

(2009) 12 P&H CK 0133
In the Punjab And Haryana At Chandigarh
Case No : C.E.C. No. 91 of 2001

Asstt. Executive Engineer, PCC Poles

APPELLANT

Vs

Commr. of C. Ex.

RESPONDENT

Date of Decision : 01-12-2009

Acts Referred:

Central Excise Rules, 1944 — Rule 173C

Central Excises and Salt Act, 1944 — Section 11B, 35H

Citation : (2010) 258 ELT 46

Hon'ble Judges : M.M. Kumar, J; Jaswant Singh, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

M.M. Kumar, J.—The petitioner has invoked the provisions of Section 35H of the Central Excise Tax Act, 1944 (for brevity "the Act") and prays for issuance of directions to the Customs, Excise and Cold (Control), Appellate Tribunal, New Delhi (for brevity "the Tribunal") to make a reference to this Court claiming that various substantial questions of law would emerge from the order dated 17-11-2000 [2001 (127) E.L.T. 594 (Tri.-Del.)] passed by the Tribunal dismissing the rectification application as well as against the original order dated 9-6-2000.

2. Brief facts necessary for the disposal of the instant petition are that the petitioners are engaged in the manufacture of PCC poles falling under subheading 6807.00 of the schedule appended to Central Excise Tariff Act, 1985 under valid central excise registration. The poles manufactured by the petitioners are captively consumed by them in the various field formation and are not meant for sale in the open market. They are maintaining prescribed central excise record and are filing periodical returns from time to time. As per the provisions of Rule 173C of the Central Excise Rules, 1944, they filed price list No. 1/92-93 effective from 1992 -93 w.e.f. 1-4-1992 before the jurisdictional Assistant Collector of Central Excise in respect of PCC Poles which was duly approved @ Rs. 667.49 per pole. Similarly price lists were also filed later on and approval was

duly accorded. During the period commencing from 24-2-1993 to 30-11-1993 the petitioner cleared that PCC Poles @ Rs. 667.49 P. per pole plus excise duty @ 20% ad valorem. Thereafter they filed refund claim of duty amounting to Rs. 6,19,451/-claiming that excess duty has been paid.

3. A show cause notice dated 9-2-1995 (P.1) was issued to them calling upon them to explain to the Assistant Collector, Central Excise, Patiala as to why their refund claim be not rejected u/s 11B of the Act because the refund claim pertaining to the period 24-2-1993 to 30-11-1993 was time barred as the petitioner had not opted for provisional assessment. The show cause notice further asserted that the petitioner had failed to produce the original duty paid documents. They were further directed to prove the doubt that duty incidence has not been passed on to the buyer. The petitioner filed a reply to the show cause notice inter-alia contending that they have earlier filed refund of claim before their jurisdictional Range Superintendent on 20-4-1993 which was returned to them with the remarks that the same be submitted to the Divisional Office and as such the claim could not be considered time barred. The question of incidence of duty claimed from the buyer did not arise. The Assistant Collector passed an order on 5-5-1995 and partially rejected the refund claim of Rs. 3,30,425/- and sanctioned a refund of Rs. 2,98,119/-. One of the basic reasons for granting refund of claim was that the doctrine of unjust enrichment was not attracted as the petitioner was manufacturing poles for their captive consumption and no pole was being sold to the customer.

4. The matter was carried in appeal and the Commissioner (Appeals) partially allowed the appeal by rejecting the refund claim of Rs. 1,82,934/-. However, he accorded sanction to an amount of Rs. 1,44,747/-. The Tribunal vide order dated 9-6-2000 rejected the claim with the observation that u/s 11B of the Act application for claiming refund of any duty is to be made before the expiry of six months from the relevant date which is defined in Explanation to Section 11B(f) of the Act. The relevant date is to be computed from the payment due. The date of payment of due falls beyond the period of six months prior to the date of filing of refund claim.

5. We have heard the learned Counsel and are of the view that no question of law warranting issuance of directions for reference to this Court would arise. Firstly, the question of limitation is a mixed question of fact and law and the findings recorded by the Tribunal in its order dated 9-6-2000 dismissing the main appeal as also in the order dated 17-11-2000 while dismissing the rectification application, have categorically held that the refund claim should have been filed before the expiry of six months from the relevant date which is defined in Explanation to Section 11B(f) of the Act. Accordingly, the relevant date has to be computed from the date of payment of duty which fell admittedly beyond the period of six months. In fact it is the duty of the Tribunal to act in accordance with the statutory provisions. Another aspect of the matter is that doctrine of unjust enrichment would even apply to cases of captive consumption. In that

regard reliance may be placed on a judgment of Hon"ble the Supreme Court in the case of Union of India and others Vs. Solar Pesticide Pvt. Ltd. and Another, .

6. In view of the above, the reference petition fails and the same is dismissed.