
(2016) 09 BOM CK 0083

In the Bombay High Court

Case No : Central Excise Appeal No. 57 of 2015

Commissioner Of C. Ex., Pune-II

APPELLANT

Vs

Daimler Chrysler India Pvt. Ltd.

RESPONDENT

Date of Decision : 19-09-2016

Acts Referred:

Citation : (2016) 342 ELT 28

Hon'ble Judges : S.C. Dharmadhikari and B.P. Colabawalla, JJ.

Bench : Division Bench

Advocate : S/Shri V. Sridharan, SC with Prakash Shah and Jas Sanghavi i/by M/s. PDS Legal, for the Respondent; S/Shri Pradeep S. Jetly with Jitendra B. Mishra, Advocates, for the Appellant

Final Decision : Allowed

Judgement

S.C. Dharmadhikari, J.(Oral) - Heard both sides. Perused the Order of the Tribunal. On perusal of the same as also on perusal of the judgment of the Hon'ble Supreme Court of India, delivered on 29-8-2016 by a Three Judge Bench in Civil Appeal No. 7906 of 2002 {Commissioner of Central Excise, Madras v. M/s. Addison & Co. Ltd.} [2016 (339) E.L.T. 177 (S.C.)] together with connected appeals, we are of the view that the appeal raises substantial questions of law. It is admitted on the following substantial questions of law :-

(i) Whether the CESTAT was right in not considering the fact that the incidence of duty had been passed on to the customer and hence the assessee was not eligible for refund?

(ii) Whether the CESTAT was right in deciding the case on the basis of ruling of Hon'ble Madras High Court in the case of Addison & Co. where the Revenue has filed appeal against the said judgment before the Hon'ble Supreme Court even though no stay has been granted by the Apex Court?

2. With the consent of both sides, we dispose of the appeal finally by this order.

3. The respondent/assessee is engaged in the manufacture of motor vehicles falling under Chapter Head 8703.90. The assessee clears the motor vehicles to their dealers at a fixed price and allows quantity discount on the basis of actual number of vehicles sold by them over last year's performance, which is not known at the time of clearance. The discount proposed is on the basis of level of performance for various classes of vehicles, to their dealers, and final discount is known only at the end of the calendar year. Hence, the assessee requested the Revenue to consider such clearance effected on provisional assessment basis under Rule 7 of the Central Excise Rule, 2002. The provisional assessment was ordered on the basis of quantity discount scheme made known by the assessee and existing from 1-9-2000.

4. The assessee made a payment of Rs. 18,62,346/- towards the differential duty in respect of debit notes raised on the dealers to whom excess quantity discount was passed on and on the other hand, requested for refund of an amount of Rs. 40,59,180/- towards credit notes raised on various dealers to whom short quantity discount was passed on. The Assistant Commissioner, Central Excise, Pune-III Division finalised this provisional assessment vide Order-in-Original dated 29-8-2003. He confirmed the payment made by the assessee and the amount claimed, as above, as refund. This refund was sanctioned but the amount was directed to be credited to the Consumer Welfare Fund as incidence of duty was passed on to the buyers.

5. Aggrieved and dissatisfied with this Order-in-Original, an appeal was preferred to the First Appellate Authority. He dismissed the assessee's appeal filed on 31-8-2007.

6. Aggrieved by this Order, the matter was carried to the Customs, Excise and Service Tax Appellate Tribunal (CESTAT), West Zonal Bench at Mumbai. By the impugned Order, the CESTAT has allowed this appeal on 25-4-2014 [2014 (307) E.L.T. 182 (Tribunal)], relying on the ruling of the Madras High Court in the case of Addison & Co. v. Commissioner of Central Excise, Madras, 2001 (129) E.L.T. 44 (Mad.).

7. It is contended by Mr. Jetly, appearing on behalf of the appellant that against the view taken by the Madras High Court, the Revenue has preferred appeal to the Supreme Court and the appeal has been admitted. He invited our attention to the impugned Order to submit that the view taken by the Madras High Court and relied upon could not have been followed and bearing in mind the peculiar facts and circumstances. If the assessee has passed on the incentive and the consequent duty relating to the dealers by way of credit notes issued subsequent to the clearance of goods, it means that the incidence of duty was passed on to the dealers at the time of clearance of the goods. The subsequent credit notes will not take the refund claim out of the mischief of unjust enrichment.

8. The Madras High Court's view, according to Mr. Jetly, cannot be followed in such a case, not only bearing in mind the language of the provisions but also the

peculiar facts.

9. Mr. Sridharan, learned Senior Counsel appearing on behalf of the assessee would submit that the Madras High Court's ruling in Addison (*supra*) has been recently reversed by the Three Judge Bench judgment, delivered on 29-8-2016. A copy of this judgment has been handed over to us by Mr. Sridharan.

10. Having perused this judgment, we find that as far as Addison is concerned, the Hon'ble Supreme Court has analysed Section 11B of the Central Excise Act, 1944 and has held that the assessee in that case had admitted that the incidence of duty was originally passed on to the buyer. There is no material brought on record to show that the buyer to whom the incidence of duty was passed on by the assessee did not pass it on to any other person. That is why the statutory presumption under Section 12B has been raised.

11. Though the Madras High Court's judgment has been specifically overruled by the Hon'ble Supreme Court of India, we find some substance in the contention of Mr. Sridharan that the matter will have to go back to the Tribunal even if this Court were to allow the appeal of the Revenue and set aside the order of the Tribunal.

12. In Para 16 of the judgment delivered by the Hon'ble Supreme Court we find that presumption was raised from the facts that the duty which was originally paid by the assessee was passed on. The refund claimed by the assessee is for an amount which is part of the excise duty paid earlier and passed on. The assessee who did not bear the burden of the duty, though entitled to claim deduction, is not entitled for a refund as he was unjustly enriched.

13. In the facts and circumstances of the present case and which the Tribunal has noted in Para 2, it appears that the duty incidence was passed on to the consumer and subsequently the appellant issued credit notes. The Order-in-Original observes that the incidence of duty which was refunded to the dealer through credit notes has not been passed on to the consumers (final purchasers) and that the duty burden was passed on to the buyer and refund claimed was filed by the manufacturer, that is, the appellant.

14. Beyond following the Madras High Court's view and the later view taken by the Andhra Pradesh High Court, we do not find that the Tribunal has discussed anything about the factual aspects. It came to the conclusion that the facts in the case of Sangam Processors (Bhilwara) Ltd. v. Collector [1994 (71) E.L.T. 989 (T)], and which also is the view taken by the Tribunal, were inapplicable. The manufacturer in that case had applied for refund without paying back the duty collected from the buyers/dealers. We are of the opinion that if the present assessee relies on the credit notes raised on the dealer, then, an opportunity should be given to it to establish and prove that in pursuance thereof the duty burden which was passed on to the buyer has not eventually fallen on the said buyer on account of this arrangement. Thus, if the dealer has been found to be recovering the amounts or having given credit to the buyer, then, whether the

raising of the credit notes would negate the presumption raised in Section 12B of the Act or not is an issue or matter required to be examined by the Tribunal. We, therefore, pass the following order :-

ORDER

(i) The appeal is allowed. The impugned Order passed by the Tribunal, dated 25-4-2014, is quashed and set aside.

(ii) The appeal of the assessee, namely, Appeal No. E/1556/2007 is restored to the file of the Tribunal only for examining the issue highlighted above and in accordance with law. We clarify that the Tribunal is free to come to and arrive at the conclusion that the issue stands fully covered in terms of the judgment of the Hon"ble Supreme Court. It can also come to a conclusion otherwise, but only after examining the facts and circumstances of the present case. We are, therefore, only remanding the matter to the Tribunal for a decision afresh and in accordance with law. While we remand it, we only highlight the issue raised by the assessee's Senior Counsel. We do not express any opinion either way.

(iii) This appeal is allowed in the above terms with no order as to costs.