(2016) 03 MAD CK 0231

In the Madras High Court

Case No : Writ Petition Nos. 13366-13367 of 2003

Elgi Ultra Industries Ltd. APPELLANT

Vs

Dy. Commr. of C. Ex., Coimbatore RESPONDENT

Date of Decision : 10-03-2016

Acts Referred:

Citation : (2016) 335 ELT 204

Hon'ble Judges : M. Duraiswamy, J.

Bench : Single Bench

Advocate : Shri N. Prasad, Advocate, for the Petitioner; Shri K. Ravindranath, SC (C and CE), for the Respondent

Final Decision : Dismissed

Judgement

M. Duraiswamy, J.—W.P. No. 13366 of 2003 has been filed by the petitioner to issue a writ of certiorari to call for the records of the 3rd respondent dated 21-1-2003 confirming its earlier order dated 12-7-2002 and quash the proceedings of the 3rd respondent dated 21-1-2003.

2. W.P. No. 13367 of 2003 has been filed by the petitioner to issue a writ of certiorarified mandamus to call for the records of the 3rd respondent herein in Final Order dated 12-7-2002 and to quash the same and direct the 1st respondent herein to restore to the petitioner a sum of Rs. 41,58,566/- being amounts paid under protest between the period 1-10-1995 and 31-8-1999.

3. According to the petitioner, they are engaged in the business of manufacture and sale of Drip Irrigation System falling under Chapter 8424.10 of the Central Excise Tariff Act, 1944 and was exempted by Notification No. 56/95, dated 16-3-1995. As the Drip Irrigation System as a whole was exempted from payment of duty and the petitioner had also cleared the plastic pipes/tubes as part of the system without payment of duty, by show cause notice dated 19-4-1996, it was proposed that plastic pipes/tubes cleared as part of the Drip Irrigation System involved a clearance of dutiable goods and therefore, Rs.

9,70,085/- for the period from 1-10-1995 to 4-3-1996 on such plastic pipes/ tubes was proposed to be demanded. Subsequently, the demand was confirmed by order dated 4-12-1996 by the Commissioner of Central Excise and Customs, Coimbatore. The petitioner paid sum of Rs. 10,45,885/-, comprising of Rs. 9,70,085/- towards duty on plastic pipes/tubes and Rs. 75,000/- towards penalty for the period from 1-10-1995 to 4-3-1996 under protest and thereafter, proceeded to challenge the validity of the order by way of statutory appeals. By final order dated 30-7-1999, the 3rd respondent accepted the stand of the petitioner that the clearance of the Drip Irrigation System as a whole including the plastic pipes/tubes did not involve the clearance of any dutiable goods and therefore, no duty can be imposed on the plastic pipes/tubes cleared by the petitioner as parts of Drip Irrigation System. However, in the meanwhile, the petitioner had paid the duty under protest amounting to Rs. 92,02,446/-. A portion of this duty paid by using Modvat credit available on the raw materials, had entered the manufacture of plastic pipes/tubes amounting to Rs. 50,43,880/-. A balance of Rs. 41,58,566/- was paid by the petitioner out of their own pocket by debiting the PLA account required to be maintained under the Central Excise Rules and this includes a sum of Rs. 10,45,085/- paid by the petitioner. The said sum of Rs. 10,45,085/- was paid subsequent to the clearance of goods and paid out of their own pocket and therefore, the provisions of unjust enrichment would not apply to the entire amount of Rs. 41,58,566/-. On receipt of the order of the 3rd respondent dated 30-7-1999, the petitioner filed an application claiming refund of Excise duty of Rs. 41,58,566/- paid between October, 1995 and August, 1999 by debiting the PLA Account. By show cause notice dated 28-4-2000, the 1st respondent proposed to disallow the claim of refund made by the petitioner. In response to the notice, the petitioner, by their letter dated 17-6-2000, submitted their objections. Personal hearing was also extended to the petitioner on 31-7-2000. By order dated 8-1-2001, the 1st respondent rejected the claim of refund and ordered a sum of Rs. 41,58,566/- to be credited to the Consumer Welfare Fund as per Section 11B(2) of the Central Excise Act. Aggrieved by the proceedings of the 1st respondent, the petitioner preferred a statutory appeal before the 2nd respondent. By order dated 10-8-2001, the second respondent allowed the appeal filed by the petitioner and held that the petitioner was eligible for refund of Rs. 41,58,566/-. Against the order of the 2nd respondent, the Revenue filed an appeal before the 3rd respondent and the 3rd respondent by its order dated 12-7-2002 allowed the appeal and restored the order of the 1st respondent. Thereafter, the petitioner took out an application for rectification and by order dated 21-1-2003, the 3rd respondent dismissed the application for rectification. Against the orders dated 12-7-2002 and 21-1-2003, the petitioner has filed the above writ petitions.

4. The learned counsel appearing for the petitioner submitted that the 2nd respondent had rendered clear findings that the price of plastic pipes/tubes, which were part of the Drip Irrigation System on which excise duty was paid under protest between 1-10-1995 and 31-8-1999 had remained unaltered, which

finding of the 2nd respondent was rendered on the basis of various invoices produced by the petitioner for the period from 1-10-1995 to 31-8-1999. It is clear that the petitioner had not passed on the incidence of duty paid under protest on the plastic pipes/tubes to the customs.

5. The learned counsel for the petitioner, in support of his contentions relied upon the following judgments :

(i) 2005 (183) E.L.T. 225 (S.C.) (SACI Allied Products Ltd. v. Commissioner of C.Ex., Meerut), wherein the Hon''ble Supreme Court held as follows :

"17. Thus according to the appellate Tribunal, since the dealers in Uttar Pradesh who purchase the goods from Syndet, and independent dealers in other parts of the country to whom, the appellants directly sold the goods are different class of buyers, appellants'' price to the independent dealers cannot be taken as the basis for assessing appellants'' sales to Syndet in Uttar Pradesh. This finding of the appellate Tribunal is based on first proviso to Section 4(1)(a) of the Act. While the show cause notice and the order of the Collector proceeded on the basis of the invocation of third proviso to Section 4(1)(a) of the Act, the appellant Tribunal for the first time in the impugned order has sustained the proceedings on the basis of first proviso to Section 4(1)(a) of the Act. It was argued that the first proviso to Section 4(1)(a) of the Act was never invoked by the Department either in the show cause notice or in the impugned order and it was for the first time that the appellate Tribunal in the impugned order has sought to sustain the impugned order invoking the first proviso to Section 4(1)(a) of the Act. It is the order of the Collector, which is impermissible. The appellate Tribunal cannot sustain the case of the Revenue against the appellants on a ground not raised by the Revenue either in the show cause notice or in the order."

(ii) 2006 (202) E.L.T. 404 (Mad.) (Commissioner of C.Ex., Coimbatore v. Flow Tech Power), wherein the Division Bench of this Court held as follows :

"3. We heard the learned counsel in length. There was a factual finding by the authorities below that the duty had been paid under protest and the question of time bar would not arise. Hence, the argument that the petitioner paid the duty without protest is rejected. In respect of unjust enrichment, the facts reveal that the price was a composite one fixed by the Ministry of Agriculture. The factual position is that the duty has been absorbed by the assessee and it was submitted that the Chartered Accountant''s Certificate dated 8-7-2002 and the profit and loss account, also confirm that the duty paid on the impugned goods had been absorbed by the assessee and had been shown as expenditure in profit and loss account and had been passed on to the customer.

4. In the foregoing conclusions, we find no error in the order passed by the Customs, Excise and Service Tax Appellate Tribunal and requires no interference. Hence, no substantial questions of law arise for consideration of this Court. Accordingly, the Civil Miscellaneous Appeal is dismissed. No costs."

(iii) 2015 (320) E.L.T. 703 (Mad.) = 2015 (39) S.T.R. 190 (Mad.) (Commissioner of C.Ex., Coimbatore v. Pricol Ltd.), wherein a Division Bench of this Court held as follows :

"7. The first question of law, which is raised, relates to the pleas of unjust enrichment and much emphasis is laid on the decision of the Supreme Court in Mafatlal Industries case [1997 (89) E.L.T. 247 (S.C.)]. Relevant portion of the order passed by the Supreme Court in Mafatlal Industries case (supra) has been extracted in the grounds (b) and (c). There is no dispute with regard to the proposition of law as laid down by the Supreme Court. In the present case, as is evident from the records, it is not a case of refund of duty. It is a pre-deposit made under protest at the time of investigation, as has been recorded in the original proceedings itself. In this regard, it has to be noticed that it has been the consistent view taken by the Courts that any amount, that is deposited during the pendency of the adjudication proceedings or investigation is in the nature of deposit made under protest and therefore, the principles of unjust enrichment does not apply."

(iv) 2000 (116) E.L.T. 401 (S.C.) (Union of India v. Solar Pesticide Pvt. Ltd.), wherein the Hon''ble Supreme Court held as follows :

"For the aforesaid reasons, we hold that the High Court has not correctly interpreted the relevant provisions of the Customs Act and, in our opinion, the principle of unjust enrichment incorporated in Section 27 of the Act would be applicable in respect of imported raw material and captively consumed in the manufacture of a final product. Whether the incidence of the duty had been passed on to the consumer was not decided by the High Court in Solar Pesticide''s case (supra) because in its opinion the principle of unjust enrichment could not apply to the cases of captive consumption. In the case of Solar Pesticide Pvt. Ltd., therefore, we do not go into this question whether the incidence of duty had not been passed on by the respondent. This appeal is, accordingly, allowed and the impugned judgment of the High Court is set aside, the effect of which would be that the Writ Petition filed by the Solar Pesticide Pvt. Ltd. stands dismissed. Writ Petition (C) No. 189 of 1993 filed by M/s. Solar Pesticide Pvt. Ltd. in this Court also stands dismissed. No costs."

6. Countering the submissions made by the learned counsel for the petitioner, Mr. K. Ravindranath, learned Standing Counsel for the respondents submitted that under Section 35G of the Central Excise Act, 1944, an appeal shall lie to the High Court from every order passed in the appeal by the Appellate Tribunal on or after 1-7-1999. Further, the learned counsel submitted that the orders dated 21-1-2003 and 12-7-2002 were passed in a proper manner and those orders do not require any interference in these writ petitions.

7. In support of his contentions, the learned Standing Counsel relied upon the following judgments :

(i) 2000 (116) E.L.T. 401 (S.C.) (Union of India v. Solar Pesticide Pvt. Ltd.), wherein the Hon''ble Supreme Court held that the incidence of duty being passed on to another person would take within its ambit not only the passing of the duty directly to another person but also the cases where it is passed on indirectly.

(ii) an unreported judgment made in W.P. No. 24615 of 2012, etc., batch dated 30-10-2013 [2014 (299) E.L.T. 3 (Mad.)], the Division Bench of this Court answered the reference made by the learned single judge as follows :

"The order passed by the CESTAT in terms of Section 35F of the Central Excise Act, 1944 or Section 129E of the Customs Act, 1962 is appealable in terms of Section 35G of the Excise Act, 1944 or Section 130 of the Customs Act, 1962."

8. In the judgment reported in 2000 (116) E.L.T. 401 (S.C.) (Union of India v. Solar Pesticide Pvt. Ltd.), the Hon''ble Supreme Court held that the principle of unjust enrichment is applicable to cases of captive consumption also. It was also held that the expression "incidence of such duty being passed on to another person" would take within its ambit not only the passing of the duty directly to another person but also cases where it is passed on indirectly. In the instant case, the plastic pipes/tubes were cleared on payment of duty for captive consumption in the manufacture of Drip Irrigation System and the petitioner was not able to produce any documentary proof to establish that the duty has not been passed on to the buyer. In the judgment reported in 1997 (89) E.L.T. 247 (S.C.) (Mafatlal Industries v. Union of India), the Hon''ble Supreme Court held that it is the responsibility of the assessee to establish that the duty incidence has not been passed on to any other customer. The respondents 1 and 3 relying upon the judgment of the Hon''ble Supreme Court reported in 2000 (116) E.L.T. 401 (S.C.) (Union of India v. Solar Pesticide Pvt. Ltd.) and 1997 (89) E.L.T. 247 (S.C.) (Mafatlal Industries v. Union of India), has rightly passed the orders.

9. The order of the 3rd respondent is absolutely correct, since it is settled law that refund should not lead to unjust enrichment. That apart, the petitioner was not able to show any evidence that there was no change in the price of their final product with reference to the date of commencement of the period of refund of claim. Moreover, none of the invoices for the period prior to the period of dispute was made available to show that the price charged has been uniform throughout notwithstanding the payment of duty on the plastic tubes captively consumed. Merely because duty has been paid under protest does not give credence to the claim of the petitioner that they had not passed on the incidence of duty to their customer. In these circumstances, the ratio laid down by the Hon''ble Supreme Court in 2000 (116) E.L.T. 401 (S.C.) (Union of India v. Solar Pesticide Pvt. Ltd.) and 1997 (89) E.L.T. 247 (S.C.) (Mafatlal Industries v. Union of India), squarely applies to the facts and circumstances of the present case. Since the facts and circumstances are completely different, the judgments relied upon by the learned counsel for the petitioner are not applicable to the present case.

10. In these circumstances, the writ petitions deserve no merits and are liable to be dismissed. Accordingly, the writ petitions are dismissed. No costs.