
(1992) 02 CAL CK 0048
In the Calcutta High Court
Case No : Matter No. 922 of 1991

Assistant Collector of Central Excise

APPELLANT

Vs

Indo Metal Industries

RESPONDENT

Date of Decision : 13-02-1992

Acts Referred:

Central Excise and Customs Laws (Amendment) Act, 1991 — Section 3, 3(3)

Citation : (1995) 61 ECR 193 : (1992) 58 ELT 539

Hon'ble Judges : Shyamal Kumar Sen, J;Ajit Kumar Sengupta, J

Bench : Division Bench

Advocate : N.C. Roychowdhury and Prantosh Mukherjee, for the Appellant;R.N. Bajoria Samir Chakraborty, Sanjay Baid and M.R. Bhaktavatsalam, for the Respondent

Judgement

1. This is an application for stay of the operation of the order passed by the learned Court of the first instance dated 20th December, 1991 directing the Appellants to grant the refund of Rs. 10,70,973.04 to the Respondent by 15-1-1992.

2. It appears that pursuant to the order dated 18th November, 1983 passed by the Customs, Excise & Gold (Control) Appellate Tribunal refund was due to the Respondent. The Department preferred an appeal before the Supreme Court against the said order of the Tribunal which was dismissed by the Supreme Court on 27th April, 1984. The Respondent made an application before the Assistant Collector of Central Excise for refund of the amount in terms of the order of the Tribunal, but that application was rejected by the Assistant Collector on 23-8-1989. The Respondent preferred an appeal before the Collector of Central Excise (Appeals) and the Collector allowed the said appeal setting aside the order of the adjudicating authority and directing him to reconsider the case of the appellant for refund on merits in the light of the clear order of the Tribunal. Since then no action was taken by the Appellants.

3. Upon a writ application preferred on February 12, 1991 a learned single Judge

of this Court passed the following order:-

"This application is disposed of by directing the adjudicating authority being the respondent No. 1 to reconsider the case of the appellant for refund on merits in the light of the orders of the Tribunal as stated in the Collector of Central Excise (Appeals") Order dated 2-3-1990 within a period of 4 weeks from date. The petitioner will be at liberty to raise all points taken in this writ petition before the adjudicating authority. The adjudicating authority will pass a reasoned order within the time specified above after giving the petitioner an opportunity of being heard. In the event the respondent No. 1 comes to conclusion that refund is due of any amount to the petitioner such refund shall be made within a period of 4 weeks from the date of the order which the petitioner will accept without prejudice to its rights and contentions. Since no affidavit has been filed it is recorded that the allegations contained in the petition are not admitted. . . ."

4. Pursuant to the aforesaid order dated 12-2-1991 passed by the learned single Judge the Assistant Collector of Central Excise passed an order on 6th March, 1991 and held that the petitioner's claim for refund of Rs. 15,23,530.30 was not justified but that the petitioner should have claimed for refund for the amount of Rs. 10,70,973.04 in as much as prior to the classification under the 1986 Act the goods were liable to excise duty under Tariff Item 26AA(ia) of the erstwhile First Schedule to the Act. He however, did not direct the refund on the following grounds:

"I have gone through both the case reports submitted by the learned Advocate during the course of personal hearing. Those are not relevant in the present case. Both the cases were decided on the ground of unjust enrichment. The question here is to be decided who is the actual payer of C.E. duty and who will be the claimant. Central Excise duty is an indirect taxation and hence the duty is paid by the ultimate actual users of the goods. Manufacturers are the middlemen who collect duty from the buyers and pay to Government. So, C. E. duty is not paid from their own pockets and they cannot be claimants of duty so collected and paid to the Government. In the case of Doctor Beck and Co. (India) Ltd. Vs. Assistant Collector, , the Hon"ble Bombay High Court relied on the case ruling 1990 (46) ELT 23 (Bom.)(F.B.) which reads as follows:-

"Refund not rejectable by resort to the concept of unjust enrichment if the Department cannot establish that tax burden has been shifted by the assessee to the customers".

In the case of Kirloskar Oil Engines Ltd. Vs. Union of India, it was observed by the Hon"ble Bombay High Court that "unjust enrichment - not applicable when the Department not able to prove that the burden of duty was passed on to the customers". The Hon"ble Court relied in the case of India Industries Ltd. v. U.O.I. It was held by the full Bench that the burden is upon the Department to state on affidavit as to how the doctrine of unjust enrichment would be attracted and the Department must establish that duty was passed on by the Company to the

customers. In the instant case, it is well established from the agreement entered into between M/s. Poonam Trading Co, and M/s. Indo Metal Industries as referred to above, that burden of duty had been passed on by the assessee manufacturer to its buyer. M/s Poonam Trading Co. is the sole purchaser of the goods manufactured by M/s. Indo Metal Industries. M/s. Poonam Trading Co., is a trading concern. It did not actually use the goods. It passed on the goods to other customers on sale.

From the above discussion I come to the conclusion that M/s. Indo Metal Industries is not the actual payer of C.E. duty. The actual payers of the duty are ultimate actual consumers of the goods. M/s. Poonam Trading Co. is also not entitled to receive back the C. E. duties as M/s. Poonam Trading Co, is purely a Trading concern but not the actual users of the goods".

5. The Respondent again moved before the Writ Court and the learned Judge after considering the facts and circumstances of this case allowed the writ petition and set aside the said order of the Assistant Collector of Central Excise dated 6-3-1991 and directed the refund of the said amount of Rs. 10,70,973.04. Hence, the present appeal.

6. Mr. Roychowdhury, learned Advocate for the appellant has drawn our attention to the provisions of Section 3(3) of the Central Excise and Customs Laws (Amendment) Act, 1991. He has contended that no refund can be allowed except in accordance with the provisions contained in the said Amendment Act. He has not disputed the quantum of the refund but his only contention is that the refund has to be credited, notwithstanding any order passed by this Court, to the Consumer Welfare Fund unless the Respondent comes within the exceptions provided in Section 3 of the said Act.

7. Mr. Bajoria learned Counsel for the respondent has, however, contended to the contrary.

8. In our view, there is an arguable case and the question has to be decided in appeal. Since a point of law only is involved, let this application be treated as an appeal and heard accordingly.

9. In the meantime, we direct the Appellants to refund a sum of Rs. 10 lakhs within 4 weeks from date upon the respondent's furnishing a bank guarantee of the like amount to the satisfaction of the Collector of Central Excise, Calcutta-I. Such bank guarantee shall be initially for one year and shall be renewable from year to year until this appeal is disposed of. Such bank guarantee shall be renewable within 3 weeks before the date of expiry of the same and if not, in that event the Bank shall pay the entire amount in enforcement of the bank guarantee to the Collector of Central Excise, Calcutta-I.

10. Let the Paper Book be filed by the Respondent including therein all papers used in the Trial Court and the papers relied on as well as the application made before the Appeal Bench within 4 weeks from date. Notice of Appeal is waived.

Settlement of Index is dispensed with.

11. Liberty to mention.

12. All parties concerned to act on a signed copy of this dictated order on the usual undertaking.