

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 21.04.2017

DELIVERED ON : 06.06.2017

CORAM

THE HONOURABLE MR.JUSTICE RAJIV SHAKDHER

AND

THE HONOURABLE MR.JUSTICE R.SURESH KUMAR

Civil Miscellaneous Appeal No.3430 of 2011

Commissioner of Central Excise,
Chennai III Commissionerate,
121, Uthamar Gandhi Salai,
Nungambakkam,
Chennai - 34.

... Appellant

Vs

1.M/s.National Plywood Industries Limited,
No.215/2, Hosur - Thally Road,
Kalukondapally - 635 114,
Krishnagiri District.

2.Customs, Excise & Service Tax
Appellate Tribunal,

South Zonal Bench, Ist Floor,
Shastri Bhavan Annexe,
26, Haddows Road, Chennai 600 006.

... Respondent

Prayer : Appeal filed under Section 35G of the Central Excise Act, 1944 against the order dated 22.06.2010 made in Final Order No.678 of 2010 on the file of the Customs, Excise and Service Tax Appellate Tribunal and against the Order of the Commissioner of Central Excise (Appeals), Chennai 34, made in Appeal No.10 of 2007 on (III)(D) dated 31.10.2007, against the Order of the Deputy Commissioner of Central Excise, Hosur, I Division, made in C.No.V/18/50/2004- Refund Order dated 29.08.2007.

For Appellant : Mr.A.P.Srinivas

For Respondent : Mr.R.Parthiban

J U D G M E N T

(Judgment of the Court was delivered by RAJIV SHAKDHER,J.)

Background Facts:

1. This appeal, filed by the Revenue against the order of the Customs, Excise and Service Tax Appellate Tribunal (in short, Tribunal), was admitted, on 08.02.2012, when the following substantial questions of law were framed for consideration by this Court:

(i). Whether the Tribunal was justified in setting aside the impugned order of the Commissioner Appeals without dealing with the non-obstante Sec.11B read with Section 12 of Central Excise Act, 1944 that adjustment of short paid against the (sic) excise duty has to be given after considering these statutory provisions?

(ii). Whether the (sic) Tribunal was correct in not considering the amended provisions of CEA 1944 which mandates that refund in the Provisional Assessment has to be sanctioned only after considering the principle of unjust enrichment and the (sic) Tribunal also in not considering the judgment of Bombay High Court in CCE, Mumbai-II Vs. Standard Drum & Barrel Mfg.Co. reported in 2006 (199) ELT 590 (Bom)?

(iii) Whether the Tribunal was correct in deciding the case when the decision of two cases relied upon by it has not reached its finality which are appealed by the department in higher forum?

2. In order to adjudicate upon the questions of law framed, one would require to broadly notice the following facts, which have arisen in the case.

2.1. The 1st respondent herein, i.e., the Assessee, apparently, is in the business of manufacturing paper based decorative laminated boards, falling under TSH 3920.37 of the Central Excise Tariff Act, 1985 (in short, CETA). The Assessee, it appears, cleared goods from depots, located in Bangalore, Chennai and Delhi. The record shows that the goods, which were cleared by the Assessee from various depots were not evenly priced. In so far as some depots were concerned, the price was higher, as compared to the others. It was, on account of this reason, that the Assessee had opted for provisional assessment, for the years, 2000-2001, 2001-02 and 2002-03. Accordingly, provisional assessment was made, followed by a final assessment, after the Assessee was able to determine the exact selling price of its goods.

2.2. The final assessment order was passed on 30.12.2003. By virtue of this order, the concerned Authority held that the

Assessee could claim a refund of Rs.1,90,838/- and furthermore, would be required to pay a sum of Rs.2,22,338/-, on account of differential duty in respect of the goods cleared at a higher value.

2.3. Given this background, the Assessee, on 30.4.2004, filed refund claims, in all amounting to Rs.1,71,691/-, pertaining to the aforementioned three (3) years, spanning between 2000-2001 and 2002-03. The breakup of the refund claims, which totalled, as indicated above, to a sum of Rs.1,71,691/- is as follows: Rs.95,703/- (2000-2001); Rs.72,694/- (2001-2002) and Rs.3,294/- (2002-2003).

2.4. It is pertinent to note that the refund claim had been lodged by the Assessee based on credit notes issued to its customers.

2.5. Continuing with the narrative, the refund claims of the Assessee were processed by the concerned authority and thereupon, an order dated 29.08.2007 was passed. Via this order, the concerned authority sanctioned the refund amount claimed by the Assessee, i.e., a sum of Rs.1,71,691/-, and also, confirmed the demand raised in the sum of Rs.2,22,338/-. In the operative part, the concerned authority squared off the refund against the duty demand and, accordingly, called upon the Assessee to pay the balance sum of Rs.50,647/- along with interest calculated on Rs.2,22,338/-. The Assessee was directed to pay interest for the period, commencing from 01.01.2004 till the date of payment.

2.6. Pursuant to the aforementioned order being passed, two events transpired. First, a show cause notice dated 29.10.2007 was served on the Assessee with regard to the claim of refund, amounting to Rs.1,71,691/-. By this notice, the Assessee was called upon to show cause as to why the refund of Rs.1,71,691/-, erroneously sanctioned to it, ought not to be recovered under Section 11A of the Central Excise Act, 1944 (in short 'the 1944 Act'), along with interest, under Section 11AB of the very same Act.

2.7. The other event, which transpired was that the Revenue filed an appeal against the order-in-original dated 29.08.2007, whereby, a refund, in the sum of Rs.1,71,691/- was sanctioned and, a sum of Rs.2,22,338/- was directed to be paid by the Assessee.

2.8. As indicated herein above, these amounts were squared off. The operative direction issued, as alluded to above, was for payment of Rs.50,647/- with interest, calculated on Rs.2,22,338/-.

3. In the appeal, the Commissioner (Appeals), returned the following findings of fact:

".....It is apparent there from that the order for finalization of provisional assessment for the year 2000-01, 2001-02 and 2002-03 in C.No.V/17/39/2001-VI

dated 30.12.2003 has been accepted by the Department and attained finality as otherwise there would have been a mention as such of such a fact. It was determined there under as related in the impugned order that Rs.222338/- has to be paid by the appellant on account of higher price adopted at the Department and Rs.171691/- has to be refunded to him on account of lower price adopted at the Depot. Revenue is aggrieved on two counts. 1) In the impugned order, the LAA has taken a view that there is no unjust enrichment thanks to raising of credit notes by the appellant. It is a fact on record that the appellant has sold the goods from the Depot at a price, lower than the one adopted at factory.

A question arises as to how a higher burden of tax on a higher value at the factory would have been passed on to a buyer at the Depot when such a buyer has bought the goods at a lower value attracting proportionately lower tax. In the other words, the appellant could not have collected any amount of duty disproportionate to the value at which he has sold the goods to the buyer at the depot. The debit notes raised now seek to pass on the extra duty collected from the buyers, when there could have been no such extra duty collected on a lower value.

The case Law cited above is squarely applicable to the issue in hand.

Yet another question arises here:- There is no proof adduced by the respondent that he is maintaining stock wise and item wise accounts in the Depots of receipts from the factory and dispatch of customers, in such a way that each item and each lot is relatable to a buyer. Unless this correlational account is maintained, in a verifiable manner, it cannot be said that the actual buyer has received the duty refundable. The credit notes were raised but there is no certification or verifiable evidence produced by the respondent that the credit notes were so raised on the specific rightful buyer of a specific item cleared from the factory. In the absence of the same it cannot in fairness be held that the respondent is entitled for refund at all. Such entitlement entails question of unjust enrichment. Here, even the very entitlement is at stake. Hence he is not entitled to or eligible at all for refund, as seen from the records available in the appeal paper....."

3.1. Based on the above-said, the Commissioner (Appeals) directed that the adjustment directed via the Order-in-Original of the refund amount, equivalent to Rs.1,71,691/-, against the duty payable by the Assessee, which was quantified as

Rs.2,22,338/-, was not proper. Accordingly, this direction contained in the Order-in-Original was set aside.

3.2. Furthermore, it was held that the Assessee would be liable for payment of interest under Section 11AB of the Act on the demanded amount of duty, i.e., Rs.2,22,338/-. In addition thereto, a direction was issued that a sum of Rs.1,71,691/- should be credited to the Consumer Welfare Fund. This direction was pivoted on the rationale that the Assessee was unable to establish that the duty qua which refund was claimed had not been passed on to the ultimate customer.

4. It is, in this background, that the Assessee preferred an appeal with the Tribunal. The Tribunal, via the impugned judgment and order, which is rather cryptic, reversed the order of the Commissioner (Appeals).

4.1. The reversal was carried out by the Tribunal, on two (2) grounds: first, that upon finalisation of the provisional assessment, the excise duty paid is to be adjusted against duty short paid and, thereafter, based on the difference, it has to be determined whether any amount is to be refunded or not to the Assessee. Second, that the refund claim made by the Assessee was admissible, as the burden of duty, had not been passed on by it to its customers. This latter conclusion, the Tribunal reached, based on the fact that the Assessee had issued credit notes, albeit, after the incidence of duty had been passed on to the customer. In this behalf, the Tribunal relied wholly upon the judgment of the Rajasthan High Court in the matter of: Union of India V. A.K.Spintex, 2009 (234) ELT 41 (Raj.)

4.2. It is, in these circumstances, that the Revenue has approached this Court, by way of the instant appeal.

Submissions of Counsels:

5. Arguments, on behalf of the Revenue, in support of the appeal, have been advanced by Mr.A.P.Srinivas, while, on behalf of the Assessee, submissions have been advanced by Mr.R.Parthiban.

6. Mr.A.P.Srinivas, largely relied upon the order passed by the Commissioner (Appeals). Furthermore, in support of his submissions, Mr.Srinivas, relied upon the following judgments:

(i) Commissioner of Central Excise, Madras V. Addison & Co. Ltd. 2016 (339) E.L.T.177 (S.C.)

(ii) Hindustan Petroleum Corpn. Ltd. V. Commr. of Cus. (Import), Mumbai 2013 (291) E.L.T. 230 (Tri-Mumbai)

(iii) Toyota Kirloskar Auto Parts Pvt. Ltd. V. C.C.E., LTU, Bangalore 2012 (276) E.L.T. 332 (Kar.)

(iv) Commissioner of Central Excise & Customs V. Dutron Plastics 2015 (322) E.L.T. 267 (Guj.)

(v) Sri Raja Vinayagar Mills V. CESTAT, Chennai 2015 (325) E.L.T. 488 (Mad.)

(vi) Judgment dated 26.10.2016, passed in C.M.A.No.3742 of 2011 titled: M/s.TVS Electronics Ltd. V. The Assistant Commissioner of Central Excise and two others.

7. On the other hand, Mr.R.Parthiban, relied upon the Tribunal's judgment and order, and particularly, the judgment of the Rajasthan High Court in the matter of: Union of India V. A.K.Spintex, 2009 (234) ELT 41 (Raj.).

Reasons:

8. Having heard the learned counsel for the parties and perused the record, what has come to fore, is as follows:

i) That the Assessee had been clearing goods at different values from various Depots, located in different cities.

ii) On account of the Assessee not knowing the final price of the goods, it opted for Provisional assessment of goods.

iii) Upon final assessment being made vide order dated 30.12.2003, the Assessee was accorded refund, in the sum of Rs.1,90,838/- and directed to pay differential duty qua clearances made from Depots, where higher value had been adopted by the Assessee.

iv) The Assessee, accordingly, filed three (3) claims for refund, amounting in all, to the sum of Rs.1,71,691/-.

v) The Adjudicating Authority vide order dated 29.08.2007 sanctioned the refund amount in the sum of Rs.1,71,691/-, and also, directed the Assessee to pay a sum of Rs.2,22,338/-.

vi) These amounts were squared off against each other and, therefore, the operative direction issued to the Assessee was to pay a sum of Rs.50,647/- with interest. Interest was calculated on Rs.2,22,338/- . Interest was required to run between 01.01.2004 and the date of payment.

8.1. In so far as the refund sanctioned in favour of the Assessee, a show cause notice was issued on 29.10.2007 by the Assistant Commissioner, Hosur, 1st Division. This show cause notice was predicated on the fact that since, refund had been filed after credit notes were issued to the customer on 28.01.2005, it could not be established that duty had not been passed on to the customers.

8.2. In this behalf, provisions of Section 11AB of the 1944 Act were relied upon by the Revenue. In addition to the above, the Revenue preferred an appeal with the Commissioner (Appeals), who vide order dated 27.07.2009 reversed the order dated 29.08.2007.

8.3. The Tribunal, however, by way of impugned judgment and order reversed the aforementioned order of the Commissioner (Appeals).

8.4. As noticed above by us, the Commissioner (Appeals) has returned a finding of fact that the Assessee was not maintaining stock wise and item wise accounts in the Depots qua goods received from the factory and their onward dispatch to the

customers. In other words, no correlation could be made between the credit notes issued and the goods dispatched to the customers.

8.5. The Tribunal, on the other hand, has noted qua this aspect two points: first, that credit notes were issued after the incidence of duty had been passed on to the customer. Second, that this methodology of reversing the impact of customs duty was permissible, in view of the judgment of the Rajasthan High Court in the matter of Union of India V. A.K.Spintex, 2009 (234) ELT 41 (Raj.).

8.6. In so far as the Assessee generally, claiming refund on the basis of credit notes qua trade discounts is concerned, the Supreme Court in the judgment rendered in Commissioner of Central Excise, Madras V. Addison & Co. Ltd. [2016] 10 SCC 56, has accepted the said methodology.

8.7. As a matter of fact, in that behalf, the Supreme Court relied upon its earlier judgments in the matter of Addison & Co. Ltd. V. CCE (1997) 5 SCC 763 and UOI V. Bombay Tyres International (P) Ltd. (2005) 3 SCC 787, (see observation made in paragraph 15 at page 65). The Court observed the fact that trade discount shall not be disallowed only because it was not payable each time an invoice was raised or even where it was not deducted from invoice price.

8.8. That being said as to whether the methodology of credit notes would be countenanced to revise the final price payable by the customer does not appear to have been ruled upon by the Supreme Court in the aforementioned judgment.

9. In the facts of this case, reliance was placed by the Assessee on the credit notes, apparently, to demonstrate that the burden of duty had not been passed on to the customer.

10. In the matter of Union of India V. A.K.Spintex, 2009 (234) ELT 41 (Raj.), the Rajasthan High Court had accepted the similar arguments advanced on behalf of the Assessee by holding that the burden placed on the Assessee under Section 12B of the 1944 Act, raised a statutory presumption, which was rebuttable and that, once, an Assessee placed on record reliable evidence to the effect, that the burden of duty had not been passed on to the purchaser and the Revenue failed to counter the same, the statutory presumption, raised under Section 12B against the Assessee, would stand sufficiently rebutted.

10.1. It appears that the judgment of the Rajasthan High Court in the matter of: Union of India V. A.K.Spintex, 2009 (234) ELT 41 (Raj.) was carried in appeal by the Revenue to the Supreme Court. The Supreme Court, while hearing a batch of appeals, which included the appeal in the matter of: Commissioner of Central Excise, Madras V. Addison & Co. Ltd. [2016] 10 SCC 56, to which we have made a reference above,

reversed the judgment of the Rajasthan High Court [See paragraph Nos.3, 34, 37 and 40].

10.2. We may only note, that in paragraph 3, a typographical error seems to have crept in, wherein, the cause title of the Rajasthan High Court judgment is shown as A.K.Spintex V. Union of India, whereas, it ought to be the other way round. Notably, the same judgment of the Supreme Court, i.e., Commissioner of Central Excise, Madras V. Addison & Co. Ltd. [2016] 10 SCC 56, as reported in the ELT, adverts to the correct cause title of the judgment, passed by the Rajasthan High Court, i.e., Union of India V. A.K.Spintex. As indicated above, the judgment of the Rajasthan High Court has been reversed, which was numbered as S.L.P.(C) No.25055 of 2009. In the operative part, in paragraph 40 of the judgment reported in the SCC, the Union of India's appeal has been allowed.

11. Therefore, quite clearly, the basis of the judgment of the Tribunal does not hold good any longer. The Supreme Court having reversed the judgment of the Division Bench of the Rajasthan High Court in Union of India V. A.K.Spintex, 2009 (234) ELT 41 (Raj.), the sanction of refund to the Assessee cannot be sustained.

12. At this juncture, we must also advert to the fact that the Supreme Court came to the conclusion that it was incumbent upon the Assessee to demonstrate, as contemplated under Section 11B of the 1944 Act that the amount of duty of excise, in relation to which, refund was claimed, had not been passed on by him to any other person. The Court, while enunciating the principle, noticed the provisions of Section 11B(2) of the very same Act and held that in terms of the said Section, the refund claimed has to be ordinarily, credited in the first instance to the Consumer Welfare Fund (in short 'Fund') and furthermore, in terms of the proviso to the said Section, i.e., Section 11B(2), the amount of duty, which is refundable, could be paid to the "applicant", instead of being credited to a Fund, if, the amount qua which refund is sought is relatable to duty paid by the manufacturer and, the manufacturer, in turn, is able to demonstrate that the incidence of such duty had not been passed on to any other person.

12.1. Furthermore, the Court also noticed that clause (e) appended to the proviso to Section 11B(2), which enabled even the customer or buyer to seek refund - could claim refund, provided one was able to demonstrate that the incidence of duty had not been passed on to any other person. Similarly, a third category, that is, a class of applicant, who could claim refund was also noticed. These are applicants referred to in clause (f) to the proviso appended to Section 11B(2). This class of applicants, in terms of the said clause, would emerge as claimants of the refund, only upon the Central Government

issuing the notification in that behalf, in the official gazette. Pertinently, though, Central Government's, mandate in that behalf is circumscribed to the extent that it cannot issue such a notification, unless it forms an opinion that the applicants, so notified had not passed on the duty to any other person. [see paragraph 21 to 24 at pages 70 to 73 of the judgment Commissioner of Central Excise, Madras V. Addison & Co. Ltd. [2016] 10 SCC 56].

12.2. Clearly, the Supreme Court recognises that no refund can be claimed, unless the Assessee satisfies the conditions set forth in Section 11B of the 1944 Act.

13. The Assessee, in this case is a manufacturer, had to necessarily demonstrate that the burden of duty had not been passed on to the ultimate customer.

13.1. As noted herein above, the finding of fact, returned by the Commissioner, was to the contrary. The Assessee, clearly, has not discharged its burden, as set forth in Section 11B. The Tribunal, without noticing this factual finding, applied the judgment of the Division Bench of the Rajasthan High Court, which, as noticed above, has been reversed by the Supreme Court.

13.2. Thus, once, the sanction of refund is reversed, there can be no squaring off. The sum of Rs.1,71,691/- cannot be adjusted against the duty payable by the Assessee, which is quantified at Rs.2,22,338/-.

14. Accordingly, the order of the Commissioner (Appeals) is sustained and the judgment of the Tribunal is reversed, as indicated above.

14.1. Consequently, question Nos.1 and 2 are answered in favour of the Revenue and against the Assessee. The reference to the judgment of the Bombay High court in question No.2 need not detain us, as the position in law stands clarified by virtue of the judgment of the Supreme Court rendered in: Commissioner of Central Excise, Madras V. Addison & Co. Ltd. [2016] 10 SCC 56.

14.2. For the reasons given above, question No.3, in our view, does not need to be answered, as the answers to question Nos.1 and 2 would suffice for the disposal of the appeal.

15. Resultantly, the Civil Miscellaneous Appeal stand allowed. However, there will be no order as to costs.

Sd/-
Assistant Registrar(CS VIII)

//True Copy//

Sub Assistant Registrar

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To

1. Customs, Excise & Service Tax
Appellate Tribunal,
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2. The Commissioner of Central Excise,
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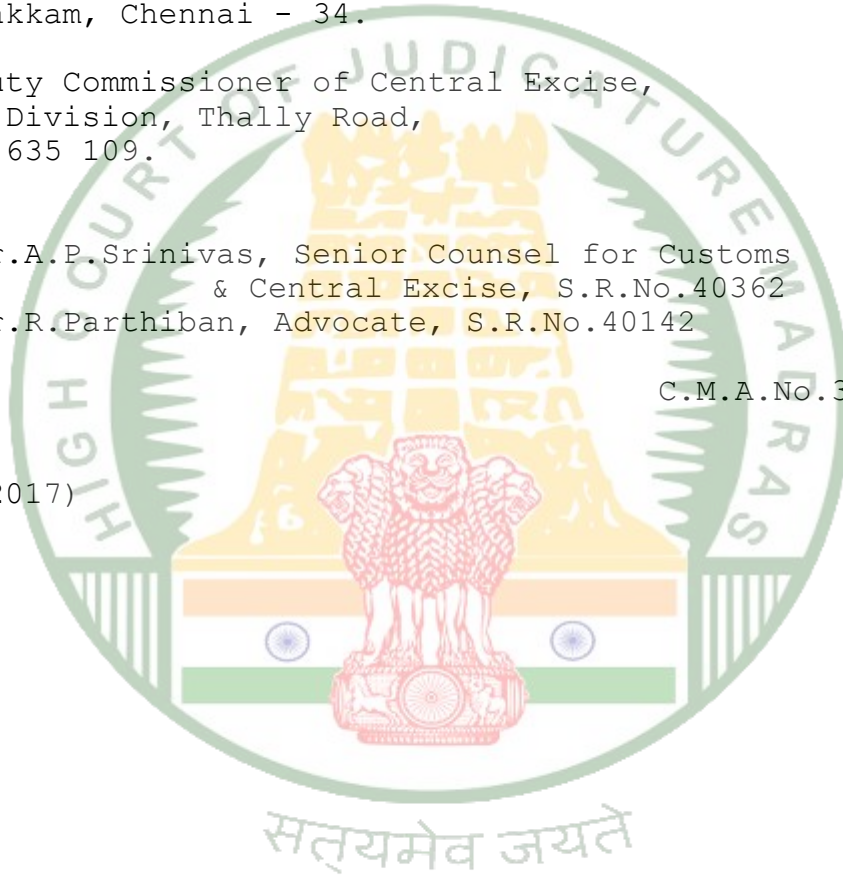
3. The Deputy Commissioner of Central Excise,
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+1cc to Mr. A.P. Srinivas, Senior Counsel for Customs
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+1cc to Mr. R. Parthiban, Advocate, S.R.No.40142

C.M.A.No.3430 of 2011

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