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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : May-04-2005

Judge : A T V.K., P Bajaj

Appellant : Universal Cables Limited

Respondent : Commissioner of C. Ex.

Judgement :

1. This appeal has been directed by the appellants against the impugned order-in-appeal vide which the Commissioner (Appeals) has reversed the order of the adjudicating authority who allowed their refund of the duty amount by holding that the same is hit by the principle of unjust enrichment.

2. The facts giving rise to the present case may briefly be stated as under: The appellants during the period in dispute i.e. 1-3-1982 to 31-3-1986 were engaged in the manufacture of Wires and Cables and using wooden drums for winding the same. They included the value of those drums in the assessable value of their final products (wires and cables) for the payment of the excise duty. They claimed the benefit of the provisions of Rule 56C for the duty paid on the wooden drums, but their claim was rejected by the Department.

Finally, the Tribunal allowed the benefit of these provisions vide final Order dated 30-7-1990 and set aside the order of the lower authorities. The Tribunal while disposing of the matter, directed the Department to give consequential effect to its order.

3. In pursuance of the above said order of the Tribunal, the appellants filed the claim on 3-9-1990 for the refund of the duty amount in dispute. The Asstt. Commissioner allowed the refund vide order dated 22-7-1991. That order was appealed against after review, before the Commissioner (Appeals) by the Department and the learned Commissioner (Appeals) through the impugned order has set aside the order of the Asstt. Commissioner and disallowed the refund claim on the ground that the same is barred by the principle of unjust enrichment as the appellants had passed on the incidence of duty to the ultimate buyers.

4. The learned Counsel in order to assail the validity of the impugned order has raised two fold contentions : Firstly, that the doctrine of unjust enrichment is not attracted to the case of the appellants as the amendment to Section 11B incorporating this doctrine came into force w.e.f. 20-9-1991, whereas the refund was allowed and the amount was even paid to the appellants by the adjudicating authority i.e. Asstt.

Commissioner vide order dated 22-7-1991 and the same stood finally settled/disposed of. No refund claim of the appellants, according to the learned Counsel was pending when the amended provisions of Section 11B came into force and this amendment could not be given retrospective effect. Secondly; that before reviewing the order of the Asstt.

Commissioner under Section 35E for filing the appeal before the Commissioner (Appeals), the reviewing authority was duty bound to issue notice under Section 11A of the Act for recovery of the refund amount already paid to the appellants and in the absence of such a notice, the impugned order could not be passed by the Commissioner (Appeals).

5. On the other hand, the learned SDR, has rebuted the above referred contentions of the counsel and contended that the doctrine of unjust enrichment is fully applicable to the case of the appellants as they had passed on the incidence of duty to the ultimate buyers. The refund claim of the appellants, according to the learned SDR, did not stand finally settled when the amended provisions of Section 11B came into force as the period for filing an appeal against the order of the Asstt. Commissioner allowing refund claim to the appellants did not expire and the

Department filed the appeal within the period of limitation before the Commissioner (Appeals). Regarding the service of notice under Section 11A of the Act on the appellants, the learned SDR, has contended that the same has got no application to the case of the appellants as the provisions of Section 35E operate in different fields and are invocable for different purposes.

6. We have heard both sides and gone through the record. In our view, the contentions raised by the learned Counsel are not liable to be accepted. The refund claim was no doubt filed by the appellants before the amendment of Section 11B, in pursuance of the order of the Tribunal dated 30-7-1990 and the adjudicating authority passed a favourable order allowing their refund claim on 22-7-1991, but that order of the Asstt. Commissioner did not attain any finality, as the same was not accepted by the Department. Being an appealable order, the Commissioner by exercising the power conferred on him under Section 35E of the Act, ordered for filing of appeal against that order before the Commissioner (Appeals). The appeal was accordingly filed by the Department before the Commissioner (Appeals) within the period prescribed under the law.

The fact that Asstt. Commissioner in a haste for the reasons best known to him even handed over the refund amount to the appellants, but that did not debar the Commissioner from exercising his power under Section 35E and directing the filing of the appeal against that order. The payment Of the refund amount to the appellants by the Asstt.

Commissioner also did not had the effect of making his order unassailable and final.

7. When the appeal was filed before the Commissioner (Appeals) challenging the correctness of the order of the Asstt. Commissioner allowing the refund to the appellants, the amended provisions of Section 11B came into force incorporating the principle of unjust enrichment and as such could be made applicable legally to the case of the appellants by the Commissioner (Appeals). No illegality can be said to have been committed by him in this regard.Mafatlal Industries v. UOI , has observed as under: In the face of this proviso, it is idle to contend that Sub-sections (1) and (2) of Section 11B do not apply to pending proceedings. They

apply to all proceedings where the refund has not been made finally and unconditionally. Where the duty has been refunded under the orders of the Court pending disposal of an appeal, writ or other proceedings, it would not be a case of refund finally and unconditionally, as explained in Jain Spinners and I.T.C. It is, of course, obvious that where the refund proceedings have finally terminated - in the sense that the period prescribed for filing the appeal against such order has also expired - before the commencement of the 1991 (Amendment) Act (September, 19-1991), they cannot be re-opened and/or be governed by Section 11B(3) [as amended by the 1991 (Amendment) Act]. This, however, does not mean that the power of the appellate authorities to condone delay in appropriate cases is affected in any manner by this clarification made by us....

The learned Counsel has also relied upon these observations of the Apex Court, but these are not of any help to the appellants, rather these observations advance the case of the Revenue. The order of the Asstt.

Commissioner when the amended provisions of Section 11B came into force, had not attained the finality, as observed above. His order was subject to review by the Commissioner under Section 35E of the Act. The Commissioner accordingly reviewed the order and appeal was filed before the Commissioner (Appeals) against that order within limitation. If the period of limitation challenging the order of the Asstt. Commissioner had expired, it could be well said and argued that the order of the Asstt. Commissioner had attained the finality, but when the period of limitation was very much there and within that period, the appeal was filed against the order of the Asstt. Commissioner by the Department, it cannot be accepted that the order of the Asstt. Commissioner had acquired finality before enforcement of amended provisions of Section 11B, in view of the above referred observations of the Apex Court.

Similarly, these observations had been even followed by the Tribunal in the case of CC & CE v. Shree Synthetics Ltd. .

9. Apart from this, the Apex Court has even clarified the position regarding the principle of unjust enrichment before the amendment of Section 11B in para 88 of the above referred case of Mafatlal Industries, supra, by observing as under: 7(b)

the principle of unjust enrichment is not a new principle.

Section 12B does not create a new presumption unknown till then, it merely gives statutory shape to an existing situation. Even without Section 12B, the true position is the same. The obligation to prove that the duty has not been passed on to other persons was always there as a pre-condition to claim of refund.

10. Further in Para 96 of the judgment in that case, the Apex Court has ruled as under: 96. It would be evident from the above discussion that the claims for refund under the said two enactments constitute an independent regimen. Every decision favourable to an assessee/manufacturer, whether on the question of classification, valuation or any other issue, does not automatically entail refund. Section 11B of the Central Excises and Salt Act and Section 27 of the Contract Act, whether before or after 1991 amendment - as interpreted by us herein - make every refund claim subject to proof of not passing - on the burden of duty to others. Even if a suit is filed, the very same condition operates. Similarly, the High Court while examining its jurisdiction under Article 226 - and this Court while acting under Article 32 -would insist upon the said condition being satisfied before ordering refund, Unless the claimant for refund establishes that he has not passed on the burden of duty to another, he would not be entitled to refund, whatever be the proceedings and whichever be the forum. Section 11B/Section 27 are constitutionally valid, as explained by us hereinbefore. They have to be applied and followed implicitly wherever they are applicable.

11. The contention of the learned Counsel that the show cause notice was required to be issued under Section 11A before exercising power under Section 35E of the Act by the Commissioner, in our view, is misconceived. Regarding the scope of both these Sections, the Apex Court in the case of Asian Paints (India) Ltd. v. CCE , has observed as under: We are of the view that the judgments viewed Sections 35E and 11A of the Central Excise Act in the proper perspective. The two sections operate in different fields and are invoked for different purposes.

Different time limits are, therefore, set out therein. We do not accept the contention that recovery of excise duty cannot be made pursuant to an appeal filed after invoking the provisions of Section 35E if the time limit provided in Section 11A has

expired. To so read the provisions would be to render Section 35E virtually ineffective, which would be impressible.

12. This very view has been reiterated by the Apex Court in the case of CCE v. Woodcraft Product Ltd. . Therefore, no show cause notice was required to be issued by the Commissioner while exercising power under Section 35E and directing the filing of the appeal against the order of the Asstt. Commissioner allowing refund to the appellants. The Board's Circular dated 22-9-1998, referred to by the learned Counsel, that the show cause notice must be issued within six months from the date of grant of refund, was issued on the basis of judgment of the Apex Court in the case of CCE v. Re-rolling Mills , but the same has no application to the case of the appellants in view of the Apex Court judgment in the cases of Asian Paints Ltd., supra, and Woodcraft Product Ltd., supra, wherein the scope of Sections 35E and 11A had been detailed. As observed above, no show cause notice under Section 11A was required to be issued to the appellants before filing of appeal against the order of the Asstt.

Commissioner before the Commissioner (Appeals). Moreover, the Circular was not in existence during the relevant period and was issued at a later point of time and as such could not be availed by the appellants in view of the Apex Court judgment in the case of Kalyani Packagings Indus. Ltd. v. UOI .

13. The law laid down in the case of Bajaj Auto Ltd. v. UOI (Bom.), referred to by the learned Counsel, is not attracted to the case of the appellants. In that case, there was final and unconditional refund to an assessee and for that reason, the Hon'ble Bombay High Court on the admission of the Revenue that the principle of unjust enrichment was not applicable, disallowed the recovery of the refund amount. But such are not the facts in the present case. Similarly, the law laid down in the case of ITC Ltd. v.CCE, Patna case. In that case, the principle of unjust enrichment was not applied in respect of the refund claim of set off of duty without referring to the law laid down by the Apex Court in the case of Mafatlal Industries v. UOI, supra, and as such the same cannot be preferred over the Apex Court judgment.

14. However, the learned Counsel has lastly submitted that if the principle of unjust enrichment is found to be invocable in the present case, then the appellants deserve to be given an opportunity to prove that they had not passed on the incidence of duty to the ultimate buyers and were also covered by the Proviso (c) appended to Section 11B(2) which excludes the bar of unjust enrich in a case where the refund is of the credit of the duty paid on excisable goods used as inputs. This submission of the learned Counsel, in our view, deserves to be allowed. The adjudicating authority allowed the refund of the appellants, as observed above. The principle of unjust enrichment had been applied to their refund claim for the first time by the Commissioner (Appeals). The appellants should have been afforded effective opportunity to prove that the bar of this principle did not cover their case, for having not passed on the incidence of duty to the buyers or that they were covered by the Proviso (c) to Section 11B(2) of the Act, but it has not been done by the learned Commissioner (Appeals). Therefore, in the interest of justice, for examining the above referred submission of the learned Counsel, the matter deserves to be sent back to the adjudicating authority.

15. In view of the discussion made above, the impugned order invocing the principle of unjust enrichment is upheld, but the case is sent back to the adjudicating authority for affording an opportunity to the appellants to prove that their case on merits is not covered by this principle or is saved by proviso (c) to Section 11B(2) of the Act and thereafter to pass order, as per law.

16. The appeal of the appellants accordingly stands disposed of in the above terms.

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