

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ W.P.(C) 802/2011

MUNCH FOOD PRODUCTS LIMITED Petitioner
Through Mr. Rajendra Dutt, Advocate.

versus

COMMISSIONER AND ANR Respondent
Through Mr. Satish Kumar, sr. standing
counsel.

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE G.P. MITTAL

ORDER

02.03.2012

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The petitioner, Munch Food Products Limited, are manufacturers and traders of chocolate confectionary, chocolate covered biscuits and remoulded chocolates. Chocolate confectionary is classified under Tariff Chapter Heading No.18 and chocolate covered biscuits are classified under chapter heading No.19. On both items, excise duty is payable. On remoulded chocolates, as per the case of the petitioner, which has been accepted by the Customs, Excise & Service Tax Appellate Tribunal (tribunal, for short), no excise duty is payable.

2. Superintendent of Central Excise issued assessment memorandum dated 1st May, 1995 finalizing the provisional

assessment. In terms of the said order, he had raised a demand of Rs.1.19.775.39/- in respect of the periods April, 1993 to July, 1993 and the RT-12 returns filed for the months of February, 1994 and March, 1994. The said order further records that refund claim for the excise duty paid in the month of February, 1994 and March, 1994 and in the other preceding months should be made with the Assistant Collector of Central Excise.

3. The petitioner thereafter made applications for refund. The said applications were rejected by the Assistant Collector vide order dated 15th November, 1995 on various grounds. He held that the duty incidence was passed on to the customers as indicated in the gate passes. He further recorded that the value shown in the invoices issued along with the gate passes was towards sum total of assessable value of the item and the duty incidence thereon and, therefore, duty incidence had been passed on to the customers.

4. The petitioner against this order filed an appeal, which was disposed of vide order dated 12th July, 2001 by the Commissioner of Customs (Appeal). In the grounds of appeal, the petitioner had pleaded and submitted that the observations of the Assistant Commissioner to the effect that the value shown in the invoices issued along with the gate passes was sum total of assessable value of the item and the duty

incidence thereon, were false and incorrect. Case of the petitioner was that they had submitted invoices of similar items sold to the customers to establish and show that the prices did not include or were not inclusive of the incidence of duty. It was specifically pleaded that the invoice value of the items sold to customers against purchases prior to payment of duty (cleared as non excisable goods) and thereafter were same. Therefore, the incidence of duty was not passed on to the customers.

5. The Commissioner of Customs (Appeals) in his order dated 4th July, 2001 has recorded as under:-

“.....I have seen photocopies of invoices and related GP. Is placed before me. The invoices show that the duty element as NIL but the price charged is inclusive of duty as reflected in the GP. Is. I observe that this issue is squarely covered by the judgment of Hon’ble Tribunal in the case of Esprit Switgear Pvt. Ltd. Vs. CCE reported in 1996 (87) ELT 660 (Tribunal).”

6. It is clear from the said order that the Commissioner (Appeals) had examined the photocopy of the invoices and the related GP-Is. In the gate passes and invoices the element of duty was shown as ‘NIL’. It is admitted before us that excise duty was payable on ad-valorem basis i.e. prices mentioned in the GP-Is and this has to be same as invoice price. Yet, surprisingly the Commissioner (Appeals) has recorded that prices were inclusive of duty as reflected in the GP-Is. The aforesaid observation is not correct in view of what has been

admitted before us that the excise duty element was payable on ad-valorem basis and was not a fixed amount. There is no basis or foundation for making the said assertion.

7. The petitioner preferred an appeal before the Customs, Excise and Gold (Control) Appellate Tribunal. The said appeal was disposed of by a detailed order dated 27th March, 2002. It was held as under:-

“4. I have carefully examined the submissions.

The refund claim in question comprises three distinct elements. The claim of Rs.2,81,558/- is in respect of remoulded chocolates. There is no disputed of the fact that this item has been held to be non-excisable by this Tribunal as per Final Order NO.653/99-D dated 2.7.99. Neither side has any case that he said final order of this Tribunal has not become final. That being so, there cannot be any difficulty in refund of any duty paid on remoulded chocolates. Inclusion of the value of the remoulded chocolates in the aggregate value of clearances of the assessee for the purpose of determining the extent of exemption under Notification No.1/93 CE led to a situation in which the appellants had to pay duty of excise on the other two products viz. chocolate confectionery (CSH 1083.00) and chocolate covered biscuits (CSH 1905,11) cleared in excess of the limit. In the final order *ibid*, this Tribunal has also held that the value of the non-excisable item viz. converted chocolates cannot be included in the aggregate value of clearances for determining the limit of exemption under Notification No.1/93-CE. As regards the excess duty paid on chocolate confectionery under the undisputed tariff entry CSH 1803.00, correctness of the quantum of duty to be refunded requires to be checked after excluding the assessable value of

remoulded chocolates from the aggregate value of clearances. In regard to chocolate-covered biscuits, it has been conceded by Id. Consultant that the classification dispute is still alive before the adjudicating authority. This part of the refund claim, therefore, will be held to be premature. As and when the classification dispute over chocolate-covered biscuits is settled by adjudicating authority, the assessee will be at liberty to claim refund of any duty paid in excess and any such refund claim will be processed in accordance with law. Therefore, the refund claimed as on today in respect of chocolate-covered biscuits will stand rejected. Refund of any duty on remoulded chocolates held by this Tribunal to be non-excisable has to be allowed.

5. That orders of the lower authorities are sustained in so far as the refund claim in respect of chocolate-covered biscuits is concerned. It is made clear that this part of my order is not to be so interpreted as to hold that any future refund claim in respect of the same goods and for the same period will be hit by unjust enrichment, which question is left open. The orders of the authorities below will stand set aside in so far as the refund claim in respect of chocolate confectionery and remoulded chocolates are concerned. Refund is granted of the duty paid on remoulded chocolates, while in respect of chocolate confectionery, the matter is remanded to the adjudicating authority for the purpose already mentioned. The assessee shall be given a reasonable opportunity of being heard.”

(emphasis supplied)

8. In spite of the aforesaid order and the directions by the tribunal, the petitioner did not get refund. The respondents took the plea that Section 11B of the Central Excise Act, 1944 was applicable and the petitioner must establish and show that he had not passed on the

incidence of duty to the customers. By order dated 20th July, 2007,

Deputy Commissioner of Central Excise, Division-III held:-

“27. I find that refund is not admissible to the manufactures, if they had already passed on the incidence of the duty to the buyers. The burden to show that the duty has not been passed on to the buyers is on the person claiming the refund. Further, I find that under the provisions of Section 11B of the Central Excise Act, 1944, the applicant is required to furnish documents/evidence 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 to any other person. In such an eventuality the amount so determined and found refundable by the adjudicating authority is required to be credited to the Consumer Welfare Fund in terms of Sub Section 2 of Sec. 11B of the Central Excise Act, 1944.

28. I therefore sanction an amount of Rs.3,22,599/-. However since the claimant has not come forward to show that the duty has not been passed on to the buyers. In view of the existing law enumerated in the Central Excise Act and also in view of the Hon’ble Supreme Court decision in the case of M/s Mafatlal Industries Ltd. Vs. UOI 1997 (89) E.L.T. 247 (S.C) and M/s Sahakar Khand Udyog Mandal Ltd. Vs. CCE-2005 (181) E.L.T. 328 (SC), I have no option but to credit the same to the Consumer Welfare Fund. In terms of sub Section 2 of Section 11B of the Central Excise Act, 1944.

29. Accordingly I pass the following order:-

ORDER

I have sanction the claim of Rs.3,22,559/- filed by M/s Munch Food Products Ltd. and order for crediting the same in the consumer Welfare fund established by the Central Government under Section 12C of the Central Excise Act, 1944.”

9. The petitioner against this order approached the Excise and Service Tax Appellate Tribunal, who vide order dated 7th September, 2007, dismissed the application filed by the petitioner on the ground that it was not maintainable as an appealable order has been passed by the Deputy Commissioner of Central Excise, Division-III.

10. The petitioner thereafter filed another application, which was dismissed by the Appellate Tribunal vide order dated 3rd April, 2010, holding that there has not been willful disobedience of their order dated 27th March, 2007 by the authorities below. It was further observed that in case the petitioner was aggrieved they should have filed an appeal against the order of the Deputy Commissioner of Central Excise, Division-III.

11. We are not inclined to accept the contention and plea of the respondents of alternative remedy. As is noticeable, the present case is rather old and there are several rounds of litigation. The petitioner had succeeded before the tribunal, who had passed a detailed order dated 27th March, 2002. The respondents thereafter did not adjudicate and passed the consequential orders till 2007. This is in spite of the fact that the petitioner had filed an application on 18th February, 2003 before the respondents to process their claim for refund. There is no explanation for delay of five years. The order dated 20th July, 2007, in

fact, makes reference to another refund claim application dated 24th February, 2004.

12. During the course of hearing before us on 16th January, 2012, the following order was passed:-

“Ld. counsel for the petitioner seeks and is granted time to file affidavit within 10 days. The affidavit will clearly indicate whether the goods were cleared on Nil rate of duty and excise duty was paid after assessment order was passed and therefore there is no question of duty liability being passed on to any other party. The date on which the goods were cleared and the excise duty paid thereon, date on which the assessment order was passed and the date on which the duty was paid will be indicated in the affidavit.

The respondents will file response to this affidavit within 15 days thereafter. In the response the respondents will indicate if the duty liability mentioned in the invoices was nil and why and on what basis the claim for refund has been rejected. They shall also indicate evidence, if any, to show, if the rate of duty is Nil, refund cannot be claimed.

Relist on 29th February, 2012.”

13. In response to the said order, the petitioner has filed an affidavit stating as under:-

“2. That the petitioner company was manufacturing Chocolate Confectionery and Chocolate Covered Biscuits classifiable under chapter heading 18.03 and 19.05 of the Central Excise Tariff Act, 1985. They were also clearing re-molded chocolate as non-excisable goods and filed their classification list for approval by the departmental officer for the period February, 1993 and April, 1993-94. This classification was in dispute and the assessments were made provisionally since February 1992 onwards.

These goods were however being cleared on payment of duty under protest. The assessments were finalized by the Superintendent on 1.5.1995 vide his letter C.No.CE-20/Munch/R-17/Misc/1995-2174 on the basis of the order in appeal No.213-CE/Del/94 dated 31.3.1994 and advised the petitioner company to file refund claim for any excess duty paid in the relevant period. The duty element was however borne by the petitioner company and was not collected from the buyers for which the necessary documents i.e. GP-1 showing duty element and invoices issued for sale of goods to the customer showing nil duty element were submitted to the Assistant Collector for verification of the refund claim which was filed by the petitioner company. The invoices issued for the period immediately before February, 1993 showing the sale price of the goods to the customers and the invoices issued for the sale of same quantity of goods corresponding to the goods mentioned in the GP-1 were also produced. These invoices show the duty element as nil.

3. That the goods on which refund is claimed were cleared during the period of February 1993 till filing the refund claim in May, 1995 on payment of duty at the time of clearance of the goods.

4. That the incidence of duty was borne by the petitioner company and did not pass to its customers and the petitioner company has already submitted relevant documents showing non-passing of duty incidence to the customers. The invoices issued during the earlier period when there was no duty paid were also submitted to show that the amount of duty for the same quantity of goods has not gone under any change. This Commissioner appeal in his order in Appeal No.HKS (563) CE/2001 has given a clear finding that he has seen the gate passes and invoices and the amount of duty shown in the invoice is nil. Keeping this fact in observation the Hon'ble Tribunal granted the refund and its order dated

27.03.2002 has attained finality as the same has not been challenged in the higher Appellate Forum by the revenue department.”

14. The respondents have also filed an additional affidavit stating as follows:-

“As regards “if the duty liability mentioned in the invoices was nil” I respectfully submit that it has been held by the adjudicating authority vide Order-in-Original No.93/1995-96 dated 15/11/95 that the petitioner has submitted triplicate copies of gate passes (Now called invoices) issue to the customers. From the gate passes, it is noticed that the duty was charged from the customers. As per Rule 52 A of the Central Excise Rules, 1944 as it existed then, the gate pass was the only document prescribed for collection of Central Excise duty. As indicated in the gate passes, the duty incidence was passed on to the Customers. Further value shown in the invoices issued along with gate passes was the sum total of assessable value of the item and the duty incidence thereon. As such invoices issued by the party included the duty liability.”

(emphasis supplied)

15. The order referred to by the respondents in their affidavit is the order dated 15th November, 1995. As noticed above, this order was challenged before the Commissioner of Customs (Appeals), who had passed an order dated 4th July, 2001 communicated on 12th July, 2011. In this order, the Commissioner of Customs (Appeals) had recorded a different finding that rate/duty mentioned in the gate passes was ‘Nil’. However, he had concluded that the prices mentioned in the invoices

were inclusive of duty. As held above, the later observation does not have any force and has to be rejected as wrong. This order was made subject matter of challenge before the tribunal and we have quoted above the order dated 27th March, 2002 passed by the tribunal.

16. On the last date of hearing, we have called upon the respondents to produce before us the gate passes. They have expressed their inability to produce gate passes and photocopy thereof as matter is very old and pertains to the years 1992-94. We may notice that the averments made in the additional affidavit filed by the respondents referred to in paragraph (14) do not appear to be correct. The said averment proceeds as if the gate passes and invoices were examined by the deponent.

17. In view of the aforesaid position, we are inclined to accept the prayer of the petitioner. Accordingly, the writ petition is allowed with a direction to the respondents to refund the duty amount along with interest as per rules. The aforesaid refund will be made by sending cross cheque to the registered office address of the petitioner within a period of six weeks. The writ petition is disposed of. No costs.

SANJIV KHANNA, J.

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