

(2004) 03 AP CK 0031

In the Andhra Pradesh High Court

Case No : Central Excise Reference Case No. 6 of 2003

Commr. of C. Ex.

APPELLANT

Vs

I.T.C. Bhadrachalam Paper Boards Ltd.

RESPONDENT

Date of Decision : 03-03-2004

Acts Referred:

Central Excises and Salt Act, 1944 — Section 11B

Citation : (2004) 172 ELT 28

Hon'ble Judges : Motilal B. Naik, J; Dalava Subrahmanyam, J

Bench : Division Bench

Advocate : T. Suryakaran Reddy, SCCG, for the Appellant; M. Bhaskara Lakshmi and Aravind P. Datar, for the Respondent

Judgement

Dalava Subrahmanyam, J.—This reference case is filed by the Revenue against the orders passed in Appeal No. E/2380/1998, and Final Order No. 1252 , dated 27-9-2002 by the Customs, Excise and Gold (Control) Appellate Tribunal, South Zonal bench at Bangalore in allowing the appeal with consequential relief in favour of M/s. ITC Bhadrachalam Paper Boards Limited.

2. The matrix of the case are as follows :

M/s. ITC Bhadrachalam Paper Boards Limited are manufacturers of paper and paper boards falling under Chapter 48. Keeping in view of acute shortage of printing and writing paper, Government of India has issued a notification No. 108/81-C.E ., dated 24-4-1981 according to which the new paper mills which commenced clearances of paper for the first time during the period from 1-4-1979 to 31-3-1984 were required to pay only 50% of duty applicable on such paper. The department contended that the five year period would reckoned from the date of first clearance viz., 19-8-1979 to 18-8-1984. The department did not extend the benefit of notification from 19-8-1984 to 8-11-1984. The assessee, on the other hand, held that the relevant date for computing the period of five years should commence from the date of issue of notification. Meanwhile, Notification No. 214 of 1984 clarified that the five year period would

be computed from the date of issue of notification. Accordingly, the assessee, who paid the duty in full during the period from 19-8-1984 to 8-11-1984 filed a refund application for Rs. 47,59,801/- which was rejected by the Assistant Commissioner of Central Excise vide his order dated 22-7-1985. The appeal filed by the Assessee before the Collector was also dismissed. As against that order, the Assessee filed appeal before the Tribunal and in Final Order No. 1018/90-C , dated 12-9-1990 [1992 (59) E.L.T. 466 (Tri.)] held that the assessee was entitled for the refund. The appeal filed before the Supreme Court by the department was also dismissed in C.A. No. 640 of 1991, dated 20-2-1991 [1991 (55) E.L.T. A67 (S.C.)]. When the refund claim was filed by the Assessee, a show cause notice was issued u/s 11B of the Central Excise Act as to why the claim should not be rejected. The Assistant Commissioner of Central Excise after hearing passed an order dated 28-9-1994 and rejected the refund claim on the ground that the assessee did not produce any evidence that they have not collected the same from the customers. The Assessee filed an appeal before the CEGAT and the same was allowed. The Tribunal allowed the refund claim on the ground that the assessee paid duty at full rate under protest and the invoices showed the composite price without indicating the duty separately and since the sale price of the goods remained the same, it was concluded that incidence of duty was not passed on to the consumer. Section 11B of Central Excise Act was amended by a Notification 30/91-CE. (N.T.), dated 19-9-1991. It was contended that the Tribunal ought to have decided the issue according to the amendment but there was no finding given by the Tribunal.

3. Aggrieved against the final orders of the CEGAT, the revenue referred the case to the High Court contending that the Tribunal ought to have decided the issue according to the amended Section 11B of the Central Excise Act, 1944 (hereinafter referred as "The Act". There is no finding with regard to the unjust enrichment contemplated u/s 11C of the Central Excise Act. The Assessee has not proved that the duty has not been passed on to the customers. For the above said reasons, the following questions of law would arise in the reference.

(1) Whether the provisions of Section 11B as amended vide Notification No. 30/91-C.E. (N.T.), dated 19-9-1991 are applicable to the refund application filed before amendment ?

(2) Whether the Hon"ble CEGAT erred in not following the amended provisions ?

(3) Whether the claimant is required to prove that the incidence of duty has not passed on to any other person ?

4. Heard the Standing Counsel for Central Government and Sri. Aravind P. Datar Senior Counsel appearing on behalf of the respondent.

5. The Standing Counsel for the Central Government contended that Section 11B of the Central Excise Act was amended and the same is applicable to the refund in question and the Tribunal failed to follow the provisions of amended Section 11B of the Act and that there was no proof that the incidence of duty has not

passed on to any other person. The learned Senior Counsel appearing for the respondent contended that the order of refund has become final even prior to the date of amendment of Section 11B of the Central Excise Act. The principle of unjust enrichment would not apply to the facts of the case. Even otherwise the Tribunal found that the claimant has not passed on the incidence of duty to any other person and hence the reference may be answered in favour of the assessee and against the Revenue.

6. The admitted facts are M/s. I.T.C. Bhadrachalam paper boards limited are the manufacturers of paper and paper boards falling under Chapter 48. The Government of India issued a Notification No. 108/81-C.E., dated 24-4-1981 according to which the new paper mills which commenced clearance of paper for the first time during the period from 1-4-1979 to 31-3-1984 were required to pay only 50 per cent of duty applicable on such paper. Subsequently a further clarification was issued in Notification No. 214 of 1984 that five years period should commence from the date of issue of notification. The assessee, who had paid the duty in full during the period from 19-8-1984 to 8-11-1984 filed a refund application for Rs. 47,59,801/- which was rejected by the Assistant Collector of Central Excise and the assessee became unsuccessful before the Collector (Appeals) and on appeal the Tribunal in its final order dated 12-9-1990 held that the assessee was entitled for refund for the period from 19-8-1984 to 8-11-1984. In pursuance of the order of the Tribunal, the assessee filed refund claim on 1-11-1990. The appeal filed by the department before the Supreme Court was also dismissed and the order of the Tribunal became final. Subsequently a show cause notice was issued as to why the refund claim should not be rejected u/s 11B of the Central Excise Act. The Assistant Commissioner of Central Excise after hearing rejected the refund claim which was confirmed by the Collector. As against the order of the Collector, the Assessee filed an appeal before the Tribunal, the Tribunal allowed the appeal with consequential relief for refund.

7. The amendment to Section 11B of the Act to the effect that the applicant has to establish that the incidence of such duty has not been passed on by him to any other person was introduced with effect from 20-9-1991. The object of such amendment was that refund claims could be denied on grounds of unjust enrichment. The burden to prove that Excise duty has not been passed on to the customers was placed on the assessee. The argument of the learned Standing Counsel of the Central Government cannot be sustained because in the instant case, even prior to 20-9-1991 the Tribunal in its Final Order dated 12-9-1990 passed the refund order and the appeal filed before the Supreme Court was also dismissed. The filing of application for refund was only consequential to the orders of the Tribunal and therefore the Assistant Collector of Customs and the Collector of Customs committed error in applying the provisions of amended Section 11B of the Central Excise Act by casting the burden of proof on the assessee to prove that the incidence of such duty had not been passed on to any other person. In the facts and circumstances of the case, the Notification No. 30

of 1991, dated 19-9-1991 to Section 11B has no application to the facts of this case, as the said notification is only prospective but not retrospective in nature. In view of the said facts, the CEGAT has not erred in not following the amended provisions of Section 11B of the Act and further the claimant was not required to prove that the incidence of duty has not been passed on to any other person. Considering the facts and circumstances of this case, we are of the opinion that the amended Notification No. 30 of 1991 to Section 11B was only prospective and will not apply to the facts and circumstances of the case and hence the CEGAT has not erred in not following the amended provisions and hence the order of the Tribunal is valid in law. For the above said reasons, the referred questions are answered in favour of the assessee and against the Revenue.

8. In the result, the reference is answered in favour of the assessee and against the Revenue.