

Pearl Polymers Ltd. Vs. Commissioner of Central Excise

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Sep-01-2004

Reported in : (2004)(174)ELT41TriDel

Judge : A T V.K., P Bajaj

Appellant : Pearl Polymers Ltd.

Respondent : Commissioner of Central Excise

Judgement :

1. The above captioned appeals have been filed against the impugned order-in-appeals vide which the Commissioner (Appeals) had affirmed the orders-in-original of the adjudicating authority rejecting three refund claims of the appellants, one of Rs. 25,45,058/-, second of Rs. 89,726/- and third of Rs. 2,96,491/- 2. The facts are not much in dispute. The appellants are engaged in the manufacture of plastic goods falling under Chapter 39 of the CETA. They had been paying normal duty @ 16% Adv., on the said goods up to 3-3-1999 and also availing Modvat credit on the inputs used in the manufacture of the said goods. But w.e.f. 4-3-1999, they opted for payment of concessional duty @ 8% on the said goods under Notification No. 5/99-C.E., dated 28-2-99. They accordingly, reversed the credit attributable to the closing stock of inputs lying in balance with them as on 3-3-1999. The amount reversible/payable was worked out by them to be Rs. 25,45,058/-. They accordingly reversed credit of Rs. 16,35,777/-and paid the balance of Rs. 9,09,281/- from the PLA.3. Similarly, they reversed credit of Rs. 2,58,806/- and also paid interest of Rs. 1,27,411/-, for availing the benefit of the

above said notification, in order to pay duty at the concessional rate.

Thereafter, the appellants filed three refund claims, one of Rs. 25,45,058/-, another of Rs. 89,726/- and third of Rs. 2,96,491/-. The adjudicating authority rejected all these claims of the appellants on the grounds, (i) the appellants failed to establish that the amount reversed/paid by them was not payable, (ii) the refund claim of Rs. 25,45,058/- was time-barred, while the other two refund claims were pre-mature, and (iii) the appellants failed to prove that the incidence of duty had not been passed by them to any other person. The Commissioner (Appeals) by accepting these grounds, has affirmed the order in-original of the adjudicating authority.

4. The Id. Counsel has contended that the appellants were not required to reverse the credit or pay the duty from the PLA for availing the benefit of Notification No. 5/99-C.E. as Condition No. 10 appended to that Notification did not apply to them. He has further argued that since duty was paid under protest, the bar of limitation did not apply, in view of the proviso appended to Section 11B. The principle of unjust enrichment, according to the Counsel, also could not be invoked as the refund claims are of the Modvat credit reversed by the appellants, in view of the specific bar, under Section 11B(2) of the Act. Similarly, the refund claims of Rs. 89,726/- and Rs. 2,96,491/- according to the Counsel, could not be treated to be pre-matured under the law for the simple reason that some adjudication proceedings were pending.

5. On the other hand, the Id. SDR has reiterated the correctness of the impugned order.

7. From the record, it is evident that the appellants were earlier paying duty at the normal rate of 16% Adv., on their goods and availing the Modvat credit on the duty paid inputs utilised in the manufacture of the goods. They however, themselves voluntarily opted to pay concessional duty @ 8% on their goods under Notification No. 5/99 w.e.f. 4-3-99. The benefit under this Notification could be availed by them only after satisfying the Condition No. 10 appended to it. The said condition was that the manufacturer did not avail the credit of duty-paid under Rule 57A or 57B on the products, mentioned in Column (3) of the Table, given under the

Notification, or on any other products manufactured in the same factory. The goods manufactured by the appellants were specified in the Column (3) of the Table, set out under the Notification. They voluntarily, to fulfil the above said Condition No. 10, for availing the benefit of Notification, worked out the credit payable back/reversible as Rs. 25,45,058/- and out of this, Rs. 16,35,777/- were reversed by them from credit balance, and the balance of Rs. 9,09,281/- was paid from PLA. Similarly, the other two amounts of Rs. 89,726/- and Rs. 2,96,491/- were also reversed by them.

8. We also find that the appellants, themselves informed the Department through their letter dated 3-3-99 (copy at page 20 of the paper book) that since they were not clear as to whether they were debiting the amounts correctly or not, for availing the benefit of the above said Notification, the debit/reversal of the credit, be treated as duty paid under protest. They, at no stage, during the period in dispute, ever took the stand before filing of the refund claims, that they had wrongly reversed the credit and paid the duty from the PLA and that they were entitled to avail benefit of the above said notification without doing so. They are legally, therefore, estopped from contending that the debits/reversal of the credits and payment of duty from PLA, was wrongly made by them, on the ground that the Condition No. 10 of the above said notification did not debar the taking of credit on the inputs used in the manufacture of the goods specified in Col. 3 of the Table.

9. The contention of the Id. Counsel that duty was paid under protest and bar of limitation did not apply, cannot be accepted. There is nothing on record to suggest if any demand of duty was raised from the appellants or any order in writing was sent to them by the competent authority for reversal/debit of the credit and payment of duty from PLA for availing the benefit of the above said notification. They themselves opted to pay the duty at a concessional rate under the above said notification and for availing the benefit of that notification, being not sure about its scope, debited/reversed the Modvat credit and even paid the part of the duty from their PLA as is evident from their letter dated 3-3-99. By mere writing in that letter, that this payment should be treated as duty paid under protest, in our view, is not sufficient to hold that they paid the duty under protest, in terms of Rule 233B of the Rules. They were required to follow the procedure as prescribed

under this Rule for requiring the department to treat their payment as duty paid under protest. Under Sub-rules (5) and (6) of the said Rule, they were bound to give a written representation to the Asstt. Commissioner/Dy. Commissioner within three months in that regard and having failed to do so, their payment of duty could not be treated as payment under protest, in view of the provisions of Sub-rule (8) of the said Rule. The letter dated 3-3-99, referred above, was addressed by them to the Superintendent and even in that letter, they never alleged any coercion/threat on the part of the department which forced them to pay the duty from the P.L.A. as well as by reversal of credit.

The ratio of law laid down in (i) *Pure Drinks (New Delhi) Ltd., New Delhi v. CCE, New Delhi* [1995 (78) E.L.T. 73 (Tribunal)], and (iv) *Shree Shyam Filaments v. CCE, Jaipur* [2002 (148) E.L.T. 434 (Tribunal-Delhi)] that limitation did not apply for the refund of duty paid under protest, is not attracted to the case of the appellants as in those cases, the duty was demanded from the assesseees and they paid it under protest and their protest claim, made through representation letter accompanying the payment of duty, was not disposed of. But in the present case, the appellants themselves voluntarily debited reversed the credit and even paid part of the duty from the PLA for availing the benefit of the above referred notification. They wanted this payment to be treated under protest, on the ground that they were not sure about the true scope/implications of the above referred notification. They were never forced by the Department for debiting/reversing the credit or for paying the duty from PLA. It was purely their own decision as is evident from the contents of their letter dated 3-3-99, referred above. Therefore, the payment of duty by them could not be treated under protest in terms of Rule 233B of the Rules. That being so, no shelter can be taken by them under the proviso to Section 11B, which makes the limitation of six months for refund of duty, non-applicable where the duty had been paid under protest.

10. True that there is no provision in the Modvat Credit Rules, which provides for a reversal of the credit by the Excise authorities, where it has been illegally or irregularly taken, in which event it stands cancelled or, if utilised, has to be paid for, as observed by the Apex Court in *CCE, Pune v. Dai Ichi Karkaria Ltd.* [1999

(112) E.L.T. 353 (SC)]. It is also well settled that once the credit has been availed and utilised during the period when final products were dutiable, the same cannot be asked to be reversed by the assessee, when subsequently the final products were exempted from duty, as ruled by the Larger Bench of the Tribunal in CCE, Rajkot v. Ashok Iron & Steel Fabricators [2002 (140) E.L.T. 277 (Tribunal-Larger Bench)]. But the law laid down in these cases is not of any help to the appellants. Even if it is accepted that the credit was not reversable by the appellants and no duty was payable by them from PLA, as Condition No. 10 of the Notification, did not prohibit taking the credit on the inputs utilised in the manufacture of the goods classified in Column (3) of the Table, thereunder, but there is nothing on record to suggest if the reversal of the credit or the payment of duty was made by the appellants under the pressure, threat or coercion exercised on them, by the Department.

They of their own made reversal of the credit in the statutory record of part of the amount and some amount even was paid by them from their PLA, for availing the benefit of the notification in question, referred above. Therefore, the payment of duty by them could not be treated under protest. They were required to file the refund claim within the limitation prescribed under Section 11B and having failed to do so, the same has been rightly rejected on the ground of being time-barred. The ratio of law laid down in N.M. Nagpal (P) Ltd. v. CCE, New Delhi [2001 (130) E.L.T. 359 (Tribunal-Delhi)], referred by the Counsel, wherein it has been observed that benefit of Notification No. 5/98-C.E. would be available even if credit of duty paid on inputs which were utilised in respect of the other products manufactured in the same factory had been availed of, does not advance the case of the appellants, in the light of facts and circumstances, as detailed above.

11. The argument of the Id. Counsel that the principle of unjust enrichment did not apply to the case of the appellants, as they have sought the refund of the Modvat credit wrongly reversed by them and under Section 11B(2)(c), such a claim had been excluded from the purview of this principle, cannot be accepted. Their claim is for the refund of the duty which they paid wrongly/erroneously earlier under protest. The duty payment was made by them not only by reversing the credit but also through PLA. It is not possible to accept that the duty paid by them on inputs

did not influence the ultimate cost of their final product, for want of any evidence to substantiate the same. The principle of unjust enrichment is applicable even to captive consumption of inputs/goods, as laid down by the Apex Court in Union of India v. Solar Pesticides Ltd. [2000 (116) E.L.T. 401 (S.C.)].

Therefore, the appellants were required to prove that the incidence of duty incurred by them on the inputs utilised for the manufacture of final products, was not passed on by them to the ultimate consumers.

Having failed to do so, their refund claim has been rightly rejected by applying the principle of unjust enrichment.

12. The claim for refund of Rs. 89,726/- and Rs. 2,96,491/- had been rejected, being pre-mature, as these were subject-matter of adjudication, which was still pending at the time of passing of the order. The refund of these amounts could be claimed by the appellants only after the adjudication was completed and not before that.

Therefore, we do not find any illegality in the impugned order in regard of these refund claims.

13. In the light of discussion made above, the impugned orders in all these appeals are upheld. The appeals of the appellants are dismissed, being without merit.

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