Bhilwara Processors Vs. C.C.E.

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Oct-03-2007

Reported in : (2008)(125)ECC44

Judge : J Balasundaram, Vice, A T K.K.

Appellant : Bhilwara Processors

Respondent : C.C.E.

Judgement :

1. The authorities below have rejected the claim of the appellant herein for refund of Rs. 1,38,70,221/- on the ground that the claim is hit by the bar of unjust enrichment enshrined in Section 11B of the Central Excise Act, 1944.

None appears for the appellant inspite of notice, hence we heard Ld. DR and perused the records.

2. The claim for refund was initially rejected by the Asstt. Collector by his order dt. 29.5.90 on the ground of time bar as well as on merits. This order was appealed against before Collector(Appeals) who vide order dt. 25.10.91 upheld the rejection of the claim. The matter was carried further in appeal to the Tribunal which vide order No.223/99-A dt.4.3.99 set aside the rejection on the ground of time bar but remanded the issue for reconsideration with respect to unjust enrichment after ascertaining as to whether duty liability was passed on by the appellants to their buyers. On remand, fresh order was passed by the Asstt. Commissioner on

11.1.01 holding that the duty was recovered by the appellants from their customers. This order was upheld by the Commissioner(Appeals) vide impugned order dt. 30.9.03, hence this appeal.

3. The first contention of the appellant is that the bar of unjust enrichment is not attracted in the present case for the reason that duty was paid by the appellants under protest. However, this contention required to be rejected in the light of the judgment of the Apex Court in the case of CCE, Mumbai v. Allied Photographics India Ltd. . In this case the earlier judgment of the Apex Court in Sinkhai Synthetics & Chemicals Pvt. Ltd. v. CCE, Aurangabad which held that refund of duty paid under 'Protest' is not hit by the bar of unjust enrichment has been considered and differed from, as seen from paragraph 14 which is reproduced herein below: 14. As stated above, para 104 of the judgment in the case Mafatlal Industries Ltd. (supra) states that if refund arises upon finalisation of provisional assessment, Section 11B will not apply.

Para 104 of the said judgment does not deal with payment under protest. In the light of what is stated herein, we may now consider the judgment of this Court in the case Sinkhai Synthetics & Chemicals Pvt. Ltd. (supra). In that matter, the assessee was a manufacturer. The assesses claimed exemption which was denied by the Department. The assessee went in appeal to CEGAT. Pending appeal, assessee paid excise duty under protest. The assessee succeeded before the CEGAT and claimed refund on 17.1.91. Refund was denied by the Department. Therefore, it was a case of payment of duty under protest. However, in the said decision, this Court applied para 104 of the judgment of the Constitution Bench in the case of Mafatlal Industries Ltd. (supra), which with respect, had no application. As stated above, Para 104 of the judgment in the case of Mafatlal Industries Ltd. (supra) dealt with refund consequent upon finalisation of provisional assessment. Para 104 does not deal with refund of duty paid under protest. As stated above, there is a difference under the Act between payment of duty under protest on one hand and refund consequent upon finalisation of provisional assessment on the other hand. This distinction is missed out, with respect, by the judgment of this Court in the case of Mafatlal Industries Ltd.(supra). We may also point out that the judgment in the case of Sinkhai Synthetics & Chemicals Pvt.

Ltd.(supra) is based on the concession made by the Counsel appearing on behalf of the Department. That judgment is, therefore, per incuriam. Learned Counsel for the respondent herein placed reliance on the judgment of this Court in the case of TVS Suzuki Ltd.(supra). In that case, application for refund was filed. This was on completion of final assessment. On 9.7.96, the Department issued a show cause notice as to why the refund claim should not be rejected for non-compliance of Section 11B. By order dt. 17.7.96, the refund claim was rejected on the ground that it was beyond limitation. On appeal, the Commissioner(Appeals) observed that the bar of unjust enrichment was not applicable as the assessee claimed refund consequent upon final assessment. He allowed the refund claim. CEGAT agreed with the view of Commissioner (Appeals). Before this Court, the Department conceded rightly that in view of para 104 of the judgment of this Court in Mafatlal Industries Ltd.(supra), bar of unjust enrichment was not applicable in cases of refund consequent upon adjustment under Rule 9B(5). The judgment of this Court in the case of TVS Suzuki Ltd.(supra), therefore, supports the view which we have taken herein above that refund consequent upon finalisation of provisional assessment did not attract the bar of unjust enrichment.

4. In the light of the judgment in the case of Allied Photographics India Ltd.(supra) holding that the bar of unjust enrichment is attracted in cases where duty was paid under 'protest' and therefore, the question as to whether the appellants have passed on the duty burden to their customers will have to be examined in this case for the purpose of determining the eligibility to refund. The answer to this issue is to be found in the case of Sangam Processors (Bhilwara) Ltd. v. CCE, Jaipur the Apex Court as reported in 70 ELT. A. 183 (SC), in which the view of the Tribunal was that passing on credit notes to the supplies after initially passing on duty burden is not sufficient to hold that the duty burden has not been passed on, for the reason that only after passing on the duty burden initially the credit note had been issued, and therefore, the appellants have unjustly enriched themselves. This order has been followed by the Larger Bench in S. Kumar's Ltd. v. CCE, Indore and In the light of the above decisions, we hold that the issue of credit notes to the suppliers subsequent to passing on the duty burden will not wipe out the initial passing on of duty burden and therefore, the claims for refund filed by the appellants is hit by the bar of unjust enrichment.

5. Lastly the plea of the appellant based on Section 72 of the Contract Act also requires to be rejected in the light of para 68 of the Mafatlal Industries Ltd. decision of the Apex Court (1997 (89) ELT. 247 (SC) wherein the Apex Court has held that in the face of Section 11B of the Central Excise Act which expressly declares that all claims for refund of any duty shall be entertained in accordance with the said provisions, resort to Section 72 of the Contract Act to do precisely that which is expressly prohibited by the said provisions is not permissible. The relevant extracts of para 68 of the judgment is reproduced herein below: In the face of the express provisions which expressly declares that no claim for refund of any duty shall be entertained except in accordance with the said provision, it is not permissible to resort to Section 72 of the Contract Act to do precisely that which is expressly prohibited by the said provisions. In other words, it is not permissible to claim refund by invoking Section 72 as a separate and independent remedy when such a course is expressly barred by the provisions in the Act, vis., Rule 11 and Section 11B. For this reason, a suit for refund would also not lie. Taking any other view would amount to nullifying the provisions in Rule 11/Section 11B, which, it needs no emphasis, cannot be done. It, therefore, follows that any and every claim for refund of excise duty can be made only under and in accordance with Rule 11 or Section 11B, as the case may be, in the forums provided by the Act. No suit can be filed for refund of duty invoking Section 72 of the Contract Act. So far as the jurisdiction of the High Court under Article 265 - or for that matter, the jurisdiction of this Court under Article 32 - is concerned, it is obvious that the provisions of the Act cannot bar and curtail these remedies. It is, however, equally obvious that while exercising the power under Article 226/Article 32, the Court would certainly take note of the legislative intent manifested in the provisions of the Act and would exercise their jurisdiction consistent with the provisions of the enactment.

6. In the light of the above discussions, we see no force in the submission of the appellants. Accordingly, we uphold the impugned order by which the dismissal of the refund claim has been upheld by the lower authorities and reject the appeal.