Commissioner of Central Excise Vs. Tuton Pharma

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Mumbai

Decided On : Jan-09-2004

Reported in : (2004)(167)ELT70Tri(Mum.)bai

Judge : M T K.D.

Appellant : Commissioner of Central Excise

Respondent : Tuton Pharma

Judgement :

2. The revenue appeal is directed against the impugned order-in-appeal whereby the respondents claim of refund of Rs. 4,00,185/- was allowed by the Commissioner (Appeals). In the impugned order-in-appeal, the learned Commissioner has proceeded to accept the appeal by holding as under:- "amended provisions of Section 11B can not be applied to the refund claims, which have been adjudicated upon by the lower authorities well before the amendment of the Act. The Higher Authority has also held that the refund arising out of any orders or decision of the Appellate Authority, the adjudicating authority is under an obligation to give effect of the appellate order and refund the amount to the appellants. The order deciding the refundability has been decided much earlier than the law was amended." 2. Countering these findings appellants claim that the refund claim was undoubtedly pending for sanction and at the point of time of sanction of the refund claim, the provisions of unjust enrichment were incorporated in the Section 11B of the Act. The Show Cause Notice dated 31^st September 1991 issued in this regard make the position very clear. The appellants

place reliance on the judgment of the Hon'ble Supreme Court in the case of Mafatlal v. UOI reported in 1997 (89) ELT 247, wherein, the Supreme Court in its detailed judgment has held that, all claims of refund of Central Excise duty have to be preferred and adjudicated upon in terms of Section 11B of the Central Excise Act, 1962, subject to claimant establishing that burden of duty has not been passed on to the 3^rd party. The Assistant Commissioner of Central Excise, after considering the evidence on record, came to the conclusion that, the respondents had not satisfied the clause of unjust enrichment and accordingly the claim was rejected.

3. The respondents have placed reliance on the judgment of Hon'ble Supreme Court reported in the case of Sinkhai Synthetics & Chemicals Pvt. Ltd. v. CCE., Aurangabad reported in 2002 (143) ELT 17 (S.C.) and also that of the Tribunal in the case of Birla Corporation Ltd. and Anr. v. CCE., Jaipur reported in 2003 (54) RLT 510 (CEGAT-Del.), to claim that, once the duty is paid under protest the provisions of Section 11A are inapplicable to refunds.

4. I have considered the rival submissions. It is to be seen that, Section 11B has two components namely, (1) limitation and (2) the applicability of unjust enrichment. Section 11B itself provides that, where duty is paid under protest, no limitation shall apply for claiming the refunds. It is nowhere provided therein that the other provisions, namely applicability of unjust enrichment is waived. Once the amount claimed is held classifiable to be a claim of refund of duty, then it would have to be claimed in terms of the express provisions of Section 11B of the Act.

5. In the light of these parameters, the judgment of the Hon'ble Supreme Court has to be understood. In para 5 of the Supreme Court judgment in Sinkhai Synthetics (Supra), it is noted by the Hon'ble Court that the learned counsel for the Revenue did not dispute that the decision in Mafatalal Industries Limited governs the appeals. What it means that the refund in that particular case accrued consequent to finalization of assessment under Rule 9B of the Central Excise Rules, and the payments made for claiming refund were deposits and not duty.

The CEGAT judgment in Birla corporation Ltd. & Anr. (Supra) follows the Apex Court judgment so as to rule out the applicability of Section 11B to the refund claim in that case. Indirectly, it means that, in the case of Birla Corporation Ltd. & Anr, the issue was that of finalization of provisional assessment. Otherwise the non applicability of provisions of Section 11B relating to unjust enrichment can not be visualized to the facts involved in the case of Mafatlal Industries.

6. Accordingly, I hold that in the instant case there being no evidence that the refund claim generated as a result of finalization of assessment under Rule 9B, or the payments made were in the nature of revenue deposit the plea of non applicability of the unjust enrichment clause under Section 11B can not be accepted. 7. Accordingly, the revenue appeal succeeds and the same is allowed and the impugned order in appeal is set aside.