
(1990) 11 BOM CK 0048
In the Bombay High Court

Bombay Burmah Trading Corpn. Ltd.

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 14-11-1990

Acts Referred:

Central Excises and Salt Act, 1944 — Section 11B(3)

Citation : (1991) ECR 194 : (1991) 52 ELT 195

Hon'ble Judges : V.P. Tipnis, J;M.L. Pendse, J

Bench : Division Bench

Advocate : Shri A.H. Hidayatullah and Vikram Nankani, instructed by M/s. Crawford Bayley and Co, for the Appellant; Shri V.C. Rege, for the Respondent

Judgement

Pendse, J.—Rule returnable forthwith. Shri Rege waives services on behalf of the respondents. Heard counsel.

2. The grievance of the petitioners in this petition filed under Article 226 of the Constitution of India is that the refund application filed on August 1, 1989 is not disposed of by the Assistant Collector of Central Excise for a considerable length of time and, on the other hand, two show cause notices are issued to the petitioners to explain why the refund should not be refused on the ground of unjust enrichment. Only few facts are required to be stated to appreciate the grievance of the petitioners.

3. The petitioner No. 1 is a Company incorporated under the Indian Companies Act and, inter-alia, manufactures paper based decorative laminates. By order dated January 3, 1989, the respondent No. 2 classified the goods under sub-heading 3920.31 as it stood upto February 28, 1988 and thereafter under sub-heading 3920.37 of the Schedule to the Central Excise Tariff Act, 1985. The claim of the petitioners that the classification ought to have been under sub-heading 4818.90 upto February 28, 1990 and thereafter under sub-heading 4823.90 was turned down. The petitioners carried appeal before the Collector of Central Excise (Appeals) Bombay and the appeal was allowed by order dated April 4, 1989 and the claim of the petitioners about classification was upheld. During the pendency

of the appeal before the collector, the petitioners had paid duty under protest. In view of the order of the Appellate Collector, the petitioners were entitled to refund of excess duty paid in accordance with the order of erroneous classification made by the Assistant Collector. The order passed on April 4, 1989 by the Appellate Collector was carried in appeal by the Department before CEGAT and the appeal dated October 5, 1990. In view of the dismissal of the appeal by CEGAT, the question of classification about the goods manufactured by the petitioners have attained finality.

4. After the disposal of the appeal by the Collector, the petitioners filed refund application, for return of excess duty recovered by the Department, on August 1, 1989. The petitioners demanded the refund of amount of Rs. 5,50,00,000/- which was paid under protest and which the petitioners were entitled to seek back in accordance with the provisions of section 11B(3) of the Act. The claim was subsequently reduced to Rs. 4,63,47,981.76. The Department instead of examining the claim and awarding the same in accordance with the provisions of the Section 11B(3) of the Act served two show cause notices dated December 19, 1989 and January 19, 1990 on the petitioners to explain why the application for refund should be turned down on the ground of unjust enrichment. The Department in the show cause notices referred to the decision of Division Bench of this Court in the case of Roplas (India) Ltd. and another Vs. Union of India and another, . The petitioners filed their reply to the show cause notices pointing out that the decision in Roplas case is no longer good law and, in any event, the doctrine of unjust enrichment is not available to the Excise authorities who are the creation of the statute and who are bound to grant refund in accordance with the provisions of Section 11B(3) of the act. The department thereafter did not take any steps for disposal of the refund application and that has given rise to the filing of the present petition.

5. Shri Hidayatullah, learned counsel appearing on behalf of the petitioners, submitted that the service of show cause notices by the Department is wholly incorrect and illegal. The learned counsel urged that the Department cannot decline to make refund by resort to principle of unjust enrichment. The reliance on the decision of the Roplas case, says Shri Hidayatullah, is wholly incorrect because the decision is no longer good law in view of the decision of the Full Bench of this Court in the case of New India Industries limited v. Union of India reported in 1990 (46) E L T23 . Shri Hidayatullah also submitted that the principle of unjust enrichment is not available to the Department before the Excise authorities who are regulated and should be guided by the provisions of the Act. The submission of Shri Hidayatullah is correct and deserves acceptance. In the case of 1990 (27) ECC 179 has held that it is not permissible for the authorities created under Central Excise to deny relief of refund by report to doctrine of unjust enrichment. The Tribunal warned the authorities exercising powers under the Act to restrain from evoking its own scheme in respect of refund of the amounts by claiming that the refund would not confer any advantage on the ultimate consumers. The decision recorded by CEGAT is

binding on all the subordinate authorities created under the Act. The decision of CEGAT was approved by the Division Bench of this Court by judgment dated October 22, 1990 in Writ Petition No. 4888 of 1989 M/s. Caprihans India Limited and another v. The Union of India and another and to which one of us (Pendse, J.) was a party. Apart from the decision of CEGAT, the Department could not refuse to make refund to the petitioners because the duty sought to be recovered back by the petitioners was paid under protest. Secondly, the petitioners are entitled to claim refund in view of the decision of the Appellate Collector recorded on April 4, 1989 and which was ultimately confirmed by CEGAT on October 5, 1990. Section 11B(3) of the Act provides that the assessee is entitled to the refund as a matter of right when the decision of the lower authorities is set aside by the higher authorities under the Act. In view of the reversal of the decision of the Assistant Collector by the Collector, the right to secure refund cannot be defeated by resort to provisions of the limitation or with reference to doctrine of unjust enrichment. One of us (Pendse, J.) took this view in the judgment delivered on July 25, 1990 in Writ Petition No. 2174 of 1990 KEC International Limited and another v. Union of India and another. We are in agreement with the view taken in that decision and, therefore, it is obvious that when the provisions of Section 11B(3) of the Act come into operation, then the Department cannot refuse to make refund by resort to provisions of limitation under Sub-section (1) of Section 11B or by resort to doctrine of unjust enrichment. In our judgment, the two show cause notices issued by the Department are entirely illegal and the Department is bound to grant refund to the petitioners.

6. Accordingly, rule is made absolute and the respondents are directed to dispose of the refund application filed by the petitioners by ignoring the contents of the two show cause notices and in accordance with the decisions delivered by this Court and to which reference is made in the present judgment. The respondents are directed to dispose of the refund application and make refund to the petitioners on or before December 31, 1990. In case, the refund is not made by December 31, 1990, the Department is liable to make refund of the amount along with interest to be calculated at the rate of 18% per annum and payable from this date to the date of actual payment. The respondents shall pay the costs of the petition.

7. Shri Rege applies for stay of operation of the judgment. Prayer refused.