

(2008) 01 MAD CK 0174

In the Madras High Court

Case No : Civil Miscellaneous Appeal No. 3244 of 2007

Commissioner of Customs

APPELLANT

Vs

Virudhunagar Textile Mills Ltd.

RESPONDENT

Date of Decision : 25-01-2008

Acts Referred:

Central Excises and Salt Act, 1944 — Section 11B
Customs Act, 1962 — Section 11A, 11B, 128, 128A, 129

Citation : (2008) 128 ECC 91 : (2008) 154 ECR 91 : (2008) 230 ELT 411

Hon'ble Judges : K. Raviraja Pandian, J; Chitra Venkataraman, J

Bench : Division Bench

Advocate : S.Udayakumar, C.G.S.C, for the Appellant; Habibullah Badsha, for E.S. Govindan, for the Respondent

Final Decision : Dismissed

Judgement

K. Raviraja Pandian, J.—This appeal is filed by the Commissioner of Customs, Custom House, New Harbour Estate, Tuticorin against the

Final Order No. 956 of 2007 dated 02.08.2007 passed by the CESTAT, Chennai by formulating the following questions of law:

1. Whether the Tribunal's decision that the amount erroneously refunded could not be recovered by filing an appeal u/s 129D of the Customs Act,

1962 unless a demand notice was issued u/s 28(1) be correct in law, when the Supreme Court in the case of Asian Paints (India) Ltd. Vs.

Collector of Central Excise, Bombay, had held to the effect that an order issued u/s 35E of the Act would be equally sustainable in law for

recovering dues of excise duty?

2. Whether unjust enrichment by an individual company is permissible in law only for the reason that a demand notice u/s 28(1) of the Customs Act

was not issued for recovery of erroneous refund when the Department followed the appellate remedy available u/s 129D of the Customs Act,

1962 for recovery of erroneous refund, without considering the settled law emerging from the apex Court's decision in the case of Mafatlal

Industries Ltd. and Others Vs. Union of India (UOI) and Others, and Sahakari Khand Udyog Mandal Ltd. Vs. Commissioner of Central Excise

and Customs, ?

2. Mr. Udayakumar, learned Standing Counsel for the appellant contended that the order of the appellate Tribunal is erroneous in law and against

the ratio of the Supreme Court judgment in the case of Mafatlal Industries Ltd. and Others Vs. Union of India (UOI) and Others, in which the

Supreme Court has enunciated the law relating to claim of refund whether made under the provisions of the Act as contemplated in proposition (i)

or in a suit or writ petition in the situation contemplated by proposition (ii) can succeed only if the petitioner/plaintiff alleges and establishes that he

has not passed on the burden of duty to another person or persons. His refund claim shall be allowed or decreed only when he establishes that he

has not so passed on, as the case may be. Whether the claim for restitution is treated as a constitutional imperative or as a statutory requirement, it

is neither an absolute right nor an unconditional obligation, but is subject to the above requirement, where the burden of the duty has been passed.

3. We heard the arguments of the counsel on either side. We are not able to either accept the arguments of the counsel for the appellant or

approve the order of the Commissioner (Appeals) which is the subject matter of order of CESTAT, the correctness of which is now assailed.

4. Let us state the relevant facts of the case. The facts of the case are:

The respondent textile Mills filed a bill of entry No. 354328 dated 04.01.2005 for the import of one number of Benninger High Speed Warping

machine, claiming concessional rate of duty under Sl. No. 251 of Notification No. 21/2002-Cus., dated 01.03.2002, as amended. The bill of entry

was assessed at basic customs duty at 20%, countervailing duty at 16%, cess at 0.05%, service tax at 2% and educational cess at 2% for the total

value of Rs. 41,44,632/-. The respondent paid the amount under protest and cleared the goods. As against the assessment, the respondent filed an

appeal to the Commissioner (Appeals), who by his order dated 29.03.2005 vide

Order in Appeal No. 61 of 2005 found that the machinery imported by the respondent was entitled to the benefit of concessional rate of duty as per the Notification No. 21/2002 and allowed the appeal with consequential relief by setting aside the assessment to the value of Rs. 41,44,632/-. In pursuance of the said order, the respondent filed a refund claim in a sum of Rs. 36,13,700/- for a differential excess duty paid by him, before the Assistant Commissioner (Refund) in O.I.O. No. 220/2005-06, who by his order dated 08.07.2005 sanctioned the said amount and the same was paid back to the respondent.

5. Thereupon, the Assistant Collector of Customs (Refund) filed an appeal against the order dated 08.07.2005 made in Order in Original No. 220/2005-06 on the ground that it was not established by the importer that the duty has not been passed on to the buyers, with corroborative evidence. The Commissioner (Appeals) by his order dated 28.07.2006 allowed the appeal on the premise that the doctrine of unjust enrichment would apply to the case of the respondent that mere submission of the Chartered Accountant's certificate was not sufficient. The respondent carried that order to the CESTAT.

6. The Tribunal, after consideration of the legal issue, accepted the submission made by the respondent and set aside the order of the Commissioner dated 28.07.2006 and remanded the case to the Commissioner (Appeals) with the direction to him to examine the legal issue raised by the respondent and thereafter proceed to dispose of the appeal taking into account the observations made by the Tribunal.

7. The Commissioner (Appeals) once again, on the ground that the respondent has not established with corroborative evidence that the duty element has not been passed on to others and that the Chartered Accountant's certificate could not be regarded as a conclusive evidence to establish that there was no unjust enrichment, has allowed the appeal. The respondent being aggrieved by the order of the Commissioner (Appeals) filed an appeal before the CESTAT, which by its order dated 02.08.2007 allowed the appeal by observing that the Tribunal had no option but to set aside the order of the Commissioner, which was passed without application of mind to the settled position of law.

8. It is apparent from the records that the Tribunal, by its remand order dated

11.01.2001 has sustained the objections raised by the respondent to the effect that when the Assistant Commissioner disposed of the refund claim of the assessee in accordance with law and effected refund, any subsequent proceedings of the department to recover the amount from the party could only be on the ground of erroneous refund u/s 28(1) of the Act, it was only Section 28(1) of the Act would apply and not Section 129D(2) of the Act. The Tribunal also observed that though the said basic question had been raised by the parties before the Commissioner (appeals), but the same was not examined. The Tribunal also indicated that the appeal before the Commissioner was not against the order of the Commissioner holding that the respondent was entitled to concessional rate of duty. By observing so, the Tribunal set aside the order of the Commissioner (Appeals) and remitted the matter back to him with specific direction that the Commissioner should examine the legal issue raised by the party and thereafter proceed to dispose of the appeal taking into account the observations made by the Tribunal. But the Commissioner (Appeals), on remand, has not at all considered and carried out the directions given by the Tribunal, i.e., did not decide the legal issue in spite of the fact that such requirement was pointed out by the respondent. The Commissioner, with total disregard to the positive directions of the Tribunal, confirmed his earlier orders on the doctrine of unjust enrichment. He referred to so many case laws including the one namely, Nagpur Alloy Castings Limited Vs. Collector of Central Excise, which has been differentiated by the Tribunal in its order of remand.

9. The Tribunal, in the impugned order, has expressed its anguish in the following manner:

Our directions to the lower appellate authority were quite categorical. In our remand order, we had taken a view on Section 28 Section 129D.

After distinguishing Asian Paints (supra), we held that, where any amount of duty had already been refunded to an assessee u/s 27 of the Customs

Act, it was not open to the revenue on the ground of erroneous refund to proceed for recovery of the amount from them u/s 129D of the Act after

expiry of the period of limitation prescribed for demand notice u/s 28(1) of the Act. We held that the right recourse for the revenue was to issue a

show cause notice within the prescribed period. Had we found that, in the earlier

round, learned Commissioner (Appeals) had at least attempted examination of the issue, we would not have remanded the matter. The remand was occasioned by our finding that the appellate authority had sidestepped the above issue. It would have been graceful on its part, if the appellate authority had abided by the definite view expressed by the Tribunal in the remand order. In this context, it is significant to note that the revenue did not choose to appeal against our remand order.

Thus, it is clear that the remand order of the Tribunal became final and binding on the department. In that event, the Commissioner (Appeals) who is placed lower in the hierarchial system, has to follow the directions given by the appellate Tribunal whose decision is binding on him. As observed by the Supreme Court in the case of Union of India and others Vs. Kamlakshi Finance Corporation Ltd., , if the Department did not accept the order of the Tribunal holding that Section 28(1) of the Act is only applicable to recover the duty erroneously refunded in its order of remand, they would have agitated the matter further under the procedure known to law and got it set aside. The department has not initiated any such exercise.

Thus, it is explicit that the department has accepted the decision of the Tribunal to the effect that the department, if at all would have to agitate the matter only u/s 28(1) and not u/s 129D(2) of the Customs Act. That aspect of the matter thus attained finality. Hence, the only recourse available to the Commissioner of Appeals was to adjudicate the issue as directed by the Tribunal. The order passed by the Commissioner (Appeals) totally discarding the direction given by the Tribunal is not only disobeying the order of the superior forum, i.e., Tribunal, but impliedly indicating that the order of the Tribunal is not correct, which is impermissible in law.

10. Under the scheme of the Customs Act, 1962, Chapter XV provides for appeals to the hierarchy of the authorities and the procedure to be followed by them. Section 128 of the Act provides for appeal to the Commissioner (Appeals). Section 128A of the Act provides for the procedure to be followed while deciding the appeal. Section 129 of the Act provides for constitution of an appellate Tribunal by the Central Government. Section 129A of the Act provides for appeal to the appellate Tribunal. The other provisions in that Chapter provides for power of the Board or Commissioner of Custom to pass certain orders, powers of revision

of Board or Commissioner of Customs in certain cases, Revision by Central Government, Statement of case to the High Court, Statement of case to the Supreme Court in certain cases, power of the High Court or Supreme Court to require statement to be amended, case before High Court to be heard by not less than two Judges, appeal to the Supreme Court, etc.

11. u/s 129A of the Act, any person aggrieved by a decision or order passed by the Commissioner of Customs as an adjudicating authority or

aggrieved by an order passed by the Commissioner (Appeals) u/s 128A may appeal to the appellate Tribunal. Section 129B invests power on the

appellate Tribunal to pass orders as it thinks fit confirming, modifying or annulling the decision or order appealed against or may refer the case

back to the authority which passed such decision or order with such directions as the Appellate Tribunal may think fit, for a fresh adjudication or

decision, as the case may be. Thus, the appellate Tribunal is placed vertically over the Commissioner (Appeals) and conferred an appellate power.

The failure on the part of the latter to carry out such direction or show disrespect to or to question the propriety of such direction would - it is

obvious - be destructive of hierarchial system in the administration of justice. The seekers of remedy would lose faith in both.

12. The binding nature of the orders passed by the superior forum has been considered by the apex Court in the following cases : In the case of

Union of India and others Vs. Kamlakshi Finance Corporation Ltd., , the Supreme Court considered a case in which the respondent manufactured

electrical insulation tapes. According to the department, the goods manufactured by the assessee fell under tariff heading 85.47 of the schedule to

the Central Excise Tariff Act, 1985 and according to the assessee, the goods manufactured by it fell under the tariff heading 39.19 of the same

schedule. The Assistant Collector issued a show cause notice to that effect and the assessee replied pointing out that in respect of factories at

Bombay, its claim that the goods were classifiable u/s 85, 46 has been accepted by the Collector. The Assistant Collector did not accept the

assessee's contention and confirmed the show cause notice. The assessee preferred an appeal before the Tribunal. The Tribunal while setting aside

the order of the Assistant Collector, directed the Assistant Collector to pass a

reasoned and speaking order. When the matter went back to the Assistant Collector, he passed an order reiterating the conclusion that had been reached by him earlier. The assessee thereupon filed a writ petition in the Bombay High Court. The High Court quashed the order of the Assistant Collector and directed the department to allocate the matter to a competent officer to pass a proper order by passing some strictures on the Assistant Commissioner. The Union of India preferred an appeal. The Supreme Court laid down the proposition of law that the orders of the higher appellate authorities should be followed unreservedly by the subordinate authorities. It would be relevant to extract the relevant portions of the order of the Supreme Court:

Sri Reddy is perhaps right in saying that the officers were not actuated by any mala fides in passing the impugned orders. They perhaps genuinely felt that the claim of the assessee was not tenable and that, if it was accepted, the Revenue would suffer. But what Sri Reddy overlooks is that we

are not concerned here with the correctness or otherwise of their conclusion or of any factual mala fides but with the fact that the officers, in

reaching their conclusion, by-passed two appellate orders in regard to the same issue which were placed before them, one of the Collector

(Appeals) and the other of the Tribunal. The High Court has, in our view, rightly criticized this conduct of the Assistant Collectors and the

harassment to the assessee caused by the failure of these officers to give effect to the orders of authorities higher to them in the appellate hierarchy.

It cannot be too vehemently emphasized that it is of utmost importance that, in disposing of the quasi-judicial issues before them, revenue officers

are bound by the decisions of the appellate authorities. The order of the Appellate Collector is binding on the Assistant Collectors working within

his jurisdiction and the order of the Tribunal is binding upon the Assistant Collectors and the Appellate Collectors who function under the

jurisdiction of the Tribunal. The principles of judicial discipline require that the orders of the higher appellate authorities should be followed

unreservedly by the subordinate authorities. The mere fact that the order of the appellate authority is not "acceptable" to the department - in itself

an objectionable phrase - and is subject matter of an appeal can furnish no ground for not following it unless its operation has been suspended by a

competent Court. If this healthy rule is not followed, the result will only be undue harassment to assessees and chaos in administration of tax laws.

The impression or anxiety of the Assistant Collector that, if he accepted the assessee's contention, the department would lose revenue and would

also have no remedy to have the matter rectified is also incorrect. Section 35E confers adequate powers on the department in this regard. Under

Sub-section (1), where the Central Board of Direct Taxes come across any order passed by the Collector of Central Excise with the legality or

propriety with which it is not satisfied, it can direct the Collector to apply to the Appellate Tribunal for determination of such points arising out of

the decision or order as may be specified by the Board in its order. Under Sub-section (2), the Collector of Central Excise, when he comes across

any order passed by an authority subordinate to him, if not satisfied with its legality or propriety, may direct such authority to apply to the Collector

(Appeals) for the determination of such points arising out of the decision or order as may be specified by the Collector of Central Excise in his

order and there is a further right of appeal to the department. The position now, therefore, is that, if any order passed by an Assistant Collector or

Collector is adverse to the interests of the revenue, the immediately higher administrative authority has the power to have the matter satisfactorily

resolved by taking up the issue to the Appellate Collector or the Appellate Tribunal as the case may be. In the light of these amended provisions,

there can be no justification for any Assistant Collector or Collector refusing to follow the order of the Appellate Collector or the Appellate

Tribunal, as the case may be, even where he may have some reservations on its correctness. He has to follow the order of the higher appellate

authority. This may instantly cause some prejudice to the revenue but the remedy is also in the hands of the same officer. He has only to bring the

matter to the notice of the Board or the Collector so as to enable appropriate proceedings being taken u/s 35E(1) or (2) to keep the interests of

the department alive. If the officer's view is the correct one, it will no doubt be finally upheld and the revenue will get the duty, though after some

delay which such procedure would entail.

13. In the case of Tirupati Balaji Developers Pvt. Ltd. and Others Vs. State of Bihar and Others, , the Supreme Court held thus:

...11. The very conferral of appellate jurisdiction carries with it certain consequences. Conferral of a principal substantive jurisdiction carries with it, as a necessary concomitant of that power, the power to exercise such other incidental and ancillary powers without which the conferral of the principal power shall be rendered redundant. As held by Their Lordships of the Privy Council in AIR 1932 165 (Privy Council) (Sir Dinshah Mulla speaking for the Bench of five), an appeal is an application by a party to an appellate court asking it to set aside or revise a decision of a subordinate court. The appeal does not cease to be an appeal though irregular or incompetent. Placing on record his opinion, Subramania Ayyar, J. as a member of the Full Bench (of five Judges) in Chappan v. Moidin Kutti ILR (1899) 22 Mad 68 stated inter alia that appeal is "the removal of a cause or a suit from an inferior to a superior judge or court for re-examination or review". According to Wharton's Law Lexicon such removal of a cause or suit is for the purpose of testing the soundness of the decision of the inferior court. In consonance with this particular meaning of appeal, "appellate jurisdiction" means "the power of a superior court to review the decision of an inferior court." "Here the two things which are required to constitute appellate jurisdiction, are the existence of the relation of superior and inferior court and the power on the part of the former to review decisions of the latter. This has been well put by Story: "The essential criterion of "appellate jurisdiction" is, that it revises and corrects the proceedings in a cause already instituted and does not create that cause. In reference to judicial tribunals an appellate jurisdiction, therefore, necessarily implies that the subject-matter has been already instituted and acted upon, by some other court, whose judgment or proceedings are to be revised," (Section 1761, Commentaries on the Constitution of the United States)....

14. In Sri Rajendra Mills Limited v. Joint Commercial Tax Officer, Salem reported in (1971) 28 STC 483 a Division Bench of this Court considered the issue on the fact that certain turnover on cotton lending was regarded by the assessing officer as sale, but according to the assessee, it was only lending. For the earlier assessment year, the Tribunal in assessee's own case found similar transaction as lending. But the Revenue took the matter on appeal before High Court in Tax Case. The assessing officer on the ground of pendency of Tax case expressed his view that the

transaction was sale. In those circumstances, a writ petition came before the Division Bench, which ruled as follows:

...We consider that in the hierarchy of authorities set up under the Act, the Tribunal is superior to the Appellate Assistant Commissioner, who is

bound by the orders of the Tribunal. The orders of the Tribunal will be as effective as the orders of this Court so far as their binding character on

the Appellate Assistant Commissioner is concerned. Merely because a tax case has been filed by the department, it does not mean it acts as a kind

of stay of operation of the order of the Tribunal. So long as that order of the Tribunal is not set aside, the Appellate Assistant Commissioner is

bound to give effect to it, and if he fails to do it and by-passes it on the ground that the department has filed an appeal, it will be really a contempt

of the Tribunal's order....

15. In this case also, as we have already stated, directions given by the CESTAT has been floated just like that in spite of the fact that that has

been urged for consideration by the respondent. Even on merits, we are not able to accept the reason of the Commissioner that the respondent has

not discharged the onus of proving that the refund is not hit by the doctrine of unjust enrichment. In the refund order, the Assistant Commissioner

(Refund) stated as follows:

Under Section 27(2) of the Customs Act, the amount as determined by the Assistant Commissioner under provisions of Section 27(2) of Customs

Act, 1962 shall be credited to fund. Under first proviso to Section 27(2) of Customs Act, 1962 instead of being credited to the fund, be paid to

the applicant, if such amount is relatable to the duty and interest, if any paid on such duty paid by the importer, if he had not passed on to any other

person.

The importers have produced a certificate dated 20.05.2005 obtained from S.S. Subramanian, Chartered Accountants, Madurai stating that the

importers have shown a sum of Rs. 36,13,700/- under heading ""Duty Receivable from Customs"" in their books of accounts and it is further

confirmed that the said amount has not passed on to any other person. Hence, the unjust enrichment u/s 27 of the Customs Act, 1962 does not

arise in this case.

16. It is on record that in the cross objection dated 15.07.2006 filed by the

respondent their stand was that the warping machine imported by them was installed in the respondent's premises for being used in relation to the manufacture of textile products. The machine was not sold nor was it imported for sale and is very much available in the textile mill of the respondent. Apart from that, the Chartered Accountant has furnished a certificate to the effect that the duty element paid for importation of the capital goods has not been passed on to any person and the balance sheet of the respondent company was also produced before the authorities in which the differential duty has been shown as duty recoverable from the Customs Department. The legal presumption (Section 28D of the Act) relied on has thus been rebutted with the above materials which can well be regarded as corroborative evidence. Even to the worse, if the Department is not satisfied with the certificate of the Chartered Accountant and the balance sheet of the respondent company, they would have very well made a physical verification as to the availability of the capital goods with the respondent textile mills.

17. On the above said undisputed fact, we have come to the conclusion that there is no possibility for the respondent or there is no material on the part of the department to contend that by refund of the differential duty, the respondent has unjustly enriched. The authorities under the Act with closed mind have mechanically applied the concept of unjust enrichment against the respondent.

18. The counsel for the department placed a booklet containing certain judgments. The first of one is SRF Ltd. Vs. Assistant Collector of Central Excise, Trichy, . That was a case in which the appellant, a manufacturer of industrial fabric, manufactured RF solution and consumed captively for dipping the manufactured fibre in the solution. The appellant claimed that the RF solution were not goods and thus not liable for excise duty, however, paid the duty under protest and later obtained an order in its favour from the Tribunal. The appellant filed a refund claim u/s 11B of the Central Excise Act. In this factual circumstances of the case, i.e., inspite of the fact that the solution were not goods and payment of excise duty was not attracted, in view of the fact that the fabric so manufactured had been sold to third parties and the solution was captively consumed, and there was every possibility of cascading the duty element on the goods sold by

the appellant, the Court held that the appellant was obliged to prove that there was no unjust enrichment. But in the case on hand, the goods imported is a capital good, a machinery. After importation, the machinery was installed in the respondent textile mills and was very much available and being used for manufacture of goods. Hence, the SRF Ltd's case is not applicable to the present case.

19. Reliance was placed by the counsel for the revenue on the decision of the Supreme Court in the case of Nagpur Alloy Castings Limited Vs.

Collector of Central Excise, . We are of the view that decision cannot in any way advance the case of the appellant in the facts of the present case.

In that case, the Supreme Court considered two provisions, i.e., 35E and 11A of the Central Excise Act and held that two sections operated in

different fields and are invoked for different purposes at different time limits set out therein.

20. The other judgments annexed in the booklet are not relevant to the facts of the case, presumably that might be the reason that the counsel for the appellant has not made any argument with reference to the judgments.

21. In the light of the decisions of the Supreme Court relied on supra and in view of the discussion made above on the issue, we are of the view

that the Tribunal is correct in setting aside the order of the Commissioner (Appeals). Hence the appeal deserves no merit consideration and the

same is dismissed. No costs.