Commissioner of Central Excise Vs. Plas Pack Industries

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Mumbai

Decided On : May-07-2004

Reported in : (2004)(170)ELT293Tri(Mum.)bai

Judge : J Balasundaram, A M Moheb

Appellant : Commissioner of Central Excise

Respondent : Plas Pack Industries

Judgement :
1. This appeal is by Revenue against the order of the Commissioner (Appeals). Neither the DR nor the respondent were sure that the issue was all about. The order of the Commissioner (A) is equally confusing.

2. A letter seeking refund was filed by M/s. Plas Pack Industries (Respondent) way back in 13.8.94, referring to their earlier letter dated 11.5.94, which incidentally is not available in the Paper book.

The claim is for Rs. 27,32,347/-. The period in which the excess amount paid was 1989-90. The excess duty paid itself arose out of a classification dispute M/s. PPI were manufacturers of HOPE tapes fabrics & bags (sacks). They claimed classification of their goods under Chapter Heading 5406,5408 & 6301 respectively and were clearing them on payment of duty. However by their letter dated 22.6.1989, received in the Central Excise office on 3.7.89, the respondents claimed classification of HDPE Tapes under Chapter 39 of CETA but all the same were paying duty applicable to goods falling under Chapter 5406 under protest. This letter of protest along with another one was disposed off by the Assistant Commissioner on 7.3.90 holding that the tapes are correctly classifiable under Chapter 5406.90 instead of Chapter 39 claimed by the assessee. In another order dated 17.3.90 the Assistant Commissioner confirmed demands of duty for the period July 89 to 14/1/90. These orders were appealed against and the Commissioner (A) in his order dated 30.5.91 set aside both the orders and determined the classification of HDPE tapes under Chapter No. 3920.32. For some inexplicable reason the appellants filed their claim for refund of Rs. 27,32,347/- only in 94. The claim was accompanied with details such as the amount of duty paid on the inputs (plastic granules), duty paid on fabrics under notification No. 175/86 as SSI unit at the rate of 5% (Basic duty) for the first Rs. 75 lakhs worth of clearances and thereafter at 15% (BD), etc. The period involved was 89-92. This indicates that the appellant was paying duty at the higher rate even after the Commissioner (A) decided the classification of the goods in their favour.

3. After considerable correspondence with the assessee the Assistant Commissioner rejected the claim on the following grounds.

'[I] The part refund of Rs. 1,22,959.00 pertains to the period prior to tiling of protest letter dt. 3.7.89 and therefore is time barred Rs. 7,55,786.69 paid after O.I.A. dt. 30.5.91 is not protected by protest under Rule 233B and hence the same is hit by time bar under Section 11B. We may recall that the refund claim was filed on 13.9.94; and [ii] The entire claim of modvat credit, which was required to be taken within a reasonable period of 6 months after O.I.A. dt.30.5.91 was passed in their favour, is hit by time bar for the same reason.(claim made on 13..9.94) and [iii] The remaining amount of refund claim is not allowed on the ground of unjust enrichment as per Section 11B of the Act and [iv] So far as the amount of Bank Guarantee encashed for Rs. 3,20,000/- is concerned the ground is that the assessee has not produced any evidence to show that they had reduced the price of fabrics & Sacks cleared during relevant period and hence they appear to have passed on the burden of prospective duty liability to the buyers in the form of costing of fabrics/sacks'.

4. An appeal against this order was disposed of by the Commissioner (A) Mumbai with the following direction.

"Therefore in principle, benefit of refund due to the appellants under the circumstances would appear to be only in regard to the excess regulation of the total modvat credit, as the duties found payable subsequent to the reclassification were always of larger amounts than the duties paid initially on the goods manufactured by the appellants in the down the stream manufacture. There would also be no question of the application of the principles of unjust enrichment. The exercise will not result in grant of refund to the appellants in cash or by adjustment in PLA account, but restricted only to the question of regulation of refunds claims through the excess availability of modvat credit than what was initially admitted. The credit available should be utilized in adjustment of the differential duties found payable on reclassification of the subject-manufactured items in the appellants units.

The claims referred in their appeals considered in the impugned order shall now be regulated in terms of the directions contained in this Order-in-Appeal. The appeals are accordingly admitted by way of remand for limited purpose of recalculation of the refunds due in Modvat account".

5. The Commissioner (A) was attempting to dispose of several appeals before him in a common order. It is not clear how much attention was paid to the facts of each appeal. In regard to the respondent's appeal he observed thus:- "At this stage, I may briefly revert to the individual objections in the case of the said appeals. In the case of M/s. Plas Pack Industries referred in appeal No. 67/A/97, part claim has been rejected on the ground of time bar, although the protest letter is claimed to be submitted for the period under dispute. The claim for refund/adjustment of modvat credit should be regulated from the date of filing of the protest with the department and the payment of duty under protest and no time bar shall be applied for the period under dispute. Similarly in the ratio of the judgments cited earlier, appellants claim for modvat credit sans the ground of limitation during the period in dispute is also admitted. Benefit shall be regulated from the date of filing of protest letter, and payment of duty under protest, in regulation of modvat credit

also. Application of the principles of unjust enrichment for denial of the refund also does not appear to be correct as the amount of duty paid earlier under Chapter 54 is much lower than the duties made payable later under the revised chapter 39. Therefore, the question of passing the incidence of duty to the buyer would not come into play. The dispute regarding incorrect adjustment of Bank Guarantee amount subsequent to the clearance is also adjudged in favour of the appellants. These bank guarantees were furnished subsequent to the High Court's order on HOPE tapes for captive consumption without payment of duty, and the same is required to be invoked only towards adjustment of duties finally found to be payable after reclassification in the consolidated determination under the directions as contained in this OIA".

6. Against this order of Commissioner (A) the Revenue filed the present appeal. The main ground is: "Regarding claim for modvat, it is not denied that the adjudicating authority is bound to follow the directions of appellate authority, if the claim is made within the time limit available under the provisions of the rules/Act. The direction in appellate authorities can not be taken to mean that the party may be granted such benefit, ignoring the express provisions of law. In this regard a kind reference is invited to the Court-room highlights reported at page No. A160 of 1995 (76) PLT in which case the Supreme Court has stayed the operation of High Court's order directing revenue to examine the refund claim de hors the provisions of Section 11B. It therefore follows that the modvat claim allowed by the appellate authorities is required to be considered by keeping in provisions of law in force. In the instant case, when the protest of the party was accepted and the product was held to be classified under Chapter 39 as per O.I.A. dt.30.5.91 as mentioned herein before, the party should have filed claim for modvat within 6 months as per Rule 57G/57H but they have not done so within stipulated time limits and hence it is rightly held as time barred. The other averments relating to documents are irrelevant in so far the actual grounds for rejection of claim for modvat are concerned".

8. The claim for refund/adjustment of credit was denied by the Assistant Commissioner on several ground as narrated in para 3 above.

The Commissioner (Appeals) ordered that the claim be regulated in the form of MODVAT credit which could be utilized by the respondents to pay duty on future consignments. The Revenue's grouse against their order is that the Commissioner should not have decided the lower authority to accord credit of the entire claim made by the assessee when the claim itself was made three years after the assessee obtained a favourable order. The claim was made in 1994 whereas the Order-in-Appeal was passed in 1991. It was a fact that duty was paid under protest for some time as brought out by the Assistant Commissioner. But all protests came to an end after Order-in-Appeal dated 30.5.91 was Passed by the Commissioner (Appeals) in favour of the respondent. The claim for were rejected on the ground that the made such a claim only after the expiry of three years from the date of passing of the order by Commissioner (A) (30.5.91).Commissioner of Central Excise Chandigarh v. Kaushal Steel Rolling Mills [2004 (165) ELT 255 (Tribunal-Del.)] wherein it was held that a protest of the assessee while depositing the duty has to be vacated by the Department by passing an appealable order. There cannot be any automatic vacation of the protest. In the present case the Assistant Commissioner passed appealable order way back in 91 vacating the protests. The above-cited case does not help the respondent.

10. There is no gain (SIC) fact that the claim for refund/MODVAT credit was made 3 years after the respondent succeeded in appeal against rejection of his claim by the Assistant Commissioner. The Commissioner's direction that the entire claim be given/sanctioned as MODVAT credit irrespective of the time that has elapsed between the passing of the order in the respondents favour and the actual claim is not tenable. The Revenue's stand that the claim itself had been made after a lapse of three years has not been discussed by the Commissioner. The Commissioner's order has to be set-aside on the ground that the direction contained in his order is against settled principle of law in regard to the provisions under Section 11B.