
(2008) 03 OHC CK 0039
In the Orissa High Court

C.C.E., C. and S.T.

APPELLANT

Vs

Pradeep Phosphates Ltd.

RESPONDENT

Date of Decision : 18-03-2008

Acts Referred:

Customs Act, 1962 — Section 27, 27(2), 27(3)

Citation : (2008) 106 CLT 393 : (2010) 252 ELT 502 : (2008) 1 OLR 785 Supp

Hon'ble Judges : A.K. Ganguly, C.J.;I. Mahanty, J

Bench : Division Bench

Judgement

A.K. Ganguly, C.J.—This is an appeal at the instance of the Commissioner of Central Excise, Customs & Service Tax, Bhubaneswar-1 challenging an order dated 25-6-2007 passed by the Customs, Excise & Service Tax Appellate Tribunal (hereinafter referred to as the "said Tribunal") whereby the said Tribunal directed refund of excise duty amounting to Rs. 2,12,32,684/- which has been credited to the Consumer Welfare Fund. While passing the said order, the learned Tribunal came to a finding, that the respondent M/s. Paradeep Phosphates Limited cannot be said to be guilty of "unjust enrichment", so they need not be called upon to furnish documents to prove that they have not passed the excise burden to the customers.

2. The material facts of the case which are not much in dispute are as follows:

3. During 1989-90, M/s. Paradeep Phosphates Limited (hereinafter referred to as the "respondent") imported phosphoric acid from Morocco & Tunisia and, filed Bills of Entry before the customs authorities at Paradeep claiming, inter alia, the concessional rate of duty of 12% in terms of Notification No. 166/76 dated 2-8-1976. Those bills were assessed provisionally by the custom authorities at the standard rate of duty of 15% and the said authorities did not accept the concessional rate of duty claimed by the respondent, inter alia, on the ground that the country of origin certificate was not produced at the time of importation of the goods. Thereupon the Assistant Commissioner of Customs, Paradeep provisionally assessed and passed 17 assessment orders on those bills of Entry.

Then the adjudicating authority determined the excess amount of 3% customs duty and the respondent paid the same which is to the tune of Rs. 2,12,32,684/-. Those assessment orders were passed on 19-3-2001 and then on 3-5-2001 the respondent filed refund claim applications before the Assistant Commissioner of Customs. Then on 31-8-2001 the Deputy Commissioner of Customs passed a consolidated order holding, inter alia, that the amount of duty which was determined and paid in each case by the respondent was refundable to the respondent. However, in the said order the Deputy Commissioner directed the said amount of refund to be credited to the Consumer Welfare Fund established u/s 12C of the Central Excise Act, 1944.

4. Being aggrieved by the said order dated 31-8-2001, the respondent preferred an appeal before the Commissioner of Customs (Appeals). The said appeal of the respondent was rejected by the appellate authority on 23-7-2002. Being aggrieved by the said order dated 23-7-2002 passed by the Commissioner of Customs (Appeals), the respondent filed further appeal before the said Tribunal, Kolkata. The said appeal was disposed of by an order of the said Tribunal dated 23-4-2004, by setting aside the impugned order and by remanding the matter to the original authority for sanction and payment of the refund amount subject to verification of cost of calculation. In the said order the learned Tribunal held that the respondent has not passed on the duty burden to the buyers nor have they received any subsidy to compensate for the extra duty burden of 3%, inasmuch as, the selling price plus the subsidy received from the Government, was much less than the cost of production, even at the lower rate of duty. The Tribunal, however, held that it is not necessary to go into the question of unjust enrichment in connection with the refund of the aforesaid amount in view of the provisional assessment having been made u/s 18 of the Customs Act, 1962.

5. Being aggrieved by the said order of the Tribunal, the Commissioner, Central Excise, Customs & Service Tax, Bhubaneswar-1 filed an appeal before this Court u/s 130 of the Customs Act on 17-8-2006, which was numbered as OTAPL No. 12 of 2006. This Hon''ble Court was pleased to allow the appeal and pass an order of remand to the said Tribunal for re-hearing of the appeal after affording an opportunity of hearing to the Commissioner of Customs by order dated 3-4-2007. Thereafter the Tribunal took up the appeal for rehearing in terms of the High Court order dated 3-4-2007 and by the impugned order disposed of the appeal by holding, inter alia, that the "principle of unjust enrichment" does not apply in a case of provisional assessment u/s 18 of the Customs Act, during the period in question and the Tribunal allowed the appeal and directed the original authority to withdraw the sanctioned refund amount from the Consumer Welfare Fund and to pay the same to the respondent.

6. In the instant appeal which has been filed before this Court by the appellant two questions of law have been urged. They are as follows:

(A) Whether the CESTAT's order directing to settle the pending refund matters arising out of finalization of provisional assessments without taking into account

the Doctrine of unjust enrichment, ignoring the amended provisions of Section 18(5) of Customs Act, 1962 which was made effective on 13-7-2006 is correct in law?

(B) Whether the CESTAT's order directing to refund the amount to the party ignoring the mandatory provisions of Section 27(2) and 27(3) of the Customs Act, 1962 is correct in law?

7. In respect of the first question, the primary enquiry is whether the amended provision of Section 18(5) of the Customs Act, 1962 (hereinafter called the "said Act") can be made applicable in the facts of the instant case. Admittedly, the said amendment was made on 13-7-2006. The sunended provisions of Section 18(5) is set out below:

18(5). The amount of duty refundable under Sub-section (2) and the interest under Sub-section (4), if any, shall instead of being credited to the Fund, be paid to the importer or the exporter, as the case may be, if such amount is relatable to-

(a) the duty and interest, if any, paid on such duty paid by the importer, or the exporter, as the case may be, if he had not passed on the incidence of such duty and interest, if any, paid on such duty to any other person;

(b) the duty and interest, if any, paid on such duty on imports made by an individual for his personal use;

(c) the duty and interest, if any, paid on such duty borne by the buyer, if he had not passed on the incidence of such duty and interest, if any, paid on such duty to any other person;

(d) the export duty as specified in section 26; drawback of duty payable under Sections 74 and 75.

8. But in the instant case, the Deputy Commissioner, Custom House, Paradeep finalized the bill of entry submitted by the respondents and sanctioned the refund in 2001 which is much prior to the date of amendment i.e. 13-7-2006. The said order is as follows:

In view of my findings above, I do hereby sanction refund of duty amounting to Rs. 21232684.00 (Rupees two crore twelve lakh thirty two thousand and six hundred eighty four only) as hereunder and order for crediting of the same to the Consumer Welfare Fund established u/s 12C of Central Excises & Salt Act, 1944 (now Central Excise Act, 1944).

9. It appears that under the un-amended provisions of Section 18, no obligation is cast on the respondents to prove with documentary evidence that duty has not been passed on to the ultimate customers. Reference in this connection may be made to the judgment of the Supreme Court in the case of Commissioner of Central Excise, Mumbai-II Vs. Allied Photographics India Ltd., . The said case deals with the provisions of Rule 9B of the Central Excise Rules. It is not in

dispute that said Rule 9B is in pari materia with Section 18 of the Customs Act. Dealing with Rule 9B, learned Judges of the Hon'ble Supreme Court observed as follows:

Rule 9B covered cases of ordering of refund/making of refund, where on satisfaction of the conditions, the concerned officer was duty bound to make the order of refund and in which case question of limitation did not arise and, therefore, there was no requirement on the part of the assessee to apply u/s 11B. Lastly, Rule 9B referred to payment of duty on provisional basis by the assessee on his own account and, therefore, in cases where the manufacturer has been allowed to invoke this rule and refund accrues on adjustment under Rule 9B(5) that refund is on the account of the manufacturer and not on the account of the buyer.

Rule 9B was also considered in the case of Mafatlal Industries Ltd. and Others Vs. Union of India (UOI) and Others, In paragraph 104 of the said judgment, learned Judges were also considering Rule 9B of the Central Excise Rules. In the said paragraph it was made clear that if a refund arises upon finalisation of provisional assessment, Section 11B which calls for unjust enrichment will not apply. The basic distinction of refund under 9B and 11B is that under 9B(5), it is the authority who upon final assessment of the provisional duty passes an order in the question whether the duty provisionally paid is deficient or in excess. In a case where it is in excess, it passes an order entitling the assessee to the refund. In such a case, there is no question of unjust enrichment.

10. Reference in this connection may also be made to the decision of the Commissioner v. Oriental Exports reported in 2006 (200) E.L.T. A138 (S.C.). In the said judgment, learned Judges have noted that the decision of the Supreme Court in the case of Commissioner of Central Excise Vs. T.V.S. Suzuki Limited, Hosur, , it has been held by a three Judge Bench in Oriental Exports that the doctrine of unjust enrichment is not applicable to provisional assessment even after the same is finalized. In TVS Suzuki referred to above, the learned Judges followed the decision of the Constitution Bench in Mafatlal Industries Ltd. and held that the concept of unjust enrichment would not be attracted on finalisation of provisional assessment. (See : Commissioner of Central Excise, Chennai Vs. T.V.S. Suzuki Limited, Hosur, at page 162 of the report). In so far as whether the amended Section 18(5) would be made applicable to the order of refund passed in favour of the petitioner on 31-8-2001 by the Deputy Commissioner is concerned, the same question has also been answered in TVS Suzuki. In paragraph 5 at page 163 of the judgment it has been held as follows:

Merely because the departmental authorities took a long time to process the application for refund, the right of the appellant does not get defeated by the subsequent amendment made in Sub-rule (5) of Rule 9B.

11. So far as the second question is concerned, whether Section 27(2) and (3) of the Customs Act are attracted in the facts of the case, this Court holds, that in

the instant case, the petitioner does not have to ask for refund. The refund order has been passed in favour of the petitioner u/s 18. In such a case, Section 27 is not attracted. Section 27 deals with a person claiming refund. But here, the authorities while finalizing the provisional assessment of duty paid by the respondent, directed that the respondent is entitled to refund. Therefore, the respondent's case stands on a different footing.

12. For the reasons aforesaid, this Court holds that there is no merit in the appeal filed by the Revenue and both the questions are answered against the Revenue and in favour of the respondent.

13. The respondent must be paid the said refund amount along with interest forthwith and definitely within a period of four weeks from the date of service of this order by the appellant. In default, the appellant is to pay interest at the rate of 10% on the amount to be calculated on the expiry of the said four weeks till the date of actual payment. The order passed by the Customs, Excise & Service Tax Appellate Tribunal dated 25-6-2007 is confirmed.

14. The appeal is thus dismissed. No costs.

I. Mahanty, J.

15. I agree.