

**Contemporary Packaging Vs. C.C.E.**

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**Court :** Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

**Decided On :** May-29-2003

**Reported in :** (2003)(88)ECC510

**Judge :** A T V.K., P Bajaj

**Appellant :** Contemporary Packaging

**Respondent :** C.C.E.

**Judgement :**

1. This appeal has been directed against the impugned order-in-appeal dated 11-12-2001 vide which the Commissioner (Appeals) has affirmed the order-in-original of the Deputy Commissioner who rejected the refund claim of the appellants being hit by the doctrine of unjust enrichment.

2. The sole issue involved in the present appeal is as to whether the refund claim of the appellants falls within the ambit of doctrine of unjust enrichment or not as propounded by the Constitution Bench of the Apex Court in the case of Mafatlal Indus. Ltd. v. UOI -1997 (89) E.L.T.247 (S.C.).

3. The learned Counsel has contended that since the duty sought to be refunded, was paid under protest by the appellants, the above said doctrine of unjust enrichment did not apply and as such the claim of the appellants for refund of the duty, though paid under the provisional assessment, had been wrongly rejected by the authorities below. The learned Counsel, in support of his contention, has

placed reliance on the Apex Court judgments in the Sinkhai Synthetics & Chemicals Pvt. Ltd. v. CCE, Aurangabad, 2002 (143) E.L.T. 17 (S.C.); Hindustan Metal Pressing Works v. CCE, Pune, 2003 (55) RLT 259 (SC); and Tribunal's judgments in Tecil Chemicals & Hydro Power Ltd. v. CCE, Cochin, Birla Corpn. Ltd. and Anr.

v. CCE, Jaipur, 2003 (54) RLT 510 (CEGAT), wherein it has been observed that the refund of the duty paid under protest will not be governed by the provisions of Section 11B.4. On the other hand, the learned SDR, has reiterated the correctness of the impugned order and relied upon the observations of the Apex Court in para 95 of Mafatlal Indus. Ltd. case, supra, to contend that the principle of unjust enrichment will be attracted even if the duty was paid under protest, when provisional assessment procedure was taken out under Rule 9B, and the order passed under Sub-rule (5) of the said Rule, was challenged by the assessee before the higher forum. The learned SDR has also referred to the amended provisions of Rule 9B wherein it has been specifically provided that the refund of the duty paid during the course of provisional assessment, would be governed by Section 11B of the Act.

5. We have heard both sides and gone through the record. For the proper appreciation of the contentions raised by both the sides, it would be beneficial to refer to the facts and circumstances under which the duty sought to be refunded, was paid by the appellants. Admittedly, the appellants, as a job worker, manufactured 'Cigarette Shells' for ITC. For the purpose of payment of duty, they sought classification of this product under Chapter 49, while the Department wanted the classification under Chapter 48 (sub-heading 4819.12). In the face of this classification dispute, the assessments were made provisional under Rule 9B of the Central Excise Rules. The duty was paid by the appellants under protest, pending the final assessment and approval of the classification list of the appellants. The final assessment order went against the appellants as the classification of the goods was held under Chapter 48 of the CETA. The appellants did not accept that order, and they challenged the correctness of that order under Sub-rule (5) of Rule 9B before the Tribunal. The Tribunal held the classification issue in favour of the appellants. Thus, the duty was paid by the appellants under

protest, obviously on account of classification dispute and their protest directly related to the non-acceptance of the classification, as desired by them, of their goods, by the Department. The Department instead of approving their classification list, in the manner in which they filed it, proceeded under Rule 9B of the Rules. It also remains undisputed that the appellants had recovered the duty which they paid under protest to the Department, from the ITC to whom they supplied the goods. The refund claim has been filed by them in consequence of the Tribunal's Order vide which the classification issue was decided in their favour. They want the refund of the excess duty paid by them in spite of the fact that they had already recovered from their buyer ITC, simply on the ground that they paid it under protest.

6. Keeping in mind the above referred facts and circumstances, it has to be determined, as to whether the appellants are still entitled to the refund of the duty paid under protest when they had recovered from their supplier and that their claim is not hit by the doctrine of unjust enrichment as propounded by the Apex Court's judgment in the case of *Mafatlal Indus. Ltd. supra*. The Apex Court in the above case, in para 99, regarding the doctrine of unjust enrichment, has observed as under:- "The doctrine of unjust enrichment is a just and salutary doctrine.

No person can seek to collect the duty from both ends. In other words, he cannot collect the duty from his purchaser at one end and also collect the same duty from the State on the ground that it has been collected from him contrary to law. The power of the Court is not meant to be exercised for unjustly enriching a person. The doctrine of unjust enrichment is, however, inapplicable to the State. State represents the people of the country. No one can speak of the people being unjustly enriched." 7. In that very judgment, in paras 74, 77 & 99, the Apex Court has observed that "in a claim for refund of duty, the petitioner has to allege and establish that he has not passed on burden of duty to others. Where he himself has not suffered any loss or prejudice (having passed on the burden of the duty to others), there is no justice or equity in refunding the tax (collected without the authority of law) to him merely because he paid it to the State. It would be a windfall to him. As against it, by refusing refund, the monies would continue to be with the State and available for public purposes. Refunding the duty paid by a

manufacturer/assessee in situations where he himself has not suffered any loss or prejudice (i.e. where he has passed on burden to others) is no economic justice, it is the very negation of economic justice. By doing so, the State would be conferring an unearned and unjustifiable windfall upon the manufacturers". Applying these observations of the Apex Court in the above said case, the refund claim of the appellants is apparently hit by the doctrine of unjust enrichment. They had already collected the duty, for the refund of which they had lodged the claim, from the ITC, to whom they supplied the goods. Having passed on the burden of duty to their purchaser of the goods, legally they cannot be permitted to claim the refund of the same, from the Department.

8. The contention of the Counsel that since the duty was paid under protest, the doctrine of unjust enrichment was not attracted to their case, is wholly misconceived and not tangible, keeping in view the facts and circumstances of the case, detailed above. The learned Counsel had placed much reliance on the observations of the Apex Court in the above referred case of Mafatlal Indus. Ltd., supra, in para 95, but in fact, those observations are not of any avail to the appellants.

In that para, the Apex Court has only observed that "as per the provisions of Sub-rule (5) of Rule 9B when the duty leviable on the goods is assessed finally in accordance with the provisions of these Rules, the duty provisionally assessed shall be adjusted against the duty finally assessed and if the duty provisionally assessed falls short or is in excess of the duty finally assessed, the assessee shall pay the deficiency or be entitled to a refund, as the case may be. Any recoveries or refund consequent upon the adjustment under Sub-rule (5) of Rule 9B will not be governed by Section 11A or Section 11B, as the case may be. The Apex Court has also further in that very para made clear that if the final order passed under Sub-rule (5) is appealed against or questioned in a writ petition or suit, as the case may be, assuming that such a writ or suit is entertained and is allowed/ decreed, then any refund claim arising as a consequence of the decision in such appeal or such other proceedings, as the case may be, would be governed by Section 11B. The case of the appellants is covered by these later observations of the Apex Court and not the former observations.

In other words, the refund claim of the appellants has not arisen upon the adjustment under Sub-rule (5) of Rule 9B. They rather did not accept the final assessment order passed under Sub-rule (5). That order was challenged by them before the Tribunal who reversed the same. Their refund claim has arisen out of the order of the Tribunal and as such would be governed by the provisions of Section 11B. That being so, they were under legal obligation to establish that they had not passed on the burden of duty to others. Having failed to prove so, rather having admitted the recovery of the duty from their purchaser of the goods, their refund claim had been rightly held to be hit by the doctrine of unjust enrichment, by the authorities below.

9. The impugned order of the Commissioner (Appeals) is perfectly in conformity with the ratio of the law laid down by the Apex Court in the case of Mafatlal Indus. Ltd., supra. Even in the case of Bombay Tyres International Ltd. v. CCE, Indore, 2000 (121) E.L.T. 8 (S.C.), the Apex Court rejected the refund claim of the assessee by holding that no material was produced to show that the burden of duty paid under protest was not passed on to the consumer. In that case also, the Apex Court relied upon the judgment of the Constitution Bench in the case of Mafatlal Indus. Ltd., supra. In the case of Sinkhai Synthetics & Chemicals Pvt. Ltd. v. CCE, Aurangabad, 2002 (143) E.L.T. 17 (S.C.), referred by the Counsel, the assessee claimed the benefit of exemption notification, but the same was challenged by the Revenue. The matter went upto the Tribunal which decided in favour of the assessee. In the interregnum, the assessee paid the excise duty under protest. After the decision of the Tribunal in his favour, he lodged the claim for the refund. It was under these circumstances that the Apex Court observed that since the duty was paid under protest the refund of the same was not hit by the bar of unjust enrichment. But in the instant case, the duty was paid under the provisional assessment under Rule 9B of the Rules. It was paid under protest only to dispute the classification of the product as proposed by the Revenue. The final assessment order passed under Sub-rule (5) of the said Rule, was challenged by the appellants before the Tribunal, and on the passing of the order of the Tribunal, the refund claim had been filed. Moreover, the appellants had already recovered the duty, for the refund of which they had lodged the present claim. Their case is squarely covered by the ratio of the law laid down in the case of Mafat Lal Indus.

Ltd., supra. Moreover, in the case of Sinkhai Synthetics & Chemicals Pvt. Ltd., supra, there was nothing to suggest that the duty paid under protest, was recovered by the assessee. But such is not the position in the case in hand, as observed above. Hindustan Metal Pressing Works v. CCE, Pune - 2003 (153) E.L.T. 11 (S.C.) = 2003 (55) RLT 259 (SC), relied upon by the Counsel, the refund claim arose out of the assessment of RT-12 return and for that reason it was observed that the same would not be covered by the provisions of unjust enrichment. The refund amount was also not recovered by the assessee from others, but such is not the position in the case in hand, as detailed above.

11. In the case of Tecil Chemicals & Hydro Power Ltd. v. Commissioner of Central Excise, Cochin - 2003 (151) E.L.T. 136 (CEGAT), cited by the Counsel, it was found that incidence of duty was not passed on to the buyers by the assessee and for that reason it was observed that the refund claim of the duty amount paid under protest was not hit by the principle of unjust enrichment. But in the instant case, as observed above, the facts are totally different. Birla Corporation Ltd. v. CCE, Jaipur, 2003 (54) RLT 510 (CEGAT), the duty was recovered from the assessee by denying the exemption of a notification, but ultimately the assessee was found to be entitled to the benefit of that notification. The refund claim of the assessee, under these circumstances, was held to be not hit by the principle of unjust enrichment as they paid the duty under protest, and also did not recover the excess duty paid under protest, from others. But in the instant case, as observed above, the facts are quite contrary and different.

13. The refund of the Modvat credit on inputs (Rs. 27.80 lacs) had been declined to the appellants as they opted for Kar Vivad Samadhan Scheme and thereby admitted the allegations made in the show cause notice that not they but M/s. ITC Ltd. was a real manufacturer. This part of the impugned order had not been challenged before us during the course of arguments. Similarly, the refund claim of Rs. 2.78 lacs, being the duty on differential assessable value on account of Modvat credit on inputs and of Rs. 43.81 lacs, had been rightly disallowed to the appellants being hit by the doctrine of unjust enrichment for having recovered the duty from the buyer of their goods, in the light of discussion made above.

14. In view of what had been discussed above, we do not find any illegality in the impugned order of the Commissioner (Appeals) and the same is upheld. There being no merit in the appeal of the appellants, the same is ordered to be dismissed.

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