

Jct Limited Vs. Cce

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Nov-06-2003

Reported in : (2004)(91)ECC692

Judge : Author: P Bajaj

Appellant : Jct Limited

Respondent : Cce

Judgement :

1. This appeal has been preferred against the impugned Order-in-Appeal vide which the Commissioner (Appeals) has affirmed the Order-in-Original of the Assistant Commissioner who rejected the refund claim of the appellant on the ground of unjust enrichment.

2. The facts are not much in dispute. The appellants during the period April 1990 to June 1990 paid excess excise duty at the time of clearance of their goods (polyester staple fibre) manufactured out of duty paid Purified Terephathelic Acid (PTA). They filed refund claim of Rs. 23,81,776.35 on 22.4.97. The Assistant Commissioner rejected their claim vide Order-in-Original dated 31.5.2000 on the ground of unjust enrichment for having passed on burden of duty of the customers. The Commissioner (Appeals) has affirmed that order.

3. The learned Counsel for the appellant has contended that the doctrine of unjust enrichment could not be invoked for rejecting refund claim of the appellant on the

ground, - (i) the invoices issued by the appellant did not indicate the duty elements separately as composite price was recorded therein (ii) there had been no increase of sale price even after payment of duty rather there was a decrease in the price. To substantiate his contention, the Counsel has referred to the ratio of law laid down in *Infar (India) Ltd. v. CCE., Delhi-2002-TaxindiaOnline- -CESTAT-Del Chandigarh v. Metro Tyres 2002-TaindiaOnline- -Chandigarh v. Pawan Tyres-2002 (126) ELT 1061, Sarvaraya Sugar Mills Ltd. A.P., v. CCE., Hyderabad - 2003 (85) ECC 743.*

On the other hand, learned DR has reiterated the correctness of the impugned order and contended that no evidence has been adduced by the appellants in spite of the directions given earlier by the Tribunal remanding the matter for fresh decision, to prove that burden of duty had not been passed on the them, to the customers.

5. It is well settled that it has to be specifically alleged and established by the assessee that he has not passed on the burden of duty to others. Otherwise, his claim for refund would not be maintainable where he himself has not suffered any loss or prejudice, (having passed on, the burden of duty to others), there is no justice or equity in refunding the tax to him merely because he has paid to the Government. It would be a windfall to him. As against it by refusing refund, the money would continue to be with the Government and available for public purposes. Refunding the duty paid by assessee, in situations where he himself has not suffered any loss or prejudice (i.e. where he has passed on duty to others) is not economic justice, it is the very negation of economic justice. Assessee in such a case, cannot be allowed to make a fortune. The doctrine of unjust enrichment is a just and salutary doctrine. No one can be allowed to collect the duty from both ends. In other words, he cannot collect duty from purchaser at one end and also claim refund of the same from the Government on the ground that it had been earlier wrongly collected from him contrary to law, by the Government. The power by the Court cannot be exercised in his favour for unjustly enriching him.

6. Section 12B of the Act raises a presumption of law that until the contrary is proved, every person who has paid duty of excise on any goods, shall be deemed to have passed on the full incidence of such duty to the buyers of such goods. No doubt, the presumption created by this Section is rebuttable presumption of law, but a very strong, cogent, tangible evidence is required to be brought on record by the assessee, to rebut the same and to claim his refund of duty.

7. In the case in hand, in our view, the appellants have failed to rebut this statutory presumption by adducing any convincing unimpeachable evidence. That fact that they showed composite price in the invoices does not lead to irresistible conclusion that they had not passed on the incidence of duty to the buyers. These invoices were prepared by them. It is difficult to assume that composite price calculated and recorded by them in the invoices did not include the duty element. Similarly, keeping the price stable even after payment of duty would not lead an irresistible conclusion that they themselves bore the duty burden. This, they may have done by forgoing a part of their profit, in order to face the competitive atmosphere in the market for the sale of their goods. Like wise, the decrease in the price by them later on also could not lead to a logical conclusion that they took upon themselves the liability to pay full excise duty and not to charge from the customers. The decrease in price may have been affected by them on account of various factors and commercial reason. There may be the decrease in the price of the inputs, the cost of production etc.

The commercial reason may have also forced them to forgo their profit.

But to say that they sold goods in the market at loss after decreasing the prices, would not be legally justifiable also.

8. Ordinarily, no manufacture will sell his product at less than the cost price plus duty. He could not survive in business, if he does so.

Only in a case distress sales, such a thing is understandable, but such sales are not a normal feature and as such cannot constitute the basis for judging the non-passing of duty incidence to the buyers by the manufacturer. Similarly, no one will ordinarily pass on less excise duty than what is exigible and payable by him under

the law. The manufacturer may dip into his profit but would not ordinarily further dip in the excise duty component. He will do so in case of distress sale again. In this context, reference may be made to the judgment of the Construction Bench of the Apex Court in *Mafatlal Industries v. Union of India* 2002-TaxindiaOnline- -SC-CX wherein para-91 of the judgment, it has been so observed. The Tribunal has also in *Commissioner of Central Excise, Goa v. Christine Haden (I) Pt. Ltd.* - 2003 (155) ELT 271 observed that keeping the price stable is no ground to hold that the manufacturer had not passed on incidence of duty to the buyers. Price always will include cost of manufacturer and duty element and others taxes plus reasonable profit margin. The appellants in the case in hand, simply by alleging their invoices contained composite price and no increase in the price was made rather than the price during some period, fell down, and placing on record a certificate of the Chartered Accountant, has not led any corroborative evidence to substantiate all of these factors. The certificate issued by the Chartered Accountant is a stereotype wherein it was certified that during the period April 1990 to June 1990, the price of the product of the appellant remained the same irrespective of the fact whether it was manufactured out of duty paid or non-duty paid goods. He has further stated that the appellants had charged from their customers the same amount as sale price inclusive of excise duty and no extra amount has been charged. But on the basis of what material and record.

He has so certified, has not been disclosed in the certificate. In other words, he has nowhere stated that he had issued certificate after examining the cost data and other relevant documents of the appellants.

The certificate, in our view, appears to have been procured from the Chartered Accountant by the appellants to create evidence. Learned Counsel has not doubt, referred to two charts - one captioned as Table NO. 1- the effective rate of excise duty on man-made staple fibre and other as Table No. 6 , average price quotation of the price list on the staple fibre, to contend that there was decrease in the market price of that goods manufactured by the appellants, but these tables have not been certified to be correct by any authorised representative of the appellants. These are photocopies on plain pieces of papers and room where these photocopies have taken, has not been disclosed and as such, cannot be attached

any evidential value. Even otherwise as observed above, mere decrease in the price which may be on account of commercial reasons or may other reasons, discussed above cannot be made basis for holding that statutory presumption prescribed by Section 12B of the Act, stands rebutted.

9. We find from the record that in the earlier round of the proceedings, the matter came up before the Tribunal in appeal filed by the appellant when at that time their refund claim was rejected on the ground of unjust enrichment by the authorities gave specific direction to the appellants to furnish evidence such as invoices, copies of books of accounts, and other data to show that they had not passed on the incidence of duty to the buyers even after imposition of duty on their product. But no such evidence has been furnished by them, as we find from the perusal of the Order-in-Original as well as Order-in-Appeal.

Learned Counsel except for the Chartered Accountant report and the Tables referred above had not been able to refer any other document to establish that the statutory presumption to be raised under Section 12B of having passed on incidence of duty to the buyers by the appellants, stand rebutted. Therefore, in our view, the refund claim of the appellants has been rightly rejected by the Commissioner (Appeals) through impugned orders by conforming the Order-in-Original being hit by doctrine of unjust enrichment.

10. The ratio of law laid down in none of the case referred by the learned Counsel is attracted to the facts of the present case. In the first case *Infar (India) Ltd. 2002-TaxindiaOnline- -CESTAT* there was sufficient evidence to prove that incidence of duty was not passed on by the claimants to the buyers. The product was sold by them strictly as per Drug Laws at the pre-determined price according to the price list prescribed by law. Keeping in view the evidence available in that case, the Tribunal allowed the refund. Similarly, in the second case *C.C.E., Delhi v. Metro Tyres*, it has been only observed that since the assessee's invoice during the material time showed composite price, and duty was not indicated separately, the burden to prove that incidence of duty did not pass on to the customer stood discharged. The main issue in that case involved was classification of the goods. These above said observations by the Tribunal in that case were made before

pronouncement of the judgement of the Constitution Bench of the Supreme Court in Maftalal Industries 2002-TaxindiaOnline- -SC-CX wherein it has been clearly observed in para 91 of the judgement as under : "Just because duty is not separately shown in the invoice price, it does not follow that the manufacturer is not passing on the duty.

Nor does it follow therefrom that the manufacturer is absorbing duty himself. The manner of preparing the invoice is not 11. In the fact of this proposition of law propounded by the Apex Court while laying down the guidelines and the situations for invoking the doctrine of unjust enrichment the observations made by the Tribunal in the above said case cannot be given preference. No doubt, the learned Counsel has stated that the judgment of the Tribunal in the case, had been affirmed by the Apex Court, by dismissing the appeal of the Revenue as reported in 1997 (94A) ELT 51 (Courtroom Highlights), but the view expressed on a specific issue of applicability of doctrine of unjust enrichment to the refund claim of the claimant where he had issued composite invoices, as reproduced above in Mafatlal Industries case by the Apex Court has to prevail Moreover, from the Courtroom Highlights it is not clear that on what grounds the appeal of the Revenue was dismissed as the issue of classification was also involved therein besides of the refund claim. It cannot be speculated that the Apex Court in that case (C.C., Delhi v. Metro Tyres) supra in the absence of any other evidence except the invoices showing composite price, approved the non-applicability of the doctrine of unjust enrichment to the refund claim of the petitioner therein.C.C.E., Chandigarh v. Pawan Tyres, the observations of the Tribunal that refund could not be denied on account of unjust enrichment when composite price was shown in the invoice, had been based on the view expressed by the Tribunal in C.C.E., Chandigarh v. Metro Tyres (supra), the case which was decided before pronouncement of the judgement of the Constitution Bench of the Apex Court in Mafatlal Industries (supra) wherein it has been specifically ruled that mention of composite price in the invoice by the manufacturer cannot be made basis for holding that incidence of duty was not passed on by him to the buyer. This judgment of the Apex Court was never brought to the notice of the Bench in the above said case and as such, no capital out of it can be made by the appellants.

13. In the fourth and last case - Sarvaraya Sugar Mills Ltd., the doctrine of unjust enrichment was not invoked on the ground that the price remained the same, by relying upon the judgement of the Tribunal in Metro Tyres and Pawan Tyres, cases (supra), the benefit of which can not be given to the appellant in the face of the Apex Court judgment in Mafatlal industries case (Supra) and facts and circumstances discussed above.

14. In view of the discussion made above, the impugned order passed by the Commissioner (Appeals) is perfectly valid and the same is upheld. The appeal of the appellants is dismissed.

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