

In the High Court of Judicature at Hyderabad
for the State of Telangana and the State of Andhra Pradesh

C.E.A. No. 155 of 2017

Between:

The Commissioner of Customs, Central Excise &
Service Tax, Hyderabad-III Commissionerate.

... Appellant

AND

M/s Amrutanjan Health Care Ltd.

... Respondent

Date of Judgment Pronounced: 13.04.2018

Submitted for Approval:

**THE HON'BLE SRI JUSTICE C.V. NAGARJUNA REDDY
AND
THE HON'BLE SRI JUSTICE CHALLA KODANDA RAM**

1. Whether Reporters of Local newspapers may be allowed to see the judgments ? Yes/No
2. Whether the copies of judgment may be marked to Law Reporters/Journals Yes/No
3. Whether Their Ladyship/Lordship wish to see the fair copy of the Judgment ? Yes/No

C.V. NAGARJUNA REDDY, J

CHALLA KODANDA RAM, J

**THE HON'BLE SRI JUSTICE C.V. NAGARJUNA REDDY
AND
THE HON'BLE SRI JUSTICE CHALLA KODANDA RAM**

C.E.A. No. 155 of 2017

% Dated 13.04.2018

Between:

The Commissioner of Customs, Central Excise &
Service Tax, Hyderabad-III Commissionerate.

... Appellant

AND

M/s Amrutanjan Health Care Ltd.

... Respondent

! Counsel for the Appellant : Sri Swaroop Orilla for
Sri M.V.J.K. Kumar,
Senior Standing Counsel
For Central Excise, Customs &
Service Tax

^ Counsel for the respondent :

<GIST:

>HEAD NOTE:

? Cases cited:

1. 2003 (156) ELT 161 (SC) = (2003) 7 SCC 24
2. 2005 (181) ELT 328 (SC)
3. (2009) 8 SCC 235
4. (2002) 9 SCC 416

**THE HON'BLE SRI JUSTICE C.V.NAGARJUNA REDDY
AND
THE HON'BLE SRI JUSTICE CHALLA KODANDA RAM**

C.E.A. NO. 155 OF 2017

DATE: 13th APRIL 2018

Between:

The Commissioner of Customs, Central Excise &
Service Tax, Hyderabad-III Commissionerate.

... Appellant

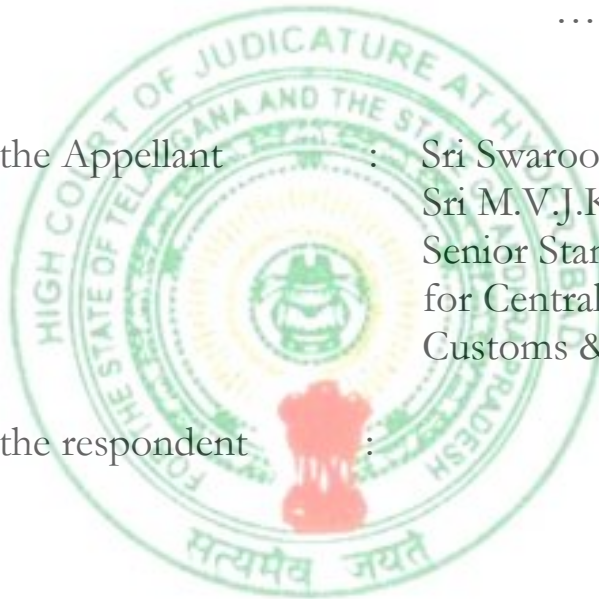
AND

M/s Amrutanjan Health Care Ltd.

... Respondent

Counsel for the Appellant : Sri Swaroop Orilla for
Sri M.V.J.K. Kumar,
Senior Standing Counsel
for Central Excise,
Customs & Service Tax

Counsel for the respondent :



THE COURT MADE THE FOLLOWING:

J U D G M E N T: *(per Hon'ble Sri Justice Challa Kodanda Ram)*

Heard Mr. Swaroop Orilla, appearing on behalf of Mr. M.V.J.K. Kumar, learned Senior Standing Counsel for Central Excise, Customs and Service Tax and Mr. K. Raji Reddy, learned counsel for the respondent.

This Appeal by the Revenue, invoking Section 35-G of the Central Excise Act, 1944 (for short, 'the Act'), challenges the final order No. A/30782/2016, dated 03.08.2016 in Appeal No. E/964/2012 on the file of the Central Excise and Service Tax Appellate Tribunal (CESTAT), Regional Bench, Hyderabad.

In this Appeal, two substantial questions of law have been raised:

- 1) Whether the Hon'ble CESTAT's decision is correct in holding that refund arising out of the finalization of provisional assessments during the period February 1985 to April 1995 need not pass the test of unjust enrichment as the amendment to sub-rule (5) of Rule 9B came into force only w.e.f. 25.06.1999; and
- 2) Whether Hon'ble CESTAT's Final Order was correct in setting aside the impugned order in Appeal dated 30.08.2011 passed by the Appellate Authority and decided the case without discussing on the grounds put- forth and the case laws referred therein.

The narration of facts, as is evident from the grounds of Appeal, discloses that the case has a chequered history and it

has undergone various stages of litigation, though, in substance, the issue relates to the duty collected from the respondent (hereinafter be referred to as the assessee”) on the medicaments manufactured by them for the period April 1985 to April 1991. Initially, the medicaments that are being manufactured by the assessee were assessed to duty, denying their claim for exemption, as the goods manufactured i.e. ayurvedic medicines attract duty. The assessee was unsuccessful before the appellate authorities and up to the High Court. However, finally, the Supreme Court, through the order dated 30.03.1995, had set at rest the controversy holding that the goods manufactured by the assessee are ayurvedic medicines and therefore, they are entitled to be exempted from duty. Immediately thereafter, on 20.09.1995, the respondent-assessee filed a claim for refund of duty paid on the subject goods for the period from 1985 to 26.04.1995. The jurisdictional Assistant Commissioner, by order dated 13.02.1995, rejected the Application for refund on the ground of non-submission of the following documents, in support of the claim:

- 1) Documentary evidence to show that the incidence of duty has not been passed on to any other person.
- 2) Duplicate copies of PLA/PG23A Part-II for the relevant period.
- 3) Triplicate copies of GP1s/duplicate invoices for relevant period.

- 4) A work sheet showing details of duty payment GP1 wise/invoice was for the relevant period.

In Appeal, the order-in-original dated 13.02.1995 of the Assistant Commissioner was set aside by order, dated 24.09.1996 and the matter was remanded for fresh decision after examination of the documents that might be submitted by the assessee. The Appellate Authority had also recorded the undertaking given by the assessee not to claim interest because of the delay that might be caused due to remand of the matter. Thereafter, once again, the Assistant Commissioner, by order dated 10.03.1997, rejected the claim of the assessee holding that:

“ The assessee have submitted all the documents except documentary evidence to prove that excise duty paid was not passed on to any other person. The assessee have not produced the relevant and necessary documentary evidence to process their refund claim Section 11B clearly stipulated that a refund applications should be accompanied by all the relevant including the documentary evidence to prove that excise duty paid was not passed on to any other person. In absence of above documentary evidence, the claim is unsubstantiated under the provisions of Section 11B of Central Excise Act, 1944 and the same is liable for rejection as an unsubstantial claim.”

Feeling aggrieved, the assessee appealed to the Appellate Commissioner, who, by order, dated 13.06.2001, rejected its

claim, as the fact that the incidence of duty has been passed on to the buyers is not in dispute, and that thus, they are ineligible to get refund in terms of Section 11(B2) of the Act. This order was the subject matter of Appeal before the CESTAT in Appeal No. E/Misc./177/2007 in E/1237/2001 which came to be allowed by final order dated 27.07.2007 and the matter was remanded to the Original Authority to examine 'whether the assessments made were all provisional and if so, the presumption that the duty has not been passed on to the customer is to be considered'. The Tribunal also directed to examine the evidence produced before it to establish that the incidence of duty has not been passed on to the customers and that in case, the assessee is entitled to refund, the same should be considered and paid expeditiously along with interest as per law. On remand, the Assistant Commissioner, by his order dated 10.04.2008 once again, rejected the claim of the assessee for refund on the ground that the said claim was not substantiated and no material evidence was produced for consideration. The said order came to be challenged before the Appellate Commissioner, who allowed the Appeal *vide* order dated 30.09.2008, holding that the assessee was entitled for refund and remanded the matter to the lower authority for the

limited purpose of quantification of the refund due, provided the assessments stood finalized prior to 25.06.1999. The Appellate Commissioner had taken note of the judgment of the Supreme Court in ***CCE, Chennai v. TVS Suzuki Limited***¹, wherein it has been held that the restrictions under Sections 11-A and 11-B would not apply to refund claims consequent upon finalization of the provisional assessment orders. The Assistant Commissioner, by order dated 30.11.2009, sanctioned refund of a sum of Rs.2,06,61,883/- as against the claim of the assessee for original sum of Rs.7,51,71,516/-. Both the assessee and Department filed Appeals bearing No.9 of 2010 (H-III) (CE) and 10 of 2010 (H-III)(D)(CE) respectively before the Commissioner of Customs, Central Excise & Service Tax (Appeals-III), who, *vide* order dated 30.08.2010 dismissed both the Appeals. The Department had accepted the decision of the Appellate Commissioner, who, confirmed the order-in-original granting refund of duty paid by the assessee through PLA during the period from 01.04.1991 to 28.02.1994 to a tune of Rs.2,06,61,883/-, which amount, in fact, came to be refunded through a cheque dated 30.11.2009. Thus, in effect, the

¹ 2003(156)ELT 161 (SC) = (2003) 7 SCC 24

assessee's claim for refund for the period from March 1994 to April 1995 was held not legal and proper.

However, the assessee had filed Appeals against both the orders passed by the Appellate Commissioner. While disposing of the appeals, the CESTAT, in its order, dated 03.08.2016, had held as under:

“7. In the circumstances, the view taken by the lower appellate authority in the impugned order upholding original authority's decision to reject the refund for the period 4/1985 to 03/1991 for want of relevant records and for non-production of proof that assessments were finalized prior to 26.05.1999; and for the period 3/84 to 4/91 for want of all relevant documents evidencing payment of duty is not just and proper.

8. In the light of the discussions above and also reiterating the findings in the Tribunal's earlier order 882/2009 dated 26.03.2009, we are of the considered opinion that refund arising out of the finalization of provisional assessments during the period February 1985 to April 1995 need not pass the test of unjust enrichment as the amendment to sub-rule 5 of Rule 9B came into force only w.e.f. 25.06.1999. In the event, we are of the view that appellants are eligible for the refund of Rs.2,86,39,117/- for the period 3/85 to 4/91 and 3/94 to 4/95 as prayed for in their appeal.

9. In the result, the impugned order is set aside and Appeal is allowed with consequential benefits, as per law.”

At the outset, it may be noted that from the facts summarized hereinabove, it is not clear whether the Appeal

filed by the assessee insofar as the order of the Appellate Authority rejecting its claim is concerned is allowed or not or is it the Appeal filed by the Department against the order-in-original that has been allowed. However, on a careful reading of the orders of the CESTAT, one can make out 1) that the claim of the assessee came to be allowed by setting aside the order-in-original to the extent the same is against the assessee which came to be confirmed by the 1st Appellate Authority. In the order-in-original dated 30.11.2009, the claim of the assessee for refund of the duty collected for the period from 1985 to 26.04.1995 was allowed-in-part to the extent of Rs.2,06,61,883/-, as against the original claim of Rs. 7 crores and odd. The Tribunal accepted the submission of the assessee that the finding of the Appellate Authority to the effect 1) that the assessee had not provided any documentary proof to show the provisional assessments for the period 1985 to 1991 and has not filed the invoices for the period March 1994 to April 1995 is not correct and that as a matter of fact, in the very first show cause notice, dated 03.12.1997 and in subsequent order dated 10.03.1997, the Department had admitted the assessee filing all the documents and further, the factum of verification of the same; 2) that the fact of allowing the refund claim to the

extent of Rs.2,06,61,883/- itself is proof-positive that such ascertainment of the amount could be made only when record is available and thus, the stand taken by the Department that relevant documents were not placed, is perverse and contrary to the material on record; 3) that the Appellate Authority failed to appreciate the specific aspect of the assessee having paid amounts right from 1985 on provisional basis, under protest, till the Supreme Court passed orders finally holding that the products manufactured by the assessee are not excisable and thus, the question of applying the doctrine of 'unjust enrichment' and thereby, Rule 9B(5) of the Central Excise Rules, 1944 as settled by the Supreme Court in the case of **TVS Suzuki Limited** (cited supra) does not arise; 4) and that the first Appellate Authority failed to appreciate the specific contention that in the light of assessments for the period 1991-92 having been, admittedly, finalized before 25.06.1999, it is but logical that the assessment for the earlier period also be treated as finalized. The reasoning given by the first Appellate Authority, without verification of the record and merely recording that the assessee had failed to produce proof of assessments being finalized prior to 25.06.1999 is not proper and correct and is done only with bias. At any rate, the

finalization of assessment is the responsibility of the Department and its failure to do so cannot be put against the assessee.

As can be seen from the material on record, the above contentions practically do not appear to have been controverted by the appellant before the Tribunal. Adverting to the earlier proceedings between the parties, the Tribunal had concluded that, the grounds raised by the appellant are unsubstantiated. The material on record does not disclose any effort having been made by the appellant to substantiate or to controvert any of the findings recorded by the Tribunal. While the Tribunal was content with extracting its earlier orders and that of the lower authorities, to put a quietus to the controversy, we have perused the record placed before this Court.

Before us, the reasons of the first Appellate Authority justifying rejection of the claim of the assessee have been converted into grounds in the present Appeal and the two substantial questions, as set out above, are raised. The scope of the appeal before this Court under Section 35-G of the 1944 Act is limited to the questions of law arising from the orders of the Tribunal and on the findings of fact, as recorded by the

Tribunal. It is well-settled by a catena of judgments of the Supreme Court as well as this Court that the findings of fact as recorded by the Tribunal are final and the same have to be accepted as apparent on the face of the record and it is impermissible to delve into the facts by the High Court except in cases where a particular fact is disputed as perverse. In the absence of any question having been raised that a particular finding of fact is perverse, the High Court is duty-bound to answer the questions raised based on the facts and findings recorded by the Tribunal (see *Commissioner of Income Tax v. Cupro Industrial Corporation* (1993 202 ITR 728 All), *Patnaik & Co.Ltd. v. The Commissioner of Income Tax* (161 ITR 365), *Commissioner of Income Tax Bihar v. Sahu Jain Limited* (103 ITR 135), *M.A. Jabbar v. Commissioner of Income Tax, Andhra Pradesh* (1968 ITR 493).

In the instant case, the finding of fact has not been questioned as perverse. However, to put an end to the controversy in issue, which was the subject matter of a number of orders-in-original and the orders in appeal at the first Appellate and the second Appellate stages and also before the Supreme Court, right from 1985 till date, particularly, with respect to refund claim starting from the one dated 20.05.1995

till date, we examined the material on record with respect to the grounds urged. While the claim for refund was rejected vide order-in-original dated 13.12.1995 on the ground that the documentary proof was not furnished, on remand from the Appellate Authority, having been satisfied that all the material documents were placed, the only ground on which rejection for refund was made on 10.03.1997 was that the assessee had failed to substantiate and prove that excise duty paid was not passed on to any other person, and also failed to satisfy the conditions laid down under Section 11B of the 1944 Act. The first Appellate Authority *vide* its order dated 13.06.2001, confirmed the same, which was set aside by the Tribunal by its order dated 07.08.2007 with a direction to quantify the refund amount payable. In other words, what remained to be considered is only quantification of refund, but unfortunately, once again, the claim for refund was rejected by order dated 10.04.2008, which was again set aside by the 1st Appellate Authority *vide* order dated 30.09.2008. It may be noted, at this stage, that the 1st Appellate Authority in its order dated 30.09.2008 having taken note of the judgment of the Supreme Court in ***TVS Suzuki Limited***, had categorically held that the doctrine of ‘unjust enrichment’ and the provisions of amended Rule 9B of the

Central Excise Rules are not applicable to the assessee's case notwithstanding the fact that the assessee had admitted that the incidence of duty has been passed on to the customers (the said aspect was recorded in the order of the Appellate Authority dated 30.06.2001). The order dated 30.09.2008 was the subject matter of Appeal before the CESTAT at the instance of the Department in Appeal No. E/938/2008 which came to be dismissed by its order dated 26.03.2009. Thus, what remains to be done by the Department was only quantification of the amount that is liable to be refunded consequent upon confirmation of the orders in Appeal by the Appellate Authority in its order dated 30.09.2008. In the process of quantification, the issues with respect to the justification and whether assessments have been completed or not were brought up and findings contrary thereto were recorded while restricting the claim of the assessee. These orders-in-original as confirmed by the 1st Appellate Authority were set aside by the Tribunal.

The above narration from the material placed before this Court is made to put on record the method and manner in which the issue was dealt with from time to time, creating a mass of facts without adverting to the core issue viz., the applicability or otherwise of the amended Rule 9B in 1999 for

the transactions prior to 1995 and particularly, in relation to the payments made under protest, on provisional basis, when there is a doubt in respect of levying excise duty. In its order, the Appellate Authority had relied on the judgment of the Supreme Court in ***Sahakari Khand Udyog Mandal Limited v. CCE***². In the said judgment and in the judgment rendered in ***State of Maharashtra v. Swanstone Multiplex Cinema Pvt. Ltd.***³, there is no reference to the earlier judgment of the Supreme Court in ***TVS Suzuki Ltd.*** and also ***Sinkhai Synthetics & Chemicals v. Collector Of Central Excise***⁴, wherein the applicability of amended Rule 9B, in particular sub-rule (5) was discussed. The specific plea that sub-rule (5) of Rule 9B would be applicable to the refund claims made even prior to the amended provision came into existence, was rejected holding that the operation of sub-rule (5) of Rule 9B was not retrospective. At any rate, as noted supra, the aspect of entitlement of the assessee for refund has become final, by order-in-Appeal dated 30.09.2008, except to the extent of quantification of the refund which order also attained finality on account of the orders of the Tribunal dated 26.03.2009.

² 2005 (181) ELT 328(SC)

³ (2009) 8 SCC 235

⁴ (2002) 9 SCC 416

In view of the above, the substantial questions of law framed by the Revenue do not arise from the facts on record, more so when the order of the Tribunal dated 30.09.2008 attained finality. We, therefore, see no merit in the Appeal and accordingly, the same is dismissed. No costs.

C.V. NAGARJUNA REDDY, J

CHALLA KODANDA RAM, J

13th April, 2018

ksld



