(2011) 08 CAL CK 0172

In the Calcutta High Court

Case No : CEXA No. 7 of 2004

Commissioner of Central Excise-III APPELLANT

Vs

Nicco Corporation Ltd. RESPONDENT

Date of Decision : 18-08-2011

Acts Referred:

Citation : (2017) 346 ELT 556

Hon'ble Judges : Bhattacharya and Dr. Sambuddha Chakrabarti, JJ.

Bench : Division Bench

Advocate : Shri P.D. Mukherjee, Advocate, for the Appellant; S/Shri Pranab Kr. Dutta with Atish Dipankar Roy and Kaushik Dey, Advocates, for the Respondent

Final Decision : Disposed Off

Judgement

1. This reference under Section 35H of the Central Excise Act, 1944 is at the instance of the revenue and is directed against order dated 10th June, 2003 passed by the Customs, Excise & Gold Control Appellate Tribunal, East Zonal Bench, Kolkata in Appeal E-377/2002 thereby dismissing the appeal preferred by the Commissioner of Central Excise, Kolkata-III against order dated 6th February, 2002, passed by the Commissioner of Central Excise (Appeals), Kolkata.

2. The disputes involved in this reference relate to the claim of refund by the respondent in respect of Waste and Scrap of Cables.

3. It appears that there was initially dispute as to the question whether such Scrap and Waste materials were excisable. Such dispute was ultimately resolved by the order of the Assistant Commissioner, Behrampore dated 25th April, 1994 by which it was held that such Waste and Scraps were not excisable. The revenue has not challenged such decision and thus the said order has attained finality.

4. Subsequently, the respondent filed an application for refund of duty paid by them under protest during the course of litigation pending between the respondent and the appellant. Such application for refund was rejected by the

Assistant Commissioner on the ground of unjust enrichment.

5. Being dissatisfied the respondent/assessee preferred an appeal before the Commissioner (Appeals) where the appeal was allowed and it was held that there was no unjust enrichment and the assessee himself paid the amount of duty from his own pocket.

6. Being dissatisfied the revenue preferred an appeal before the Tribunal below and as indicated earlier, the Tribunal by the order impugned herein has affirmed the order passed by the Commissioner (Appeals) thereby holding that from the materials on record it has been well established that there has been no unjust enrichment and that the assessee paid the amount of duty which was illegally realised by the revenue during the pendency of the litigation.

7. At the time of entertaining the present reference, a Division Bench of this Court directed the Tribunal to draw up a statement and furnish the same to this High Court on the following substantial question of law :-

"(i) Whether the refund of the duty paid under protest would amount to unjust enrichment when there are materials before the authority to hold that the burden was passed on to the buyers by the assessee and the ratio decided in the decision in Sinkhai Synthetic & Chemicals Pvt. Ltd. v. C.C.E., Aurangabad reported in 2002 (143) E.L.T. 17 (S.C.) would apply and the ratio decided in the said decision would apply?"

8. Pursuant to such direction the Tribunal has made the statement of cases and has sent the matter back to this Court.

9. After going through the question formulated by the Division Bench, we find that from the materials on record there was no justification of formulating a question in a form where it has been mentioned that there are materials before the authority to hold that the burden was passed on to the buyer by the assessee.

10. We find from the materials on record that the purchaser gave specific offer to purchase the items at a firm price of Rs. 69/- per kg. by asserting that they will be under no obligation to pay any excise duty as the materials are not excisable. The assessee accepted the said offer and started supplying the materials. As indicated earlier, the revenue having demanded excise duty on the aforesaid materials, it appears that the assessee reduced the margin of profit and itself went on paying the excise duty without charging the customer for payment of that amount. Such fact will appear from the affidavits filed by the customer as well as letters written by the customer. The Tribunal below has recorded that the revenue failed to produce any evidence controverting such statements or materials placed on record and on appreciation of evidence affirmed the finding of the Commissioner (Appeals) that there has been no unjust enrichment.

11. The question of "unjust enrichment" is essentially a question of fact. In the case before us, the assessee has laid evidence in support of its contention that

there has been no unjust enrichment by not only production of original offer and the acceptance but also subsequent affidavit affirmed by the purchaser. Both the Commissioner (Appeals) and Tribunal below believed such materials and accepted the case of the assessee.

12. This is not a case where the concurrent findings recorded by the Commissioner (Appeals) and the Tribunal can be said to be based on no evidence nor can it be said that such finding is a perverse finding of fact justifying interference in reference. We have already indicated that the revenue could not produce any material for controverting the evidence produced by the assessee.

13. In such circumstances, in our opinion, there was no justification of formulating the question for reference as if there were materials before the authority to hold that the burden had passed on to the buyers.

14. Mr. Mukherjee, the learned advocate appearing on behalf of the appellant, strenuously contended before us that the Tribunal below committed substantial error of law in relying upon the decision of the Supreme Court in the case of Sinkhai Synthetics & Chemicals Pvt. Ltd. v. CCE, Aurangabad, reported in 2002 (143) E.L.T. 17, in view of the subsequent decision of the Supreme Court in the case of Commissioner of Central Excise, Mumbai-II v. Allied Photographics India Ltd. reported in 2004 (166) E.L.T. 3. According to Mr. Mukherjee, in view of the subsequent decision of the Supreme Court in the case of Allied Photographics India Ltd. (supra), we should ignore the decision of the Supreme Court earlier given in the case of Sinkhai Synthetics & Chemicals Pvt. Ltd. (supra).

15. In our opinion, the decision given in the case of Sinkhai Synthetics & Chemicals Pvt. Ltd. (supra) being one delivered by a Bench consisting of 3 Judges of the Supreme Court, the pronouncement of law that the decision in the case of Sinkhai Synthetics & Chemicals Pvt. Ltd. (supra) was per incurium by subsequent 3-Judge Bench in the case of Allied Photographics India Ltd. (supra) cannot be said to be a valid precedent.

16. In our opinion, if the latter Three Judge-Bench wanted to disagree with the view taken in the earlier Three Judge-Bench on the question of application of the decision of Mafatlal Industries Pvt. Ltd. and Ors. v. Union of India & Ors. reported in 1997 (5) SCC 536 : 1997 (89) E.L.T. 247 (S.C.), it was its duty to refer the matter for constitution of a larger Bench. So long the decision given in the case of Sinkhai Synthetics & Chemicals Pvt. Ltd. (supra) is not set aside by a larger Bench of the Supreme Court, in our opinion, the said decision is binding upon us and not the subsequent one delivered in the case of Allied Photographics India Ltd. (supra).

17. However, we have already pointed out that the aforesaid question of law, sought to be raised by Mr. Mukherjee, is immaterial for the purpose of disposal of this reference in view of the concurrent finding of fact based on evidence by both the Commissioner of Appeals and the Tribunal below on the question of unjust enrichment which is essentially a question of fact.

18. We, thus, find that in the fact of the present case the Tribunal below rightly affirmed the order of the Commissioner of Appeals on the question of unjust enrichment and directed to refund of the excise duty in favour of the assessee.

19. The reference, thus, fails.

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

21. Urgent xerox certified copy of this order, if applied for, be supplied to the parties subject to compliance with all requisite formalities.