(2008) 09 CAL CK 0059

In the Calcutta High Court

Case No : Writ Petition No. 24441 (W) of 2005

Olivine Mercantile Pvt. Ltd. APPELLANT

Vs

Union of India RESPONDENT

Date of Decision : 05-09-2008

Acts Referred:

Central Excise Rules, 1944 — Rule 173B, 173F, 173G(2), 173G(3), 173G(4)
Central Excises and Salt Act, 1944 — Section 11A, 11A(2), 11AB, 11AC, 35F

Citation : (2011) 273 ELT 42

Hon'ble Judges : Indira Banerjee, J

Bench : Single Bench

Advocate : Pradip Mukherjee, for the Appellant;

Judgement

Indira Banerjee, J.—In this writ application, the petitioners have challenged the order dated 21st October, 2005 of the Customs Excise and Service Tax Appellate Tribunal, Eastern Regional Bench, Kolkata, hereinafter referred to as the CESTAT, in Stay Petition No. 30/05 in Appeal No. ESM-16/05 whereby the CESTAT directed the petitioner company to deposit Rs. 4,11,077/- towards disputed duty within 8 weeks from the date of the said order. Upon such deposit, the penalty and the interest were to remain stayed until further orders.

2. The petitioner company claims to have carried on business of packing and/or repacking detergent powder from bulk packs to smaller packs upon purchase from other manufacturers. It is stated that the nature and character of the detergent powder remained the same.

3. Initially, the petitioner had no Excise Registration Certificate. Subsequently, however, an Excise Registration Certificate No. 160310/97/03 dated 1-4-1997 was issued to the petitioner company.

4. According to the petitioners, on or about 6th October, 1995, the petitioner company executed a memorandum of understanding with the Respondent No. 6 for supply of detergent powders in pouches of different sizes, as per design and

specification approved by the respondent No. 6.

5. Since the petitioner company had no excise registration, and did not carry on any manufacturing activity at the material time, the petitioner company purchased blue, yellow and white washing powder in packets of 1 Kg. and 500 Gms. from Hindusthan Detergent Corporation Ltd.

6. It is submitted that the manufacturer duly paid excise duty on the detergent powder supplied to the petitioner company. The requisite invoices of Hindusthan Detergent Corporation Ltd. have been annexed to the writ petition.

7. It is stated that the petitioners remained under the bona fide impression that since the petitioners had already made payment of Central Excise duty at the time of purchase of the detergent powder, there could be no question of any further payment of excise duty on the same consignment.

8. It is submitted that since the petitioners purchased the detergent powder from Hindusthan Detergent Corporation in bulk packs upon payment of excise tariff/ duty under sub-head No. 3408.80 at the rate of 20% for the purpose of repacking into small packs without changing the nature and character thereof, the petitioners remained under the impression that the petitioners were entitled to the benefit of exemption as envisaged under the Notification dated 28th February, 1993 and 1st March, 1997. The petitioner supplied detergent/washing powder to M/s. Peerless Developers Ltd., that is, the respondent No. 6.

9. The challans which accompanied the detergent powder, did not, however, mention any brand name. The detergent/washing powder was described as ''blue'', ''white'' and ''yellow''.

10. Reliance has been placed on a Circular No. 342/58/97-C.E., dated 8th October, 1997 issued by the Government stating that whether an operation amounted to repacking or not, was a question of fact but clarifying that simple transfer of materials from one container to another, might not be categorized ''manufacture''.

11. On 18th June, 1997, the factory-cum-godown of the petitioner company located at 21A, Shakespeare Sarani, Kolkata - 700 017 and at Kumrakhali, Narendrapur, South 24 Parganas were searched and documents and goods seized. On 25th May, 1998, a show-cause notice was issued to the petitioner alleging at the petitioner had been manufacturing excisable goods.

12. Under cover of a Memo. No. V(ch.34)(15)76.CE/Cal.-I/98/32, the Commissioner, Calcutta sent a copy of the show-cause notice to the petitioner.

13. In the show-cause notice, it was alleged that the petitioner had been engaged in manufacture of excisable goods and branded washing powder/ detergent powder at its factory and had contravened the provisions of Section 6 of the Central Excise Act, 1944 read with Rule 174 of the Central Excise Rules, 1944, Rule 9(1) read with Rules 173F, Rule 52A read with Rule 173G(2), Rule 53

read with Rule 173G(4), Rule 53G(1) read with Rule 173G(3) and Rules 226 and 173B of Central Excise Rules, 1944 with ulterior motive to evade payment.

14. The petitioner was called upon to show-cause why duty amounting to Rs. 4,11,077/- on 1,27,650 Kgs. of ''Current'' and ''Current Supreme'' washing powder/detergent powder valued at 14,39,460/- should not be demanded along with penalty and interest by invocation of the proviso to Section 11A of the Central Excise Act, 1944.

15. It appears that the petitioner company appeared before the Joint Commissioner of Central Excise, Calcutta-1, through an Advocate, Mr. K.K. Banerjee. A written reply to the show-cause notice was also submitted on 2nd November, 1999.

16. The learned Joint Commissioner of Central Excise, however, held as follows :

I have therefore, no doubt in my mind that M/s. OMPL''s claim in their reply to S.C. Notice that they supplied unbranded washing/detergent powder to M/s. PDL is entirely untrue and is liable to the rejected as afterthought and it is obvious that they evaded CE duly due on the subject goods suppressing materials facts pertaining production & removed thereof from the CE department and the proposed demand of duty so evaded is wholly justified and merits confirmation. With regard to M/s. OMPL''s claim of modvat credit, I find that this cannot be accepted as they have not all followed the requisite procedures which are substantial in nature and neither they have adduced any documentary evidence in support of such claim.

17. The learned Joint Commissioner imposed on the petitioner company the following penalties :

1. I hereby confirm the demand of Central Excise duty of Rs. 4,11,077.00 as proposed in the subject show cause notice u/s 11A(2) of the Central Excise Act, 1944 read with Rule 9(2) of the Central Excise Rules, 1944 which M/s. Olivine Mercantile (P) Ltd. should pay forthwith.

2. I impose penalty of Rs. 4,11,077.00 on said M/s. Olivine Mercantiles (P) Ltd., u/s 11AC of CE Act, 1944 being the equivalent amount of Central Excise duty evaded by resorting to suppression of material facts so alleged in the subject show cause notice and as determined at above which should also be paid by them forthwith.

3. M/s. Olivine Mercantiles (P) Ltd., are also directed to pay appropriate interest in terms of the provisions of Sec. 11AB of the CE. Act, 1944 due on the total amount of Central Excise duty payable by them as determined at 1 above.

18. Being aggrieved by the aforesaid order of the Joint Commissioner of Central Excise, the petitioner company preferred an appeal before the Commissioner of Central Excise u/s 35F of the Central Excise Act, 1944. The appeal was numbered as 193/Kol III/04. An application was also filed for stay of operation of the order

of the Joint Commissioner. By an order dated 30th July, 2004, the Commissioner of Central Excise (Appeals) rejected the appeal, relying on Circular No. 328/44/97-CX., dated 13-8-1997 which empowered the Joint Commissioner to decide the case and also on Note 6 of Chapter 34 in terms whereof packing or repacking of bulk packs to retail packs on any other treatment to render the product marketable to the consumer would amount to manufacture.

19. Against the aforesaid order dated 30th July, 2004 of the Commissioner of Central Excise, the petitioner company preferred an appeal before the CESTAT which was numbered Appeal No. ESM-16/05 and also made an application for stay numbered 30/05. By the order impugned, the CESTAT directed as follows:

I find that the Chapter Note referred to above by the learned S.D.R., makes it evidently clear that the activities of labelling or relabelling of containers and repacking from bulk packs to retail packs done under the above category, would amount to manufacture as far as Chapter 34 is concerned. I find a prima facie case in favour of the Revenue. In view of this, I direct the applicant/appellant company to pay a sum of Rs. 4,11,077.00 (Rupees four lakh eleven thousand and seventy-seven) towards the duty within eight weeks from today. After deposit of the above amount, the penalty and the interest are stayed till further orders. Compliance to be reported on 2-12-2005.

20. Mr. Pradip Mukherjee appearing on behalf of the petitioner, submitted that the petitioner carried on business of packing and repacking of detergent powder from bulk packs to small packages with the design, specification and brand name of the respondent No. 6. The petitioner was thus in no way involved in any manufacturing activity.

21. It appears that representative of the petitioner company prayed for adjournment of the proceedings before CESTAT on the ground that he wanted to elaborate the submission of want of jurisdiction of the Joint Commissioner of Central Excise to pass the impugned order.

22. The CESTAT on considering the relevant notification and/or Government order found that the Joint Commissioner did have jurisdiction.

23. Mr. Mukherjee submitted that when a strong prima facie case was made out, it was incumbent upon the CESTAT to waive the requirement of pre-deposit of the disputed duty. In support of his aforesaid submission, Mr. Mukherjee relied on the following decisions of the Supreme Court:

(1) Mehsana Dist. Co-op. Milk P.U. Ltd. Vs. Union of India (UOI),

(2) Collector of Central Excise, Jaipur Vs. Rajasthan State Chemical Works, Deedwana, Rajasthan,

(3) Union of India (UOI) and Others Vs. J.G. Glass Industries Ltd. and Others,

24. It is a well-established proposition of law that the requirement of pre-deposit should be waived when a strong prima facie case is made out. However, in this

case, the CESTAT has, in effect, arrived at the finding that the petitioner did not have a good prima facie case.

25. Mr. Mukherjee''s argument, that the CESTAT looked into the prima facie case of the respondent and not the prima facie case of the appellant, is, in my view, hyper-technical. If the case of one party was found to be prima facie strong, the logical deduction would be that the prima facie case of the opponent would be weak.

26. Even before this Court, no attempt was made to demonstrate the illegality in levy of Central Excise on the detergents. In any event, pursuant to the order of CESTAT, the disputed duty has duly been deposited.

27. The order need not be interfered with. The writ application is disposed of by directing the CESTAT to dispose of the appeal filed by the petitioner, expeditiously, preferably within six months from the date of communication of this order.

28. Urgent xerox certified copy of this judgment, if applied for, be supplied expeditiously, subject to compliance with the requisite formalities.

