(2003) 04 DEL CK 0053

In the Delhi High Court

Case No : Civil Writ No. 357 of 1996

B.R. Metals Pvt. Ltd. APPELLANT

Vs

Union of India (UOI) and Others RESPONDENT

Date of Decision : 28-04-2003

Acts Referred:

Citation : (2003) 105 DLT 123 : (2003) 69 DRJ 271 : (2003) 88 ECC 519 : (2003) 157 ELT 21

Hon'ble Judges : S.K. Mahajan, J

Bench : Single Bench

Advocate : Amita Gupta, for the Appellant; Tamali Wad, for the Respondent

Judgement

S.K. Mahajan, J.—The petitioner has filed the present writ petition impugning the assessment made by the Customs Authorities whereby the duty was directed to be paid not on the basis of the invoice price declared by the petitioner but was assessed on the basis of the London Metal Exchange Price and by adopting the best value judgment under the relevant rules. On 18th April, 1996 after "Rule" was issued by the Court it was directed that the five containers mentioned in the order shall be cleared by the respondents on payment of customs duty on the invoice value instead of LME value of the scrap provided the petitioner furnishes to the satisfaction of the Collector of Customs security of some immovable property in respect of difference in duty calculated on the basis of LME value and invoice value. By order dated 25th April, 1996 the Court permitted the petitioner to furnish bank guarantee instead of security in terms of the order dated 18th April, 1996. In respect of the other 21 containers the petitioner had paid under protest the customs duty assessed by the respondents.

2. When the matter came up for hearing today, learned counsel for the respondent has brought to the notice of the Court the judgments of the Supreme Court in Mafatlal Industries Ltd. and Others Vs. Union of India (UOI) and Others, and in Union of India and others Vs. Solar Pesticide Pvt. Ltd. and Another, to contend that even assuming the petitioner succeeds in this case, he will still not

be entitled to the refund of the customs duty inasmuch as it will be a case of undue enrichment.

3. In Mafatlal Industries Ltd. Vs. Union of India (supra), the Supreme Court had held that the claim for refund that are made under the provisions of the Act can succeed only if the petitioner alleges and establishes that he had not passed on the burden of the duty to another person/persons. It was held that where the burden of duty had been passed on, the claimant could not say that he had suffered any real loss or prejudice. The real loss or prejudice is suffered in such a case by a person who had ultimately borne the burden and it is only that person who can legitimately claim such a refund. It was held that the power of the Court is not meant to be exercised for unjustly enriching a person. The observation of the Supreme Court in Mafatlal Industries Ltd. case in so far as they are relevant for this case may be reproduce as under:-

"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."

4. In Union of India Vs. Solar Pesticides Pvt. Ltd. (supra), the Supreme Court approved the observations made in Mafatlal case and further held that to claim refund of the duty, it was immaterial whether the goods imported were used by the importer himself and the duty thereon passed on to the purchaser of the finished product or that the imported goods were sold as such with the incidence

of tax being passed on to the buyer. It was held that in either case the principle of unjust enrichment will apply and the person responsible for paying the import duty would not be entitled to get refund because of the plain language of Section 27 of the Customs Act. Having passed on the burden of tax to another person, directly or indirectly, it would clearly be a case of unjust enrichment if the importer/seller is then able to get refund of the duty paid from the Government notwithstanding the incidence of tax having already been passed on to the purchaser. To the arguments advanced by the importer that it would be impossible for the assessed to establish whether the duty component was passed on to the buyers of the finished goods or was borne by the importer himself, the Supreme Court observed that even in cases of captive consumption, it should be possible for the importer to show and prove before the authorities concerned that the incidence of duty on the raw material, in respect of which refund is claimed, was not passed on by the importer to anybody else. The Supreme Court in that case held that:-

"Learned counsel for the respondent had also contended that in cases of captive consumption of imported goods, it would be impossible for the assessed to establish whether the duty component has been passed on to the buyers of the finished products or has been borne by the importer himself. Difficulty in proving that the incidence of the duty borne by the importer has not been passed on to the purchaser of the finished product can be no ground for interpreting Section 27 differently. It is not possible that in no case will an importer not be able to prove that the incidence of the duty imposed on the imported raw material has not been passed on to any other person. In fact in Civil Appeal No. 4381 of 1999 filed by the Commissioner of Customs against M/s Surya Roshini Limited, the importer had produced a certificate from the chartered accountants giving details of costing of the final produce and the Commissioner (Appeals) found as a fact that the component of excess customs duty paid on the imported raw material had not gone into the costing of the finished product. Without going into the correctness of this finding we wish to emphasise that even in cases of captive consumption, it should be possible for the importer to show and prove before the authorities concerned that the incidence of duty on the raw material, in respect of which refund is claimed, has not been passed on by the importer to anybody else."

5. Reading of the aforesaid observations of the Supreme Court clearly shows that even assuming the importer has not passed on the incidence of duty to anybody else the petitioner would not be entitled to any relief in this petition as it is not for this Court to decide this question as to whether or not the incidence of duty was passed on to anybody else. Petitioner is required to prove it before the authorities as to whether the incidence of tax was passed on to anybody else and if not whether the petitioner would be entitled to the refund of duty already paid by him.

6. I, Therefore, agree with learned counsel for the respondent that even

assuming the petitioner succeeds in the writ petition, it would not be entitled to any relief in the present writ petition. If the incidence of duty has been passed on to the ultimate buyer petitioner, in view of the judgments of the Supreme Court may not be entitled to the refund of duty, however, if the incidence of duty has not been passed on by the petitioner to anybody else it may make appropriate application before the concerned authorities and make a claim in respect thereof.

7. I, accordingly, dispose of this petition granting liberty to the petitioner to make appropriate claim/application before the Customs Authorities for claiming refund of the customs duty on the ground that the incidence of duty had not been passed on by it to anybody else. If such a claim is made within two months of the passing of this order, the same will not be dismissed only on the ground of limitation and the Customs Authorities will decide the same expeditiously in accordance with law without in any manner being influenced by any observation of this Court in this judgment.