IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 25/4/2018

C O R A M

THE HON'BLE MR.JUSTICE S.MANIKUMAR
AND
THE HON'BLE MRS.JUSTICE V.BHAVANI SUBBAROYAN

Civil Miscellaneous Appeal No.1882 of 2015

M/s. Seshasayee Paper and Boards Limited
Pallippalayam
Cauvery R.S.P.O
Erode 638 007. ... Appellant

Vs

The Commissioner of Central Excise
No.1 Foulks Compound
Anai Medu
Salem 636 001. ... Respondent

Appeal filed under Section 35 G of the Central Excise Act, 1994, to set aside the Final Order No.40054 of 2015, dated 13/1/2015, on the file of the Customs, Excise and Service Tax Appellate Tribunal, Chennai.

For appellant ... Mr.M.N.Bharathi
for Mr.S.Muthuvenkataraman

For respondent ... Mr.Rajinish Pathiyil

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J U D G M E N T

(Judgment of the Court was made by S.MANIKUMAR, J)

Civil Miscellaneous Appeal has been filed against the Final Order No.40054 of 2015, dated 13/1/2015, on the file of the Customs, Excise and Service Tax Appellate Tribunal, Chennai.

2. Short facts leading to the filing of the civil miscellaneous appeal are that, the appellant engaged in the manufacture of paper and paper boards, on 07.12.2008, had cleared their goods on payment of duty at the rate of 8% advance even though the rate of duty on that date had been reduced to 4%

vide Notification No.58/2008 dated 07.12.2008, which according to them had occurred due to late receipt of Notification. After passing the 4% excess duty collected to the respective customers through Credit Notes dated 31.03.2009, the appellants have filed refund claim claiming refund of Rs.2,43,349/- stating that 4% excess payment was made by them on 07.12.2008. After due process of law, the adjudicating authority passed an order on the refund claim by sanctioning the claim, but instead of paying it to the appellants, credited to the Consumer Welfare Fund holding that though there has been an excess payment of duty by the appellant, the appellant has failed to submit documentary evidence that the ultimate consumer had not borne the duty incidence, as required under Section 11B(1) of Central Excise Act, 1944.

3. Aggrieved by the order passed by the lower authority, the appellant herein filed an appeal in Appeal No.19/2010/CE/SLM. The Commissioner (Appeals) in the order-in-appeal dated 19.03.2010, allowed the appeal with consequential relief. Aggrieved by the same, Revenue has filed an appeal against the order of Commissioner (Appeals). The Tribunal vide Final Order No.348/2011 dated 22.02.2011, allowed the appeal filed by the Revenue and set aside the order-in-appeal and restored the order-in-original passed by the adjudicating authority.

During the pendency of the proceedings before the Tribunal, the appellant had received the refund, consequent to the order of the Commissioner (Appeals). The department issued show cause notice dated 06.07.2010, demanding erroneous refund and the same was confirmed by the Assistant Commissioner vide Order-in-Original No.14/2011 dated 30.11.2011. The lower appellate authority in the impugned order dated 31.08.2012 upheld the adjudication order and dismissed the appeal filed by the appellant, by relying on the Tribunal's order dated 22.02.2011. Hence the appellant, preferred an appeal before CESTAT. The Tribunal vide its order dated 13.01.2015, in Final Order No.40054/2015, held as hereunder:

> "4. I have carefully considered the submissions of both sides and perused the records. In the present appeal, the department issued show cause notice on erroneous sanction of refund which was confirmed by the lower authority and upheld by the lower appellate authority. The whole issue is on the outcome of the parallel proceedings initiated by the department on consequent to the Order-in-Appeal dated 19.03.2010 on the erroneous sanction of the refund. This Tribunal has ordered for pre-deposit of entire duty vide Miscellaneous Order No.40729/2013 dated 15.03.2013. The appellants have complied the stay order dated 26.04.2013. On appeal by Revenue, this Tribunal in Final order dated 22.02.2011 has

allowed Revenue appeal and set aside the order-in-appeal dated 19.03.2010 and restored the order-in-original. The relevant portion of the Tribunal's order is reproduced as under:-

> "6.4. Coming to the facts of the present case, as already noted, the respondents raised invoices indicating higher rate of duty and collected the same from their customers. The payment of excise duty is not even linked to recovery of the value of the goods from the customers. The indication of duty amounts in the invoices prepared in terms of Section 12 is clearly evidence for passing on the credit. As held in the case of Devi Bhoomi Spinning & Weaving Mills (supra), the relevant test to ascertain as to whether the duty burden has been passed on or not is indication of the duty amount separately in the invoices raised under the Section 12 of the Central Excise Act.
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> 6.5. If the contention of the assessee is accepted, it would be lead to a situation that after years also they would claim that they are taking over the burden of duty initially passed on to their customers by issuing of credit notes. If the credit notes issued after four months can be accepted, there is no bar to accept the credit notes issued after a few years also. Therefore, this reasoning that once credit note is issued the manufacture should be deemed to have absorbed the duty burden is to be rejected.
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> 6.6. A perusal of the show cause notice clearly indicates that the basis for proposal to deny the refund was the initial collection of higher amount of duty by the respondents. Certain observations that there is no evidence that the burden has not been passed on downstream has no relevance to the decision taken by the original authority.
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> 7. In view of the above, order of the Commissioner (Appeals) sanctioning the case refund is set aside and the order of the original authority ordering the deposit of the refund to the Consumer Welfare Fund is restored."

Considering the above order that this Tribunal has already decided settled the issue in favour of Revenue and held that the appellants are not eligible for refund on account of unjust enrichment and set aside the order of the Commissioner (A) and restored the adjudication order. The Commissioner (Appeals) has rightly rejected their appeal by relying this Tribunal's above Final order. Though the appellants have filed CMA No.1929/2011, which is pending before the Hon'ble High Court , there is no stay against the final order of the Tribunal. I do not find any infirmity in the impugned order rejecting the appellant's appeal. Accordingly, the appeal is dismissed and the impugned order is upheld."

4. Aggrieved by the Final Order No.40054 of 2015, dated 13/1/2015, passed by the Customs, Excise and Service Tax Appellate Tribunal, Chennai, instant civil miscellaneous appeal has been filed.

5. On 7/9/2015, a Hon'ble Division Bench of this Court, has admitted the instant Civil Miscellaneous Appeal, on the following substantial questions of law:-

"1. Whether the Tribunal failed to see that Section 11 B which provides for claim for refund of duty while requiring the applicant to prove that the duty had not been passed on by him to any other person by letting in documentary or other evidence, however, does not prescribe nor exclude any specific document being let in as evidence?

2. Whether the Tribunal after finding that the appellant has refunded the excess duty collected, to its customs by way of credit notes has completely misdirected itself in rejecting the petitioner's claim for refund on the erroneous premise that the refund to its customers were made through credit notes which is not a valid document for the purpose of Section 11 B?

3. Whether the Tribunal is right in not considering the aspect that the issuance of credit note has the legal sanctity as set out in Rule 6 of the Service Tax Rules, 1994?"

6. On this day, when the matter came up for hearing, Mr.M.N.Bharathi, learned counsel for the appellant/assessee fairly submitted that the questions of law framed in the instant appeal are covered against the appellant/assessee, in the judgment rendered in The Commissioner of Central Excise, Madras Vs. Addison & Co. Ltd., reported in 2016 (339) ELT 177 (SC). He further submitted that a Review Petition preferred against the said judgment, was also dismissed. Reliance was also placed on a decision of a Hon'ble Division Bench of this Court, in C.M.A.No.1929 of 2011, dated 22/6/2017. Relevant portion is extracted hereunder:-

"Mr.Muthu Venkatraman, learned counsel for the appellant/assessee informs us that the questions of law framed in the captioned appeal are covered against the appellant/assessee, by virtue of the judgment in the following case: Commissioner of Central Excise, Madras Vs. Addison & Co. Ltd., {2016 (339) ELT 177 (SC).

3. To be noted, the appeal was admitted on 21/7/2011, when the following questions of law was framed for consideration by this Court:

> (1). Whether the Tribunal failed to see that Section 11 B which provides for claim for refund of duty while requiring the applicant to prove that the duty had not been passed on by him to any other person by letting in documentary or other evidence, however, does not prescribe nor exclude any specific document being let in as evidence?
>
> (2). Whether the Tribunal after finding that the appellant has refunded the excess duty collected to its customers by way of credit notes has completely misdirected itself in rejecting the petitioner's claim for refund on the erroneous premise that the refund to its customers were made through credit notes which is not a valid document for the purpose of Section 11 B?"

We are informed that a Review Petition {R.P.(C) No.884 of 2017 was preferred against the said judgment, which was dismissed on 27/4/2017.

5. The appeal is, accordingly dismissed. The questions of law, as framed, are answered in favour of the revenue and against the assessee. Consequently, pending M.P.No.1 of 2011 is closed. There shall be no order as to costs."

7. In view of the above decisions, instant Civil Miscellaneous Appeal is dismissed. The questions of law, are answered in favour of the revenue and against the assessee. No costs.

Sd/-
Assistant Registrar(CS II)

//True Copy//

Sub Assistant Registrar

To

1. The Customs, Excise and Service Tax Appellate Tribunal, Chennai.

2. The Commissioner of Central Excise
No.1 Foulks Compound
Anai Medu
Salem 636 001.

+1cc to Mr.Rajinish Pathiyil, Advocate sr.no.30995

C.M.A.No.1882 of 2015

nr 12/06/2018