(2014) 03 AHC CK 0281

In the Allahabad High Court

Case No : Central Excise Appeal No. 283 of 2008

Commissioner, Central Excise — APPELLANT

Vs

M/s. Dabur India Ltd. — RESPONDENT

Date of Decision : 13-03-2014

Acts Referred:
Central Excises and Salt Act, 1944 — Section 11B, 11B(2), 12(B), 12B, 35G

Citation : (2014) 304 ELT 321 : (2014) 28 GSTR 205

Hon'ble Judges : Mahesh Chandra Tripathi, J;Ashok Bhushan, J

Bench : Division Bench

Advocate : Surya Prakash Kesarwani, S.Z. Moonis and Z.A. Moonis, Advocate for the Appellant; A.P. Malhotra and A.P. Mathur, Advocate for the Respondent

Judgement

1. This Central Excise Appeal has been filed u/s 35G of the Central Excise Act, 1944 against the final order dated 15th April, 2008 passed by Customs, Excise & Service Tax, Appellate Tribunal.

This appeal has been admitted on the following two questions of law which is as under:

1. Whether under the facts and circumstances of the case the finding recorded by Tribunal to the effect that the amount of refund claim is shown in the balance sheet of the financial year 1997-98 as Excise duty recoverable from the Revenue Department, is perverse and contrary to evidences on record, rendering the order of Tribunal to be bad in law and on facts both?

2. Whether, under the facts and circumstances of the case the respondents have rebutted the statutory presumption u/s 12B of the Act so as to be entitled for refund u/s 11B of the Act?

2. Brief facts of the case giving rise to this appeal are that the respondent submitted a classification list for their product "Gulabari" wherein the respondent claimed classification of product as Ayurvedic Medicament under sub heading 3003.30 of Central Excise Tariff Act, 1985. The said classification list was

provisionally approved. The department claimed that aforesaid product of respondent is classifiable under sub heading 3303.00 liable to Central Excise duty at the rate of 18%. A show cause notice dated 19.9.1997 was issued to the respondent and by an adjudication order dated 11.12.1997, it was held that product "Gulabari" is classifiable under sub heading 3303.00. The respondent by letter dated 18.12.1997 wrote to the Assistant Commissioner, referring to order dated 11.12.1997 that the respondent is paying differential excise duty "under protest". In the letter further mentioned that respondent shall be claiming the refund once the issue is resolved and the claim will, therefore, be not hit by unjust enrichment clause.

3. The respondent from 22nd January, 1998 to 15th December, 1998 deposited total differential excise duty amounting to Rs. 11,478,517/-. Against the adjudication order dated 11.12.1997, respondent preferred an appeal before the Commissioner (Appeals) Central Excise, which was dismissed and further the respondent again preferred an Appeal before the Tribunal, which appeal was allowed on 14.1.2000 setting aside the demand. The Tribunal while setting aside the demand had observed that it is open for the department to arrive at correct classification of the impugned goods in appropriate proceedings. An order dated 27.12.2001 was passed classifying the product "Gulabari" under Chap. Heading 3303.00. Against the said order appeal was filed before the Commissioner which was dismissed on 31.3.2003 and against the order of Commissioner, an Appeal was filed before the Tribunal, who vide its order dated 10.10.2003 set aside the order of the Commissioner. The respondent, thereafter, filed a refund claim of Rs. 11,478,517/- on 13.1.2004.

4. The Assistant Commissioner vide its order dated 20th January, 2006 although allowed the refund claim of Rs. 11,478,517/- but it was held that same is hit by principles of unjust enrichment, hence same was credited to "Consumer Welfare Fund".

5. Aggrieved by the order dated 20th January, 2006, the respondent filed an Appeal before the Commissioner which was dismissed on 6.11.2006, against the order of the Commissioner, respondent filed an Appeal before the Tribunal. The Tribunal vide impugned judgment dated 15th April, 2008 has allowed the appeal filed by the respondent. The Commissioner Central Excise has filed this Appeal against the said order of the Tribunal dated 15th April 2008.

6. We have heard Sri Ashok Singh, learned counsel appearing for the appellant and Sri A.P. Mathur, assisted by Sri Rajesh Chhibber for the respondent.

7. Sri Ashok Singh, learned counsel for the appellant submits that u/s 12B of the Central Excise Act, 1944, there has to be a presumption that a person, who has paid the duty of excise on any goods passed under the Act shall, unless the contrary is proved by him, be deemed to have proved on the full incidence of such duty to the buyer of such goods. The Tribunal committed an error in allowing the appeal of the respondent since respondent has not proved to the

contrary by any cogent evidence. It is submitted that no invoices were filed by the respondent to prove that he has not charged the enhanced excise duty from the buyer. Learned counsel for the appellant relied upon the judgment of the Apex Court reported in Union of India and others Vs. Solar Pesticide Pvt. Ltd. and Another, .

8. Sri Ashok Singh further submitted that the balance sheet which was filed by the respondent do not indicate that amount of Rs. 11,478,517/- was to be recovered from the department. Hence Tribunal committed an error in allowing the appeal.

9. Sri A.P. Mathur, learned counsel for the respondent refuting the submission of learned counsel for the appellant contended that the presumption u/s 12B was satisfactorily rebutted by the respondent. Sri Mathur submits that the differential duty was paid by the respondent under protest after writing letter dated 18.12.1997 where it claimed that the respondent shall be claiming refund once the issue is decided in favour of the respondent. Sri Mathur submits that M.R.P. of the product was not increased by the respondent even after provisional classification in sub heading 3303.00 and the differential duty was paid by the respondent which duty was not passed on the buyer. He submits that the balance sheet filed before the department mentioned about the total excise duty recoverable. He further submits that the Tribunal has rightly allowed the appeal of the respondent and both the questions of law framed in the appeal be answered in favour of the respondent.

10. We have considered the submissions of the learned counsel for the parties and perused the record.

11. From the facts as noted above, it is clear that the differential excise duty paid by the appellant after the order dated 11.12.1997 related to the period 1st March, 1990 to 30 September, 1997. The classification of the product by the department, which imposed 18% excise duty, was challenged by the respondent and in pursuance to the demand as made by order dated 11.12.1997, the deposits were made by the respondent under protest after writing letter dated 18.12.1997 which has been brought on the record as Annexure-C.A.-3. In the letter dated 18.12.1997, it was clearly mentioned that the respondent does not agree with the classification of the product. It was further mentioned that the respondent is not changing the maximum retail price or wholesale price of the product. The letter dated 18.12.1997 is as under:

We shall be paying excise duty "UNDER PROTEST" under rule 233-B and shall not be passing on this amount to anybody else. We will be claiming the refund once the issue is resolved in our favour. Our claim will therefore be not hit by unjust enrichment clause.

We also undertake to furnish any other information as required by you.

This letter of protest may be kept on record for further reference, if any.

Thanking you.

Yours faithfully, for Dabur India Limited.

12. There is no dispute that differential amount was paid by the respondent from different dates between January, 1998 to December, 1998. Section 11B(2) which is relevant for the present case is as follows:-

According to proviso of sub Section 2, the amount be paid to the applicant, if such amount is relatable to-

(e) the [duty of excise 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;

Section 12(B) which is relevant provides as follows:-

12B. Presumption that incidence of duty has been passed on to the buyer. - Every person who has paid the duty of excise on any goods under this Act shall, unless the contrary is proved by him, be deemed to have passed on the full incidence of such duty to the buyer of such goods.

13. From the materials brought on record, it is clear that the M.R.P. of the product was not increased and the deposit of differential excise duty was made by the respondent under protest with clear representation that refund shall be claimed.

14. The Tribunal in paragraph 5 of the judgment dated 15th April, 2008 has held as follows:-

5. We find that in this case admitted fact is that the appellants paid differential duty after clearance of goods. Demand of differential duty was confirmed for the period 1.3.1990 to 30.9.1997 and the duty has been paid in the year, 1998. It is settled law that all the refund claimed are subject to the principle of unjust enrichment and onus is on the assessee to show that the burden of duty has not been passed on to the customer. In the present case demand was confirmed in respect of product Gulabari after classifying the same under heading different from the heading claimed by the appellant. Demand was subsequently set aside by the Tribunal. In the balance-sheet for the financial year, 1997-98 this amount is shown as excise duty recoverable from the revenue department. The amount in question was also shown in subsequent balance sheet as recoverable excise duty. We find that the Tribunal in various decisions relied upon by the appellants has taken a view that in case balance sheet amount of refund was shown as recoverable it has been taken as established that the appellants have not passed on extra duty burden but have borne the same themselves. In these circumstances, as the balance sheet which is as per record under the Companies Act showing the amount as recoverable from the revenue and in view of the earlier decisions on this issue impugned, order is set aside.

Appeal is allowed.

15. The Tribunal has also relied to the balance sheet which is brought on record by the respondent stating about the amount recoverable as excise duty. The Commissioner in its order dated 6.11.2006 which was in favour of the department has observed that the amount was shown as recoverable from the department in the balance sheet. In the rejoinder affidavit, the respondent has brought on record the extract of details of the amount under the heading "Excise Duty Recoverable" for the year, 2004-05 which was submitted before the Superintendent on 5.10.2005. The same has been annexed as Annexure-R.A.-1 which mentions at Code 7108 EXCISE DUTY RECOVERABLE -- 61,929,376.47/-. The reference has been made to the balance brought on the record as Annexure-3 to the appeal. In Part-B of schedule H the amount of Rs. 632.14 Lacs was mentioned as the balance with Excise Authorities which included also the amount which was recovered from the Excise Department. Thus balance sheet supports the case of the respondent.

16. When the payment of differential excise duty was made by the respondent under protest and the M.R.P. has not been raised by the respondent, we fail to see that how the incidence of such duty shall be treated to have been passed on the buyer of such goods. The Assistant Commissioner Central Excise had referred to the letter dated 18.12.1997 sent by the respondent by which it was mentioned that respondent has not change maximum retail price or wholesale price and is paying the duty under protest.

17. The conclusion recorded by the Assistant Commissioner Central Excise that the amount of Rs. 11,478,517/- paid by the respondent was part and parcel of M.R.P. amount that has been realised by them from their buyer during the period of 1994 to 1997 and has to be deemed to have been passed to the buyer, is without any basis and based on surmises and conjunctures. The differential excise duty having been paid by the respondent themselves under protest on different dates in the year 1998, there is no basis to come to the conclusion that the incidence of duty was passed to buyers. The judgment of the Apex Court relied by the learned counsel for the appellant was a case where Tribunal did not decide as to whether assessee has passed the incidence of excise duty to the consumer. In view of the above, the order of the Tribunal was set aside and Tribunal was directed to decide the appeal afresh. It is useful to quote the following observation of the Apex Court:-

Civil Appeal No. 2711 of 1999

In view of the decision of this Court in Civil Appeal No. 921 of 1992, we allow this appeal, set aside the judgment of the Tribunal and direct it to decide the appeal of the Revenue afresh on the question as to whether the principle of unjust enrichment would, on facts, apply or not.

Civil Appeal No. 6113 of 1999

In a claim for refund of duty, the respondent raised two contentions. Firstly that the duty had not been passed on to the consumer and the principle of unjust enrichment did not apply. The second contention was that in any event, in view of the decision of the Bombay High Court in the case of Solar Pesticides (India) Limited v. Union of India, the principle of unjust enrichment was not applicable in cases of captive consumption. Neither the Assistant Commissioner nor the Commissioner (Appeals) accepted any of the two contentions. It was held that the respondent had failed to prove that the incidence of duty in respect of the imported goods had not been passed on.

On appeal filed by the assessee, the Tribunal allowed the same following the decisions of the Bombay High Court in Solar Pesticides (India) Limited v. Union of India, which we have now held is not a good law. The Tribunal did not decide as to whether the assessee had passed on the incidence of duty to the consumer. That contention would require consideration. Accordingly, we allow this appeal, set aside the judgment dated 6-7-1999 of the Customs, Excise and Gold (Control) Appellate Tribunal, New Delhi and direct it to decide the appeal by the assessee afresh on the question as to whether the incidence of duty on the imported raw material had been passed on by the importer to any other person.

18. The above judgment does not help the appellant in the present case. On the other hand the Division Bench judgment relied by the respondent in the case of Commissioner of Central Excise Vs. U.T. Ltd., upheld the judgment of the Tribunal which had taken almost the similar view. Paragraph 4 of the aforesaid judgment is to the following effect:

Shri Ashok Singh, learned counsel for the appellant contended that the Tribunal had only affirmed the finding of the Commissioner (Appeals) without recording its own finding on the question of unjust enrichment. The Tribunal in paragraphs 3 and 4 observed as follows: "3. After hearing both the sides and on perusal of the records, it is seen that the main contention of the Ld. DR is that the refund claim is hit by principles of unjust enrichment. He submits that the Commissioner (appeals) erroneously followed the decision of the Gujarat High Court and ignored the decision of the Hon''ble Supreme Court. On perusal of the order of the Commissioner (Appeals), I find that the Commissioner (Appeals), examined the principle of unjust enrichment in the impugned order as under:-

I find that the contention of the department that the amount of Rs. 10,94,263/- was deposited by the party on their own has not been shown in the balance sheet of relevant year 1997-98 in the schedule of loans and advances to be recovered for the department is not sustainable as the party had deposited this amount under protest as an advance payment of central excise duty pending enquiry and investigation and intimated this fact to the Additional Director General of DGAE, Central Excise New Delhi vide their letter dated 06.12.1997 and has also shown in their Balance Sheet of the company for whole of the group in the relevant year 1997-98 in the schedule of "Other Current Assets".

4. I find that the Revenue had not disputed the above facts of examination of balance sheet in their Grounds of Appeal. So, it is evident from the record that

the Commissioner (Appeals) allowed the refund claim after examining the unjust enrichment. Hence, I do not find any reason to interfere the order of the Commissioner (Appeals).

Accordingly, the appeal filed by the Revenue is rejected.

19. In view of the forgoing discussions, we answer both the above questions in favour of the respondent and against the revenue. Consequently, the appeal is dismissed.