
(2011) 08 CAL CK 0141
In the Calcutta High Court
Case No : CEXA No. 1 of 2008

Madura Coats Pvt. Ltd.

APPELLANT

Vs

The Commissioner of Central Excise

RESPONDENT

Date of Decision : 12-08-2011

Acts Referred:

Central Excises and Salt Act, 1944 — Section 11B(2), 12B, 35F, 35G

Citation : (2011) 187 ECR 310

Hon'ble Judges : Sambuddha Chakrabarti, J; Bhaskar Bhattacharya, J

Bench : Division Bench

Advocate : J.P. Khaitan, Partha Banerjee and Sanjoy Bhumik, for the Appellant; N. C. Roy Chowdhury and K. K. Maity, for the Respondent

Final Decision : Allowed

Judgement

Bhaskar Bhattacharya, J.—This appeal u/s 35G of the Central Excise Act, 1944 ("Act") is at the instance of an Assessee and is directed against an order dated June 15, 2007, passed by the Customs, Excise and Service Tax Appellate Tribunal, East Zonal Bench, Kolkata, in Excise Appeal bearing No. EDM-641/2006 thereby partly allowing the appeal of the Appellant by directing refund of Rs. 14.98 crore which was earlier deposited by the Appellant by virtue of the orders passed by the Tribunal and the Hon'ble Supreme Court. The Tribunal, however, did not enter into the question of interest claimed by the Appellant on the ground that the refund was allowed by the Tribunal on that very date.

2. Being dissatisfied, the importer has preferred the present appeal before this Court.

3. The facts leading to filing of the present appeal may be summed up thus:

a) The Appellant manufactured during the material period, namely, 1988 to 1992, inter alia, "grey tyre cord fabrics" on job work basis for M/s. Dunlop (I) Ltd., out of yarn supplied by the said customer. The Appellant completely stopped the said activity in the year 1993 and consequently, M/s. Dunlop India Ltd. had

ceased to be the Appellant's customer since then. The Appellant, since the year 1995, has been manufacturing and selling to different customers yarn and sewing thread from the factory.

b) The Appellant had, during the material period, classified the said "grey tyre cord fabrics" under the Heading CH 59.02 of CETA 1985 and the said classification was approved by the department. The Appellant also claimed exemption from payment of basic excise duty under the Notification No. 63/87 CE dated March 1, 1987. Accordingly, the Appellant did not pay any basic excise duty or special excise duty on the said fabrics but paid the specific additional excise duty under the Additional Duties of Excise (Goods of Special Importance) Act, 1957 as approved by the department.

c) On 25th February, 1993, however, the Collector of Central Excise, Calcutta II, issued a show-cause notice covering the period February 1988 to August 1992 proposing to change the approved classification of CH 59.02 to 59.09 and raised a demand for duty of Rs. 17,88,76,842/-.

d) The Commissioner of Central Excise, Calcutta-IV upheld the proposed classification of 59.09 and confirmed the duty demand of Rs. 17,88,76,842/- which comprised of the Basic Excise Duty of Rs. 15,55,45,080/- and Special Duty of Rs. 2,33,31,762/-. He also imposed a penalty of Rs. 17,88,76,842/-. This was done vide his order No. 11/Ch.59/Commissioner/CE/Cal-IV/Adjn/99 dated December 29, 1999.

e) Appellant's appeal, against the above order before the Tribunal, was allowed by way of remand vide final order No. A-974CAL/2000 dated July 11, 2000.

f) In the de novo proceedings, the Commissioner of Central Excise, Calcutta-IV again upheld the classification proposed in the show-cause notice, and confirmed the duty demand of Rs. 17,88,76,842/- and also imposed a penalty of Rs. 17,88,76,842/- vide his Order in Original No. 3-/Ch.59/Commissioner/CE/Cal-IV/Adjn/ De novo/2001 dated February 22, 2001.

g) The Appellant filed an appeal before the Tribunal against the above order dated February 22, 2001 along with an application for waiver of pre-deposit of duty and penalty. The Tribunal, vide order dated May 23, 2001 directed the Appellant to make a pre-deposit of Rs. 1,00,00,000/- in terms of Section 35F of the Central Excise Act 1944. Appellant, consequently, deposited Rs. 1,00,00,000/-. The Tribunal ultimately upheld the order of the Commissioner demanding the duty of Rs. 17,88,76,842/- but reduced the penalty to Rs. 9,00,000/- vide final order No. A-536/KOL/2002 dated April 17, 2002.

h) The Appellant then filed Civil Appeal No. 8675 of 2002 before the Supreme Court against final order No. A-536/KOL/2002 dated April 17, 2002 of the Tribunal along with a stay petition. However, the Supreme Court, while admitting Appellant's appeal, dismissed the stay petition vide order dated 19th January, 2004.

i)Consequent to dismissal of Appellant's stay petition, Appellant, pending Civil Appeal No. 8675 of 2002, made the following payments in terms of Section 35F of the Central Excise Act 1944 vide TR6 challans as detailed below:

Sl.No.

Date of payment

Amount paid (in Rs.)

TR6 Challan No.

1.

14.05.2004

10,000,000

Misc. No.1/2004-2005

2.

21.06.2004

10,000,000

Misc. No.2/2004-2005

3.

20.08.2004

15,000,000

Misc. No.3/2004-2005

4.

19.10.2004

15,000,000

Misc. No.4/2004-2005

5.

21.12.2004

20,000,000

Misc. No.5/2004-2005

6.

22.01.2005

39,800,000

Misc. No.6/2004-2005

7.

21.02.2005

30,000,000

Misc. No.7/2004-2005

Total

139,800,000

j)The Supreme Court, vide order dated February 24, 2005 ultimately allowed the above Civil Appeal No. 8675 of 2002 filed by the Appellant.

k) Consequent to the above order of the Supreme Court, Appellant, vide its letter dated February 25, 2005 requested the Deputy Commissioner of Central Excise, Serampore Division, to refund the total amount of Rs. 14,98,00,000/- which was paid u/s 35F of the Central Excise Act, 1944 during the pendency of the appeal proceedings in terms of CBEC Circular F. No. 275/37/2K-CX, 8A, dated January 2, 2002.

l) The Deputy Commissioner of Central Excise, Serampore Division, in response to Appellant's above letter, advised the Appellant to file a consolidated refund claim for Rs. 14,98,00,000/-in Form "R" along with necessary documents including the documents to prove nonpassing of incidence of the said amount to other persons vide his letter C. No. V (18)01/MCPL/Refund/SRMP/ 2004/714 dated March 10, 2005.

m) The Appellant claimed that although it was not required to file formal refund-claim for the refund of the said amount paid u/s 35F of the Central Excise Act, 1944 during pendency of appellate proceedings, as an abundant caution and without prejudice, the Appellant filed a consolidated refund claim for Rs. 14,98,00,000/- in Form "R" on March 17, 2005 vide its letter dated March 17, 2005. The Appellant also brought to the notice of the department that having paid the said amount nearly 12 years after the actual clearance of goods, the doctrine of unjust enrichment would not be applicable and the presumption u/s 12B was not available to the department and therefore, the question of production of any documents prepared during the time of clearance of the goods to establish absence of unjust enrichment did not arise.

n) The Deputy Commissioner, however, vide his letter dated March 21, 2005 returned the consolidated refund claim filed by the Appellant as incomplete and advised the Appellant to file the said refund-claim along with documentary evidence viz. (i) Central Excise Gate Passes/Sales Invoices issued by the Appellant during the period between February, 1988 to August, 1992 and (ii) Profit & Loss Accounts and Balance Sheets for the relevant Financial Years showing expenditure incurred on account of Central Excise Duty, in support of

non-passing of incidence of the said amount to buyers of the goods and to appear for personal hearing on March 28, 2005. This was required by invoking Section 11B and Section 12B of the Central Excise Act, 1944 despite the Deputy Commissioner being aware that the payment was made between 2001 and 2005.

o) The Appellant appeared for the personal hearing on March 29, 2005, as allowed by the Deputy Commissioner, Serampore Division and resubmitted the refund-claim for Rs. 14,98,00,000/- along with a covering letter dated March 28, 2005 wherein the Appellant made detailed submissions as regards non-applicability of the doctrine of unjust enrichment u/s 11B and non-availability of the presumption u/s 12B of the Central Excise Act 1944. Appellant also enclosed a Chartered Accountant's certificate wherein, after verification of its records, the Chartered Accountant had certified that the amount for which the refund was claimed was not passed on to any other person and was being shown in the books of account of the Appellant as "Receivables". Appellant also produced the requisite P&L Accounts and Balance Sheets as desired by the Adjudicating Authority.

p) The Deputy Commissioner of Central Excise, Serampore Division, instead of settling Appellant's refund-claim, issued a show-cause notice C. No. V(18)01/MCPL/Refund/SRMP/2004 dated Nil on March 5, 2005 and asked the Appellant to show cause as to why the refund claim for Rs. 14,98,00,000/- should not be rejected as the Appellant had not produced any documentary evidence to prove that the incidence of duty had not been passed on to buyers of the goods as required under Sections 11B and 12B of the Central Excise Act, 1944.

q) The Appellant filed a detailed reply vide its letter dated May 10, 2005 denying the allegations raised in the show cause notice relying upon various case laws and instructions issued by CBEC. Appellant appeared for personal hearing on May 17, 2005 before the Deputy Commissioner of Central Excise, Serampore Division and made additional submissions during the personal hearing and requested to refund the amount paid in terms of provisions of Section 35F, without further delay.

r) The Deputy Commissioner, vide his order No. 63/MCPL/ Refund/ DC/ SRMP/2005 dated May 25, 2005 sanctioned the refund claimed by the Appellant but ordered credit of the said amount to the Consumer Welfare Fund on the ground that the incidence of duty had passed on to buyers of the goods by the Appellant.

s) The Appellant, aggrieved by the above order of the Deputy Commissioner, filed an appeal before the Commissioner (Appeals-IV) of Central Excise, Kolkata vide Appeal No. V/Ch. 59.02/ XAP-49/Kol-IV/2005. Appellant, during the personal hearing held before the Commissioner (Appeals) on June 14, 2005 reiterated the submissions made in the Memorandum of Appeal and also filed written submissions enclosing certificate issued by Chartered Accountant and specimen documents obtained from its Sales Tax Authorities at Madurai, namely, excise

gate passes in Form GP1 and invoices raised on Dunlop India Ltd. for the conversion charges to show that the Appellant had not realized any amount from M/s. Dunlop India Ltd. towards Basic Excise Duty and Special Duty.

t) Appellant, in view of delay in disposal of the appeal beyond the time specified in the Board's Circular No. 732/48/2003-CX dated August 5, 2003, filed a writ-petition before this High Court which was disposed of by an order dated October 7, 2005 directing the Commissioner (Appeals) to dispose of the appeal positively within 2 weeks from the date of receipt of the said order.

u) The Commissioner (Appeals), thereafter, vide order in Appeal No. 178/Kol-IV/2005 dated October 21, 2005 ordered refund of Rs. 1,00,00,000/- deposited by the Appellant on July 12, 2001 and credit of the balance amount of Rs. 13,98,00,000/- to the Consumer Welfare Fund in terms of Section 11B(2) of Central Excise Act, 1944 holding that it was not pre-deposit u/s 35F of Central Excise Act, 1944 and was hit by the doctrine of unjust enrichment. He also denied interest claimed by the Appellant on the ground that the claim was beyond the scope of the show-cause notice, such claim of interest having not been referred to in the show-cause notice, ignoring the fact that claim for interest was made by the Appellant in the refund claim lodged by it.

v) The above order of the Commissioner (Appeals) was challenged by both the Appellant as well as the Revenue before the Tribunal vide Appeal Nos. EDM-62/06 and No. EDM-9/-6 respectively.

w) The Tribunal, vide final order No. A-538/Kol/-06 dated July 4, 2006 read with order No. M-302/Kol/06 dated July 13, 2006 passed in MA(ROM)256/06 filed by the Appellant allowed both the appeals by way of remand to the Commissioner (Appeals) with direction to pass fresh order after hearing the Appellant.

x) In the de novo proceedings, Appellant was heard by the Commissioner (Appeals-IV), Kolkata on August 17, 2006. The Appellant, during the personal hearing, filed written submissions in detail along with Chartered Accountant's certificates together with Appellant's balance sheets as of 31st December, 2001 and 31st March, 2005 in support of Appellant's contention that Rs. 14.98 crore paid by the Appellant during the pendency of appeal proceedings had been shown in its financial books as "receivable" under the head "loans and advances". Appellant, therefore, claimed that it had effectively proved that the incidence of the said amount had not been passed on to the customers or any other person.

y) The Commissioner (Appeals), however, upheld the order of the lower authority directing credit of the sanctioned refund of Rs. 14.98 crore to Consumer Welfare Fund in terms of Section 11B(2) of CEA 1944 vide his impugned Order in Appeal No. 118/Kol-IV/2006 dated August 25, 2006.

4. Being dissatisfied, the Appellant preferred an appeal before the Tribunal below and by the order impugned herein, the Tribunal has passed an order of refund

but refused to enter into the question of grant of interest payable to the Appellant.

5. Being dissatisfied, the Appellant has come up with the present appeal. At the time of admission of this appeal, a Division Bench of this Court formulated the following substantial question of law for determination:

Whether the Tribunal below committed substantial error of law in not passing any direction for payment of interest in favour of the Appellant in spite of holding that the Appellant is entitled to the order of refund.

6. After hearing the learned Counsel for the parties and after going through the materials on record, we find that in this case, the Hon"ble Supreme Court decided the matter finally on February 24, 2005 and thus, in view of the decision of the Supreme Court in the case of Commissioner of Central Excise v. ITC Limited, reported in (2005) 179 ELT 15, interest was payable for the period commencing from three months after the final disposal of the matter till the date of refund and thus, in this case interest was payable from May 25, 2005. It appears that the Central Board of Excise and Customs, pursuant to the aforesaid decision of the Supreme Court, has already issued a circular bearing No. 802/35/2004-CX dated December 8, 2004 specifying the rate of interest in this regard.

7. In this case, the Appellant had deposited a sum of Rs. 14.98 Crore which had been retained by the Revenue even after the success of the Appellant before the Supreme Court in the month of February, 2005 and thus, it was the duty of the Tribunal below to direct payment of interest while passing order of refund dated June 15, 2007.

8. The Tribunal below erred in law in not considering the question of payment of interest.

9. We, therefore, set aside the order of the Tribunal below and direct the Respondent to pay interest to the Appellant in terms of the circular bearing No. 802/35/2004-CX dated December 8, 2004 on the pre-deposit for the delayed refund within two months from today.

10. The appeal is thus, allowed by answering the formulated question in the affirmative and against the Revenue.

11. In the facts and circumstances, there will be, however, no order as to costs.

I agree.