

IN THE HIGH COURT OF JUDICATURE AT MADRAS
DATED: 28.10.2020

CORAM :

THE HON'BLE DR.JUSTICE VINEET KOTHARI
AND
THE HON'BLE MR.JUSTICE M.S.RAMESH
C.M.A.Nos.4298, 4299 and 4301 of 2019

M/s.Chennai Petroleum Corporation Ltd.,
Manali, Chennai 600 068 ... Appellant in all Appeals

vs.

Commissioner of GST & Central Excise,
Chennai North,
26/1, Mahathma Gandhi Road,
Nungambakkam, Chennai 34. ... Respondent in all Appeals

Civil Miscellaneous Appeals filed under section 35G of Central Excise Act 1944 against the Final Order Nos.40786, 40787 and 40788 of 2019 dated 10.5.2019 on the file of Customs, Excise and Service Tax Appellate Tribunal, South Zonal Bench, Chennai.

For Appellant :: Mr.P.R.Renganath
For Respondent :: Mr.A.P.Srinivas,
Senior Standing Counsel

COMMON JUDGMENT

(Delivered by Dr.Vineet Kothari, J.)

These appeals have been filed by M/s.Chennai Petroleum Corporation Ltd., (M/s.CPCL, for short) raising the following purported questions of law arising from the order of the learned CESTAT dated 10.05.2019, rejecting the claim of refund of Excise Duty to the Appellant M/s.CPCL, which is a Government of India undertaking.

(a) The questions of law raised in C.M.A.No.4298 of 2019 are as follows :-

(a) Whether or not the Tribunal erred in rendering a finding that the amount claimed as refund had been passed on to buyer PPNP who is admittedly the user of the said excisable goods;

(b) Is it not that the Tribunal dismissed the appeal (to hold that appellant is not eligible for refund claimed) because it committed fundamental error in coming to conclusion that buyer of the excisable goods

viz PPNP had suffered the duty claimed as refund by the appellant.

(c) Whether or not the Tribunal is in error when it says that the amount claimed as refund had been passed on to the buyer PPNP when it is on record that the buyer had been issued credit note towards excess duty charged (which is since claimed as refund)

(d) Whether or not Tribunal erred in holding that judgment of the Hon'ble Supreme Court in Addison & Co. Ltd. case 2016 (339) ELT 177 (SC) applies even when the said judgment says that refund of excess duty paid has to be allowed once it is shown that the ultimate consumer of the excisable goods did not suffer the duty (claimed as refund).

(e) Whether the Tribunal was correct in dismissing the appeal when the ultimate consumer in this case PPNP who was supplied excisable goods namely LPG by the appellant has not suffered the excess duty claimed as refund by the appellant as the ultimate consumer was refunded the excess duty (through credit note) and therefore the excess duty claimed as refund had not been passed on.

(f) Whether or not the Tribunal erred in assuming that the excess duty (claimed as refund in this proceedings) had been passed on merely because refund of such duty was through credit note.

(g) Whether or not the sum and substance of the judgment of Hon'ble Supreme Court in Addison & Co. Ltd. case is that the ultimate user of the excisable goods in respect of which the refund is claimed ought not to have paid the duty claimed as refund by the manufacturer (assessee)

(h) When credit note is a means for refunding the excess collected and it is shown through the books of accounts that the excess amount claimed has been refunded to the ultimate buyer of the subject excisable goods, whether refund could be rejected.

(i) Whether the proof that amount claimed as refund has not been passed on to the ultimate buyer is relevant or the mode (method / procedure) adopted establish the fact of the excess duty (claimed as refund) has not been passed on to the ultimate consumer is relevant for claiming refund

under Section-11B of CEA'44.

(j) Whether in the facts and circumstances of this case is it not enough to show that the ultimate buyer of the excisable goods PPNP had not borne the duty claimed as refund by the appellant to the eligible for refund.

(b) The questions of law raised in C.M.A.No.4299 of 2019 are as follows :-

(a) Whether or not the Tribunal erred in rendering a finding that the amount claimed as refund had been passed on to buyer who is admittedly the user of the said excisable goods;

(b) Is it not that the Tribunal dismissed the appeal (to hold that appellant is not eligible for refund claimed) because it committed fundamental error in coming to conclusion that buyer of the excisable goods viz MFL had suffered the duty claimed as refund by the appellant.

(c) Whether or not the Tribunal is in error when it says that the amount claimed as refund had been passed on to the buyer MFL when it is on record that the buyer had been issued credit note towards excess duty charged (which is since claimed as refund)

(d) Whether or not Tribunal erred in holding that judgment of the Hon'ble Supreme Court in Addison & Co. Ltd. case 2016 (339) ELT 177 (SC) applies even when the said judgment says that refund of excess duty paid has to be allowed once it is shown that the ultimate consumer of the excisable goods did not suffer the duty (claimed as refund).

(e) Whether the Tribunal was correct in dismissing the appeal when the ultimate consumer in this case MFL who was supplied excisable goods namely LPG by the appellant has not suffered the excess duty claimed as refund by the appellant as the ultimate consumer was refunded the excess duty (through credit note) and therefore the excess duty claimed as refund had not been passed on.

(f) Whether or not the Tribunal erred in assuming that the excess duty (claimed as refund in this proceedings) had been passed on merely because refund of such duty was through credit note.

(g) Whether or not the sum and substance of the judgment of Hon'ble Supreme Court in

Addison & Co. Ltd. case is that the ultimate user of the excisable goods in respect of which the refund is claimed ought not to have paid the duty claimed as refund by the manufacturer (assessee)

(h) When credit note is a means for refunding the excess collected and it is shown through the books of accounts that the excess amount claimed has been refunded to the ultimate buyer of the subject excisable goods, whether refund could be rejected.

(i) Whether the proof that amount claimed as refund has not been passed on to the ultimate buyer is relevant or the mode (method / procedure) adopted establish the fact of the excess duty (claimed as refund) has not been passed on to the ultimate consumer is relevant for claiming refund under Section-11B of CEA'44.

(j) Whether in the facts and circumstances of this case is it not enough to show that the ultimate buyer of the excisable goods MFL had not borne the duty claimed as refund by the appellant to the eligible for refund.

(c) The questions of law raised in CMA No.4301 of 2019 are as follows:-

(a) Whether or not the Tribunal erred in rendering a finding that the amount claimed as refund had been passed on to buyer KSCL who is admittedly the user of the said excisable goods;

(b) Is it not that the Tribunal dismissed the appeal (to hold that appellant is not eligible for refund claimed) because it committed fundamental error in coming to conclusion that buyer of the excisable goods viz KSCL had suffered the duty claimed as refund by the appellant.

(c) Whether or not the Tribunal is in error when it says that the amount claimed as refund had been passed on to the buyer KSCL when it is on record that the buyer had been issued credit note towards excess duty charged (which is since claimed as refund)

(d) Whether or not Tribunal erred in holding that judgment of the Hon'ble Supreme Court in Addison & Co. Ltd. case 2016 (339) ELT 177 (SC) applies even when the said judgment says that refund of excess duty paid has to be allowed once it is shown that

the ultimate consumer of the excisable goods did not suffer the duty (claimed as refund).

(e) Whether the Tribunal was correct in dismissing the appeal when the ultimate consumer in this case KSCL who was supplied excisable goods namely LPG by the appellant has not suffered the excess duty claimed as refund by the appellant as the ultimate consumer was refunded the excess duty (through credit note) and therefore the excess duty claimed as refund had not been passed on

(f) Whether or not the Tribunal erred in assuming that the excess duty (claimed as refund in this proceedings) had been passed on merely because refund of such duty was through credit note.

(g) Whether or not the sum and substance of the judgment of Hon'ble Supreme Court in Addison & Co. Ltd. case is that the ultimate user of the excisable goods in respect of which the refund is claimed ought not to have paid the duty claimed as refund by the manufacturer (assessee)

(h) When credit note is a means for refunding the excess collected and it is shown through the books of accounts that the excess amount claimed has been refunded to the ultimate buyer of the subject excisable goods, whether refund could be rejected

(i) Whether the proof that amount claimed as refund has not been passed on to the ultimate buyer is relevant or he mode (method / procedure) adopted establish the fact of the excess duty (claimed as refund) has not been passed on to the ultimate consumer is relevant for claiming refund under Section-11B of CEA'44.

(j) Whether in the facts and circumstances of this case is it not enough to show that the ultimate buyer of the excisable goods KSCL had not borne the duty claimed as refund by the appellant to the eligible for refund.

2. The reason given by the learned Tribunal in its impugned order is quoted below for ready reference :-

6. The authorities below have rejected the refund claim holding that as per the doctrine of unjust enrichment, the duty has been passed on to the buyer. Mere issuance of Credit Notes will not establish that the

duty has not been passed on to another. The Hon'ble Apex Court in the decision of M/s.Addison & Co. Ltd. (supra) has well analyzed the issue and held that mere issuance of Credit Notes cannot be the sole basis for holding that the duty has been borne by the Assessee and that it has not been passed on to another.

7.Following the said decision and appreciating the facts, I hold that the credit of the sanctioned refund to the Consumer Welfare Fund is legal and proper. The impugned orders do not require any interference.

3. The learned Counsel for the Appellant/Assessee Mr.P.R.Renganath submitted before us that the learned Tribunal has erred in applying the judgment of the Hon'ble Supreme Court in the case of Commissioner of Central Excise, Madras vs. M/s.Addison and Co.Ltd., [2016(339) ELT 177 (SC)] and therefore, question of law does arise from the order of the learned Tribunal.

4. Explaining the transactions in question, the learned Counsel submitted that the Appellant Company is an oil refinery and is manufacturer of petroleum products which are sold at the instance of or on the purchase orders placed by their marketing company M/s.Indian Oil Corporation Ltd., (M/s.IOCL, for short) to yet another Government Company, M/s.PPN Power Generating Company Ltd., (M/s.PPN, for short) which manufactures power, out of the Raw Naptha, which is manufactured by the Appellant M/s.CPCL and sold to M/s.PPN on the basis of purchase orders placed by their marketing company M/s.Indian Oil Corporation Ltd. He submitted that the Appellant company raises invoice including Excise Duty component on its marketing company M/s.IOCL, which in turn raises its own invoice on the purchasing company M/s.PPN. He submitted that the Appellant company has a Running Account with the Marketing Company M/s.IOCL. Some reduction in price happened, when M/s.IOCL informed the Appellant Corporation that excess price has been charged by the Appellant Corporation from M/s.PPN and accordingly it has issued Credit Notes to M/s.PPN. Accordingly, refund claims were made by the manufacturer M/s.CPCL with the Respondent Excise Department which has been rejected by the Excise Department on the basis of the impugned show cause notice issued to the Appellant Corporation on 19 July 2002, which further resulted in adverse orders against the Appellant Corporation, being Order in Original on 29 November 2002, order passed by the Commissioner of Appeals dated 11 April 2018 and impugned order passed by the learned CESTAT on 10 May 2019. The facts of all the three appeals in this regard are similar. The purchasing company alone varied; M/s.Madras Fertilizers Ltd., in C.M.A.No.4299 of 2019 and M/s.Kothari Sugars and Chemicals Ltd., in C.M.A.No.4301 of

2019. Therefore, C.M.A.No.4298 of 2019 is taken as the lead case.

5. The learned Counsel for the Assessee urged before us that since the incidence of Excise Duty has not been passed on by the consumer of raw naptha in question, viz., M/s.PPN, for the electricity or power manufactured out of use of such raw naptha. The Appellant company is entitled to a refund and the only reason given in the impugned show cause notice for refusing the said refund to the Appellant was that on the basis of the Credit Notes issued by M/s.IOCL to M/s.PPN, refund could not be claimed by the Appellant M/s.CPCL. He has further submitted that as far as refund claim on the basis of Credit Notes is concerned, the Hon'ble Supreme Court in the case of M/s.Addison & Co. Ltd. and itself has held, following the judgment of the Hon'ble Supreme Court in the case of UOI vs. Bombay Tyre International Pvt. Ltd., 1983 (14) ELT 1896, that on the basis of the Credit Notes issued with regard to trade discounts, which are later on given by the supplier, such Excise Duty refund can be claimed and therefore, on this basis, the Department could not have refused refund to the Appellant M/s.CPCL. On the question of presumption under Section 12B of the Act, the learned counsel for the Assessee submitted that the presumption of the incidence of duty having been passed on to the buyer, is not applicable in the present case because the said provision of Section 12B of the Act provides that "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". The learned counsel urged that 'such goods' only means the goods in the same form. But here, once the raw Naptha was consumed in the process of manufacture of power/electricity, the incidence of Excise Duty, borne by M/s.PPN cannot be said to have been passed on to the consumers of power/electricity and therefore, the Appellant M/s.CPCL becomes entitled to the refund of Excise Duty on the basis of Credit Notes issued by M/s.IOCL to M/s.PPN.

6. Per Contra, the learned counsel for Revenue Mr.A.P.Srinivas submitted that not only the show cause notice clearly refuted the claim of the Assessee to claim such refund, inter alia on the grounds of 12B Presumption, but also on the ground, vide paragraph 13 of the show cause notice that the Appellant/ Assessee was not entitled to any refund of such Excise Duty, because it has collected the duty from the buyer in the first instance viz., M/s.PPN. The learned counsel for the Revenue also submitted that the judgment of the Hon'ble Supreme Court in the case of Adison & Co. Ltd., applies on all fours to the facts of the present case and the Hon'ble Supreme Court in the case of Adison & Co. Ltd. followed the decision of the Constitution Bench of the Hon'ble Supreme Court in the case of Mafatlal Industries Ltd., vs. UOI, 1997(89) ELT 247 (SC), in the

following terms :-

16. In the instant case, the Assessee has admitted that the incidence of duty was originally passed on to the buyer. There is no material brought on record to show that the buyer to whom the incidence of duty was passed on by the Assessee did not pass it on to any other person. There is a statutory presumption under Section 12-B of the Act that the duty has been passed on to the ultimate consumer. It is clear from the facts of the instant case that the duty which was originally paid by the Assessee was passed on. The refund claimed by the Assessee is for an amount which is part of the Excise Duty paid earlier and passed on. The Assessee who did not bear the burden of the duty, though entitled to claim deduction, is not entitled for a refund as he would be unjustly enriched.

It will be useful to refer to the relevant para of Mafatlal Industries Vs. Union of India (supra) in this connection.

"108. (iii) A claim for refund, whether made under the provisions of the Act as contemplated in Proposition (i) above or in a suit or writ petition in the situations contemplated by Proposition (ii) above, can succeed only if the petitioner/ plaintiff alleges and establishes that he has not passed on the burden of duty to another person/other persons. His refund claim shall be allowed/decreed only when he establishes that he has not passed on the burden of the duty or to the extent he has not so passed on, as the case may be. Whether the claim for restitution is treated as a constitutional imperative or as a statutory requirement, it is neither an absolute right nor an unconditional obligation but is subject to the above requirement, as explained in the body of the judgment. Where the burden of the duty has been passed on, the claimant cannot say that he has

suffered any real loss or prejudice. The real loss or prejudice is suffered in such a case by the person who has ultimately borne the burden and it is only that person who can legitimately claim its refund. But where such person does not come forward or where it is not possible to refund the amount to him for one or the other reason, it is just and appropriate that that amount is retained by the State, i.e., by the people. There is no immorality or impropriety involved in such a proposition.

The doctrine of unjust enrichment is a just and salutary doctrine. No person can seek to collect the duty from both ends. In other words, he cannot collect the duty from his purchaser at one end and also collect the same duty from the State on the ground that it has been collected from him contrary to law. The power of the Court is not meant to be exercised for unjustly enriching a person. The doctrine of unjust enrichment is, however, inapplicable to the State. State represents the people of the country. No one can speak of the people being unjustly enriched".

17. Section 11-B (2) of the Act contemplates that the amount of refund determined by the Authorities shall be credited to the fund. The Proviso to Section 11-B (2) permits the refund to be paid to the applicant instead of being credited to the fund if such amount is relatable to the manufacturer, the buyer or any other such class of applicants as notified by the Central Government.

18. Mr. Venkatraman interpreted the said provision to mean that the only persons who were entitled for claim of refund are the manufacturer, his buyer and any other class of persons as notified by the Central

Government. There is no dispute about the fact that no notification has been issued by the Central Government as contemplated in Clause (f) to proviso to Section 11-B (2) of the Act. He contested that the claim for refund can be made only by the manufacturer or his buyer and any enquiry pertaining to unjust enrichment should be restricted only to the manufacturer and his buyer. The ultimate buyer/ consumer will not figure in the scheme of Sections 11-B, 12- A, 12-B and 12-C of the Act. This submission was accepted by the High Court in the impugned judgment. We do not approve the findings of the High Court in this regard.

7. Mr.A.P.Srinivas, learned counsel for the Revenue submitted that the moment the appellant M/s.CPCL has raised invoice on M/s.IOCL, who in turn has raised invoice for supply of raw naptha in question, on the buyer company M/s.PPN, the incidence of the Excise Duty is deemed to have been passed on by the appellant M/s.CPCL and therefore, the Appellant is not entitled to any refund of Excise Duty u/s 11B of the Act, merely because M/s.IOCL, the marketing company found that the valuation or price adopted for charging of Excise Duty was on the higher side and on that basis, Credit Notes are said to have been issued to the buyer company M/s.PPN. He further submitted that merely because the appellant and M/s.IOCL have a running account between them, it cannot be said that on the basis of Credit Notes issued by M/s.IOCL, the incidence of Excise Duty is said to have been borne by the appellant Assessee M/s.CPCL. He submitted that once the incidence has been passed on, Excise Law clearly provides the end result of the same, up to the final buyer or consumer of the goods in question who, if identifiable can claim a refund, if the refund of Excise Duty is indeed due and the same has been collected in violation of Article 265 of the Constitution of India. He submitted that nothing of this sort has happened in the present case and if the final consumer is not identifiable, the law provides for such Excise Duty collected to remain in the Consumer Welfare Fund to be utilized for specified purposes and therefore, the appellant Assessee in no case is entitled to any refund in the present case.

8. We have heard the learned counsel on both sides at some length and perused the impugned order of the learned Tribunal as well as the judgments cited at the Bar.

9. We are of the clear opinion that there is no merit in the present appeals filed by the Assessee M/s.CPCL and they deserve to be dismissed.

10. The reasons are as follows :-

(a) The scheme of the Act contained in Section 11B of the Act read with other relevant provisions of the Central Excise Act as it then prevailed before the introduction of GST regime with effect from 1 July 2017, with regard to refunds is very clear viz., that it is only the person who has borne the incidence of Excise Duty, which was not leviable in law is entitled to claim refund of the same, subject to his locus standi and the limitation prescribed in Section 11B of the Act. The law on the said issue was propounded beyond the pale of doubt by the Constitution Bench of the Hon'ble Supreme Court in the case of Mafatlal Industries Ltd. (supra). The said judgment has been correctly applied, with great respects, by the Hon'ble Supreme Court in the case of Addison and Co.Ltd., (supra). There is hardly any doubt on facts in the present case, where, admittedly, the invoice of the appellant for the supply of raw naptha which is a dutiable product, was raised by the appellant M/s.CPCL on its marketing company M/s.IOCL, which is a separate company, who in turn raised invoice on the purchaser or buyer of the said raw naptha M/s.PPN, who in turn, manufactured power by use of such raw naptha and other raw materials. If at all, duty can be said to have been collected in excess on account of over valuation of the supplies, it is the consumer of the said raw material/raw naptha, viz., M/s.PPN who could have claimed the refund of Excise Duty as per the settled legal position. Merely because M/s.IOCL issued a credit note to the buyer M/s.PPN, it cannot be said that the incidence of Excise Duty was not passed on to the purchaser M/s.PPN. Once the incidence of Excise Duty has been passed on, whether it is further passed on to the ultimate buyer or consumer or not, is not the relevant question. The appellant Assessee M/s.CPCL, cannot be said to have borne any incidence of Excise Duty illegally levied and therefore, the right of the appellant Assessee to claim any refund cannot arise. The law in this regard of unjust enrichment has been settled as aforesaid, beyond pale of doubt, by the Constitution Bench Judgment of the Hon'ble Supreme Court in the case of Mafatlal Industries Ltd., reiterated and followed by the Hon'ble Supreme Court in the case of Addison & Co.Ltd., wherein the contentions which are now raised before us and almost similar contentions having been raised there, have been negatived by the Hon'ble Supreme Court, reversing the decision of the Division Bench of the Madras High Court, vide paragraph 18

quoted above.

(b) The question raised before us relates to question of locus standi of the person who is claiming the refund and not on what basis it is claimed. Whether on the basis of Credit Note issued by M/s.IOCL, a refund of Excise Duty could be made or not is not the question, and the claim of the Assessee is not fortified merely because the show cause notice refuted the claim of the Assessee on the basis of credit note alone. Therefore, viewed from that angle, even if the contention of the learned Counsel for the Assessee was to be considered that on the basis of Credit Notes issued in the cases of Addison Co. Ltd. or Bombay Tyre International Pvt. Ltd. (supra), that on the basis of Credit Notes issued for Trade discounts, which is an established trade practice, such refund could be claimed. No such situation is available, factually before us. The facts before us are clear and undisputed and there is no material or facts available on record which even prima facie could indicate that the appellant Assessee has borne the incidence of Excise Duty which in law could not be charged from it. The moment it raised the invoice on M/s.IOCL and M/s.IOCL issued Invoice on M/s.PPN, the incidence of Excise Duty is definitely passed on to the buyer or consumer of raw naptha, viz., M/s.PPN. Therefore, the right to claim refund by the Appellant M/s.CPCL is completely lost.

11. In view of the above, we do not find any question of law arising in the present appeals, which is required to be considered afresh or outside the scope of the binding precedents of the Hon'ble Supreme Court in the case of Mafatlal Industries Ltd. and Addison and Co.Ltd.

12. The Appeals are thus found to be devoid of merits and therefore they are liable to be dismissed. Accordingly, the Appeals are dismissed. There is no order as to costs.

Sd/-

Assistant Registrar(insp cell)

//True Copy//

Sub Assistant Registrar

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To
The Commissioner of GST & Central Excise,
Chennai North,
26/1, Mahathma Gandhi Road,
Nungambakkam, Chennai 34.

2.The Registrar,
Customs, Excise ad Service Tax Appellate Tribunal, South Zonal
Bench, Chennai.

+1cc to Mr.A.P.Srinivas , Advocate SR.No. 34838

+1cc to Mr.R.Raghavan , Advocate SR.No. 34953

C.M.A.Nos.4298, 4299
and 4301 of 2019

A.SK(19.02.2021).



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