(2011) 03 BOM CK 0039

In the Bombay High Court

Case No : Writ Petition No. 1982 of 2010

Arviva Industries (India) Ltd. APPELLANT

Vs

Union of India (UOI) RESPONDENT

Date of Decision : 23-03-2011

Acts Referred:
Customs Act, 1962 — Section 27(2)

Citation : (2011) 267 ELT 599

Hon'ble Judges : Roshan Dalvi, J;J.P. Devadhar, J

Bench : Division Bench

Advocate : D.B. Shroff, i./b., R.K. Sheth and Co, for the Appellant; R. Ashokan, for the Respondent

Final Decision : Allowed

Judgement

J.P. Devadhar, J.—Rule. Rule is made returnable forthwith.

2. This writ petition was originally filed to challenge the show cause notice dated 18th August 2010 whereby the Petitioners were called upon to show cause as to why the refund claimed by the Petitioners should not be rejected on the principles of unjust enrichment. While the petition was pending the Assistant Commissioner, Customs (Preventive) Refund Section: M & P Wing, Mumbai by his order-in-original dated 24th January 2011 sanctioned refund of Rs. 1,30,55,000/-, but directed that only Rs. 20,00,000/- be paid to the Petitioners and Rs. 1,10,55,000/- be credited to the Consumer Welfare Fund of India as provided u/s 27(2) of the Customs Act, 1962. The Writ Petition has been amended to challenge the order dated 24th January 2011.

3. The relevant facts are that during the year 1994 the Petitioners had obtained advance licences from the Licensing Authorities for duty pre-import of the raw materials specified therein. The advance licences being freely transferable, the Petitioners had sold the said licences to third parties for valuable consideration. The third parties to whom the licences were sold had imported goods duty free

under those advance licences.

4. Thereafter a show cause notice was issued to Petitioners on 8th December 1997 alleging that the Petitioners had obtained the advance licences fraudulently and by misrepresentation and the Petitioners were called upon to show cause as to why Rs. 21,13,482/- being the duty payable on the imports made under the advance licences by the license holders, should not be recovered from the Petitioners. Prior to the issuance of the show cause notice, the Managing Director of the Petitioner No. 1 was arrested and was made to pay various amounts in all amounting to Rs. 1,30,55,000/- to secure the duty demand that may be raised on completion of investigation.

5. During the pendency of the said show cause notice, the Central Government of India, in the 1998-1999 Budget, introduced a scheme known as Kar Vivad Samadhan Scheme (for short KVSS) under which the disputed tax arrears could be settled by paying 50% of the tax arrears. With a view to avail the benefit of the scheme, the Petitioners made an application under KVSS for settlement of the dispute. The said application was rejected however, on the ground that the duty demand does not survive as the duty has already been paid. The Petitioners filed Writ Petition No. 1074/1999 to challenge the rejection of KVSS application. The Writ Petition was disposed off on 23rd April 2009 by holding that the amount of Rs. 1,30,55,000/- paid by the Petitioners was a deposit and not payment of customs duty and till the show cause notice is adjudicated, it cannot be said that the liability has ceased. This Court further directed the Commissioner to consider the KVSS application filed by the Petitioners and pass appropriate order thereon. The SLP filed against the aforesaid order of this Court was dismissed by the Apex Court on 16th December 2009. Thereupon the Commissioner by his order dated 14th January 2010 allowed the KVSS application filed by the Petitioners. Accordingly Petitioners paid 50% of the duty demanded under the show cause notice dated 8th December 1997. Thus, the entire liability under the show cause notice stood settled.

6. Thereafter the Petitioners filed refund claim seeking refund of the amount of Rs. 1,30,55,000/- which was collected from the Petitioners prior to the issuance of the show cause notice dated 8th December 1997. The said application was originally returned on the ground that all the relevant documents were not annexed to the refund application. The Petitioners resubmitted the claim and also pointed that there was no question of any unjust enrichment. However vide impugned show cause noticed dated 18th August 2010 the Respondent No. 2 called upon the Petitioners to show cause as to why the refund claimed should not be rejected. During the pendency of the writ petition vide order-in-original dated 24th January 2011 the Assistant Commissioner of Customs sanctioned refund of Rs. 1,30,55,000/-, but directed that out of the said amount, Rs. 20,00,000/-be paid to the Petitioners and the balance amount of Rs. 1,10,55,000/- be credited to the Consumer Welfare Fund of India. The writ petition was filed to challenge the show cause notice dated 18th August 2010

and by amendment the order in original dated 24th January 2011 has also been challenged.

7. Mr. Shroff learned Counsel for the Petitioners submitted that once this Court by order dated 23rd April 1999 passed in Writ Petition No. 1074/1999 has held that the amount of Rs. 1,30,55,000/- paid during investigation is a deposit and the demand raised after investigation stood settled by the order passed under KVSS, the Petitioners are entitled to refund of the entire amount of Rs. 1,30,55,000/- deposited during the course of investigation.

8. It is further contended by the Counsel for the Petitioners that when the amount was deposited by the Petitioner No. 1 company and the same is evidenced by the payment challans, it is not open to the Respondents to deny refund of Rs. 1,10,55,000/- merely because the said amount was deposited by M/s. Naraindas Dayaram a proprietary concern of Mr. Raaju Amarnani who was also a Managing Director of the Petitioner No. 1 company.

9. Mr. Ashokan learned Counsel for the Respondents on the other hand submitted that in the present case, the books of the account maintained by the Petitioners show that only Rs. 20,00,000/- is shown as recoverable from customs authorities and there is nothing on record to suggest that balance amount of Rs. 1,10,55,000/- is recoverable from the customs authorities. He submitted that the fact that in the accounts maintained by M/s. Naraindas Dayaram Rs. 1,10,55,000/- is shown as recoverable from the customs cannot be a ground for the Petitioners to claim that amount.

10. Relying on the decision of the Apex Court in the case of Sahakari Khand Udyog Mandal Ltd. Vs. Commissioner of Central Excise and Customs, , Mr. Ashokan submitted that the doctrine of ''unjust enrichment'', can be invoked to deny the benefit to which a person is not otherwise entitled to.

11. In the present case it is not in dispute that the amount of Rs. 1,30,55,000/- was recovered as deposit towards the liability that may arise from the advance licences obtained by the predecessor of the Petitioner No. 1 company. Since the Managing Director of the predecessor company who was also the proprietor of M/s. Naraindas Dayaram, a sum of Rs. 1,10,55,000/- was paid from the proprietary concern. However, it is not in dispute that the challans show that the amounts were deposited for and on behalf of the company. Moreover, M/s. Naraindas Dayaram has also issued no objection certificate to the effect that the amount of Rs. 1,10,55,000/- can be paid to the Petitioner No. 1 company. In these circumstances, having found that the entire amount of Rs. 1,30,55,000/- is refundable, the officer could not have declined to release the amount of Rs. 1,10,55,000/- merely because the said amount is not shown in the books as recoverable when in fact the said amount was paid by M/s. Naraindas Dayaram for and on behalf of the company and M/s. Naraindas Dayaram has no objection if customs pay that amount to the Petitioner No. 1.

12. In the present case, there is no question of applying the principles of unjust

enrichment because, the company has not imported the goods under the advance licences. Goods were imported duty free by the persons to whom the advance licences were sold. Since the predecessor company had not imported the goods duty free, the question of passing on the duty element to the customers did not arise at all. However, alleging that the company had obtained advance licences fraudulently, action was initiated and the Managing Director of the erstwhile Company who was also the proprietor of M/s. Naraindas Dayaram was arrested. Pending investigation, Rs. 1,30,55,000/- was paid for and on behalf of the company to secure the interest of the revenue. On completion of investigation show cause notice was issued to the company as also M/s. Naraindas Dayaram. The amount claimed in the show cause notice has been settled and paid under KVSS. Thus the amount of Rs. 1,30,55,000/- deposited during investigation became refundable. Accordingly refund has been sanctioned, but Rs. 1,10,55,000/- has been directed to be credited to the Consumer Welfare Fund, not because the said amount is recovered from the customers but because the said amount is not shown in the books of the Petitioner No. 1 as recoverable from customer. Such a course was unwarranted, because, in the present case, it is not in dispute that the amount was deposited for and on behalf of the Petitioners, it is not in dispute that the said amount is refundable and it is also not in dispute that the said deposit amount could not be passed on to the customer. Since the amount in question did not belong to the consumer the said amount could not be directed to be credited to the Consumer Welfare Fund.

13. Reliance placed on the decision of the Apex Court in the case of Sahakari Khand Udyog Mandal Ltd. (Supra) is misplaced because what is held in that case is that the doctrine of unjust enrichment can be invoked to deny the benefit to which a person is otherwise not entitled. In the present case the Petitioner No. 1 is otherwise entitled to the refund and granting refund of the amount deposited does not unjustly enrich the Petitioner No. 1. Therefore, the above decision of the Apex Court does not support the case of the revenue.

14. For all the aforesaid reasons the petition is allowed. The impugned order dated 24th January 2011 is quashed and set aside to the extent it holds that the refund amount of Rs. 1,10,55,000/- be credited to the Consumer Welfare Fund. The Respondents are directed to refund the entire amount of Rs. 1,30,55,000/- to the Petitioner No. 1 with interest @ 6% p.a. from the date of deposit till payment within a period of three weeks from today.

15. Rule is made absolute in the above terms with no order as to costs.

