

(2011) 08 AP CK 0072
In the Andhra Pradesh High Court
Case No : C.E.A. No. 129 of 2011

Commr. of Cus. and C. Ex., Guntur

APPELLANT

Vs

Crane Betel Nut Powder Works

RESPONDENT

Date of Decision : 11-08-2011

Acts Referred:

Central Excises and Salt Act, 1944 — Section 11B, 35G

Citation : (2012) 279 ELT 487 : (2013) 29 STR 85

Hon'ble Judges : Goda Raghuram, J; Ashutosh Mohunta, J

Bench : Division Bench

Advocate : Gopalakrishna Gokhale, for the Appellant; Gandra Mohan Rao, for the Respondent

Final Decision : Dismissed

Judgement

Goda Raghuram, J.—This appeal u/s 35G of the Central Excise Act, 1944 ["the Act" for brevity], is preferred against the Final Order No. 77 of 2011 Miscellaneous Order No. 46 of 2011 dated 7-2-2011 passed in Appeal No. E/2203/10 & E/CO/146/10 on the file of the 2011 (274) ELT 113 The respondent-manufacturers of betel nut powder (a product known as supari) were paying duty, classifying the product under Ch.S.H. No. 2107.00. They filed a revised classification list with effect from 17-7-1997 classifying the product under Ch.S.H. No. 0801.00 attracting a "nil" rate of duty. Nevertheless, they were paying duty under protest with effect from 25-7-1997, as the assessee felt that the Department may object to clearance of the goods at "nil" rate of duty. The Assistant Commissioner, Central Excise, Guntur Division, vide order dated 14-10-1998, rejected the revised classification under Ch.S.H. No. 0801.00 and classified the product under Ch.S.H. No. 2107.00. Aggrieved by the same, the respondent filed an appeal before the Commissioner (Appeals), who, by his order dated 6-5-2004, set aside the order of the primary authority. The respondent paid duty under protest from 25-7-1997 to 10-5-2004 and stopped payment of duty thereafter with effect from 11-5-2004, on the basis of the appellate order.

Aggrieved by the appellate order, the Revenue appealed to the CESTAT, which allowed the appeal and restored the order of the primary authority. The respondent preferred an appeal to this Court against the CESTAT's Final Order dated 12-4-2005 2005 (187) ELT 106], which was dismissed on 15-9-2005 in C.E.A. No. 20 of 2005. The respondent thereupon preferred an appeal to the Supreme Court, which reversed the judgment of the High Court and upheld the classification under Ch.S.H. No. 0801.00, vide judgment dated 19-3-2007 reported in Crane Betel Nut Powder Works Vs. Commissioner of Customs and Central Excise, Tirupathi and Another, .

2. After a review petition filed by the Revenue before the Supreme Court was also dismissed on 2-4-2008, the assessee filed a refund claim on 7-5-2008 for Rs. 32,03,97,583/- comprising the amounts paid through cash (PLA) and another amount paid through credit account. Thereafter, the assessee filed a revised refund claim on 12-5-2008 for Rs. 32,29,59,831/-.

3. The Revenue issued show cause notice dated 5-8-2008 proposing to reject the refund claim and eventually, the Deputy Commissioner, Central Excise, Guntur, vide order dated 29-4-2010 held that the assessee was eligible for the refund under the provisions of Section 11B of the Act but was not entitled for refund since it was not proved that the assessee had passed on the duty burden to the buyers. Consequently, the Deputy Commissioner ordered the amount to be credited to the Consumer Welfare Fund.

4. Aggrieved over the denial of refund in specie, the respondent assessee filed an appeal before the Commissioner of Appeals, who allowed the appeal by the order dated 6-8-2010 holding (a) that assessee did pass on the incidence of the duty to the buyers/consignment agents and therefore. They are eligible for refund, which has been paid by them through PLA; (b) that the duty paid through credit account is not eligible for refund as the goods in question were held to be non-dutiable; and (c) that the question of payment of interest does not arise at this stage as duty is not paid in three months. The appeal was allowed on several grounds including that the duty was paid under protest; that the price remained same through out the period i.e., before introduction of the levy, during the payment of duty and after stopping the payment of duty; the assessee has shown the amount of excise duty payable under the head "Expenditure" in the profit and loss account; and had furnished Chartered Accountant's Certificate based on the records maintained by them, which certified that the total wholesale price to the Agent/Dealer had not significantly varied before or after the introduction of excise duty in 1994-95.

5. Aggrieved thereby, the Revenue filed an appeal before the CESTAT, Bangalore, which was dismissed by the order impugned.

6. As both the Commissioner of Appeals and the CESTAT have upheld the order of refund on the ground that there is no variation in the price of the product both before and after the period the duty was paid by the assessee; and the

respondent-assessee had produced a detailed Chartered Accountant's Certificate before adjudicating the authority; and in view of the fact that the Revenue failed to marshal any countervailing evidence to counteract the material produced by the assessee to disclose the passing of the duty liability to the consumer, the respondent-assessee is liable for refund.

7. It is fairly admitted by the learned counsel for the appellant herein that in case of material/evidence on record to establish the passing on of the burden of duty to the consumer, the assessee is entitled for refund of duty paid under protest or paid even though warranted by law. What the learned counsel would contend is that the substantive evidence with regard to the claim of passing of the liability of duty to the consumer or the consignment agent are the invoices in respect of the transactions and not inferences drawn from the price not having charged before and after the payment of duty; or the Certificate of the Chartered Accountant.

8. In our considered view, the Commissioner (Appeals) and the CESTAT in the order impugned have considered the material on record and if there is some evidence on the basis of which the primary and appellate authorities have based their conclusions, then the fact that better evidence ought to have been marshalled by the assessee and absence of the substantive evidence of invoices, was not considered, would not constitute a substantial question of law warranting consideration by this Court u/s 35G of the Act, in an appeal. On the aforesaid premises, there are no merits in the appeal and it is accordingly dismissed at the stage of admission. In the circumstances, however, without costs.