

Coatrex Vs. Assistant Collector of Central Excise and anr.

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Court : Chennai

Decided On : Apr-03-1992

Reported in : 1993(41)ECC146

Judge : Bakthavatsalam, J.

Appeal No. : Writ Petition No. 14286 of 1990

Appellant : Coatrex

Respondent : Assistant Collector of Central Excise and anr.

Disposition : Petition dismissed

Judgement :

ORDER

Bakthavatsalam, J.

1. The prayer in the writ petition is as follows:

.to issue a writ of mandamus, or any other appropriate writ, order or direction in the nature of a writ directing the respondents to refund the duty collected by the first respondent on the PVC resin of the petitioner under tariff item 19(iii) of the first schedule to the Central Excises and Salt Tax (sic), 1944 and..

2. The petitioner is manufacturing PVC rexin goods after obtaining L-4 licence under the Central Excises and Salt Act, 1944, in various designs and the said goods are sold in the market as rexin. It is alleged in the affidavit that the raw materials shown in para 4 of the affidavit filed in support of the writ petition with PVC compound is subjected to manufacture, that the percentage of cotton cloth is less than 15% in the end product, that the cotton cloth content will not vary, that the product manufactured by the petitioner is predominantly used for seat cover to buses, cars, motor-cycles, bi-cycles, auto-rickshaws, etc., that the petitioner was called upon to clear the goods of PVC rexin on payment of excise duty and that the first respondent has classified the goods of the petitioner under Tariff item 19(iii) of the First Schedule to the Central Excises and Salt Act, 1944, as it stood then. The petitioner alleges in the affidavit that the demand and collection of excise duty by the first respondent for the PVC rexin under Tariff item 19(iii) is illegal and without authority of law inasmuch as the goods are not under the definition of cotton fabric as provided in Tariff item 19(iii), that the first respondent has no jurisdiction to demand and collect duty on the goods manufactured by the petitioner, that by mistake of law, the petitioner has paid the duty, that he came to know in the month of May 1990 that a similar manufacturer of PVC rexin took up the matter for refund to the Customs, Excise and Gold Control Appellate Tribunal (in short as 'CEGAT') with regard to the demand and collection of duty for PVC rexin and that the CEGAT by order dated 8-2-1990 has held that the PVC goods are not classifiable under Tariff item 19(iii) of the First Schedule to Central Excises and Salt Act, 1944 and that the same is classifiable under Residuary Tariff 68 direction the authorities to refund the amount collected under the said Tariff item 19(iii). It seems that in a suit filed by the very same manufacturer praying for a declaration, the trial Court (Sub Court, Ramanathapuram) in O.S. No. 29 of 1986 has decreed the suit that the PVC rexin is not falling under Tariff item No. 19(iii) and that the same has been confirmed in appeal. As such, it is alleged in the affidavit that on coming to know of the orders mentioned above, in the month of May 1990, the petitioner issued a notice on 7.5.1990 requesting the first respondent to refund the entire amount collected from the petitioner-company under Tariff item 19(iii) for the goods manufactured by the petitioner from the date of inception since it is paid under mistake of law, and that the petitioner has not

received any letter. The petitioner further alleges in the affidavit that the end-product of the petitioner-company is PVC rexin, that it is a commodity by itself and in which the cotton is not prominent, that the end-product of the petitioner is not classifiable under Tariff item 19(iii) and that there is no bar for the petitioner-company to approach this Court for refund of duty which is collected by the respondents without authority of law. It is also stated in the affidavit that if by mistake of law, duty was collected by the respondent, it is bound to refund it and that the petitioner can approach this Court in a petition under Article 226 of the Constitution. It is alleged in the affidavit that the petitioner's claim comes to Rs. 39,00,000/- that based on the challans a consolidated order could be passed for refund, that there is no dispute relating to the payment of tax, that no disputed question of tax [fact?] involved in the matter since the classification of PVC rexin is settled as falling under Residuary Tariff No. 68 and that since the decision for refund is covered by a decision of CEGAT, the prayer of the petitioner in this writ petition for classification and refund of duty so collected should be ordered.

3. A counter-affidavit has been filed by the respondents claiming that the petitioner company had been manufacturing PVC rexin cloth falling under Item 19(iii) of the erstwhile Tariff from the year 1980-85, that the description of the goods was given as cotton fabrics impregnated, coated or laminated with preparation of cellulose derivatives or other artificial plastic materials, that after the advent of Central Excise Tariff Act, 1985 the impugned product is being classified under heading 3903.19 of the Tariff. It is further claimed in the counter affidavit that on 7.7.1990 the counsel for the petitioner had sent a letter stating that the PVC rexin was not classifiable under Tariff item 19(iii) and that his client was not applying under the refund procedure as it would not be applicable to him. It is also claimed in the counter-affidavit that as the PVC rexin was stated to be made of cotton fabrics, though coated or laminated or impregnated its classification under Item 19(iii) of the First Schedule to the Central Excises and Salt Act, 1944 is correct, that the product declared and manufactured by the petitioner are correctly classifiable under Tariff item 19(iii) and as such the collection of excise duty is legal and within authority of law. It is also claimed in the counter-affidavit that inspite [instead] of approaching the first respondent and exhausting statutory remedies, the petitioner chose to seek the remedy under Article 226 of the Constitution. It is also claimed

in the counter-affidavit that as no refund claim was submitted by the petitioner following its letter dated 7.5.1990 no action could be initiated; that the petitioner, if aggrieved about the classification of the product could have approached the first respondent so that the first respondent could decide whether the product is classifiable under the different tariff headings, that Section 11-B of the Act provides that any person claiming refund of any duty should make an application before the first respondent herein, that in the present case the petitioner has not made any claim before the first respondent to decide on merits and that the petitioner has not made nay mistake as claimed by the petitioner. It is also claimed in the counter-affidavit that the petitioner is not entitled to refund inasmuch as it has collected the same from customers. It is also pointed out that the question of refund, if any, due to the petitioner is subject to an important qualification based on the equitable doctrine of unjust enrichment, that the petitioner has not filed any refund claim and that it having passed on the duty amount to its customers has not suffered any loss, and as such this Court should not exercise its discretion in favour of the petitioner. It is also pointed out in the counter-affidavit that the petitioner has not specified the period for the refund claim in detail, that it is not known as to how the petitioner arrived at the amount of Rs. 39,00,000/-. It is also claimed in the counter-affidavit that under Section 11-B of the Excises and Salt Act, 1944 a time limit is prescribed and as such the petitioner herein cannot get refund, and that the petitioner is not entitled to claim any refund as it has not filed any refund claim under the statutory provisions of the Act. It is further claimed that without following any procedure, the petitioner is trying to get refund of duty in a blanket prayer without proper documents and particulars.

4. Mr. R. Thiagarajan, the learned Senior Counsel appearing for the petitioner contends mainly that based on an order of CEGAT in a similar case, the petitioner has issued a notice to the first respondent herein on 7.5.1990 claiming refund of duty, which was collected under mistake of law and as such the petitioner is entitled to refund of excise duty. He also points out that since the collection of duty is made without authority of law, no provision under the Act for refund is applicable to the petitioner's case and that the claim of the petitioner will fall 'outside the Act'. It is also pointed out by the learned Senior Counsel that Central Act 40 of 1991 which amended Section 11-B of the Act will not apply to the facts of the case since

the claim is made 'outside the Act'. He mainly refers to the decisions in Associated Bearing Co. Ltd. v. Union of India 33 ELT 285, in Cuddappah Co-operative Sugars v. Union of India 38 ELT 258 and in Khardah Co. Ltd. v. Union of India 14 ELT 2159 for the proposition that the petitioner is entitled to get the refund when the collection is made without authority of law and that there cannot be any limit to that. The learned Senior Counsel further points out the decision in D. Cawasji and Co. v. State of Mysore 1978 ELT 154 and contends that the court cannot deny refund of tax paid under mistake of law even if the person who paid it has collected it from his customers and has no subsisting liability or intention to refund it.

5. Per contra, Mr. Jayachandran, the learned Counsel appearing for the respondents Department relies upon an unreported decision of a Division Bench of this Court (to which I am also a party) in The Joint Secretary to the Government of India, Ministry of Finance, Department of Revenue, New Delhi v. Beema . (Writ Appeal Nos. 445 and 446 of 1982 dated 5.10.1988) ([1993] 41 ECC 142 and contends that the Division Bench considered the principle of equitable doctrine and applying the same to the facts of the case on hand, a refund cannot be ordered as prayed for. The learned Counsel for the respondent also points out that Section 11-B has come into force by Act 40 of 1991 on 20.9.1991 and also Sub-section (3) of Section 11-B which reads as follows:

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

The learned Counsel for the respondent Department heavily relies upon the decision of S. Ramalingam, J, in M/s. Upper India Bearings and Bustlings Ltd. rep. by its Secretary, Madras v. The Union of India rep. by the Secretary to Government, New Delhi and Ors. (W.P. No. 6669 of 1982 dated 4.12.1990) [1993] 41 ECC 145 and contends that the Tribunal's order relied upon by the petitioner cannot be invoked by the petitioner for obtaining a refund in this case. The learned Counsel also brings to my notice that the learned Judge in the abovementioned case in W.P.No. 6669 of 1982 dated 4.12.1990, after referring to the decision of

the Division Bench of this Court in WA. Nos. 445 and 446 of 1982 dated 5.10.1988 (to which I am a party) has held as follows:

.The law having thus been so clearly declared it is seen that if the petitioner were to be given the benefit of an order of refund it would result in unjust enrichment to the petitioner because the benefit would not reach the ultimate consumer..

6. Mr. R. Thiagarajan, the learned Senior Counsel appearing for the petitioner replies that the Division Bench of this Court, in the decision cited supra, has not taken note of the decision in D. Cawasji and Co. v. State of Mysore 1978 ELT 154 and as such the judgment requires reconsideration. He. also represents that the said matter has been referred to a Full Bench of this Court.

7. I have heard considered the arguments of Mr. R. Thiagarajan, the learned Senior Counsel appearing for the petitioner in extenso and of Mr. Jayachandran, the learned Counsel appearing for the respondent-Department and considered the same.

8. On the facts and circumstances of the case, whether the petitioner company is entitled to get refund of the duty collected for the PVC rexin of the petitioner by the respondent-Department, in view of the judgment of the CEGAT, is the short question to be decided.

9. The learned Counsel appearing for the respondent-Department brings to my notice the judgment of CEGAT against which an appeal is pending before Supreme Court on which heavy reliance was made by the learned Counsel for the petitioner is made. Apart from that, I am of the view that after the amendment 40 of 1991 which has come into force on 20.9.1991, Sub-section (3) of Section 11-B of the Act is substituted for Sub-sections (2) to (5) which reads as follows:

(2) If, on receipt of any such application the Assistant Collector of central Excise is satisfied that the whole or any part of the duly 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 Collector of Central Excise under the foregoing provision 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 account current maintained with the Collector 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) 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 or any Court or in any other provision of this Act or the rules made there under 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, 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 there under.

(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.

(c) in the Explanation, in Clause (b) for Sub-clause (e) the following sub-clause shall be substituted, namely:--

(e) in the case of a person, other than the manufacturer, the date of purchase of the goods by such person.

In view of Sub-section (3) extracted above, I do not think the order of the Tribunal can be relied upon by the learned Counsel for the petitioner. As such I am of the view that the product manufactured by the petitioner is not entitled to refund of excise duty. However, the Supreme Court in *State of M.P. v. Vyankatlal* : [1985]3SCR561 observed as follows:

.The principles laid down in the aforesaid cases were based on the specific provisions in those Acts but the same principles can safely be applied to the facts of the present case inasmuch as in the present case also the respondents had not to pay the amount from their coffers. The burden of paying the amount in question was transferred by the respondents to the purchasers and, therefore, they were not entitled to get a refund. Only the persons on whom lay the ultimate burden to pay the amount would be to get a refund of the same. The amount deposited towards the Fund was to be utilised for the development of sugarcane. It is not possible to identify the persons on whom had the burden been placed for payment towards the Fund, the amount of the Fund can be utilised by the Government for the purpose for which the Fund was created, namely, development of sugarcane.

There is no question of refunding the amount to the respondents who had not eventually paid the amount towards the Fund. Doing so would virtually amount to allow the respondents unjust enrichment..(underlining is mine).

In the abovementioned decision, the Supreme Court has considered its earlier decision in Shiv Shankar Dal Mills etc. v. State of Haryana : [1980]1SCR1170 and in Amar Nath Om Prakash v. State of Punjab : [1985]2SCR72 and has come to the conclusion that if a refund is allowed it will be virtually amounting to allow the unjust enrichment. It is true that the earlier judgment in D. Cawasji and Co. v. State of Mysore 1978 ELT 154 has not been brought to the notice of the apex Court of the land when it was deciding the issue of unjust enrichment. As I have already stated since the issue raised has been decided against the petitioner by the judgment of the Division Bench of this Court in W.A. Nos. 445 and 446 of 1982 dated 5.10.1988 [1993] 41 ECC 142 (Mad) (to which I am a party). I am not inclined to exercise my discretionary power with regard to the refund of excise duty, in my view, since the petitioner has already collected the duty from the customers which is one of the modes of indirect taxation. When such is the case, I do not think that there will be any equity if an order of refund is made at the later point of time. For the reasons stated above, the writ petition will stand dismissed. No costs.