

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 20.09.2017

CORAM:

THE HONOURABLE MR.JUSTICE S.MANIKUMAR
and
THE HONOURABLE MR.JUSTICE V.BHAVANI SUBBAROYAN

C.M.A.No.2715 of 2015

The Commissioner of Central Excise,
Chennai III Commissionerate,
Chennai.

Appellant

versus

1. The Tamil Nadu Electricity Board,
Rep., by its Superintending Engineer,
Electricity Distribution Circle,
Dharmapuri-5.
2. The Customs, Excise & Service
Tax Appellate Tribunal,
No.26, Shastri Bhavan Annexe Building,
Haddows Road, Chennai 600 006.

Respondent

Prayer: Civil Miscellaneous Appeal is filed under Section 35G of Central Excise Act, 1944, against the Final Order No.40985 of 2014, dated 16.12.2014, passed by the CESTAT, South Zonal Bench, Chennai.

For Appellant : Mr.A.P.Srinivas

For 1st Respondent : Mr.V.Viswanathan

JUDGMENT

(Judgement of this Court was made by S.MANIKUMAR, J.)

Civil Miscellaneous Appeal is directed against the order of the Customs Excise and Service Tax Appellate Tribunal, Chennai, dated 16.12.2014 in Final Order No.40985 of 2014, by which, the Tribunal has upheld the original order.

2. The Superintending Engineer, Tamil Nadu Electricity Board, Electricity Distribution Circle, Dharmapuri, 1st respondent herein, has been using RCC Poles, supplied by their Contractors and that the latter used to supply necessary raw materials, like steel rods, cement, sand, blue metal etc., to their various yards. The Commissioner of Central Excise, Chennai

III Commissionerate, Chennai, appellant herein, has raised a dispute as to the liability of duty on RCC Poles. The adjudicating authority vide Order-in-Original No.51/99, dated 01.12.1999 decided that M/s.TNEB is not a "Manufacturer" of RCC Poles and the contractor is the real manufacturer. Refund claim was consequential to the abovesaid finding and the said decision in Order-in-Original No.51/99, dated 01.12.1999, has not been challenged by the Department.

3. Consequent to the same, M/s.TNEB has filed a consolidated refund claim for Rs.53,26,610.34, in respect of 11 RCC Yards, falling under Dharmapuri Circle, on the ground that they were eligible for the said amount paid by them, as duty towards RCC Poles manufactured on Contract basis, during the period 1986-1996. The claims were lodged with the Deputy Commissioner of Central Excise, Hosur I Division. According to the department, TNEB did not furnish the required documents to the Divisional Office to prove that the claim. Documents, directed to be produced in the Department's letter, dated 19.03.2001, are (a) PLA Register; (b) RG23A Part 1/Part 2 Register; (c) Yard-wise value of RCC Poles manufactured - Contractor-wise; and (d) Copy of invoices (Yard-wise) raised by Contractors for supply of poles of TNEB. As there was no reply from M/s.TNEB, a Show Cause Notice, dated 29.06.2001, was issued to them.

4. Due to re-organisation of the Excise Department, Dharmapuri range, was transferred to Salem-II Division, with effect from 01.11.2002. Adjudication of Show Cause Notice was restricted to only 3 RCC Yard, viz., Hosur, Krishnagiri and Bargur, falling under the Jurisdiction of Hosur Division. A Personal hearing given on 09.01.2003 and M/s.TNEB requested further time to produce the documents, mentioned in the Show Cause Notice. Another personal hearing given on 21.01.2003, but TNEB, the first respondent produced some documents only. The first respondent, in their final reply, submitted that they have produced the related documents for the refund of Central Excise Duty paid, under protest to RCC Poles, manufactured at Krishnagiri, Hosur and Bargur. After verifying various documents, like PLA Register, TR6 Challans and RG23A Part 1 and 2 and copies of invoices raised by Contractors (Yard wise), the adjudicating authority, vide Order-in-Original No.49 of 2003, dated 31.07.2003, ordered refund amount of Rs.17,74,3001/-.

5. Aggrieved by the order of the adjudicating authority, dated 31.07.2003, directing refund, the department has preferred an appeal with the Commissioner (Appeals), on the ground of unjust enrichment. The Commissioner (Appeals) has dismissed the Revenue Appeal, vide Order-in-Appeal No.19/03(M)-III, dated 23.12.2003, holding that it was beyond the scope of Show Cause Notice.

6. Aggrieved by the same, the department has preferred an appeal before CESTAT, Chennai, who in turn, dismissed the Revenue's appeal, vide Final Order No.40985 of 2015, dated 16.12.2014, against which, the present appeal has been filed, on the following substantial questions of law,

"(1) Whether as per Section 11B of Central Excise Act, 1944 claimant of refund has to establish the fact, "that the amount of duty of excise in relation to which such refund is claimed was collected from, or paid by, the assessee, and the incidence of such duty had not been passed on by him to any other person" by way of documentary or other evidence (including documents referred to in section 12A Central Excise Act, 1944).

(2) Whether in the facts and circumstances of the case, whether as per Section 12B, every person who has paid duty of excise on any goods shall be deemed to have passed on the full incidence of such duty to the buyer of such goods unless he proves the contrary. Inasmuch as the respondent had failed to prove the same, they are not eligible for refund of duty paid.

(3) Whether in the facts and circumstances of the case, the CESTAT, Chennai was legal and correct in rejecting the appeal of the department."

7. In support of the above substantial questions of law, the appellant has raised following grounds, as follows:

"(i) The Tribunal has failed to consider that the TNEB failed to prove with documentary evidence that the Duty Incidence has not been loaded either in the cost of Poles or on the Cost of electricity sold and as such TNEB is not entitled for the refund which ought to have been credited to the Consumer Welfare Fund.

(ii) Vide letter, dated 07.02.2004, TNEB has classified that development charges are levied for the development of generation, transmission and distribution to the customers. The Tribunal has failed to consider that the RCC Poles are required to install transmission wires/cables through which the power is transmitted to the consumers. Therefore any organization will normally include the cost of all the materials used for establishing the infrastructure for transmitting the power while arriving at the charges to be collected from the consumers. Hence the expression development charges as clarified by the assessee themselves would include the cost of such infrastructure. Thus, M/s.TNEB would have normally taken into consideration of the cost of RCC poles including the duties paid on them while arriving at

the charges.

(iii) The Tribunal has failed to consider that the concept of Unjust Enrichment shall apply in the case of captively consumed goods & machinery. Hence the concept of Unjust Enrichment would be attracted in the instant case.

(iv) The Tribunal has failed to analyze the issue, as to whether, the first respondent herein, would be entitled to refund in terms of Section 11B of Central Excise Act, 1944.

(v) In terms of the scheme of this Section, the assessee would be entitled to grant of refund only if he is able to show that he had not passed on the duty burden which is claimed as refund, to the customers. In case the duty burden has been passed on to the buyers then, it would be buyer, who is entitled to claim the refund, in question. Here again, the buyer will be entitled to refund, if he has not passed on the incidence of duty to any other person. As per Section 11B of Central Excise Act, 1944 claimant of refund has to establish the fact "that the amount of duty of excise in relation to which such refund is claimed was collected from, or paid by, the assessee, and the incidence of such duty had not been passed on by him to any other person" by way of documentary or other evidence (including documents referred to in section 12A Central Excise Act, 1944). Further as per Section 12B of Central Excise Act, 1944 it has to be presumed that the assessee claimed refund has passed on the burden of duty unless the contrary is proved by them. In this case the TNEB obviously, has not proved or established that they have not passed on the duty burden to any other person either directly or indirectly as required.

(vi) Section 11B(2) is also applicable, in case of refund which arise out of the judgment decree, order or direction of the Appellate Tribunal or any court or any provisions of the Act or Rules or any other law for the time being in force in terms of Section 11B(3) as above. The order of the CESTAT, directing refund, has to be therefore, considered in the light of the above provisions.

(vii) The Tribunal has failed to consider that the issue has been settled by the Hon'ble Apex court in the case of Solar pesticides (2000(116)EL T 401 (S.C)), wherein it has been held that the concept of unjust enrichment shall apply even in the case of captively consumed inputs. The Hon'ble Supreme Court in the Case of Mafatlal Industries Limited v. UOI (1997 (89) 247 SC)) (para 91) has held that as per Section 12B, every person who has paid duty excise on

any goods shall be deemed to have passed on the full incidence of such duty to the buyer of such goods unless he proves the contrary. In as much as the respondent had failed to prove the same, they are not eligible for refund of duty paid. The theory of unjust enrichment has been propounded by the Supreme Court in large number of decided cases, viz., i) Union of India v. Jain Spinners Ltd. - 1992 (61) E.L.T. 321 = J.T. 1992 (5) Supreme Court 386 and ii) Union of India v. I.T.C. Ltd., 1993 (67) E.L.T. 3 (SC) = J.T. 1993 (4) Supreme Court 250, would suffice for the purpose of deciding this case. In the case of Jain Spinners, the Hon'ble Supreme Court held that the respondents therein are not entitled to take advantage of the order passed by the High Court on 19.02.1986, unless they succeed in showing to the statutory authorities that they had not passed on the whole or any part of the duty in question to the others. In the second case, the Hon'ble Supreme Court once again held that unless proof is furnished by a party to the effect that it has not passed on the burden of duty to other persons, a claim of refund of the duty cannot be allowed.

(viii) Section 12(B) creates a rebuttable presumption that every person who has paid excise duty had passed on the burden of the same to the buyers of such goods. The presumption has to be rebutted by the manufacturer who has paid duty. The burden of proof is on the person claiming the refund to establish that he has paid the duty but not passed on the duty to the buyer of such goods. Failure of the respondent to produce the necessary evidence establishes that the respondent has failed to rebut the presumption that it had not passed on the burden of the excise duty to any other person as envisaged by Section 12(B) of the Act.

(ix) In the following decisions, the Hon'ble Tribunal held. that "Refund not allowable if applicant has failed to plead that he had not passed on burden of duty to others" Reference can be made to (i) Union of India v. Alang Ship Breakers (P) Ltd., - 1993 (67) E.L.T. 449; (ii) Union of India v. Jain Spinners Ltd. - 1992 (61) E.L.T. 321; and (iii) Union of India v. ITC Ltd. - 1993 (67) E.L.T. 3 (SC).

(x) In the case of Toyota Kirloskar Motor Ltd. Vs. CCE., Aurangabad-II, it was held that "Assessee made no effort to produce additional materials/evidence before the Tribunal, even after remand of matter, such that evidence on record was not sufficient to show that incidence of duty was not passed on to the customers"

(xi) In the instant case, TNEB, the first

respondent herein had expressed their inability to produce the age-old documents in support of their claim while replying to the Show Cause Notice which proves that the assessee had failed to prove with documentary evidence that the incidence of duty has not been loaded either in the cost of the poles or on the cost of electricity sold. Since the RCC poles are used in connection with the distribution of electricity to various consumers, hence first respondent is not entitled for the refund.

(xii) CESTAT, Chennai, has held that doctrine of unjust enrichment applies even in the case of captive consumption and held that the revenue failed to demonstrate how the duty liability if any has been passed on to the consumer without being borne by the respondent and dismissing the department appeal is erroneous and bad in law.

Heard Mr.A.P.Srinivas, learned Senior Standing Counsel for the appellant and perused the materials available on record.

8. Before adverting to the submissions, let us have a cursory look at the provisions, relevant for the lis. Section 11B of the Central Excise Act, 1944, reads thus,

"If, on receipt of any such application the Assistant 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 under the foregoing provisions of this subsection shall, instead of being credited to the Fund, be paid to the applicant, if such amount is relatable to -

(i) 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;

(ii) Unspent advance deposits lying in balance in the applicant's account current maintained with the Commissioner of Central Excise;

(iii) 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;

(iv) Duty of excise paid by the manufacturer, if he had not passed on the incidence of such duty to any other person;

(v) The duty of excise borne by the buyer, if he had not passed on the incidence of such duty to any other person;

(vi) The duty of excise borne by any other such class of applicants as the Central Government may, by notification in the Official Gazette, specify:"

9. As per Section 12(B) of the Central Excise Act, 1944, every person, who has paid the duty of excise on any goods under this Act shall, unless the contrary is proved by him, be deemed to have passed on the full incidence of such duty to the buyer of such goods.

10. The term "manufacture" refers to a process involving the conversion of an input into a completely different output. As per section 2(f) of Central Excise Act, 1944 (CEA), manufacture includes any process,

(i) Incidental or ancillary to the completion of a manufactured product; and

(ii) Which is specified in relation to any goods in the section or chapter notes of the 1st Schedule to the Central Excise Tariff Act, 1985 (CETA), as amounting to manufacture (deemed manufacture); or

(iii) Which in relation to goods specified in 3rd Schedule of CETA involves packing or repacking of such goods in a unit container or labeling or re-labeling of containers including declaration or alteration of retail sale price on it or adoption of any other treatment on the goods to render the product marketable to the consumer (deemed manufacture).

11. In a decision in TNEB, Superintending Engineer v. CCE Trichy reported in 1999 (106) ELT 499 (Tri.), CESTAT, Madras, had made the following observations,

"6. On a careful consideration of the submission, we notice that the appellants had come up in a large number of appeals against the orders passed by the lower authorities holding them as manufacturers. The Tribunal in the noted orders examined the terms of contract and hold that the appellants are not the manufacturers but the real manufacturer is the contractor and on that ground allowed all their appeals and dismissed the Commissioners appeal in Appeal No. E/1245/95. Therefore it follows that the duties paid by them on protest is required to be refunded in terms of the refund claim filed by them. The refund claims were rejected solely on the ground that they are the manufacturers and not the contractors and duty had been rightly demanded and collected from them. As the Tribunal has not categorically held that they are not the manufacturers, therefore the duty paid by them is required to be refunded and further question of unjust

enrichment also does not arise in this case. In that view of the matter, following the ratio of the cited judgments in the appellants' own case, we allow the appeals with consequential reliefs."

12. There are no materials before us to indicate, as to whether, the revenue has challenged the above decision of the Tribunal. However, the dispute in the case on hand, is that M/s.TNEB has not produced sufficient reliable/required documents to the Deputy Commissioner of Central Excise, to prove that the amounts claimed by them, have been discharged and paid towards duty on RCC poles, during the relevant period. After verifying the documents, viz., PLA Register, TR6 Challans and RG23A Part I and 2 and copies of the invoices raised by Contractors (Yardwise), the Adjudicating Authority, viz., Assistant Commissioner, Hosur I Division, Hosur, vide Order-in-Original No.49 of 2003, dated 31.07.2003, has sanctioned refund amount of Rs.17,74,300/-.

13. Refund claim has been made by TNEB that the Board has paid duty on RCC poles, not manufactured by the Board. The adjudicating authority, vide Order-in-Original No.49 of 2003, dated 31.07.2003, held in favour of the assessee. Let us consider, as to how, the adjudicating authority considered the submission of the revenue,

"In accordance with the principles of natural justice a personal hearing was conducted on 22.10.2001. Smt.G.Rajalakshmi, Assistant Executive Engineer (Civil), who attended the personal hearing made a written submission that they have produced the original records for all the RCC Yards at the time filing of original claims and the details of contractors who manufactured the RCC poles could not be collected since the details were pertaining to the period from 1986-87 and requested for refund of the duty paid under protest on the basis of available records.

Another personal hearing was granted to M/s TNEB on 06.05.02. Smt.G.Rajalakshmi, Asst. Executive Engineer (Civil), TNEB Dharmapuri attended the personal hearing and reiterated the same points and difficulties in producing the age-old documents in support of their claim as mentioned in their reply to the show cause notice. Further they stated that they had already submitted documents pertaining to 3 years which had been retrieved with lot of sustained efforts and requested for further period of one month to search and submit relevant documents for the remaining yards and requested to keep the issue alive till such time.

The Superintending Engineer, DEDC, Dharmapuri in his letter dated 12.11.02 has certified that M/s TNEB, is not the real manufacturer of RCC / PSC poles and the contractors alone are the real manufacturers; that they have not passed the incidence of duty to the consumers; that the refund of excise duty paid under protest was not hit by the bar of unjust enrichment and requested for sanction of the refund of excise duty paid under protest in respect of 7 yards at an early date for which they have produced records.

Because of Re-organisation of the department, Dharmapuri Range was transferred to Salem II Division with effect from 01.11.2002. The RCC Yards falling under the jurisdiction of Dharmapuri Range is not under the control of Salem II Division. Hence, the adjudication of show cause notice is not being restricted to the three RCC Yards viz. Hosur, Krishnagiri and Bargur falling under the jurisdiction of this division. Meantime since there was a change in the adjudicating authority and as I have taken charge as Assistant Commissioner, Hosur I Division, I granted a personal hearing to M/s TNEB on 9.01.03. Smt.G.Rajalakshmi, Asst. Executive Engineer who attended the personal hearing requested for another Personal Hearing. The next hearing was held on 23.01.03. Smt.G.Rajalakshmi, Asst, Executive Engineer (Civil) attended the personal hearing on the said date and submitted a statement dated 21.01.03 giving a list of documents pertaining to Hosur and Bargur and requested for granting refund based on these documents.

M/s TNEB in their final reply dated 27.01.03 submitted that they have produced the related documents for the refund of central excise duty paid under protest for RCC poles manufactured at Krishnagiri, Hosur and Hargur yards falling under the jurisdiction of this division; that as the refund claims are related to very old periods, the PLA registers pertaining to whole period are not available; that the duty paid under protest by TNEB in TR 6 challans is almost to the extent of duty discharged on poles cleared; that they have produced all TR 6 Challans (either original or Xerox copies). They also add that they have enclosed copies of Pass order Register maintained at their Accounts Section in their Central Officer as well as in TNEB, Dharmapuri Circle as corroboratory evidences; that they have produced all originals documents while filing the refund claims originally from time to time.

I have gone through the show cause notice replies to the show cause notice, records available on file and relevant case laws. I find that this refund claim is based on the final order of CEGAT, New Delhi in the case of Superintending Engineering Dharmapuri Vs. Collector of Central Excise (Appeals) Madras, No.579/96 O dated 8.10.96 wherein it was held that the contractor was the manufacturer of RCC poles and not M/s TNEB.

M/s TNEB was asked to produce (a) PLA register (b) 23 A Part I and Part II registers (c) Yard wise value of RCC poles manufactured - Contractor wise (d) Copies of invoices (Yard wise) raised by contractors for supply of poles to TNEB. M/s TNEB have not been able to produce the above said documents in full. M/s TNEB have not produced the register from 1986 onwards in r/o Krishnagiri Yard, from April 91 to March 95 with regard to Hosur Yard and from April 93 to March 2000 in respect of Bargur Yard. Hence it is seen that they have not been able to produce the PLA registers in full for the relevant period except for Krishnagiri. In respect of RC 23 A Part I and Part II registers, they have produced the registers from 92 to 95 in respect of Krishnagiri and Bargur Yards and from April 91 to March 95 with respect to Hosur Yard. I have gone through the documents produced by M/s TNEB only in respect of three RCC yards falling under my jurisdiction. I am now discussing usefulness of the following documents with respect to sanction of refund.

PLA REGISTER:

I find that as per CEGAT decision M/s TNEB are not the real manufacturers and only the contractors are the manufacturers. They are eligible for the refund of all the debits in their PLA and the balance available in their credit. I find that the sum total of all the amounts paid vide TR 6 challans under accounting head 038 will be equal to the sum total of the debits and balance in their PLA.

RG 23 A PART I & II

M/s TNEB have availed modvat credit and utilised the same for payment of duty. Now since M/s TNEB are not the real manufacturers and they are not required to pay the duty, hence the question of refund of credit available in their RG 23 A does not arise. I find RG 23 Part I & II is not related to this issue of refund. **VALUE OF RCC ROLES MANUFACTURED (YARD WISE- CONTRACTOR WISE)**

I find this irrelevant to the issue of refund in as much as the refund pertains to the amounts deposited towards duty by M/s TNEB and the same is

available in the TR 6 challans under the accounting head 038.

COPIES OF INVOICES RAISED BY CONTRACTORS (YARD WISE)

I find this irrelevant to the issue of refund in as much as the refund pertains to the amounts deposited towards duty by M/s TNEB and the same is available in the TR 6 challans under the accounting head 038.

I find that the TR 6 challans are the basic documents evidencing payment to the government account. I find that M/s TNEB have credited in the TR6 Challans, the amounts under accounting head 038, which is the accounting head for excise duty. I am taking the TR 6 Challans as the document for granting refund in as much as TNEB are not the real manufacturer and it has been held that no duty is due from them."

14. The Department has preferred an appeal against the abovesaid decision, before the Commissioner (Appeal), on the ground of unjust enrichment. After considering various decisions and by observing that the poles are the property of TNEB, and not sold to any other person, the Commissioner of Central Excise (Appeals), held that TNEB is not a manufacturer of RCC poles, and that there is no question of unjust enrichment, when the poles were cleared for their own use. However, the appellate authority held that TNEB would be entitled to refund of duty paid through Personal Ledger Account only, and no refund can be given, in respect of duty paid, through Modvat Account, as TNEB is not the manufacturer.

15. Aggrieved by the same, the Commissioner of Central Excise has filed an appeal before Appellate Tribunal, on the ground that the 1st respondent-TNEB had unjustly enriched. To support the same, Revenue has placed reliance on a decision in Union of India v. Solar Pesticide Pvt. Ltd., reported in 2000 (116) ELT 401 (SC). CESTAT, Madras. After considering the decision in Solar Pesticide's case (cited supra), the Tribunal, vide Final Order No.40985/2014, dated 16.12.2014, held as follows:

"There is no difference to the citation of Revenue in the case of Union of India v. Solar Pesticide Pvt. Ltd., 2000 (116) ELT 401 (SC), wherein the Apex Court has held that doctrine of unjust enrichment applies even in the case of captive consumption. But Revenue has failed to demonstrate how the duty liability if any has been passed on to the consumer without being borne by the respondent. Therefore, the Revenue's appeal fails for no evidence on record."

16. Question of payment of duty arises, if there is any manufacturing activity and clearance from factory site. As stated supra, Order-in-Original No.51 of 1999, dated 01.02.1999, holding TNEB as not a manufacturer, has not been challenged and it has reached finality. Question, as to whether, incidence of duty, paid by TNEB, has been passed on to the customers, arises if only there is any transaction to that effect. TNEB is not a manufacturer of RCC poles and the same have been used by them. When the Revenue has not produced any evidence to prove that there was any customer, who had purchased RCC poles from TNEB, we fail to understand, as to how, the theory of unjust enrichment, can be applied to the case on hand.

17. Decisions relied on by Mr.A.P.Srinivas, learned counsel for the appellant and the provisions quoted, can be made applicable, only to a manufacturer and if only the revenue, with credible evidence, substantiate the contention that incidence of duty, has been passed on to the customers. In the case on hand, no customer is involved. That is why, the adjudicating authority, in Order-in-Original No.49 of 2003, dated 31.07.2003, ordered refund of the duty paid and that the appellate authority, viz., the Commissioner (Appeals), on appeal by the Revenue, has categorically held that it was beyond the scope of the show cause notice.

18. Issue, as to whether, TNEB was a manufacturer of RCC poles and whether there was any transaction with a customer, on facts, have been concurrently held against the revenue. On the material on record, findings of fact, by the appellate authority and the Tribunal, cannot be considered as perverse. As rightly observed by the appellate authority, vide Order-in-Appeal No.19/03(M)-III, dated 23.12.2003, the adjudicating authority has travelled beyond the scope of show cause notice.

19. In the light of the above discussion, we are of the view that the appellant has not made out a case, for interference. Substantial questions of law are answered in the negative, as against the revenue.

20. Hence, the Civil Miscellaneous Appeal is dismissed. No costs.

s/d-
Assistant Registrar(CS VIII)

True Copy

Sub-Assistant Registrar

skm

To

1. The Customs, Excise & Service
Tax Appellate Tribunal,
No.26, Shastri Bhavan Annexe Building,
Haddows Road, Chennai 600 006.
2. The Superintending Engineer,
Tamil Nadu Electricity Board,
Electricity Distribution Circle,
Dharmapuri-5.
3. The Commissioner of Central Excise
Chennai III Commissionerate
Chennai

+1 CC to Mr.V. Viswanathan, Advocate sr 71054.

C.M.A.No.2715 of 2015

SAI (CO)
SP(13/03/2018)



WEB COPY