
(2007) 01 P&H CK 0050
In the Punjab And Haryana At Chandigarh

Commissioner of C. Ex.

APPELLANT

Vs

Modi Oil and General Mills

RESPONDENT

Date of Decision : 22-01-2007

Acts Referred:

Central Excises and Salt Act, 1944 — Section 11B, 12B, 12C, 35G, 3A

Citation : (2007) 210 ELT 342

Hon'ble Judges : Vinod K.Sharma, J;M.M. Kumar, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

M.M. Kumar, JJ

1. The Revenue has approached this Court seeking reference u/s 35G of the Central Excise Act, 1944 (for brevity, "the Act") seeking direction to the Central Excise and Gold Control Appellate Tribunal, New Delhi to state facts of the case and refer the question of law to this Court arising out of its final order dated 16-4-2002 (Annexure P-3) while deciding Appeal No. F/273/2002-N.B. The prayer made is to refer the following questions of law:

Whether the Hon''ble CEGAT has erred in allowing refund of Central Excise Duty even when the respondent No. 1 has failed to discharge the burden to prove that the incidence of duty had not been passed on to the buyer as required under Sub-section (1) of Section 11B and Section 12B of the Central Excise Act, 1944?

Facts are not in dispute. The assessee-respondent No. 1 had been operating a hot steel re-rolling mill. It manufactures inter alia hot re-rolled products of non alloy steel which are chargeable to duty as per Section 3A of the Act read with Notification No. 31/97-C.E. (N.T.), dated 1-8-1997 which is assessed on the basis of annual production capacity (A.C.P.) of the unit. The assessee applied for A.C.P. on 5-9-1997 opting for payment of duty on lump sum basis on their final products under Rule 96ZP(3) of the Central Excise Rules, 1944 (for brevity, "the Rules") read with Section 3A of the Act. The Range Officer under Rule 5 of the

Hot Re-rolling Steel Mills Annual Capacity Determination Rules, 1997 recommended the A.C.P. to be 16583.687 MT on the basis of the assessee's annual production of 1996-97. The Assistant Commissioner vide his order dated 23-3-1998 also recommended the same. The duty liability worked out is Rs. 4,14,592/-. The Commissioner vide his order dated 3-3-1999 determined the A.C.P. of the assessee as 13927.268 MT with effect from 1-9-1997 and 11922.960 MT with effect from 23-12-1997. As the assessee had deposited the excise duty for the period September, 1997 to March, 1999, it claimed vide their letter dated 5-3-1999 refund/adjustment of the amount paid in excess. The Assistant Commissioner, Patiala invoked the principle of undue enrichment by concluding that the assessee must have recovered the duty from their buyers by adding in the cost of their production. Consequently, a show cause notice was issued to the assessee for crediting the refund to the Consumer Welfare Fund. The Deputy Commissioner in his Order-in-Original dated 10-2-2001 (Annexure P-1) held that the assessee has actually collected the duty from their buyers and has, thus, passed on the incidence of duty to them. It was found that any refund if given to them would lead to unjust enrichment under the provisions of Section 12B of the Act and that the refund amount should be credited u/s 12C of the Act to Consumer Welfare Fund.

2. The assessee filed an appeal before the Commissioner (Appeals) against the Order-in-Original, who accepted the appeal by holding that the assessee had deposited Rs. 10,87,824/- on 25-3-1998 in respect of the period 1997-98 after the goods had been cleared and, therefore, it could not be established that the amount of duty had passed on to the buyer. According to the Commissioner (Appeals) the duty liability amounting to Rs. 10,87,824/- determined by the Commissioner deposited by the assessee on 25-3-1998 was paid by the assessee from its own pocket. Therefore, the refund was held admissible. It was also found that in cases where duty is paid subsequent to the date of clearance, the presumption u/s 12B of the Act stood rebutted. However, in respect of the month of March, 1998 the deposit of Rs. 1,36,870/- was not refundable as it had been passed on to the buyer. The Revenue approached the CEGAT against the Order-in-Appeal dated 24-7-2001. The CEGAT vide its final order dated 16-4-2002 dismissed the appeal of the Revenue and upheld the Order-in-appeal by observing as under:

5. We have heard the rival submissions. On careful consideration of the submissions made by both the sides we find that the respondents herein deposited Rs. 13,99,728/- towards central excise duty for the months of September, 1997 to February, 1998. The annual production capacity of the respondents unit was yet to be determined finally. The Assistant Commissioner directed the respondents herein on 16-3-98 to deposit Rs. 10,87,824/- more by 25-3-98 as their duty liability for the material period was Rs. 24,87,592/-. The respondents herein deposited a sum of Rs. 10,87,592/- under protest on 25-3-98 and for the month of March 1998 they deposited Rs. 1,36,670/- on 31-3-98. The Commissioner on 3-3-99 finally determined annual production capacity of the

furnace. According to the final capacity the duty amount came to Rs. 58,49,290/- whereas the respondents herein had deposited Rs. 70,48,064/- in the material period.

7. We find in the instance [?] case that the amount of Rs. 10,87,824/- for the period September, 1997 to February, 1998 was deposited on 25-3-98. We agree with the findings of the learned Commissioner that the amount of Rs. 10,87,824/- deposited on 25-3-98 on the demand of Assistant Commissioner was paid from their own pocket by the respondents herein. We do not find any legal or factual infirmity in this finding. In respect of the amount of Rs. 1,36,870/- deposited on 31-3-98 for the month of March 1998 the denial of refund to the respondents herein is not challenged as the goods were cleared during the month of deposit. In this view of the matter we do not see any reason to disagree with the findings of the learned Commissioner (Appeals)....

3. We have heard learned Counsel for the Revenue and find that no question of law would arise warranting acceptance of prayer of the Revenue to make a reference to this Court u/s 35G of the Act. The question whether the incidence of duty has been passed on to the buyer is necessarily a question of fact. The Commissioner (Appeals) as well as CEGAT in their respective orders dated 24-10-2001 and 16-4-2002 have recorded a categoric finding of fact that the incidence of duty could not be transferred to the buyer after the date of clearance as the duty had been paid on a subsequent date. This has been held to be sufficient to replace the presumption raised u/s 12B of the Act. Therefore, we find that no question of law warranting admission of this matter would arise and accordingly the application filed by the Revenue is dismissed.