(2011) 02 CAL CK 0095

In the Calcutta High Court

Case No : CEXA No. 20 of 2003

Commissioner of Central Excise APPELLANT

Vs

Alliance Udyog Limited RESPONDENT

Date of Decision : 04-02-2011

Acts Referred:

Central Excise Rules, 1944 — Rule 56A
Central Excise Rules, 2002 — Rule 49, 9
Central Excises and Salt Act, 1944 — Section 12B, 35H

Citation : (2011) 2 CALLT 76 : (2011) 184 ECR 318 : (2011) 266 ELT 171

Hon'ble Judges : Sambuddha Chakrabarti, J;Bhaskar Bhattacharya, J

Bench : Division Bench

Advocate : N.C. Roychowdhury and K.K. Maity, for the Appellant; None, for the Respondent

Final Decision : Dismissed

Judgement

Bhaskar Bhattacharya, J.—This application is at the instance of the Commissioner of Central Excise, Calcutta, III u/s 35H(1) of the Central Excise Act, 1944 and is directed against an order dated 19th July, 2002 passed by the Customs, Excise and Gold (Control) Appellate Tribunal, Eastern Zonal Bench thereby dismissing the appeal preferred by the Appellant.

2. The facts giving rise to filing of this appeal may be enumerated thus:

a) M/s. Alliance Udyog Ltd. is the manufacturer of HDPE Tapes in their factory and used them captively for the manufacture of HDPE Woven Fabrics.

b) The Woven Fabrics were used captively for the manufacture of HDPE Sacks and on which Central Excise Duty was paid. As the manufacturer did not pay the duty of their immediate product, the Department asked the Assessee for payment of Central Excise Duty on HDPE Tapes.

c) The Assessee paid the Central Excise Duty on HDPE Tapes for the period from 20th November, 1986 to 31st March, 1987 amounting to Rs. 6,78,074.87 paisa.

d) Subsequently, the Assessee filed a refund claim on 18th May, 1987 for the aforesaid amount of Central Excise Duty paid on HDPE Tapes on the ground that as per Rules 9 and 49 of the Central Excise Rules, HDPE Tapes manufactured and used in their factory for manufacture of HDPE Bags should not have been subjected to payment of duty because those commodities were under Tariff Item No. 68 and the Tapes manufactured and used for the manufacture of HDPE Bags or Sacks were exempted for payment of duty issued under Rule 56A of the Central Excise Rules, 1944 being notification No. 176 of 1986.

e) The said claim was rejected by the Assistant Commissioner of Central Excise, Barrack pore Division by order dated 30th June, 1989.

f) The Assessee preferred an appeal before the Commissioner (Appeals) Central Excise against the Assistant Commissioner''s order in original.

g) The Commissioner (Appeals) by order dated 11th January, 1990 set aside the order of the Assistant Commissioner with a direction to refund the amount.

h) The Department preferred an appeal to the CEGAT against the order dated 11th January, 1990 passed by the Commissioner (Appeals).

i) The CEGAT vide order dated 24th October, 1991 ordered to refund the amount within two months from the date of receipt of the order by dismissing the appeal.

j) The Department filed a reference application to the CEGAT incorporating a new point of "unjust enrichment".

k) The CEGAT vide order dated 13th August, 1992 dismissed such reference and directed the Department to refund the amount within two months.

l) The Department field an application to this Court against order dated 13th August, 1992 and this Court by order dated 10th May, 1993 rejected the application of the Department.

m) The Department then filed a Special Leave Application before the Hon''ble Supreme Court and the Hon''ble Supreme Court by order dated 4th December, 1997 set aside the order of the High Court with the following observations:

In this case the refund application was filed on 16th May, 1987 for the period from 20th November, 1986 to 31st March, 1987. The claim is therefore, within limitation. The only question is whether the Respondent has passed on the duty to others. Accordingly, the appeal is allowed and the matter is remanded to the Assistant Collector of Central excise to examine and dispose of the claim of Respondent in the light of and in terms of the decision of this Court in Mafatlal Industries Ltd. and Others Vs. Union of India (UOI) and Others, and their enclosed format. No costs

n) Pursuant to the aforesaid direction passed by the Supreme Court, the Deputy Commissioner decided the matter afresh and allowed the prayer for Assessee for refund of the claim by order dated 16th May, 2000.

o) On an appeal preferred by the Defendant Commissioner (Appeals) Central Excise, Kolkata, however, set aside the order of the Deputy Commissioner.

p) The Assessee being aggrieved by the order of the Commissioner (Appeals) preferred an appeal before the CEGAT which, however, allowed the appeal by setting aside the order of the Commissioner (Appeals) and allowing the refund.

3. Being dissatisfied, the Department has come up before this Court.

4. A Division Bench of this Court by order dated 19th May, 2004 framed the following question of law for the purpose of disposal of the present appeal:

Whether the presumption with regard to the passing of the burden to the buyer as laid down in the ratio decided in the case of "Mafatlal Industries Ltd. v. Union of India 1997 (7) SCC 536 could be rebutted simply by production of a statement without producing the relevant records relating to the prices received by the Assessee from its buyers.

5. Mr. Roychowdhury, the learned senior advocate appearing on behalf of the Department, placed strong reliance upon the provisions contained in Section 12B of the Central Excise Act according to which every person who has paid the duty of excise on any goods under the said Act shall, unless contrary is proved by him, be deemed to have passed on the full incidence of such duty to the buyer of such goods and has contended that in the case before us, the onus was upon the Assessee to prove that there was no unjust enrichment and that the duty paid on the tapes had not been included in the value of the HDPE Bags. According to Mr. RoyChowdhury, such onus has not been discharged by the Assessee.

6. We find that the aforesaid Section 12B was substituted by the Amending Act 40 of 1991 with effect from 20th November, 1991 and thus, the said provision has no application to the claim of refund made earlier.

7. After going through the order passed by the Tribunal, we find that the Tribunal on consideration of the materials on record arrived at the conclusion that the Assessee had sufficiently shown that the prices of the final product remained the same irrespective of the fact whether duty was being paid by them on the tapes or not and held that the Commissioner (Appeals) without considering any evidence as regards the aspect of unjust enrichment passed the order in favour of the Revenue. It appears from the assessment order that the Assessee had produced materials showing the price of the different types of sacks party-wise for two periods, one from November 20, 1986 to March 31, 1987 and the other from April 1, 1987 to September 15, 1987 indicating that the Assessee did not add any amount even up to September 15, 1987. In other words, the price of the articles remained the same even after the period in question pointing out that nothing was added to the price although the Assessee was asked to pay duty for the period which they initially paid on demand.

8. We, therefore, find that the point now sought to be urged before us by Mr. RoyChowdhury by taking aid of Section 12B of the Act on the basis of onus is

even not tenable as sufficient materials were placed by the Assessee in support of their claim that there was no unjust enrichment and those statements have not been found to be false or unreliable.

9. The learned Tribunal below thus rightly set aside the order of the Commissioner (Appeals) as the said appellate authority did not take into consideration those materials placed by the Assessee.

10. The application is, thus, devoid of any substance and is dismissed.

11. In the facts and circumstances, there will be, however, no order as to costs.

12. Let Photostat certified copy of this judgment be given to the parties within a week from the date of making of such application.