(2013) 10 DEL CK 0314

In the Delhi High Court

Case No : Cus. A.C. No. 20 of 2013

Hero Motocorp Ltd. APPELLANT

Vs

Commissioner of Customs (Import and General) RESPONDENT

Date of Decision : 23-10-2013

Acts Referred:

Citation : (2014) 302 ELT 501

Hon'ble Judges : Sanjiv Khanna, J;Sanjeev Sachdeva, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

1. By an order dated 26th July, 2013 the following substantial question of law was admitted for hearing in this appeal which arises out of the Customs Appeal No. 411/2008 decided by the Customs, Excise and Service Tax Appeal Tribunal (''Tribunal'', for short) on 30-10-2012: Whether the Tribunal was right in holding that the appellant is not entitled to refund of CVD as the appellant has failed to meet the prescribed requirements.

We shall be referring to the order of Tribunal in detail subsequently. First, the facts which are relevant may be first noticed in brief. 2. The appellant a manufacturer of motorcycles had imported a consignment of components for motorcycles. It is an accepted position that nil, Countervailing Duty (CVD) was payable on the said consignment as per Notification No. 149/95 dated 19th September, 1995. The appellant claims that CVD amounting to Rs. 22,34,700/- was erroneously calculated and paid on 23rd April, 1997 but within the statutory time, the appellant filed a refund claim before the Assistant Commissioner of Customs (Refund) vide refund claim application dated 11th August, 1997. The Assistant Commissioner of Customs (Refund), however, rejected the refund application by order dated 5th March, 1998. The matter was taken up in appeal and orders of remand was passed, and ultimately vide order dated 3rd February, 2000, passed by the Tribunal, the appellant was held entitled to refund of CVD and the same was directed to be paid in accordance with law. The directions given by the Tribunal in their order dated 3rd February, 2000 read:

We have heard the rival submissions. We have perused the various Notifications particularly Notification No. 149/95. We note that Advance licence was issued to the appellants on 23-8-1996. We find that the requirement of Notification 149/95 was that the exemption under this Notification shall be available on the goods imported into India against an advance licence applied for and issued on or after 19-9-1995. Thus, the requirement of Notification No. 149/95 was complied with by the appellants inasmuch as they were issued the advance licence on 23-8-96. Since the appellants had complied with the requirement of Notification No. 149/95, they were not required to pay countervailing duty on the imported goods against their Advance licence in terms of Section 3 of the Customs Tariff Act and since this duty was incorrectly paid by them by mistake, therefore, they were entitled to the refund thereof. We do not see any other condition of this Notification being violated. In the circumstances, we hold that the appellants are entitled to the refund of countervailing duty. This, however, will be paid in accordance with law. The appeal is disposed of in the above terms.

3. On 4th April, 2000, the appellant through its authorized representative, wrote a letter seeking refund in terms of the said order. The appellant thereafter filed (i) original bill of entry, original TR-6 challan (ii) balance sheet of relevant period (iii) unjust enrichment certificate (iv) DEEC book of related case (v) Chartered Accountant certificate. The appellant had filed detailed clarifications and furnished information asked for. During the period 29th March, 2004 to 12th January, 2005, the appellant wrote numerous letters seeking refund but there was no positive response. On 21st September, 2005, the appellant in addition to the documents mentioned above submitted (i) indemnity bond (ii) affidavit to the effect that they amount claimed as refund had not been sanctioned (iii) copy of the audited balance sheet of the relevant period (iv) self-attested invoice/packing list/bill of entry (v) copy of Chartered Accountant Certificate to the effect that incidence of tax had not been passed to third parties. Thereupon, the appellant was asked to furnish copy of sale invoices and comparative sheet containing prices of vehicles both before and after import. These details and invoices were furnished vide letter dated 6th December, 2005.

4. The Assistant Commissioner of Customs (Refund), however, rejected the claim of refund vide order dated 1st March, 2006 on the ground that the appellant had not been able to satisfy and meet the burden cast upon them. The refund, it was directed, should be credited to the Consumer Welfare Fund as per the provisions of Section 27(2) of the Customs Act, 1962 (Act). He observed that the appellant had not been able to substantiate their contention that the CVD paid on the imported goods has not been taken into account while calculating the sale value of the subject goods. He further observed that the appellant could not corroborate the contention that the CVD had not been passed on to their customers/buyers. The said order at the same time records that the file of the Department was untraceable and at request the appellant had furnished

photocopies of documents along with indemnity bond, copy of balance sheet and Chartered Accountant certificate. The party had also furnished invoices for the relevant period for verification.

5. The appellant did not succeed before the Commissioner (Appeals), who vide order dated 31st January, 2008, rejected the claim. The appellate authority did not go into the question of unjust enrichment on merits and the claim of the appellant that they have not passed on CVD duty. Commissioner (Appeals) failed to deal with the said issue and had only examined the scope of order of the Tribunal dated 3rd February, 2000.

6. As noticed above, the appellant has not succeeded before the Tribunal. The Tribunal in the impugned order dated 30th October, 2012 has recorded as under:

Section 27 of the Customs Act, 1962 is not required to be read in piecemeal or hither and thither to understand the legislative intent of that section. Sub-section (1) of the said section has bar against unjust enrichment for which no refund claim shall be allowed without meeting the test prescribed by Section 27(1) of Customs Act, 1962. Sub-section (3) of the said Act, while permitting the refund arising out of sub-section (2) nowhere states that subsection (1) of Section 27 is not applicable to refund arising under that section. Had the intention been to oust the test of unjust enrichment, there would have been overriding mandate in sub-section (2) itself. Therefore, sub-section (1) and sub-section (3) operate on their own field and all refunds undergo test by sub-section (1) of Section 27. This we can say following the Apex Court judgment in the case of Sahakari Khand Udyog Mandal Ltd. Vs. Commissioner of Central Excise and Customs, .

6. Both the authorities below had no evidence before them as to meeting of the test of unjust enrichment by the appellant. We are not able to find which the documents that give relief to the appellants and that was shown to the appellate authority but denied. Nothing was specifically brought to our notice.

7. Tribunal being final court of fact we made every effort to examine whether the appellant was denied justice. Once we do not find evidence overruling unjust enrichment, it is difficult to impeach the first appellate order. This calls for upholding the first appellate order for which appeal is dismissed.

(Emphasis supplied)

7. As clearly noticeable from the aforesaid order, the Tribunal has failed to examine the documents and papers which were filed by the appellant before the adjudicating authority, i.e. Assistant Commissioner of Customs (Refund). We have specifically noted the papers and documents which were filed by the appellant before the said authority which included the balance sheet for the relevant period, Chartered Accountant certificate regarding passing of incidence of CVD to the customers/buyers, certificate of the appellant and affidavit, as well as self-attested copies of invoices/packing list etc. It is quite noticeable that the factual matrix of the case and documents have not been examined by the

Tribunal and they have referred to the generality and quite contrary to specific evidence and material, have failed to deal with the issue and submission. The document/papers relied upon by the appellant find mention even in the order passed by the Assistant Commissioner of Customs (Refund).

8. The learned counsel for the appellant has drawn our attention to the submissions which were made before the Tribunal, which have been enclosed as Annexure-14. We would like to reproduce some portions of the said submissions which read:

That the appellate authority has also not brought out any reason for rejection of Balance Sheet, the Chartered Accountant Certificate and the sale invoices of the appellant. All these financial documents that erroneously paid CVD was shown in the books of account as recoverable from the Government had not been passed to the consumer and therefore was justifiably to be refunded to the appellant and not taken into the consumer fund.

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That without prejudice to the submission made above in regard to unjust enrichment not being invoked, the appellant also put across to the Hon''ble Assistant Commissioner (Refund) and Commissioner of Customs (Appeals) the documents to substantiate that there was no unjust enrichment and that the duty sanctioned as refund had not been passed on to the final customers.

That the Bill of Entry for import of components under which the CVD was wrongly paid was filed on 23-4-1997 and the consignment was cleared on 28-4-1997. Prior to clearance of this consignment, motorcycles of the company were being sold at prices of Rs. 23,800 to 27,640 for different models. Refer invoices for the period February, 1997 and comparative chart enclosed. Even after clearance of the said consignment and arrival of component at the factory the motorcycles of the company continued to be sold at the same price at which they were earlier sold to public. In this regard, refer to invoices and comparative chart enclosed. These invoices pertaining to the period from June, 1997 to September, 1997 will clearly indicate that duties which had been wrongly paid did not effect the price of final product to the consumer and that the said duty had not been passed on to the customers. In support, the appellant submitted a copy of balance sheet and Chartered Accountant certificate. These documents have not been considered thus leading to a injudicious order which merits to be set aside.

9. Noticing the above facts, at one stage, we were inclined to remand the matter to the Tribunal for fresh decision but there has been extraordinary delay and peculiar facts have compelled and prompted us to examine the documents on record to ascertain whether the appellant has discharged the burden as per Section 28D of the Act. This is the third round of litigation. The appellant had filed a refund application dated 11th August, 1997, which was rejected on 5th March, 1998. This order was set aside and the matter was remanded to the adjudicating authority by the Commissioner (Appeals) vide order dated 2nd

September, 1998. In the second round again, the Assistant Commissioner (Refund) rejected the application of refund. The appellant did not succeed before the Commissioner of Customs (Appeals) but finally succeeded before the Tribunal on 3rd February, 2000. We have noted the facts relating to the third round. The Assistant Commissioner of Customs (Refund) rejected the claim for refund vide order dated 1st March, 2006, nearly six years after the order of the Tribunal dated 3rd February, 2000. By this order dated 3rd Feb., 2000, it was held that the appellant was entitled to refund of CVD and the same however would be paid in accordance with law. The order dated 1st March, 2006 records that the appellant had furnished indemnity bond, affidavit, copy of balance sheet, Chartered Accountant certificate. On scrutiny of these documents, the appellant was asked to furnish audited balance sheet and invoices for the relevant period for verification. It records that the appellant had furnished import invoices issued by the supplier. Sale invoices as required for verification were also submitted. The Chartered Accountant certificate dated 28th October, 1997 specifically states that no Modvat was claimed against the amount of Rs. 22,34,700/-. It also states that there was no change in the cost of motorcycles for last more than one year and thus there was no involvement of unjust enrichment. In spite of the said material, the Assistant Commissioner of Customs (Refund) refused to pay/refund on the ground that the appellant was not able to substantiate their contentions in the form of documentary evidence. He did not elaborate as to what sort of corroboration or evidence was required and how the contention could be further substantiated. The first appellate authority did not deal with the issue on merits and simply observed that in the initial order dated 3rd February, 2000, passed by the Tribunal, it was held that the appellant was entitled for refund only in accordance with law. Thus, the refund should not be sanctioned and the amount of refund should be paid to the Consumer Welfare Fund.

10. We have gone through the documents placed on record by the appellant before the original authority. The appellant has furnished a perpetual indemnity bond clearly stating therein that the indemnifier shall within 60 days of request from the proper officer deposit the amount forthwith in case it is held at any time that the refund amount was not due and was erroneously refunded to them. The appellant has also filed an affidavit stating therein that they have never claimed or never received earlier the refund of Rs. 22,34,700/- paid in excess on account of CVD paid vide Bill of Entry No. 103872 dated 23-4-1997, and the goods in question were used captively and the amount of duty paid in excess had never been added to arrive at the sale price of the final product. It had been shown as recoverable from the customs. The said statement is also made in the annual report and the balance sheet which have been placed on record. The appellant has also filed a copy of the balance sheet for the period 31st March, 1998 in support. The details of the excise duty claim as receivable on 31st March, 1998 as detailed in the balance sheet was thus placed on record. The appellant had filed a certificate from the Chartered Accountant certifying that there was no change in the cost of the motor cycle for the last one year and hence there was

no involvement of unjust enrichment and no Modvat has been claimed against the amount of Rs. 22,34,700/-.

11. The learned counsel for the respondent, on the other hand, relies upon Section 28D of the Act and submits that the appellant has not furnished and complied with Section 28C, by specifically indicating in the sale invoice the amount of duty included in the price of the goods as was sold. The counsel relies upon the decision of the Supreme Court in Union of India and others Vs. Solar Pesticide Pvt. Ltd. and Another, and Commissioner of Central Excise, Mumbai-II Vs. Allied Photographics India Ltd., .

12. Section 28D states that every person who has paid duty on any goods, unless contrary is proved by him, is deemed to have passed on full incidence of such duty to the buyer. It raises a rebuttable presumption and the assessee can prove to the contrary. In Solar Pesticides (supra), question arose whether the plea/bar of unjust enrichment can be applied to cases of captive consumption. The plea and the contention of the assessee that the said principle would not be applicable in case of captive consumption but would apply only against resale of imported goods, was rejected by the Supreme Court by observing that the principle of unjust enrichment applies not to duty but incidence of such duty, which means burden of duty. Thus, when the duty paid on the raw material is added to the price of the goods, the incidence of duty is passed on to the buyer who actually pays for the same. The burden of duty on the raw material is not borne by the assessee. The Supreme Court rejected the contention that as Section 28C was not applicable in case of captive consumption, the principle of unjust enrichment would not be applicable. As the learned counsel for the respondent has stated that the invoices did not specifically mention whether any CVD was passed on to the consumer i.e. the purchaser of the motorcycle, we have examined the said invoices. The said invoices specifically indicate the basic excise duty, the duty paid along with full details as are prescribed under the [Central] Excise Act, 1944. It is nowhere indicated in the said form that CVD on the imported goods was passed on to the consumer and charged separately. As noticed above, Modvat Credit of CVD was not claimed. The said assertion made, has not been denied or challenged.

13. The learned counsel for the respondent while referring to the decision of Allied Photographics India ltd. (supra), has submitted that same or uniformity of price before and after the assessment does not show that the incidence of duty was not passed on to the buyer as uniformity may be due to the various factors. We would like to reproduce Paragraphs 17 and 18 of the decision in the case of Allied Photographics India Ltd. (supra), which read:--

17. On the above facts, the short point which arises for determination is ? whether incidence of duty was passed on by NIIL to its distributor M/s. AGIL and whether M/s. AGEL in turn passed on the burden to its dealers. On the first point, NHL conceded in the earlier proceedings before the High Court that it had passed on the duty burden to its distributor M/s. AGIL. Therefore, the only question

which we are required to decide is - whether M/s. AGIL in turn had passed on the duty burden to its dealers as alleged. In the present case, it was argued on behalf of the Department before the authorities below that 20% of the total price paid by M/s. AGIL represented the duty recovered by NIIL as a part of the sale price. It is important to note that M/s. AGIL was the sole distributor of NIIL. Therefore, it is highly improbable for a distributor to incur cost of purchase which included 20% element of duty in addition to the purchase price without passing on the burden to its dealers. From the record it appears that during the disputed period 1974 to 1984, M/s. AGIL was in trading which further supports the above improbability. In the present case, there is no material placed on record by M/s. AGIL as to how it had accounted for the cost of purchase in its books and the accounting treatment it gave to the said item at the time of payment of the purchase price. No record as to costing of that item has been produced. This material was relevant as in the present case NIIL conceded that it had passed on the burden of duty to its distributor M/s. AGIL (buyer) and it was the buyer who claimed refund. It has been urged on behalf of the respondent and which argument has been accepted by the authorities below that 20% of the total price paid by M/s. AGIL to NIIL represented total excess excise duty levied and not the excess duty collected by NIIL in the form of sale price from its distributor M/s. NIIL. It was argued that excess duty collected by NIIL represented only 1.62% of the total price. It was argued that resale price charged by M/s. AGIL to its dealers had no relevance to excess excise duty paid by M/s. AGIL to NIIL at the time of purchase as the sale price charged by M/s. AGIL to its dealers was based on the prevailing market price. We do not find any merit in this argument. In the present case, the refund claim is made by a buyer and not by the manufacturer. The buyer says that he has not passed on the burden to its dealers. The buyer has bought the goods from the manufacturer paying the purchase price which included cost of purchase plus taxes and duties on the date of purchase. In such cases, cost of purchase to the buyer is a relevant factor. None of the authorities below have looked into this aspect. Even the Appellate Tribunal has not gone into this relevant factor. It has merely quoted the passages from the order of the lower authority, whose order was impugned before it. Costing of the goods in the hands of the distributor, the cost element and the treatment given to purchases by the buyer in his own account were relevant circumstances which the authorities below failed to examine. It was submitted that cost of purchase was not a relevant factor. It was submitted on behalf of the respondent that the resale price charged by the buyer was not a relevant factor. It was submitted that since the sale price of the goods before and after the assessment remained the same, the burden of excess duty was absorbed by the respondent. It was submitted that in any event the sale price of the goods increased much less than the amount of duty (differential) involved in this case and, therefore, incidence of duty was not passed on to the consumers. In this connection, reliance was placed on several judgments of the Tribunal. We have gone through these judgments. They are not applicable to the facts of this case. In the present case, we are concerned with the distributor buying the products from the manufacturer and reselling them to its dealers. Hence, the cost of purchase is a relevant factor. The facts of the cases before the Tribunal deal with sale by manufacturer to the consumer. They deal with the assessees'' invoice bearing a composite price. They are the cases which dealt with the claim of refund by the manufacturer. They did not deal with claim of refund by the buyer. Hence, they have no bearing on the facts of the present case.

18. Before concluding, we may state that uniformity in price before and after the assessment does not lead to the inevitable conclusion that incidence of duty has not been passed on to the buyer as such uniformity may be due to various factors. Hence, even on merits, the respondent has failed to make out a case for refund. Since relevant factors stated above have not been examined by the authorities below, we do not find merit in the contention of the respondent that this Court should not interfere under Article 136 of the Constitution in view of the concurrent finding of fact.

(Emphasis supplied)

14. The Supreme Court noticed that the assessee at the earlier proceedings had conceded before the High Court that it had passed on the duty burden to its distributor and the only question was whether the distributor had passed on the duty burden to the dealers. It was therefore observed that it was highly improbable that the distributor had borne the duty burden or element of 20% which was already included in the purchase price of the distributor. The period in question was a decade long between 1974 to 1984. It was therefore, highly improbable that the distributor would have paid and borne the entire duty burden for the said period. It was further observed that no material was placed on record which supported the said improbability of the duty burden not being passed on to third parties. The distributors had failed to produce their account books. The assessee had also taken a plea that the actual excess duty represented only a fractional amount of the total price. But this contention was rejected analyzing the facts and for several reasons. It was in this context, the Supreme Court observed that the uniformity in price before and after the assessment cannot lead to ''inevitable conclusion'' that the duty burden has not been passed on. Therefore, the fact that there was no increase in price is a relevant factor but not an inevitable conclusive factor. Several other facets and material relevant should be given due consideration.

15. In the facts of the present case, it is not disputed or denied that there was no change in the price whatsoever and the refund of CVD was claimed within a short time and the amount involved is very small compared to the overall transactions or turnover of the appellant. The appellant had filed affidavits and the certificate of the Chartered Accountant certifying the factual position and asserting on oath with documents that duty burden was not passed. We do not agree with the counsel for the respondent that the certificate should be disbelieved. When a professional like a chartered accountant gives a certificate, he owes and takes responsibility of what he certifies as personally ascertained

and known to him. Even when an individual or officer of a company certifies a particular fact, the same should be normally believed unless there are grounds and reasons to reject or disbelieve the said assertion. The assertion should be objectively examined. Details and particulars if required should and can be ascertained and verified. Authorities may be justified and ask for documentation and details. In the present case the appellant has furnished relevant documents and materials which demonstrate and prove their claim that they had not passed on the incidence of CVD on the buyers. Reliance is not based upon the certificate alone. We would like to reproduce the observations of the Supreme Court in Solar Pesticides Pvt. Ltd.

21. Learned Counsel for the respondent had also contended that in cases of captive consumption of imported goods, it would be impossible for the assessee to establish whether the duty component has been passed on to the buyers of the finished products or has been borne by the importer himself. Difficulty in proving that the incidence of the duty borne by the importer has not been passed on to the purchaser of the finished product can be no ground for interpreting Section 27 differently. It is not possible that in no case will an importer not be able to prove that the incidence of the duty imposed on the imported raw material has not been passed on to any other person. In fact in Civil Appeal No. 4381 of 1999 filed by the Commissioner of Customs against M/s. Surya Roshini Limited, the importer had produced certificate from the Chartered Accountants giving details of costing of the final product and the Commissioner (Appeals) found as a fact that the component of excess customs duty paid on the imported raw material had not gone into the costing of the finished product. Without going into the correctness of this finding we wish to emphasize that even in cases of captive consumption, it should be possible for the importer to show and prove before the authorities concerned that the incidence of duty on the raw material, in respect of which refund is claimed, has not been passed on by the importer to anybody else.

16. While examining the question whether or not burden of duty has been discharged by the assessee, one has to be practical and adopt a realistic approach and not be oblivious as to nature and character of proof which will be available. When the assessee is able to show that the burden of duty has not been passed on, he asserts and submits affidavits and certificate of a chartered accountant along with copy of the balance sheet, indicates and shows sales invoices for pre and post-period and when there is no other negative factor or evidence to the contrary to disbelieve, the contention should be accepted. To deny what was paid and has to be refunded by law to the said person is not fair, just and equitable. In view of the aforesaid discussion, we answer the question of law in favour of the appellant and against the respondent. The amount of refund shall be paid by cheque to be sent by registered post by the respondent along with interest as per the Act within a period of six weeks from the date when this order is received by the respondent with costs which is assessed at Rs. 25,000/-.

