
(2016) 09 AHC CK 0279

In the Allahabad High Court

Case No : Central Excise Reference No. 9 of 2010

Commissioner of Central Excise, Kanpur

APPELLANT

Vs

M/s Kanpur Plastic Pack Ltd.

RESPONDENT

Date of Decision : 27-09-2016

Acts Referred:

Central Excises and Salt Act, 1944 — Section 11B(1), Section 11B(2), Section 35H(4)

Citation : (2016) 11 ADJ 19 : (2017) 345 ELT 169

Hon'ble Judges : Sudhir Agarwal and Dr. Kaushal Jayendra Thaker, JJ.

Bench : Division Bench

Advocate : C.S.C, B.K. Singh Raghuvanshi, Advocate, for the Applicant;
Anubhav Chandra, Advocate, for the Opposite Party

Final Decision : Disposed Off

Judgement

1. Heard Shri Praveen Kumar, learned counsel for applicant Revenue and Shri Aasutosh Agrawal, learned counsel for respondent, Assessee.

2. The following questions have been referred for adjudication under section 35H(4) of Central Excise Act, 1944 (hereinafter referred to as "Act, 1944").

"1. Whether Tribunal has correctly applied provisions contained in proviso (c) to sub section (2) of Section 11B of Central Excise Act, 1944, which afford protection to refunds from the bar of unjust enrichment, to a case of refund of duty paid on goods which have been captively consumed, when the said refund does not correspond to credit of duty paid on excisable goods used as inputs?

2. Whether the Tribunal has correctly applied provisions contained in proviso (c) to sub section (2) of Section 11B of Central Excise Act, 1944, which afford protection to refunds from the bar of unjust enrichment, to a case of refund of duty paid on goods which have been captively consumed, when the said refund has not arisen in accordance with the Rules made or any Notification issued under the Central Excise Act, 1944?"

3. The bare minimum facts, necessary to deal with these questions, as evident from record, are stated as under:

4. M/s Kanpur Plastipack Ltd, Panki Industria Area, Kanpur (hereinafter referred to as the respondent) are manufacturer of HDPE/Polypropylene Tapes, fabrics and sacks ? both laminated and unlaminated. Their starting raw-material is HDPE/LDPE/PP Granules which are extruded in the extrusion machine to make films. The films so made are slated to form tapes of the required width. The tapes are, thereafter, woven into fabrics and the fabrics thereafter, are stitched to make sacks and bags. The basic raw-material for the manufacture of HDPE/Sacks and bags is plastic granules and falls under Chapter 39 of Central Excise Tariff.

5. Assessee filed a classification list on 31.8.1996, classifying furnished product under Chapter 54, 59 and 63, though under protest. Later, on a judgment of Tribunal in some other matters, Assessee sought revision of classification of furnished product to Chapter 39. It filed a classification list No. 2/89 effective from 11.7.1989 classifying furnished products under various headings of Chapter 39. Revised classification list was not approved by Assistant Collector who ordered on 19.1.1990 to continue classification of furnished goods under various headings of Chapters 54, 59 and 63.

6. Aggrieved by order dated 19.1.1990, Assessee preferred appeal before Commissioner of Central Excise (Appeals), Allahabad (hereinafter referred to as "CCE(A)") who rejected the same vide order dated 19.11.1990. Assessee then preferred further appeal before Customs, Central Excise & Service Tax Appellate Tribunal (hereinafter referred to as "Tribunal") who by order dated 21.9.1992 allowed appeal and set aside CCE(A)'s order dated 19.11.1990 and granted consequential relief to Assessee.

7. Based on the order of Tribunal, dated 21.9.1992, Assessee submitted an application dated 15.3.1993 before Assistant Commissioner claiming refund of Central Excise Duty of Rs.1,85,84,873/- paid by him on Tapes during 1.3.1986 to 11.2.1990 on the ground that Tribunal has held these tapes classifiable under Chapter 39 and since these tapes were consumed by Assessee for manufacture of fabric, again a Chapter 39 product, the same was exempt from duty. The application remained unattended whereupon Assessee came to this Court and filed a writ petition which was disposed of directing concerned authority to take a final decision within two months. Pursuant thereto, Assistant Collector vide order dated 13.10.1995, rejected claim of refund on the ground of being barred by "time" as also "unjust enrichment". Assessee preferred appeal to CCE(A) which was decided vide order dated 31.1.1996 and the matter was remanded to Assistant Commissioner with the following observations:

(a) the ground of rejection of refund claim i.e undue enrichment is not sustainable, as the duty was paid on intermediate products and the question of passing on of incidence of duty to the customers does not arise; and

(b) in the instance case, duty has been under protest and hence limitation of six

months does not apply as per the provisions of Section 11-B of Excise Act.

8. Assistant Commissioner again passed order dated 30.6.1998 after remand, wherein he dropped objection regarding limitation but with respect to "unjust enrichment", it held that Section 12B of Act 1944 talks of "excise duty" which includes "duty paid on intermediate product" also hence burden to prove that incidence of duty whereof refund is asked, was not passed on to the customer, is upon Assessee.

9. Aggrieved by this order dated 30.6.1998 passed by Assistant Commissioner, Assessee preferred appeal before CCE(A) who allowed the same vide order dated 16.11.1998, set aside order 30.6.1998 and directed for refund of Rs. 1,16,28,268/-. CCE(A) determined amount of refund after adjusting duty, to Rs. 3,71,57,046/- on fabrics which became payable by virtue of settlement of classification dispute and allowing Modvat credit of duty on inputs, to Rs. 3,02,00,441/- and adjustment of duty of Rs.1,85,84,873/- paid from PLA at the tape stage. According to CCE(A), admissible refund was calculated as [Rs. 3,02,00,441 + Rs. 1,85,84,873 - Rs. 3,71,57,046 = 1,16,28,268/-].

10. Revenue felt aggrieved by this order dated 16.11.1998, hence preferred appeal before Tribunal but failed since appeal was rejected by Tribunal vide order dated 25.10.2000. Tribunal while rejecting appeal, observed as under:

(a) They do not agree with the contention of the department that the grant of refund in this case results in unjust enrichment to the Respondents.

(b) The refund of credit of duty is admissible to the Respondent in terms of proviso (c) to Section 11B of the Central Excise Act, according to which the bar of unjust enrichment does not apply to the refund of credit of duty paid on excisable goods used as inputs, in accordance with the Rules made, or any notification issued under the Excise Act.

(c) The finding of the lower appellate authority that requirement of cost data on HDPE tape is irrelevant, since duty on tape was paid at specific rate and that verification of modvatable document showed the total credit available, the amount of duty paid, amount of duty to be debited against sale of fabrics and the total amount refundable and that, therefore, the Respondents were entitled to refund of Rs. 1,16,28,268/- and the Commissioner(Appeals)'s order dated 16.11.1998 does not suffer from any legal infirmity.

11. Revenue thereafter filed a reference application no.23/2001 before this Court under section 35H(1) of Act, 1944 and vide order dated 24.11.2009, this Court directed Tribunal to send statement of case referring above mentioned questions of law, arising from Tribunal's order dated 25.10.2000.

12. In the present case record shows that order of CCE(A) dated 31.1.1996 itself decided the issue and held that there was no question of rejection of refund on the ground of " undue enrichment" since it was not sustainable, as duty was paid on intermediate products and question of passing on incidence of duty to

customers does not arise. This order of CCE(A) attained finality since Revenue did not challenge this order in appeal. Once CCE(A) held that there was no question of "unjust enrichment", Assistant Commissioner had no jurisdiction to reiterate and follow his overruled view of "unjust enrichment" which was already negated by CCE(A). The approach of Assistant Commissioner in reiterating the issue of "unjust enrichment" despite having been answered by CCE(A) otherwise, vide order dated 31.1.1996 which order had attained finality, was wholly unauthorized, beyond jurisdiction and illegal. Therefore, Assistant Commissioner was wholly unjustified in denying refund on the ground of "unjust enrichment" since that was beyond his powers.

13. So far as Section 11B(2) proviso (c) is concerned, we find that it stressed on the question of refund to be paid to Assessee instead of credit to the fund if amount is relatable to (a), (b) and (c). For the purpose of unjust enrichment, reliance placed by Tribunal to Section 11B(2) proviso (c), in our view is not correct but Assessee in the case in hand could not have been denied refund on the ground of "unjust enrichment" since that was already decided in favour of Assessee by CCE(A) vide order dated 31.1.1996 and that order having attained finality, it was not open to Assistant Commissioner to deny refund on the ground of unjust enrichment.

14. We therefore, answer both the aforesaid questions by holding that in order to attract plea of "unjust enrichment" under section 11B(1), Reference made by Tribunal to Section 11B(2) proviso (c) is not justified as the said provision is not attracted. However, refund was wrongly denied to Assessee and to that extent concurrent findings in favour of Assessee has rightly been recorded by CCE(A) and Tribunal. Hence, the ultimate order of Tribunal is justified and warrants no interference. Both the questions are thus answered in favour of Assessee and against Revenue.

15. Reference is answered accordingly and stands disposed of.