

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED :: 11-08-2017

CORAM

THE HONOURABLE MR.JUSTICE NOOTY.RAMAMOHANA RAO

AND

THE HONOURABLE MR.JUSTICE T.RAJA

C.M.A.Nos.3128 of 2010 & 765 of 2011

The Commissioner of Central Excise,
Coimbatore.

Appellant in both appeals

-vs-

M/s.EL.P.EM Industries
P.B.No.1053, No.409, (Old No.1058),
Mettupalayam Road,
Coimbatore-641102.

Respondent in both appeals

C.M.A.No.3128 of 2010 is filed against the Final Order No.548 of 2010, dated 15.04.2010, on the file of Customs, Excise and Service Tax Appellate Tribunal, Chennai and appeal against the order of the Commissioner of Customs, Central Excise & Service Tax(Appeals), Coimbatore A.No.37/2008-CE/1049/82/2008-CE dt.13/6/2008 and appeal against the order of the Assistant Commissioner of Central Excise, Coimbatore-I Division, Coimbatore(Refund) in C.No.IV/16/14/2006-RF Sl.No.14/2008 dated 27/2/2008 and as against the show cause notice of the Deputy Commissioner of Customs & Central Excise, Coimbatore-I Division, Coimbatore in C.No.IV/16/14/2006(Refund) dt.12.9.2006.

C.M.A.No.765 of 2011 is filed against the Final Order No.757 of 2010, dated 09.07.2010, on the file of Customs, Excise and Service Tax Appellate Tribunal, Chennai and appeal against the order of the Commissioner of Customs, Central Excise & Service Tax(Appeals), Coimbatore in A.No.47/2008-CEx/96/2008-CE dt.29/9/2008 and appeal against the order of the Assistant Commissioner of Central Excise, Coimbatore-I Division, Coimbatore in C.No.IV/10/114/2006-RE Sl.No.16/2008(Refund) dt.20/3/2008 and appeal against the show cause notice of the Deputy Commissioner of Customs & Central Excise, Coimbatore-I Division Coimbatore in C.NO.IV/10/114/2006- 14 dt.20/11/2006.

For appellant : Mr.A.P.Srinivas

For respondent: Ms.D.Naveena

COMMON JUDGMENT

Nooy.Ramamohana Rao, J.

Both these appeals are directed against the orders passed by Customs, Excise and Service Tax Appellate Tribunal, Chennai, and since the assessee is one and the same in both the cases and the issue raised is also substantially the same, they are heard together and being disposed of by this common judgment.

2. The case of the appellant is that the respondent herein, namely, M/s.EL.P.EM. Industries are manufacturers of power driven pumps (Mono Block Pump Sets) falling under Tariff Item 30A of the earlier schedule to the Central Excise Act, 1944. The mono block pump set is an integrated version of motor and pump. The motor is the driving mechanism in the mono block in which the stators and rotors constitute the essential parts. The stators and rotors were manufactured by the assessee and are captively used in the manufacture of mono bloc pumps. The assessee claimed these stators and rotors as parts of mono bloc pump sets which were exempted under Tariff Item 68 as per Notification No.73/68.

3. The further case of the appellant is that the department denied exemption and took a stand that the rotors and stators are parts of motor falling under Tariff Item 30-D and should suffer duty before they were captively used in the manufacture of mono bloc pumps. The Range Officer, I-C Range, Coimbatore, vide letter dt.12.03.1981, informed the assessee that the exemption under notification no.73/68 was not available for them and required them to file price list under Part VI (b) with cost construction certificate. This letter was challenged before this Court in W.P.No.10072 of 1981 and the operation of the letter was stayed by order, dated 20.10.1981. However, this Court, by order, dated 12.07.1982, dismissed the petition as premature and directed to secure proper adjudication from the competent authorities in the matter of classification of stator and rotor.

4. It is also the case of the appellant that the assessee filed a classification list on 26.07.1982 claiming classification of stators and rotors under TI-68 and also claimed exemption under notification No.118/75. The Assistant Commissioner of Central Excise, Coimbatore-I Division, vide

order C.NO.V/30/30/106/82 (VC), dated 13.08.1982, rejected their claim and directed the said items to be classified under TI.30-D and duty be paid accordingly. Aggrieved by this order, the assessee preferred W.P.No.7505 of 1982. This Court stayed the operation of the above order vide its order, dated 20.09.1982, and directed the petitioner to pay the duty 'under protest'. Complying with the order, the assessee started paying duty under protest. This Court finally dismissed W.P.No.7505 of 1982 on the ground that the petitioner had not exhausted the alternative remedies available under the Act with regard to the classification matter. In view of this, the assessee preferred an appeal with Collector (Appeals), Madras, against the OIO, dated 13.08.1982. The Collector of Central Excise (Appeals) vide OIA Nos.32 to 42/90 (CBE), dated 06.03.1990, upheld the order of the lower authority. In the meantime, the Range Officer issued a Show Cause Notice, dated 04.10.1990, proposing to demand duty of Rs.42,92,497/- on 22,535 nos. of stators and rotors manufactured and used captively in the manufacture of mono bloc pump sets during the period from 01.11.1981 to 28.02.1986 and to vacate 'the protest on payment of duty' and to adjust the duty paid towards the duty liability. The Assistant Commissioner, vide order, dated 23.05.1994, in file C.No.V/30/2/2/90-DT1-(Part file No.2) confirmed the classification of stators and rotors under T.I.30-D; adjusted the entire duty paid under protest towards the duty liability and also vacated the payment under protest. This order was neither contested by the assessee nor appealed against.

5. However, the assessee preferred an appeal with CEGAT against the Order-in-Appeal, dated 06.03.1990, of Commissioner (Appeals), Chennai, on the issue of classification and the CEGAT had allowed the appeal vide Final Order No.E-158-168-B, dated 24.05.1996. The Revenue's appeal against this order was dismissed by the Supreme Court on 03.09.2003 in Civil Appeal No.276 of 2003 along with Civil Appeal Nos.3450-3460/97. The Supreme Court upheld the CEGAT order with regard to classification of stators and rotors under TI-68 observing that "the parts manufactured by the respondent in connection with this end product would necessarily be a part of that end product". Based on the order of the Supreme Court, the assessee filed a claim on 16.07.2004 for refund of duty of Rs.42,42,497/- received from them, pursuant to the Order-in-Original, dated 13.08.1982.

6. The contention of the claimant was that (i) the assessment was provisional and no final order was passed; (ii) the issue of classification had been finally settled by the Supreme Court and hence the claim for refund and (iii) an

amount of Rs.17.68 lakhs was paid as directed by the High Court and hence there is no unjust enrichment.

7. The Assistant Commissioner of Central Excise, Coimbatore-I Division, rejected the claim for refund vide Order No.12/2005-(AC-CBE I Dn.), dated 25.01.2005, on the following grounds :

(i) There was no provisional assessment ordered by the competent authority and the claimant's plea now for refund was not projected before the adjudicating authority at the time of finalizing the demand.

(ii) The assessee claimed the refund as the excess amount deposited, which is not correct since the said amount was adjusted towards duty, after vacating the protest, by the adjudicating authority.

(iii) Their plea that the concept of unjust enrichment would not apply is not acceptable, since the duty payment and assessment were not provisional, as claimed by them.

(iv) As regards payment of duty by adjustment in RG 23-proforma credit account, the credit had been utilized for payment of duty for stator and rotors, which they claimed, were exempted- this plea could not be accepted since proforma credit is available only when the final product is dutiable. Further, no cash refund could be allowed for duty debited under proforma credit scheme.

(v) The orders in appeal passed by the Collector (Appeals) and CEGAT were on the classification matter and not against the order demanding duty /vacation of protest, basing on which the present refund claim is preferred. Further, the order of Assistant Commissioner of Central Excise, dated 23.05.1994, had not been challenged by the assessee and hence the claim for refund, made on 16.07.2004, is hit by limitation.

8. Aggrieved by the above order, the assessee preferred an appeal with the Commissioner (Appeals), Coimbatore, who decided the issue vide OIA No.196/2005-CE, dated 18.07.2005, with the following observations/findings :

(i) The payment of duty for the period from 1.11.1981 to 31.10.1983 had been paid in lumpsums in instalments and that too subsequent to the clearances of the impugned goods and hence the claim for refund of such payments would not be hit by bar of unjust enrichment.

(ii) Payments made from the credit in RG 23 are not admissible for refund for the reason that once the goods were held to be exempt from duty, no credit was available on the input under the proforma credit scheme.

(iii) The order of the lower authority rejecting the claim, as time barred, is not sustainable and the refund claim is, in principle, admissible.

9. With the above findings, the Commissioner (Appeals) set aside the order in original and directed the lower authority to :

(i) grant refund in respect of duty paid during the period from 01.11.1981 to 31.10.1983, as per law, and

(ii) examine the claim pertaining to the period from 01.11.1983 to 28.02.1986 on the question of bar of unjust enrichment.

10. As per the directions of the Commissioner (Appeals), the Deputy Commissioner, Coimbatore-I Division, vide Order Nos.123/05 and 124/05, both dated 02.11.2005 and 127/05, dated 10.11.2005, granted refund of duty of Rs.3,81,911/- and Rs.3,89,069/- and Rs.6,12,016/- respectively, aggregating to Rs.13,82,995/-, pertaining to the period from 01.11.1981 to 31.10.1983.

11. For the period from 01.11.1983 to 28.02.1986, a show cause notice was issued to the assessee vide C.No.IV/16/14/2006-Refund, dated 12.09.2006, to show cause as to why their claim for refund of Rs.18,41,931/- for the period from 01.11.1983 to 28.02.1986 should not be sanctioned but credited to the Consumer Welfare Fund in terms of Section 11 B(2) of the Central Excise Act,1944, since it appeared that the excise duties paid have been loaded on indirectly to the cost of the products and that the same was charged and collected from the buyers.

12. The adjudicating authority, vide Order Sl.No.14/2008 (Refund), dated 27.02.2008, rejected the refund claim of Rs.18,41,931/- and preferred to credit the same to the Consumer Welfare Fund on the following grounds :

(i) There is no provisional assessment without proper order under the then Rule 9 (B) and execution of bond. The assessee has not produced any document requesting for provisional assessment with the proper officer or produce any order for provisional assessment issued by the competent authority.

(ii) Remarks like "approved subject to verification of prices" on the price lists filed by the assessee cannot be said to constitute an order for provisional assessment under Rule 9 (B). Rule 9(B) envisages a specific written order from the proper officer directing provisional assessment.

(iii) The assessment cannot be treated as provisional solely on the premise that endorsements have been made on the RT12 returns to the effect that the assessments are provisional

(iv) It was observed from the Trading accounts that the excise duty payments have been charged as expenditure before

arriving at the gross profit. The excise duties paid have been loaded on indirectly to the cost of the products.

13. C.M.A.No.3128 of 2010 has been admitted on the following substantial questions of law :

1. In the absence of order under Rule 9 (B), whether the Tribunal was right in holding that the assessment during the period in dispute is required to be treated as provisional when the law of the land as set out by the Hon'ble Supreme Court in the case of Metal Forging (2002 (146) ELT 241 states that "to establish that the clearances were made on a provisional basis, there should be first of all an order under Rule 9B of the Rules, and then material to show that the goods were cleared on the basis of said provisional basis, and payment of duty was also made on the basis of said provisional classification ? and
2. Whether the Tribunal was correct in holding that the appellants are not required to discharge the burden of showing that they had not passed on the incidence of duty, when the law of the land as set out by the Hon'ble Supreme Court in the case of Mafatlal Industries Ltd. (1997 (89) ELT 247 (SC), that "Every decision favourable to an assessee/manufacturer, whether on the question of classification, valuation or any other issue, does not automatically entail refund. Section 11B of the Central Excise Act makes every refund claim subject to proof of not passing on the burden of duty to others ?

14. C.M.A.No.765 of 2011 has been admitted on the following substantial question of law :

Whether the Tribunal is right in ordering refund based on its earlier decision, when the question of refund is barred by limitation ?

15. We have heard the learned counsel for the parties and also gone through the records.

16. It is relevant to notice that the Commissioner (Appeals), Coimbatore, by his order, dated 18.07.2005, found that the duty for the period from 01.11.1981 to 31.10.1983 had been paid in lumpsums on instalment basis and that too after the clearance of the goods and, hence, refund of the duty amount was paid for the period between 01.11.1981 and 31.10.1983 would not be hit by the concept of 'unjust enrichment'. The Commissioner (Appeals), hence, ordered for refund of the duty paid. Accordingly, the Deputy Commissioner, on 01.11.2005 and 10.11.2005, refunded the duty amount paid by the assessee for the period 01.11.1981 - 31.10.1983, aggregating to Rs.13,82,995/-. The Commissioner of Appals has further directed the claim for refund of duty for the period from 01.11.1983 to 28.02.1986 to be examined on the bar of 'unjust enrichment' only, that too after holding that the claim is not barred by

period of limitation. Therefore, the core/principal issue relating to entitlement of refund stands conclusively held against the revenue by the orders of the Commissioner (Appeals), Coimbatore, dated 18.07.2005. The said order has already attained finality.

17. Now, the adjudicating authority, by his order, dated 27.02.2008, has rejected the refund claim for the post 01.11.1983 period up to 28.02.1986, by going into the merits of the claim of refund, which is wholly impermissible. What is ordered to be examined by the Commissioner of Appeals on 18.07.2005 is, whether the claim for refund is hit by the bar or 'unjust enrichment'. If the adjudicating authority is not satisfied by the certificate of the Chartered Accountant that the duty burden has not been passed on to the others, then, he is required to provide an opportunity to establish that the duty has not been passed on to the others, in which event, any claim for refund would not amount to unjust enrichment.

18. An appeal was preferred against the order of rejection of refund, dated 27.02.2008, to the Commissioner (Appeals) and the Commissioner (Appeals) rejected the claim for refund, by his order, dated 13.06.2008. In our opinion, instead of trying to examine the issue from the perspective of, whether the refund would amount to unjust enrichment, the adjudicating authority and the appellate authority have concentrated on the validity of the claim for refund.

19. There is no difficulty for one to appreciate, that the bar contained under Section 11B of the Act would get attracted, so also the ratio laid down by the Supreme Court in Mafatlal Industries Limited's case, cited supra, would be applicable.

20. For the failure to record a finding specifically that the duty paid for the period beyond 1983 up to 28.02.1986 has been passed on to the others and, consequently, the claim would amount to unjust enrichment, on the part of both the adjudicating authority and the appellate authority, in our opinion, the Tribunal has arrived at the correct conclusion.

21. The claim for refund is maintainable and the said claim is not barred by limitation, as was held by the Commissioner (Appeals) on 18.07.2005 has attained finality. So, the question of examining the claim for refund on merits does not arise now, once again. The only area of scrutiny is liable to be confined as to whether the actual refund to the assessee would amount to unjust enrichment. This question is not examined from the point of finding out as to whether duty burden

is already passed on to the others or not. Surmises and conjectures are drawn by setting out that though Excise Duty is not shown separately in the bills or invoices, but, in the absence of supporting documents that the burden of duty has not been passed on to the others, the claim for refund is rejected. If the burden of Excise Duty is passed on to the others, it gets reflected in the Bills and invoices. That is a positive evidence. That was produced to show that no such burden is passed off. The appellate authority goes one step forward and found as a fact the expense account of the assessee has reflected the Excise Duty paid. But, he would surmise that the assessee company would have taken that component also, while working out the costing of the mono block pump. It is, thus, clear that far from finding out as to whether or not the duty burden has been passed on to the others, the adjudicating and appellate authority have gone about looking for negative evidence. Clearly, the very approach is wrong.

22. Accordingly, we find no merit in these appeals and the same are dismissed. The questions raised stand answered accordingly. No costs.

Sd/-
Assistant Registrar(CO)

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Sub Assistant Registrar

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To

1.The Customs, Excise and Service Tax
Appellate Tribunal, South Zonal Bench,
Shastri Bhawan Annexe, 1st Floor,
26, Haddows Road,
Chennai-6.

2.The Commissioner of Customs,
Central Excise & Service Tax(Appeals),
6/7, A.T.D.Street, Rale Course Road,
Coimbatore-641 018

3.The Assistant Commissioner of Customs &
Central Excise, Coimbatore I Division,
1237-A & B Trichy Road (Elgi Building)
Coimbatore-641 018.

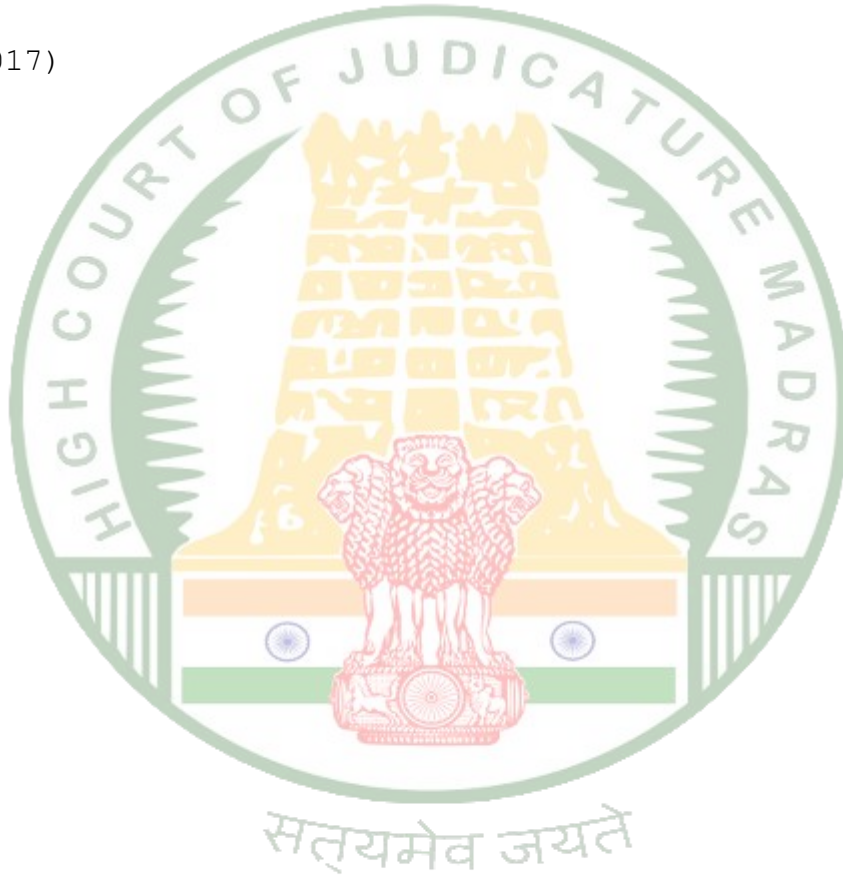
4.The Deputy Commissioner of Customs & Central
Excise, Coimbatore I Division,
Elgi Buildings 1237 Trichy Road, Coimbatore-641 018.

+2cc to Mr. A.P.Srinivas, Advocate sr.58603 & 58604

+1cc to Ms.D.Naveena, advocate sr.58369

C.M.A.Nos.3128 of 2010 & 765 of 2011

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