

The Commissioner, Central Excise Vs. Simplex Pharma Pvt. Ltd.

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Court : Punjab and Haryana

Decided On : Jan-14-2008

Reported in : 2008(126)ECC104; 2008(152)LC104(P& H); 2008(229)ELT504(P& H)

Judge : Satish Kumar Mittal and; Rakesh Kumar Garg, JJ.

Appeal No. : CEA No. 10 of 2007

Appellant : The Commissioner, Central Excise

Respondent : Simplex Pharma Pvt. Ltd.

Advocate for Pet/Ap. : Aman Chaudhary, Adv.

Disposition : Appeal dismissed

Judgement :

Rakesh Kumar Garg, J.

1. This appeal under Section 35G of the Central Excise Act, 1944 is directed against the order (Annexure A-3) dated, 27th July, 2006 passed by the Customs Excise and Service Tax Appellate Tribunal, Principal Bench, New Delhi allowing the Excise Appeal No. 4605 of 2004, arising out of the order-in appeal No. 209/AKG/GGN/2004 dated, 7th June, 2004 passed by the Commissioner (Appeals), Central Excise, Delhi-III, Gurgaon.

2. Brief facts giving rise to this appeal are as under:

The Respondent-assessee, who is a merchant exporter of Pharmaceuticals products, filed a refund claim of Rs. 9,69,250 in the office of Asstt. Commissioner Central Excise Division-II, Gurgaon on 21st June, 2002 claiming therein that during the year 2001-2002 the company imported 96 kgs of raw material called 'Prednisolone Sodium Phosphate' on which an amount of duty in the form of CVD (Counter Veiling Duty) for Rs. 9,69,250 was paid and the company got manufactured their product called 'Prednisolone Sodium Phosphate injection BP' from one of their loan licensee M/s Getwell Pharmaceuticals. It was further claimed that the total raw material was used in manufacture of final product by the loan licensee and the goods manufactured were exported out of India and that no MODVAT/CENVAT was availed by them or by their manufacturer namely M/s Getwell Pharmaceuticals on the consumption of 96 kgs of the aforesaid raw material to manufacture 6,24,172 packs of the Prednisolone injection and that since CVD amounting to Rs. 9,69,250 has been paid by them on excisable material used in the manufacture of the goods so got manufactured from loan licensee and exported out of India, and since the incidence of payment of duty has not been passed on to any other person, refund of duty amounting to Rs. 9,69,250 may be granted to them. The Asstt. Commissioner C.E Div. II, Gurgaon vide its order dated, 29th September, 2003 while rejecting the claim of the assessee for refund under Section 11-B of the Central Excise Act 1944 observed as under:

I observe that the party imported certain raw materials and paid counter veiling duty thereon at the time of importation. They got the Medicaments (Prednisolone Injections) manufactured from M/s Getwell Pharmaceuticals, 474, Udyog Vihar, Phase V on loan licence basis and exported their products & claimed refund of Counter Veiling Duty of Rs. 9,69,250 as the duty was borne by them & the incidence of the duty was not passed on to any other person.

Since it appeared that under Section 11-B of the Central Excise Act, 1944 refund of any 'duty' of excise was allowed if the conditions prescribed therein are fulfilled. It also appeared that since duty of Excise leviable under Section 3 of the Central Excise Act, 1944 was allowed to be refunded & not CVD charged under Section

3(1) of the Customs Tariff Act, 1975, a show cause notice was issued to the party as to why the refund of CVD of Rs. 9,69,250 should not be disallowed. It was also pointed out that claim in respect of one of the bills of entries was time barred and also original bill of entry was not filed in respect of another claim. The party in their defence reply stated that since the CVD was collected as Central Excise Duty by the Department they were entitled to claim Cenvat Credit as the Bill of entry was admissible under Rule 7 of the CENVAT Credit Rules, 2002 for claiming CENVAT. It was further submitted that CVD represented additional Customs Duty i.e. Central Excise Duty for the time being leviable on the like articles, if produced or manufactured in India, the same was be available for CENVAT Credit to the manufacturer in India.

It is true that CVD paid at the time of importation is equal to excise duty for the time being leviable on the like articles produced or manufactured in India and the manufacturer of the final product is entitled to CENVAT Credit of this Additional Duty leviable under Section 3 of the Custom Tariff Act paid on any inputs received in the factory and that the bill of Entry is a legal document for Cenvat Credit Purpose under Rule 7(1)(c) but the stage for refund of CENVAT Credit arises only after the CENVAT Credit on the inputs has been availed and under the CENVAT Credit Rules the manufacturer is also required to maintain proper Accounts for receipt, disposal, consumption and inventory of the inputs and is also required to submit monthly return in the prescribed form.

Since the party didn't take CENVAT Credit of the CVD paid on the inputs the provisions regarding CENVAT Credit Rules 2002 as stated by the party in their defence reply appeared misplaced. This is a case of refund of CVD in respect of the materials used in the manufacture of excisable goods exported out of India and as such the refund of CVD charged under Customs Tariff Act, 1975 is not covered under the Section 11-B of the Central Excise Act, 1944.

Further the party filed the refund claim under Section 11-B of the Central Excise Act, 1944 which presented a time limit of 1 year from the 'relevant date' since the duty in respect of B.E. No. 140911 dated, 4th May, 2001 was paid on 8th May, 2001 the claim in respect of the BE is time barred per-se.

The various case laws as referred to by the party only go to confirm that additional custom duty (CVD) is equal to excise duty for the time being leviable on the like articles produced or manufactured in India and the excise duty for the time being & that the party is entitled to MODVAT Credit of the CVD paid but none of the judgments cited/quoted by the party refer to refund of CVD under Section 11B Central Excise Act, 1944 as the Section ibid refers to refund of any duty of Excise which in turn covers only the duties specified in the first schedule & the second schedule to the Central Excise Tariff Act, 1985. The refund claim of the party is, therefore, liable to be rejected.

3. The assessee filed an appeal against the said order before Commissioner of Central Excise (Appeals) Gurgaon. However, the appeal filed by the assessee was rejected by the Commissioner of Central Excise (Appeals) vide its order dated, 7th June, 2004 and it was observed as under:

The refund claim filed by the Appellant under Section 11-B has been rejected by the original authority mainly on the ground of non-applicability of Section 11B of the Central Excise Act, 1944 to the refund of Additional Customs Duty i.e. CVD and party on account of time bar. I will first discuss the main issue of applicability of the provisions of Section 11-B of the Act to the refund claim of Additional Customs Duty. Under Section 11-B of the Central Excise Act, 1944, the opening paragraph of Sub section (1) clearly states that any person claiming refund of any duty of Excise may make an application for refund of such duty to the Asstt. Commissioner or the Deputy Commissioner of Central Excise before the expiry of one year from the relevant date. The duty of Excise is leviable on all excisable goods which are produced or manufactured in India at the rates set forth in First and Second Schedule to the Central Excise Tariff Act, 1985 as per the authority of Section 3 of the Central Excise Act, 1944. The Additional Customs duty is leviable on the imported articles under Section 3 of the Customs Tariff Act, 1975. The Central Excise duty is only a measuring yardstick for calculation of the Additional Customs duty i.e. counter veiling duty as laid down in Section 3 of the Customs Tariff Act, 1975 which cannot be equated with Central Excise Duty. From the provisions of Section 11-B, it is clear that this Section deals only with refund of duty of Excise and not the refund of the Additional Customs Duty i.e. CVD. The

claim of the Appellant is for refund of CVD which is clearly not covered under this Section. Reliance placed by the Appellant on the Hon'ble Supreme Court judgment reported as 1997 (90) ELT 7 (SC) is totally misplaced. No where it has been held in the cited case that CVD can be treated as Central Excise duty for all purposes including refund. Thus, I agree with the original authority that CVD cannot be equated with the duty Excise. The refund of CVD, is therefore, not admissible under Section 11-B of the Central Excise Act, 1944 and has been rightly so held by the original authority. The point of limitation raised by the Appellant is not relevant at this stage as the claim is held as not covered under the provisions of Section 11-B as discussed above.

4. Aggrieved against the order of the lower authorities, the assessee preferred an appeal before the Customs, Excise & Service Tax Appellate Tribunal, New Delhi. The Tribunal after considering the various provisions of the Central Excise Act and Customs Tariff Act and the submissions made by the rival parties held that Sub-section 2 (a) of Section 11-B of the Central Excise Act, 1944 clearly envisaged that the rebate of duty on excisable goods exported or on excisable material used in the manufacture of goods which are exported, are eligible for refund. Accordingly, the appeal filed by the assessee was accepted and the impugned order passed by the Lower Revenue Authorities rejecting the claim of the assessee for refund of duty was set aside.

5. In the present appeal on the basis of the above noted facts the counsel for the revenue has raised the following substantial question of law which according to him arises from the order passed by the Tribunal:

Whether the refund claim of (Counter Veiling Duty) CVD is applicable under Section 11-B of the Central Excise Act, 1944?

6. In support of his contention, the Appellant has argued that the counter veiling duty is not an excise duty but an amount equivalent to the rate at which excise duty is payable and it is only for the parties for finding out rate of duty and the refund of the same cannot be claimed under the provisions of Section 11-B of the Central Excise Act which is applicable only for refund of any duty of excise. Counsel has also relied upon Section 2(A) of the Indian Tariff Act 1934 in support

of above contention. The said section is reproduced as under:

2A Levy of counter veiling duty-

(1) Any article which is imported into Indian shall be liable to customs duty equal to the excise duty for the time being leviable on a like article if produced or manufactured in India, and if such excise duty on a like article is leviable at any percentage of its value, the customs duty to which imported article shall be so liable shall be calculated at that percentage of the value of that imported article.

Explanation: In this section, the expression "the excise duty for the time being leviable on a like article if produced or manufactured in India" means the excise duty for the time being in force which would be leviable on a like article if produced or manufactured in India or if a like article is not so produced or manufactured, which would be leviable on the class or description of articles to which the imported article belongs and where such duty is leviable at different rates, the highest duty.

7. We have heard learned Counsel for the parties and perused the record.

8. It is useful to refer to Section 11-B of the Central Excise Act 1944 hereinafter below:

11-B. Claim for refund of duty- (1) Any person claiming refund of any duty of excise may make an application for refund of such duty to the [Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise] before the expiry of [one year][from the relevant date][in such form and manner] as may be prescribed and the application shall be accompanied by such documentary or other evidence (including the documents referred to in Section 12A as the applicant may furnish to establish that the amount of duty of excise in relation to which such refund is claimed was collected from or paid by him and the incidence of such duty had not been passed on by him to any other person:

Provided that where an application for refund has been made before the commencement of the Central Excise and Customs Laws (Amendment) Act, 1991(40 of 1991), such application shall be deemed to have been made under this

sub-section as amended by the Act and the same shall be dealt with in accordance with the provisions of Sub-section (2) as substituted by that Act:]

[Provided further that] the limitation of [one year] shall not apply where any duty has been paid under protest.

[(2) If, on receipt of any such application, the [Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise] is satisfied that the whole or any part of the duty of excise paid by the applicant is refundable, he may make an order accordingly and the amount so determined shall be credited to the Fund:

Provided that the amount of duty of excise as determined by the [Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise] under the foregoing provisions of this sub-section shall, instead of being credited to the Fund, be paid to the applicant, if such amount is relatable to-

- (a) rebate of duty of excise on excisable goods exported out of India or on excisable materials used in the manufacture of goods which are exported out of India;
- (b) unspent advance deposits lying in balance in the applicant's current account maintained with the [Commissioner of Central Excise];
- (c) refund of credit of duty paid on excisable goods used as inputs in accordance with the rules made, or any notification issued, under this Act;
- (d) the duty of excise paid by the manufacturer, if he had not passed on the incidence of such duty to any other person;
- (e) the duty of excise borne by the buyer, if he had not passed on the incidence of such duty to any other person;
- (f) the duty of excise borne by any other such class of applicants as the Central Government may, by notification in the Official Gazette, specify:

Provided further that no notification under Clause (f) of the first proviso shall be issued unless in the opinion of the Central Government, the incidence of duty has

not been passed on by the persons concerned to any other person.

(3) Notwithstanding anything to the contrary contained in any judgment, decree, order or direction of the Appellate Tribunal of any Court in any other provision of this Act or the rules made thereunder or any other law for the time being in force, no refund shall be made except as provided in Sub-section (2).

(4) Every notification under Clause (f) of the first proviso to Sub-section (2) shall be laid before each House of Parliament, if it is sitting, as soon as may be after the issue of the notification, and, if it is not sitting, within seven days of its re-assembly, and the Central Government shall seek the approval of Parliament to the notification by a resolution moved within a period of fifteen days beginning with the day on which the notification is so laid before the House of the People and if Parliament makes any modification in the notification or directs that the notification should cease to have effect, the notification shall thereafter have effect only in such modified form or be of no effect, as the case may be, but without prejudice to the validity of anything previously done thereunder.

(5) For the removal of doubts, it is hereby declared that any notification issued under Clause (f) of the first proviso to Sub-section (2), including any such notification approved or modified under Sub-section (4), may be rescinded by the Central Government at any time by notification in the Official Gazette.]

[Explanation.- For the purposes of this section,-

(A) 'refund' includes rebate of duty of excise on excisable goods exported out of India or on excisable materials used in the manufacture of goods which are exported out of India;

(B) 'relevant date' means,-

(a) in the case of goods exported out of India where a refund of excise duty paid is available in respect of the goods themselves or, as the case may be, the excisable materials used in the manufacture of such goods,-

- (i) if the goods are exported by sea or air, the date on which the ship or the aircraft in which such goods are loaded, leaves India, or
- (ii) if the goods are exported by land, the date on which such goods pass the frontier, or
- (iii) if the goods are exported by post, the date of dispatch of goods by the Post Office concerned to a place outside India;
- (b) in the case of goods returned for being remade, refined, reconditioned, or subjected to any other similar process, in any factory, the date of entry into the factory for the purposes aforesaid;
- (c) in the case of goods to which banderols are required to be affixed if removed for home consumption but not so required when exported outside India, if returned to a factory after having been removed from such factory for export out of India, the date of entry into the factory;
- (d) in a case where a manufacturer is required to pay a sum, for a certain period, on the basis of the rate fixed by the Central Government by notification in the Official Gazette in full discharge of his liability for the duty leviable on his production of certain goods, if after the manufacturer has made the payment on the basis of such rate for any period but before the expiry of that period such rate is reduced, the date of such reduction;
- [(e) in the case of a person, other than the manufacturer, the date of purchase of the goods by such person;]
- [(ea) in the case of goods which are exempt from payment of duty by a special order issued under Sub-section (2) of section 5A, the date of issue of such order;]
- [(eb) in case where duty of excise is paid provisionally under this Act or the rules made thereunder, the date of adjustment of duty after the final assessment thereof;]
- [(ec) in case where the duty becomes refundable as a consequence of judgment, decree, order or direction of appellate authority, Appellate Tribunal or any court,

the date of such judgment, decree, order or direction;]

(f) in any other case, the date of payment of duty.]

9. From the perusal of Section 11-B, it is clear that any person claiming refund of any duty of excise may apply for refund of such duty in such form and manner as may be prescribed along with such documentary or other evidence to establish that the amount of duty of the excise in relation to which such refund is claimed was collected from or paid by him and the incidence of such duty had not been passed on by him to any other person. Proviso (A) to Sub-section 2 of Section 11-B further provides that if the competent authority is satisfied that the whole or any part of the duty of excise paid by the applicant is refundable he may make an order accordingly and the amount so determined instead of being credited to 'The FUND' be paid to him if such amount is relatable to rebate on duty of excise on excisable goods exported out of India or on excisable material used in the manufacture of goods which are exported out of India. Explanation (A) of Section 11B of the Central Excise Act, 1944 has further clarified the issue 'refund' includes rebate of duty of excise on excisable goods out of the India or on excisable material used in the manufacture of goods which are exported out of India. Section 3(1) of the Central Excise Act, 1944 provides for levying and collection of duty of excise/special duty of excise to be called the Central Value Added Tax (CENVAT) on all excisable goods which are produced or manufactured in India and at the rates set forth in the first and second schedule to the Central Excise Tariff Act, 1985. The proviso to this Section has further added that the duties of excise which shall be levied and collected on any excisable goods which are produced or manufactured by a 100 per cent exported oriented undertaking shall be an amount equal to the aggregate of the duties of the customs which would be leviable under the Customs Act, 1962 on like goods produced or manufactured outside India if imported into India and where the said duties of customs are chargeable by reference to their value, the value of such excisable goods notwithstanding anything contained in any other provision of this Act be determined in accordance with the provisions of the Customs Act, 1962 and the Customs Tariff Act, 1975. Thus, from the conjoint reading of the above referred provisions of the Act, it is crystal clear that the rebate of duty of excise on goods exported or on excisable

material used in the manufacture of goods which are exported are eligible for refund and such refund includes rebate of duty as well as the duty of excise on excisable material and the refund of such rebate of duty is payable in cash to the applicant if such amount is relatable to rebate of duty of excise on excisable goods exported out of India on excisable material used in the manufacture of goods which is exported out of India.

10. From the facts on the record, it is not disputed that the counter veiling duty amounting to Rs. 9,69,250 paid by the Appellant at the time of import of raw material was in fact a duty of excise equivalent to the excise duty payable on such raw material if manufactured in India and admittedly, the said raw material was consumed in the manufacturing of excisable goods exported out of India by the Appellant on which excise duty equivalent to the amount paid by the Appellant at the time of import of raw material was leviable. Further, the Appellant is admittedly eligible for the benefit of the MODVAT/CENVAT credit on the CVD/additional duty paid by him at the time of import of raw material and if he had availed the MODVAT/CENVAT credit then he would have got the refund of the same under the provisions of Section 11B(2) of the Act. Once the eligibility of the Appellant for the benefit of the MODVAT/CENVAT credit on the CVD paid by him is not disputed by the revenue then in that case the Appellant is entitled to payment/refund of the said amount under Section 11B(2) of the Act.

11. In view of the above, the argument raised by counsel for the Appellant is misconceived and devoid of any merit and the question of law as proposed does not arise in the present appeal. Hence, this appeal has no merit and the same is dismissed.