
(2003) 07 CAL CK 0041
In the Calcutta High Court
Case No : CEXA No. 5 of 2001

Commissioner of Central Excise

APPELLANT

Vs

Panihati Rubber Ltd.

RESPONDENT

Date of Decision : 31-07-2003

Acts Referred:

Central Excises and Salt Act, 1944 — Section 11B, 35G, 35K

Citation : (2004) 116 ECR 825 : (2004) 172 ELT 310

Hon'ble Judges : Altamas Kabir, J;Alok Kumar Basu, J

Bench : Division Bench

Advocate : Ramesh Chowdhury, for the Appellant;J.P. Khaitan, for the Respondent

Judgement

1. The Court : In this reference at the instance of the Department the Appellate Tribunal was directed to prepare a statement of the case and to refer to this Court the following questions viz., -

"(i) Whether or not the bar of unjust enrichment will be attracted in a case where duty has been passed on to the buyer of goods not separately as duty but by inclusion in the price as one component of the same?

(ii) Whether the learned Tribunal was justified in holding that the bar of unjust enrichment would not be attracted when the price is inclusive of duties and taxes following the case Cimmco Ltd. reported in 1999 (107) E.L.T. 246 (Tri)?

(iii) Whether the Hon"ble Tribunal was justified in passing the order ignoring the principles of law laid down in the case of Mafatlal Industries Ltd. and Others Vs. Union of India (UOI) and Others, and the findings of the department indicated in the order-in-original."

2. As will appear from the statement of facts, the respondent herein submitted two Refund Applications amounting to Rs. 3,53,268/- and Rs. 2,78,124/- to the Assistant Commissioner of Central Excise, Khardah Division, u/s 11B of the Central Excise Act, 1944. The said refund claims arose out of a dispute regarding

classification of "Hose Pipe" manufactured by the As-sessee Company and sold to the Indian Railways during the period between 26th February, 1993 and 11th July, 1993. It appears that disputing the payment of excise duty on the said goods, the respondent-company paid the excise duty on the goods supplied under protest. However, after examining the gate passes and bills issued by the respondent Company in respect of the purchase orders placed by the Railways, the Assistant Commissioner upon observing duty element has been shown from the gate passes as also in the bills, found that the duty had been passed on to the consumer in the form of the price charged and accordingly the Refund Applications made by the respondent were disallowed.

3. Being aggrieved by the order of the Assistant Commissioner, the respondent company went up in appeal before the Commissioner (Appeals), Central Excise, Calcutta but the Appellate Authority found no ground to interfere with the findings of the Assistant Commissioner.

4. The respondent Company thereafter preferred an appeal before the Customs, Excise and Gold (Control) Appellate Tribunal, Eastern Bench, Calcutta, commonly known as CEGAT, which was allowed on the basis of an earlier order of the learned Tribunal in the case of 1998 (61) ECC 535 .

5. Observing that the decision in Cimmco Ltd. which was relied upon by the CEGAT, was distinguishable on facts, the Department filed the Reference Application for the determination of the questions of law as indicated "herein-above.

6. Appearing in support of the Reference Mr. Ramesh Chowdhury, learned Advocate submitted that whatever may have been agreed upon between the respondent Company and the Railways regarding the price of the goods supplied, the Excise Authorities were only concerned with the break up of the price component as indicated in the gate pass and in the bills raised in respect of the goods supplied. Mr. Chowdhury very strongly urged that the learned Tribunal had wrongly relied on its decision in Cimmco Ltd. v. The Collector of Central Excise, Jaipur, inasmuch as, in the instant case the price component admittedly included a certain amount shown as excise duty. Mr. Chowdhury urged that since the price paid by the Railways included the said amount, it must be held that by making a claim for refund of the excise duty paid under protest the respondent Company was guilty of unjust enrichment.

7. Mr. Chowdhury urged that the first question as framed in the reference was required to be answered in the affirmative and the remaining two questions were required to be answered in the negative.

8. Appearing for the respondent Company, Mr. J.P. Khaitan, learned Advocate, drew our attention to the observations of the learned Tribunal regarding the price component and the observation that the price fixed by the Railways under the contract was a consolidated price and was inclusive of duty. As pointed out by Mr. Khaitan, according to the learned Tribunal the said expression indicated duties

which were actually payable in respect of the contracted goods.

9. Mr. Khaitan also pointed out that the learned Tribunal has taken into consideration the letter of the Railways wherein it had been specifically mentioned that no excise duty had been paid for the goods supplied by the respondent Company.

10. Mr. Khaitan then went on to add that in the gate pass, under the rules, a party was required to indicate the amount of excise duty that would be payable irrespective of whether such payment was required to be made or not in respect of the said goods, only for the purpose of paying the excise duty under protest as in the instant case. Mr. Khaitan urged that the very fact that the excise duty had been paid under protest would indicate that the question of unjust enrichment was not attracted as has been sought to be submitted on behalf of the Department.

11. We have carefully considered the submissions made on behalf of the respective parties and we are inclined to agree with the finding of the learned Tribunal that the manner of pricing resorted to by the respondent Company would not attract the bar of unjust enrichment.

12. However, there is some defect in the manner in which the questions have been framed in the reference, inasmuch as, the same have been framed on the assumption that the excise duty had been passed on to the respondent to the buyer of the goods viz., the Indian Railways, which is contrary to the findings of the learned Tribunal.

13. However, Mr. Khaitan has referred to a judgment of the Hon'ble Supreme Court in the case of SHERVANI CHARITABLE TRUST Vs. COMMISSIONER OF Income Tax, U.P., wherein it was clarified that the High Court was not compelled to restrict itself to the questions as framed in the reference but would be at liberty to see whether the said question in fact arose out of the order from which the reference is sought.

14. Having regard to the definite view expressed by the learned Tribunal that the bar of unjust enrichment was not attracted in the instant case the questions as framed in our view do not require any answer since we agree that having paid the excise duty under protest and there being a subsequent finding that no excise duty was payable in respect of the goods, the respondent Company was entitled to refund and there was no question of unjust enrichment in the instant case.

15. The reference is disposed of accordingly.

16. There will be no order as to costs.