance of the goods, issuance of credit note at subsequent stage would not alter the position. Though the Bench in Adarsh Guar Gum Udyog noted that the decision in Sangam Processors (Bhilwara) Ltd. had been upheld by the Supreme Court, it did not cite any such decision of the Apex Court in its order, Counsel pointed out. Counsel maintained that the issue involved in the instant case stood covered by the decision of the Madras High Court in Addison & Company (supra). He also relied on the Tribunal's decision in Thermon Heat Tracers Ltd. v. CCE, Pune [2001 (132) E.L.T. 455]. Referring to the finding of the Commissioner (Appeals) that M/s. DTE were not a 'buyer' of the goods in question, Id. Advocate submitted that, for rejecting a refund claim on the ground of unjust enrichment, Section 11B only required that the incidence of duty should be shown to have been passed on to "any other person", not necessarily to the buyer. Id. counsel was referring to Clause (d) of the proviso to Sub-section (2) of Section 11B. According to the counsel, it was sufficient for getting over unjust enrichment if it was shown that the incidence of duty had not been passed on to any other person. M/s. DTE came very much within the purview of the expression "any other person". In this context also, Id. Counsel relied on the Madras High Court's decision.

3. Id. JDR, Shri S.C. Pushkarna submitted that the decision of the Madras High Court was not good law in view of the fact that the Tribunal's contra decision in Sangam Processors (supra) was upheld by the Supreme Court. Id. DR urged that the instant case be decided by following Sangam Processors (supra).

4. After concluding the hearing, this Bench directed the JDR to produce the Apex Court's judgment upholding the Tribunal's decision in Sangam Processors, referred to in 2000 (120) E.L.T. 138 [CCE v. Adarsh Guar Gum Udyog]. The DR

was also asked to ascertain whether there was any order of stay, by the Apex Court, of the Madras High Court's decision in Addison & Company. Seven days time was given to the JDR for the said purposes. He has neither produced any judgment of the Apex Court nor reported any stay order of that court against the High Court's decision.

5.1 Examined the submissions as well as the grounds of the appeal. The authorities below have recorded concurrent findings against the assessee and rejected the refund claim. They have held M/s. DTE to be the owners of the goods, not the buyers thereof. According to them, it appears, the goods should have been 'sold' to a buyer so as to attract the provisions of Section 11B. They have further held that, even if it be assumed that the provisions of Section 11B were applicable to the refund claim in question, the claim was hit by unjust enrichment inasmuch as the incidence of duty had been passed on by the appellants to M/s. DTE at the time of clearance of the goods. According to the lower authorities, the subsequent refund of duty by the appellants to M/s. DTE was inconsequential in so far as the unjust enrichment provision was concerned. In other words, once the incidence of duty was passed on by a manufacturer to his customer at the time of clearance of the goods, any claim to the department for refund of the duty would be hit by the bar of unjust enrichment under Section 11B and this position was not altered by any post-clearance refund of duty by the claimant to his customer. It appears that this view was taken by this Bench in the case of Adarsh Guar Gum Udyog (supra). In that case, an appeal filed by the Revenue relying on the Tribunal's decision in Sangam Processors was allowed by this Bench. In Sangam Processors, the assessee had paid duty on their product cleared to their customers during 23-3-1986 to 23-4-1986 and had passed on the incidence of duty to the latter. The Finance Bill, 1986 had introduced a higher rate of duty for the product, but an amendment thereto brought down the rate to the pre-1-3-1986 level. The Bill received the President's assent on 13-5-1986. The assessee filed refund claims in September-October' 86.

During those days, Section 11C was there in the Central Excises and Salt Act, 1944, which authorised the Central Government to direct, by Notification, that (in the situations specified in Clauses (a) and (b) of that section) the duty of excise

payable on the excisable goods (referred to in Clauses (a) and (b) *ibid*) shall not be required to be paid. The Government issued a notification under Section 11C on 21-12-1988 in respect of the above goods waiving the requirement of payment of duty thereon at the higher rate for the period from 1-3-1986 to 12-5-1986. But, prior to that, Sub-section (2) of Section 11C had come into force on 1-7-1988. That Sub-section provided for refund of the duty which was consequential to any notification issued under Sub-section (1), i.e. Section 11C as it stood prior to 1-7-1988. The proviso to the new sub-section cast a burden on the refund-claimant to prove to the satisfaction of the Assistant Collector that the incidence of duty had not been passed on to any other person. After the above amendment to Section 11C but before the above notification was issued, the assessee issued credit notes to the customers (to whom the goods had been cleared) taking back the burden of duty from them. The assessee argued before the Tribunal that, in view of the aforesaid proviso, they were entitled to the refund. The Tribunal held thus : "It is not possible to interpret Sub-section (2) of Section 11C to accommodate such situations and to say that even when duty has been passed on to the customers at the time of clearance the assessee can still claim refund under Section 11C(2) of Central Excises and Salt Act by issuing credit notes." I observe that, in the above case, the refund claim had been filed under Section 11B only as noted by the Bench. The claim was rejected on the finding that the incidence of duty had been passed on by the assessee to their customers at the time of clearance of the goods.

Subsequent take-over of the burden of duty by issuance of credit notes to the customers was treated as inconsequential insofar as the claim was concerned. In other words, the Tribunal was just applying to the case the doctrine of unjust enrichment embodied in the proviso to Sub-section (2) of Section 11C. This very doctrine can now be seen embodied in the first proviso to Sub-section (2) of Section 11B. It stands transplanted in Section 11B(2) from Section 11C(2). That's all.

In my view, therefore, the Tribunal's decision in *Sangam Processors* (*supra*) is on an issue that is no different from the one under consideration. Ld. counsel's argument that *Sangam Processors* is on a different issue and cannot be applied to

the instant case does not seem to be correct. Indeed, it was the ratio of Sangam Processors that was followed by this Bench in Adarsh Guar Gum Udyog after noting that the view taken by the Tribunal in Sangam Processors had been upheld by the Apex Court. That the view taken in Sangam Processors by the Tribunal (2-Member Bench) has been upheld by the Supreme Court has not been decisively contested before me.

5.2 In the Addison & Co. case before the Tribunal, the assessee passed on the burden of duty to their dealers by way of credit notes issued subsequent to clearance of the goods. The Tribunal (2-Member Bench) read Section 11B(2)(d) with Section 12B and rejected the assessee's refund claim on the ground of unjust enrichment. The Bench took the following view :- "We observe that event under the Central Excise law which gives rise to cause of action for refund is payment of duty made in respect of the goods cleared from the factory. The claim of the assessee has to be related to this event of clearance of the goods on payment of duty. Once the assessee has passed on the duty burden at the time of clearance of the goods thereafter, notwithstanding the fact that he has issued credit notes to the buyer, he cannot come forward to claim the refund in terms of Section 11B and the person who becomes entitled to the benefit of refund is the buyer of the goods. Post clearance transaction by issue of credit note is not the concern of the Central Excise authorities and there is no requirement in law nor any stipulation that in the event of credit given subsequent to the clearance of the goods, the assessee will continue to remain eligible to the refund if available in terms of Section 11B." The above view is essentially similar to that taken earlier by the Tribunal in Sangam Processors (supra). Since Sangam Processors stands upheld by the Apex Court, the High Court's judgment reversing the Tribunal's decision in Addison & Co. may not help the present appellants. In this context, it may also be pertinent to note that the question of law that was considered by the High Court was apparently whether the expression "any other person" occurring in clause (d) of the first proviso to Section 11B(2) meant only the ultimate buyer (consumer) of the goods and not whether post-clearance assumption of burden of duty by the refund-claiming assessee from his customer was a valid defence against the bar of unjust enrichment.

5.3 In *Thermon Heat Tracers* case cited by Id. counsel, another 2-Member Bench of the Tribunal allowed a refund claim after observing to the effect that the decisions of the co-ordinate Benches in *Sangam Processors and Addison & Co.* were not good law in view of the Apex Court's judgment in *Mafatlal Industries Ltd. v. U.O.I.* [1997 (89) E.L.T. 247 (S.C)]. The Bench was relying on a provision of an American statute viz. Section 424 of the Revenue Act, 1928, which expressly provided that no refund be made of any amount of certain tax paid by or collected from any manufacturer, producer or importer "unless....it was established to the satisfaction of the Commissioner that..... such amount was not collected, directly or indirectly, from the purchaser or lessee or that such amount, although collected from the purchaser or lessee, was returned to him". The Bench noted that the corresponding Indian excise law viz. Section 11B of the Central Excise Act did not contain any express provision similar to the U.S. law (italicized above). Nevertheless, it infused the U.S. philosophy into Section 11B and held that the assessee's refund claim was not to be denied on the ground that they (who had passed on the incidence of duty to their buyer at the time of clearance of the goods but took back the burden of duty from the buyer later on) had passed on the incidence of duty to their buyer as contemplated under Section 11B. The Bench has claimed support for this purpose from *Mafatlal Industries*. While agreeing with its observation that in *Mafatlal Industries* our Supreme Court was in broad agreement with the U.S. Supreme Court's ruling in *United States v. Jefferson Electric Manufacturing Co.* [78 L.Ed. 859], I think it may not be justifiable to say that, by reason of our Supreme Court's endorsement of the view taken by its U.S. counterpart in relation to the U.S. legal provision, our Apex Court has found total parity between the unjust enrichment provisions of the United States and the Indian Union. Clause (d) of the first proviso to Section 11B(2) of the CE Act 1944 has to be understood in terms of its own wording and not in terms of the wording of a corresponding foreign legal provision. It is the legislative intent that is paramount. I have not been able to find out any ruling in *Mafatlal Industries* on an issue identical to the one presently under consideration in the instant case. Hence, if I may state so with respects to the learned Members of the Bench, the correctness, of the decision in *Thermon Heat Tracers* case is not beyond the bounds of doubt.

5.4 In the result, two co-ordinate Division Benches of this Tribunal have taken divergent views on the question whether post-clearance adjustments like issuance of credit notes or cheques by refund-claiming assessee to buyer of the goods taking back the burden of duty on the goods would help the assessee get over the bar of unjust enrichment under Section 11B vide Sangam Processors (supra) and Thermon Heat Tracers (supra). The decision in Sangam Processors seems to have been affirmed by the Apex Court, but the DR has not been able to produce or cite the Court's judgment. For the reasons already noted, the correctness of the decision in Thermon Heat Tracers is doubtful.

Therefore, insofar as the refund claim for Rs. 7,08,520/- is concerned, the dispute may have to be examined by a Larger Bench. As regards the claim for refund of Rs. 1,34,521/-, there is no dispute of the fact that this amount of duty had not been collected by the appellants from their customer. The claim for refund of this amount is not hit by unjust enrichment.

5.5 The Registry is directed to place the papers before the Hon'ble President to consider constitution of a Larger Bench to decide on the issue hereinbefore noted.

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