

(1997) 09 P&H CK 0039

In the Punjab And Haryana At Chandigarh

Case No : Letters Patent Appeal No. 257 of 1987

Hindustan Lever Ltd.

APPELLANT

Vs

The Collector of Central Excise and Others

RESPONDENT

Date of Decision : 16-09-1997

Acts Referred:

Central Excise Rules, 1944 — Rule 56A
Constitution of India, 1950 — Article 226, 32
Contract Act, 1872 — Section 72

Citation : (1998) 118 PLR 364 : (1998) 2 RCR(Civil) 136

Hon'ble Judges : M.L. Singhal, J;G.S. Singhvi, J

Bench : Division Bench

Advocate : Arun Nehra, for the Appellant; Rajesh Gumbar, Additional Central Government Standing Counsel for Respondent Nos. 1 to 4 and R.C. Setia and Rita Kohli, for the Respondent

Final Decision : Allowed

Judgement

G.S. Singhvi, J.—These appeals are directed against the order dated May 14, 1987 passed by the learned Single Judge in C.W.P. No. 3120 of 1985. Oswal Oil and Soap Industries and Anr. v. Customs, Excise and Gold Appellate Tribunal and Ors. whereby he directed the official respondents to refund excise duty amounting to Rs. 1,31,811.89 to the writ petitioners.

2. Oswal Oil & Soap Industries (hereinafter described as respondent-Company) is a manufacturer of hardened rice bran oil. M/s Hindustan Levers Ltd., (hereinafter described as appellant-company) is engaged in the manufacture of soap for which hardened rice bran oil is one of the raw materials. The appellant company has been purchasing a part of its requirement from the respondent company. For this purpose, they entered into contract whereunder price, exclusive of the excise duty was stipulated and the appellant company was to pay the excise duty In terms of the notification No. 201/79, issued by the Central Govt, the excise duty was paid by the respondent company on hardened rice bran oil under tariff item

68 at the time of its clearance. After the receipt of the, raw material by the appellant company the Central Govt. used to refund the element of excise keeping in view the finished goods manufactured by the appellant company and the appellant used to return the entire duty to the respondent company. In this manner the liability of the respondent company to pay the excise duty on hardened rice bran oil was nil. Notwithstanding that the respondent company raised a dispute regarding the classification of hardened rice bran oil. It pleaded that the goods were classifiable under tariff item No. 12 and not under tariff item No. 68. At one stage it had raised protest against the payment of excise duty under tariff item No. 68 but vide letter dated 29.3.1984 written to the Superintendent, Central Excise, Range-II, Ludhiana. The respondent company withdrew its protest. The dispute relating to classification of the goods came to the finally resolved by the Customs; Excised Gold (Control) Appellate Tribunal which accepted the plea of the respondent company. Soon thereafter the respondent company filed a refund claim before the Assistant Collector, Central Excise Ludhiana, who rejected the same vide order dated 10.5.1985. The relevant extract of the Order passed by the Assistant Collector is reproduced below:-

"The party paid duty to the department and charged the same from the buyers. Duty of excise is an indirect tax and the burden is passed on to "the buyers. The assessee does not pay it from their own like Income Tax. The credit of duty paid by the buyers were taken by them in their RG-23 Part II. This fact has not been denied by the Advocate... Thus, the amount of duty was in fact not retained by the Government but used by the buyers for further payment of duty on their final products in which the product was used. Thus, in fact the department has already refunded the amount of duty to the buyers of the product , hence refund claims are not justified.

I do not agree with the submissions made by the Advocate of the party that they were entitled for the refund of the amount even if this was collected by the party from the buyers. Present case is not an ordinary case where the assessee charges duty from Buyers and pays it to the department and matter ends. As discussed above in this case, credits of duty paid were allowed to buyers either under notification No. 201/79-CE dt 4.6.1979 as amended or under Rule 56-A of the Central Excise Rules, 1944 and this fact has not been denied by the party. Thus, the amount of duty was in fact returned to the buyers (from whom the party , charged the duty) as above. Thus, this case is a different one from ordinary cases and it is to be seen, examined and dealt with differently. Thus plea of the party is not accepted and on this score refund is not justified."

3. The Collector of Central Excise (Appeals) New Delhi before whom respondent company filed an appeal confirmed the order of the Assistant Collector and held:-

".... As regards the remaining contention that they are entitled for the refund, I am unable to accept this. The term "Refund" means returning back or giving back. Therefore, refund presupposes depositing the money at earlier stage. In

the instant case, no doubt the appellants did make payment of duty to the Department. This duty amount was collected by them from their customers who, in turn, got it back from the Department by way of credit under notification No. 201/79-CE dated 4.6.1979, as amended. Thus, in essence, the Department had already refunded the amount of duty collected by it earlier. If at this stage, the appellants are again given the refund, the Department would be refunding the amount second time, an unacceptable proposition. In the circumstances, the Lower Authority has correctly rejected the refund claim".

4. The respondent company challenged the order of the Assistant Collector in CWP No. 3120/1985. After its appeal was rejected by the Central Excise (Appeals) respondent No. 5, the respondent company amended the writ petition and challenged the legality of the appellate order as well. The appellant company which was likely to be affected by the decision of the writ petition sought its impleadment as party respondent. The learned single Judge rejected its application. However, on appeal, the Supreme Court reversed that order and directed the High Court to hear the appellant company as a party respondent.

5. By the impugned judgment the learned single Judge has ordered the refund of Rs. 1.31 crores to the respondent company. The appellant company as well as the Union of India have challenged the legality and correctness of the order of the learned single Judge primarily on the following grounds :-

a) The appellant company had already refunded the entire amount of excise duty received by it from the respondent company and therefore, no direction could be given to the Government to refund the amount allegedly paid by the respondent in the form of duty.

b) The order of learned single Judge amounts to unjust enrichment of the respondent company.

c) The amount of duty paid by the respondent company on the hardened rice bran oil had already been refunded to it through the appellant company. Therefore, no order of refund could be passed in its favour, more so when it had neither pleaded nor proved that the element of duty had not been transferred to the customers.

6. We have heard Sh. Arun Nehra, Sh. Rajesh Gumbar and Sh. R.C. Setia and have carefully gone through the records of the appeals.

7. While accepting the claim made by the respondent company for refund of the duty the learned single Judge relied on the following decisions :-

- 1) AIR 1949 297 (Privy Council) ;
- 2) Sales Tax Officer, Banaras and Others Vs. Kanhaiya Lal Mukundlal Saraf, ;
- 3) State of Madhya Pradesh Vs. Bhailal Bhai and Others, ;
- 4) Patel India v. Union of India AIR 1979 SC 1300;

- 5) State of Kerala v. Aluminium Industries Ltd. 1965 16 STC 689;
- 6) D. Cawasji and Co. and Ors. v. State of Mysore and Anr. 1978 ELT (154)
- 7) Atic Industries v. Assistant Collector Central Excise 1978 7 ELT 199;
- 8) Commissioner of Sales Tax U.P. v. Auriaya Chambers 1986 (25) BLT 867;
- 9) Annapuran Match Industries, Cudapah Vs. The Union of India and Another, ;
- 10) Union of India v. Mahsingka Industries Pvt. Ltd. 1979 ELT 158;
- 11) Associated Bearing Company Limited v. Union of India and Anr. 1980 E.L.T. 415;
- 12) Maharashtra Vegetable Products Pvt. Ltd. and Anr. v. Union of India and Ors. 1989 ELT 468;
- 13) Paper Products Ltd. v. Union of India 1981 ELT 538;
- 14) Madras Fertilizers Ltd. v. Assistant Collector of Central Excise Madras and Ors. 1981 ELT 194;
- 15) Prem Cables P. Ltd. v. Assistant Collector Customs 1981 ELT 440;
- 16) Assistant Collector of Customs, Madras and Ors. v. Prem Raj Ganpat Raj and Company (Pvt) Ltd. 1978 ELT 630;
- 17) Wazir Sultan Tobacoo Co. Ltd. v. Union of India and Ors. 1981 ELT 40;
- 18) Hyderabad Asbestos Cement Products Limited v. State of Andhra Pradesh 24 STC 487;
- 19) KeshoRam Cement, Basantnagar v. Union of India 1982 ELT 214;
- 20) Calcutta Paper Manufacturing Company Ltd. v. Customs, Excise and Gold (Control) Appellate Tribunal 1986 25 ELT 929;
- 21) Bermalt (India) Private Limited, Gurgaon Vs. Government of India and others, ; and
- 22) Rudipur (India) Ltd. v. Union of India and Ors. 1987 (27) ELT 22, etc.

It may have been necessary for us to analyse these decisions in detail, but in view of the recent judgment of a 9-Judges Bench in Mafatlal Industries Ltd. and Others Vs. Union of India (UOI) and Others, , it is not necessary to do so. In this judgment, the Apex Court has held that the decision of the Constitution Bench in Sales Tax Officer, Banaras v. Kanhaiya Lal Mukund Lal (supra) and the cases decided on the basis of the ratio of Kanhaiya Lal Mukund Lal's case do not lay down correct proposition of law. In Mafatlal Industries" case (supra), their Lordships reviewed all the previous decisions and laid down various propositions of which some are extracted below:-

"(i) Where a refund of tax/duty is claimed on the ground that it has been

collected from the petitioner/plaintiff-whether before the commencement of the Central Excise & Customs laws (Amendment) Act, 1991 or thereafter-by mis-interpreting or mis-applying the provisions of the Central Excise Tariff Act, 1985 or Customs Act, 1962 read with Customs Tariff Act or by mis-interpreting or mis-applying any of the rules, regulations or notifications issued under the said enactments, such a claim has necessarily to be preferred under and in accordance with the provisions of the respective enactment before the authorities specified thereunder and within the period of limitation prescribed therein. No suit is maintainable in that behalf. While the jurisdiction of the High Courts under Article 226 and of this Court under Article 32 cannot be circumscribed by the provisions of the said enactments, they will certainly have due regard to the legislative intent evidenced by the provisions of the said Acts and would exercise their jurisdiction consistent with the provisions of the Act. The writ petition will be considered and disposed of in the light of and in accordance with the provisions of Section 11-B. This is for the reason that the power under, Article 226 has to be exercised to effectuate the rule of law and not for abrogating it.

ii) xx xx xx xx xx xx xx XX XX XX XX XX XX iii) A claim for refund, whether made under the provisions of the Act as contemplated in Proposition (i) above in a suit or writ petition in the situations contemplated by proposition (ii) above, can succeed only if the petitioner/plaintiff alleges and established that he has not passed on the burden of duty to another person/other persons. His refund claim shall be allowed/decreed only when he establishes that he has not so passed on the burden of the duty or to the extent 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, as explained in the body of the judgment. Where the burden of the duty has been passed on, the claimant cannot say that he has suffered any rear loss or prejudice. The real loss or prejudice is suffered in such a case by the person who has ultimately borne the burden and it is only that person who can legitimately claim Us refund. But where such person does not come forward or where it is not possible to refund the amount to him for one or the other reason, it is just and appropriate that the amount is retained by the State, i.e. by the people. There is no immorality or impropriety involved in such a proposition.

iv) xx xx xx xx xx xx xx xx xx xx v) xx xx xx xx xx xx xx xx xx vi) Section 72 of the Contract Act is based upon and incorporates a rule of equity. In such a situation, equitable considerations cannot be ruled out while applying the said provision.

vii) xx xx xx xx xx xx xx xx xx xx viii) The decision of this Court in Sales Tax Officer, Benaras v. Kanhaiya Lal Mukundlal Saraf 1995 SGR 1350 must be held to have been wrongly decided insofar as it lays down propositions contrary to the propositions enunciated in (i) to (vii) above. It must equally be held that the subsequent decisions of this Court following and applying the said propositions in

Kanhaiyalal have also been wrongly decided to the above extent. This declaration-or the law laid down in proposition-or the law laid down in proposition (i) to (vii) above - shall not however entitle the State to recover the taxes/duties already refunded and in respect whereof no proceedings are pending before any authority/Tribunal or Courts as on this date. All pending matters shall, however, be governed by the law declared herein notwithstanding that the tax or duty has been refunded pending those proceedings, whether under the orders of an authority, Tribunal or Court or otherwise.

ix) to xii) xx xx xx xx XX XX XX XX

8. In view of the latest pronouncement of the Supreme Court, we have no hesitation to hold that the order passed by the learned single Judge directing the refund of Rs. 1,31,811.59 cannot be sustained and the same is liable to be set aside.

9. Sh. Setia learned counsel for the respondent company urged that the matter should be remanded back to the Assistant Collector so that the respondent company may get an opportunity to adduce evidence to show that the element of duty paid by it had not been passed on to the consumers. However, we are unable to accept this plea. Neither before the Assistant Collector nor before the Appellate Authority nor before the learned Single Judge, the respondent company pleaded that it had not passed on the burden of the duty on the consumers. Therefore, at this stage we cannot allow it to make out a new case and start proceedings afresh. It cannot also be ignored that the specific assertions made by the appellant company regarding the refund of duty to the respondent company after the former has manufactured finished goods out of raw material and had received the amount of duty from the Central Government, has not been contested by the respondent company. Therefore, there is no justification to accept the claim made by the respondent company.

10. In the result, the appeals are allowed. The order dated May 14, 1987 passed by the learned single Judge is set aside. Parties are directed to bear their costs throughout.