
(2009) 08 KAR CK 0013
In the Karnataka High Court
Case No : C.S.T.A. No. 18 of 2005

Commissioner of Customs

APPELLANT

Vs

Agrotech Foods Ltd.

RESPONDENT

Date of Decision : 27-08-2009

Acts Referred:

Customs Act, 1962 — Section 18, 25, 27

Citation : (2010) 249 ELT 348 : (2010) ILR (Kar) 570

Hon'ble Judges : D.V. Shylendra Kumar, J;Aravind Kumar, J

Bench : Division Bench

Advocate : T.M. Venkatareddy, for the Appellant; Rajesh Chander Kumar, for Chander Kumar and Assts., for the Respondent

Judgement

Aravind Kumar, J.—The Revenue is in appeal questioning the order of the CESTAT dated 11-2-2005 passed in appeal No. C/4/2003, final order No. 213/2004 where under the Tribunal has allowed the appeal filed by the respondent herein and remanded the matter to the original authority to reconsider the refund and grant the same without applying the provisions of unjust enrichment on the ground that in the facts and circumstances of the case, the said provisions are not applicable and has further directed that refund due to the respondent herein should be granted and for the said purpose the matter has been remanded.

2. It is this order which is questioned by the revenue. At the time of admission of the appeal on 31-1-2006 while admitting the appeal this Court has framed the following substantial questions of law:

(i) Whether the tribunal was right in directing the appellant to refund the duty paid by the Respondent, without application of the doctrine of unjust enrichment?

(ii) Whether the Tribunal was right in deciding the case on the presumption that the demand of duty had arisen because of finalization of provisional assessment and not as contended by the appellant herein?

(iii) Whether the Tribunal was right in overlooking the fact that the Doctrine of

unjust enrichment can be invoked irrespective of the applicability of Section 11B of the Central Excise Act/Section 27 of the Customs Act?

(iv) Whether in the light of the decision of the Hon'ble Apex Court in the case of Sahakari Khand Udyog Mandal Ltd. Vs. Commissioner of Central Excise and Customs, , whether the impugned order of the Tribunal is sustainable?

(v) Whether the provisions of Section 27 of the Customs Act are applicable to the case of provisional assessment u/s 18 of the Customs Act, 1962?

3. Brief facts leading to the filing of this appeal by the revenue are that respondent herein imported 2984.420 MT of RBD Palmolein oil as per bill of entry No. 185/2001 dated 10-8-2001 through Karwar Port and bonded it in tank No. 4 of Konkan Storage & Systems Pvt. Ltd., Karwar on 16-8-2001. The said bill of entry has been assessed at the existing tariff value of 372 US dollars per metric ton on 10-8-2001. Subsequently respondent have sought for Ex. bond bill of entry P.216/01 dated 27-9-2001 for clearance of 500 MT of RBD palmolien oil which has been assessed provisionally at 372 US dollars per MT and Customs out of charge was given on the same day i.e., 27-9-2001 after payment of Customs duty. However, it seems that respondent has only removed 97.510 MT of the said cargo from the bonded tank up to 8-10-2001 leaving a balance of 402.490 MT of cargo which was lying in the bonded tank.

4. It seems that notification No. 52/2001 Cus.(NT) dated 9-10-2001 came to be issued by which the tariff value of RBD palmolien was reduced from 372US dollars per MT to 307 US dollars per MT. Thereafter respondent requested for refund of difference of Custom duty and interest amount of Rs. 11,55,156/- on 402.490 MT of RBD Palmolien on the ground that the tariff value prevailing on the date of actual removal of cargo from the bonded tank has to be taken into consideration for the purpose of charging Customs duty. The Adjudicating Authority as per the Order in Original No. 1/2002 dated 14-2-2002 sanctioned the said refund claimed u/s 27(2) of the Customs Act, but ordered the same to be credited to the Consumer Welfare Fund on the ground that importer had failed to establish that the incidence of duty has not been passed on to the buyers.

5. The importer being aggrieved by the same filed an appeal before the Appellate Authority Commissioner of Customs who by order dated 16-2-2002 rejected the appeal and confirmed the order of the Adjudicating Authority which is at Annexure "C" The importer being aggrieved by the same filed an appeal before the CESTAT in appeal No. C/4/2003 in final order No. 213/2005 dated 11-2-2005 which came to be allowed after relying upon the judgment of the Tribunal; as well as judgment of the Madras High Court in the case of Commissioner of C. Ex. Vs. Hajee A.M. Abdul Rahiman, on the ground that the goods are sold at a price lesser than landed cost and the loss incurred being more or less similar to duty paid and thereby concluding that the incidence of duty has not been passed on to the actual Customer and provisions of unjust enrichment would not be applicable. It is this order which is under challenge in the present appeal.

6. Sri. T.M. Venkata Reddy appearing for Revenue contends that refund had arisen as a result of reduction of tariff value and not due finalisation of provisional assessment and as such the Tribunal order is erroneous in holding that unjust enrichment is not applicable to the instant case. It is also contended that the Tribunal has not looked into the judgment of the Hon"ble Supreme Court in the case of Sahakari Khand Udyog Mandal Ltd. Vs. Commissioner of Central Excise and Customs, wherein it has been held doctrine of unjust enrichment is based on the principle of equity and irrespective of applicability of the statutory provision the doctrine can be invoked to deny benefit to which a person is not otherwise entitled to. The learned standing Counsel hence prays for allowing of the appeal by answering the questions of law in favour of the appellant.

7. Per contra Sri. Rajesh Chander Kumar contends that Section 15(1)(b) of the Customs Act itself provides that actual removal of the goods which entails the goods to be excisable to tax and unless the goods are not actually removed the duty would not become payable and in the instant case the provisional assessment having taken place on 27-9-2001 in respect of entire 500 MT RBD palmolein oil which has been paid requires to be refunded to the extent of 402.490 MT of R.B.D. plamolein which had remained in the bonded tank and had not been removed as admittedly notification dated 9-10-2001 came to be issued by reducing the tariff value from 372 to 307 US dollars and accordingly contends the questions of law has to be answered against the revenue and in favour of the importer respondent and prays for dismissal of the appeal.

8. We have heard Sri. T.M. Venkata Reddy learned standing Counsel for the appellant and Sri. Rajesh Chander Kumar appearing for the respondent and we have perused the orders of the adjudicating authority as well as the Appellate Authority and have given our anxious consideration.

9. The main issue revolving around the granting of the refund claimed which is the Customs duty admittedly paid on 27-9-2001 at the time of ex. bonding of bill of entry F.216/2001 filed for clearance of 500 MT of RBD palmolein oil. It is also found from records that the importer had removed only 97.510 MT of RBD palmolein oil leaving a balance of 402.490 MT in the bonded tank. The test that the importer has to pass for seeking for refund of Customs duty paid is the ingredients mentioned in Section 27(2) of the Customs Act and even otherwise on general principles if the importer had not passed on incidence of duty of the buyer there would not be any burden on the importer to prove the same. These are all admittedly being questions of fact ought to have been examined by the authorities. In this connection, it would be relevant to extract the finding of the Adjudicating Authority which reads as follows:

The respondents have not produced any documentary or other evidence to establishment that, the incidence of duty has not been passed on by them to the buyers. They have submitted the copies of sales invoices No. 89, 108, 114, 117, 131, 132 dating from 9-10-2001 to 17-10-2001 but these invoice do not indicate the amount of duty which forms the part of the price as required by Section

28(c) of Customs Act, 1962. It is their submission that they have not shown the amount of Customs duty in the invoices as per the trade practice and requirement of sales tax office. In the reply to the Show cause notice they have submitted that the concept of unjust enrichment is not applicable for the commodity like RBD Palmolein as it is traded so openly. They further submits that this commodity is not traded on cost plus basis, but the trading is based on numerous other factors and market forces, which change every hour and day. They have further submitted that they have sold the goods at a price lower than the cost plus customs duty. They have submitted a statement showing break up of rate of cargo operational costs, custom duty, profit/loss. This statement shows that they have sold the goods at a loss, which is much more than the refund claimed. Therefore, it is argued that the incidence of duty is borne by them.

I do not want to go into the profit and loss making business of the importer, but generally speaking no firms will sell its goods at less than the cost price plus duty.

10. However, the Tribunal has merely accepted the plea put forward by the importer which was to the effect that the importer had sold oil at a lesser price than the landed cost. The loss incurred being more or less similar to duty paid and by preponderance the Tribunal has come to the conclusion that the plea of incidence of duty is not passed on to the actual customers would have to be accepted and accordingly accepted the same without examining the records as to entitlement or otherwise. From the order of the Adjudicating Authority as well as from the order of the Tribunal we find that it is not based on facts and there is no conclusive finding with reference to material on record. The importer has contended before the Adjudicating Authority by placing material like sales invoice, break up of rate of cargo, operational costs, custom duty, profit/loss by way of statement which are factors which ought to have been gone into by the Adjudicating Authority to ascertain the actual cost or otherwise of the goods in order to entertain and grant the relief of refund of Customs duty which exercise is admittedly lacking. The finding of the second Appellate Authority not being based on facts and there being no discussion on these aspects, we find it is a perverse finding not based on facts and to test the claim of refund on the touchstone of general principles as to whether the importer would even otherwise be entitled to claim refund, being a question of fact, the matter stands remitted to the Adjudicating Authority for adjudication afresh.

11. In so far as question No. (v) is concerned, it is the contention of the appellant that the order of the Tribunal is erroneous since refund claim had resulted in reduction of tariff value and it was not due to finalisation of provisional assessment and as such contends that provisions of Section 27 are not applicable to the facts and circumstances of the case and non consideration of this aspect by the Tribunal has resulted in great prejudice to the revenue. In this context it is advantageous to notice the provisions of Section 27 of the Act which reads as follows:

27. Claim for refund of duty

(1) Any person claiming refund of any [duty and interest, if any, paid on such duty]-

(a) paid by him in pursuance of an order of assessment; or

(b) borne by him,

may make an application for refund of such [duty and interest, if any, paid on such duty] to the [Assistant Commissioner of Customs or Deputy Commissioner of Customs]-

(a) in the case of any import made by any individual for his personal use or by Government or by any educational, research or charitable institution or hospital, before the expiry of one year;

(b) in any other case, before the expiry of six months,

from the date of payment of [duty and interest, if any, paid on such duty], in such form and manner as may be specified in the regulation made in this behalf and the application shall be accompanied by such documentary or other evidence (including the documents referred to in Section 28C as the applicant may furnish to establish that the amount of [duty and interest, if any, paid on such duty] in relation to which such refund is claimed was collected from, or paid by, him and the incidence of such [duty and interest, if any, paid on such duty] had not been passed on by him to any other person:

Provided that where an application for refund has been made before the commencement of the Central Excise and Customs Laws (Amendment) Act, 1991, such applications shall be deemed to have been made under this Sub-section and the same shall be dealt with in accordance with the provisions of Sub-section (2):

Provided Further that the limitation of one year or six months, as the case may be, shall not apply where any [duty and interest, if any, paid on such duty] has been paid under protest:

Provided Also that in the case of goods which are exempt from payment of duty by a special order issued under Sub-section (2) of Section 25, the limitation of one year or six months, as the case may be, shall be completed from the date of issue of such order.]

[Explanation 1]: For the purposes of this sub-section, "the date of payment of [duty and interest, if any, paid on such duty]", in relation to a person, other than the improper, shall be construed as "the date of purchase of goods" by such person.

[Explanation II: Where any duty is paid provisionally u/s 18, the limitation of one year or six months, as the case may be, shall be computed from the date of adjustment of duty after the final assessment thereof.]

In explanation II it has been clearly specified that if the duty is paid provisionally

u/s 18, the limitation of one year or six months should be computed from the date of adjustment of duty after the final assessment. In the instant case the adjudicating authority has held that 500 MT of RBD Palmolein had been seized provisionally at the rate of 372 US Dollars PMT as per order dated 14-2- 2002 which is at Annexure-"B". Further even the first Appellate Authority in its order dated 16-10-2002 which is at Annexure-"C" has held in paragraph 2 to the following effect:

It is now settled law that in the case of refund arising out of finalisation of provisional assessment, the principle of unjust enrichment is not applicable.

12. The Tribunal in the order dated 11-2-2005 by relying upon the judgment in the case of CCE, Trichirapalli v. Hajee A.M. Abdul Rahiman, has held that the issue is no longer res integra and concluded that the bar of unjust enrichment is not applicable to refund arising on finalisation of provisional assessment. Section 27 gives a right to a person who has paid Customs duty or interest to seek refund of the same on the grounds enumerated in the said Section. In explanation II to the said Section it is enumerated that even in respect of duty provisionally paid u/s 18 the limitation of one year or six months as the case may be should be computed from the date of adjustment of duty after the final assessment thereof. Hence, there is no bar to claim refund of customs duty or interest paid thereon by a person if it is paid pursuant to a provisional assessment. However, the said claim can be examined subject to the fulfillment of limitation of one year or six months as the case may be and this exercise is required to be undertaken by the Adjudicating Authority. In view of the matter having been remitted to the Adjudicating Authority we make it clear that the application for refund by the respondent shall be examined afresh on the basis of the available records and also examined as to whether the said application is filed in time and orders be passed thereon.

13. In the result, we pass the following:

ORDER

(a) The order of the Tribunal dated 11-2-2005 is hereby set aside as also the order of the Adjudicating Authority dated 14-2-2002 and the First Appellate Authority dated 16-10- 2002.

(b) The matter is remitted to the Adjudicating Authority for adjudication afresh in the light of the observation made herein above which would be only on the basis of records available and placed by the importer as on the date of filing of refund application.

(c) The Adjudicating Authority shall examine whether the said application is within the time limit of one year or six months as the case may be and if it is within the limitation, pass orders as observed herein above.

(d) We allow the appeal and substantial questions of law 1 to 4 is answered in the negative in favour of the appellant and against the respondent. Question No.

5 is not answered and the same is kept open as the matter is remanded to the adjudicating authority.

(e) No order as to costs.

ORDER ON FOR BEING SPOKEN TO

14. While disposing of this appeal by the revenue in terms of our judgment dated 27.8.2009, appeal was allowed and the matter remanded to the original authority.

15. Assessee, though may get a refund amount, whether the amount has to be actually parted in favour of the assessee or to be remitted to the Consumer Welfare Fund due to applicability of the doctrine of "unjust enrichment", was a question which was necessarily to be answered with reference to the facts of the case, particularly, as to whether the assessee in fact had passed on the liability to the consumer or had absorbed the tax burden by itself and there being no question of unjust enrichment and as the facts to arrive at the answer to this question having not been satisfactorily examined by the authorities below, we have indicated that the matter deserves to be remanded for ascertaining this aspect.

16. While answering the question and in view of allowing of the appeal, question necessarily requires to be answered in favour of the revenue and against the assessee and in the affirmative. Question No. 5 is as hereunder:

v) Whether the provisions of Section 27 of the Customs Act are applicable to the case of provisional assessment u/s 18 of the Customs Act, 1962?

If the answer is to be in the affirmative, then the very provision under which a possible refund claim could be entertained being not attracted and there being no refund at all, the remand would serve no purpose as the remand was for the ascertainment of the factum of unjust enrichment or otherwise on the amount being refunded to the assessee.

17. Faced with this conundrum, we thought it proper to hear further the learned Counsel for the revenue and the learned Counsel for the assessee to resolve this entanglement particularly, as we have allowed the appeal for the purpose of remand and for verification of the factual aspect which could in turn determine the applicability or otherwise of the doctrine of "unjust enrichment". It is for this purpose, the matter is listed today.

18. We have heard Sri T.M. Venkatareddy, learned standing Counsel for the appellant/revenue and Sri Rajeshchandra Kumar, learned Counsel appearing for the respondent assessee.

19. Sri T.M. Venkatareddy, learned standing Counsel for the appellant would draw our attention to para No. 48 of the judgment of the Supreme Court in the case of Sahakari Khand Udyog Mandal Ltd. Vs. Commissioner of Central Excise and Customs, , which reads as under:

From the above discussion, it is clear that the doctrine of "unjust enrichment" is based on equity and has been accepted and applied in several cases. In our opinion, therefore, irrespective of applicability of Section 11B of the Act, the doctrine can be invoked to deny the benefit to which a person is not otherwise entitled. Section 11B of the Act or similar provision merely gives legislative recognition to this doctrine. That, however, does not mean that in the absence of a statutory provision, a person can claim or retain undue benefit. Before claiming a relief of refund, it is necessary for the petitioner/appellant to show that he has paid the amount for which relief is sought, he has not passed on the burden on consumers and if such relief is not granted, he would suffer loss.

which is supportive of a positive answer in respect of question No. 5 extracted above.

20. Sri Rajeshchandra Kumar, learned Counsel for the assessee would point out that in the first instance, question as framed is not satisfactory; that perhaps it would have been more appropriate, had the question been more specific, in the sense that the question would have arisen only if it was a case of finalisation of the assessment and not merely a provisional assessment u/s 18 and after finalisation of the assessment for own consumption of the goods etc. An application u/s 27 of the Customs Act, if it is within time as specified in the Section and in such circumstance, the question would limit as to whether an application u/s 27 results in a refund; further the question as to whether the refund amount nevertheless not being distributed to the assessee on the applicability of the doctrine of "unjust enrichment" would get attracted and the question may merit examination only at that stage and not at the stage of a provisional assessment u/s 18 of the Customs Act and therefore, the question itself is a contradiction. Unless it had been ascertained that there was finalisation of the assessment, answering the question in the affirmative may not be very fair or proper to the assessee and may not even elicit correct answer in such situations.

21. In support of the submission, Sri Rajeshchandra Kumar would draw our attention to the judgment of the Supreme Court in the case of Commissioner of Central Excise, Mumbai-II Vs. Allied Photographics India Ltd., and would submit that in a situation of a provisional assessment, further question as to whether the stage was finalisation of a provisional assessment or the initial tentative deposit of the amount towards a provisional assessment, is a question which has to be first ascertained, particularly as at the initial stage, an amount which is parted by the assessee importer as in the present case, would be an amount tentatively covering the liability even as it arises on a provisional assessment and more in the nature of a deposit and when once a provisional assessment is finalised which crystallised the duty liability, then the amount in deposit can be suitably adjusted and at that stage, question of applicability of the doctrine of "unjust enrichment" does not arise in terms of the judgment in "Allied Photographies India Ltd.". He would therefore submit that with the present

situation, not even indicating as to whether the stage was finalisation of provisional assessment or a mere deposit which was being adjusted and later on, further duty being paid etc., and in a case where it is an adjustment and the doctrine not applicable, and answering the question in the affirmative and in favour of the revenue, would virtually to some extent run counter to the ratio indicated by the Supreme Court in Allied Photographs India Ltd.'s case. Further, learned Counsel for the assessee very fairly submits that a refund application u/s 27 would be tenable only in a situation where the assessment is finalised and not at the stage of a provisional assessment u/s 18.

22. But, the difficulty in the present case, as submitted by the learned Counsel for the assessee, is that the discussion by the authorities below does not necessarily indicate as to what exactly was the stage of assessment, whether it remained as a provisional assessment u/s 18 or had it gone further and had resulted in a finalisation of the assessment or even as to whether the provisional assessment itself had been finalised or not. In such a scenario, answering the question in the affirmative may not be a very satisfactory resolution and, therefore, keeping the question open, the matter can be remanded to the original authority even to ascertain as to at what stage, the claim for refund was made by the assessee even though it is termed as a claim for refund in terms of the judgment of the Supreme Court in Allied Photographies India Ltd.'s case, it being only a question of adjustment, if it was not even a finalisation of a provisional assessment, then the question of applicability of doctrine of "unjust enrichment" would not arise and the question would have to be answered in this background.

23. While we appreciate the submissions made by Sri Rajeshchandra Kumar, we also notice that whether a duty payment by an importer initially in the form of a deposit and later as a provisional payment and much later on the finalisation of the assessment as customs duty are all only towards the discharge of the liability for payment of duty under the provisions of the Customs Act, being a levy in the nature of a indirect tax. It has to be presumed that any importer who is a trader or a businessman will necessarily pass on the duty liability to the customers or the consumers. Therefore, a claim for refund to be sustained and to be released can be achieved only in a situation where ultimately the assessee is able to satisfactorily prove before the authorities that such a duty component had not been passed on to the customers of the consumers and it had been actually borne by the assessee itself and then alone, perhaps a refund application would result in flow of some amount to the assessee. But in any other situations, even if it results in a refund of duty, it would flow to the fund and not to the assessee.

24. Even in a situation of adjustment, we are of the view that the arguments of the doctrine of "unjust enrichment" being not attracted to the case of adjustment can be accepted only up to the stage when the imported goods are actually not physically removed from the customs charge, in the sense that the goods were not available to the assessee for being transacted as a trading

proposition or a business proposition and if it had actually been cleared out of customs charge and was available to the assessee for being transacted, then even in a case of adjustment, the doctrine of "unjust enrichment" cannot be kept out, but has to be verified on facts as to the possibility of the duties being passed on to the consumers or absorbed by the assessee.

25. Even with this clarification of the legal position, we still find it difficult to answer the question for the simple reason, as pointed out by the learned Counsel for the appellant, the orders of the authorities below do not necessarily indicate what was the stage of assessment.

26. After finalisation of the assessment, perhaps, there would not have been any difficulty, but it is a case of a refund of excess amount even at the stage of provisional assessment and in terms of Sub-section (2) of Section 18, there arise a difficulty and particularly in a situation of this case, the provisions of Section 18 itself is not applicable. It is for this reason, we did not answer the question and kept it open in the present situation, but the remand is nevertheless to the Original Authority even to record a finding on the aspect of the stage of assessment and as to whether the claim for refund could be attributed to a situation of provisional assessment at the stage u/s 18 or a situation whether it can be attributed to Section 27 of the Act.

27. When the Original authority examines this question, it will have to necessarily bear in mind all these legal aspects including the question of limitation and for this purpose, it is clarified that if it was a case of an application u/s 27, the starting point for running of limitation is date of finalisation of the assessment order and not the order of provisional assessment. Ordered accordingly.

28. With this clarification, the judgment is retained.