

(1992) 12 AP CK 0019

In the Andhra Pradesh High Court

Case No : Writ Petition No. 15931 of 1992

Smith, Klims Beechan Consumer Brands Ltd. (Formerly Hmm Ltd.)

APPELLANT

Vs

Asstt. Collector of Central Excise

RESPONDENT

Date of Decision : 24-12-1992

Acts Referred:

Central Excises and Salt Act, 1944 — Section 11(3), 11A, 11B

Citation : (1993) 67 ELT 469

Hon'ble Judges : S.V. Maruthi, J;A. Lakshmana Rao, J

Bench : Division Bench

Judgement

S.V. Maruthi, J.—The question that arises for consideration on this Writ Petition is whether the Assistant Collector of Central Excise viz., 1st respondent herein has jurisdiction to issue the impugned show cause notice dated 29th September, 1992.

2. The petitioner-Company manufactures malted milk food products like Horlicks, Boost falling under the Central Excise Tariff Item No. 1901.19. They have filed price lists for the years 1986-87, 1987- 88, 1988-89, 1989-90 and 1990-91 on 13-9-1987, 19-8-1989, 7-9-1990 and 16-7-1991 respectively.

3. In the price lists the petitioner-company has claimed deductions from the prices on account of trade discounts, freight, insurances, turnover tax octroi sales tax, basic excise duty and special excise duty and distribution expenses. The Assistant Collector by order dated 31-10-1991 finalised the price list and allowed deductions from the prices in respect of all the items except the distribution expenses. On appeal, the Collector confirmed the order of the Assistant Collector by his order dated 14-9-1992.

4. In pursuance of the order of the Assistant Collector as confirmed by the Collector, the differential duty paid by the petitioner- Company has been refunded. Accordingly, the petitioner took credit into the Personal Ledger Account

an amount of Rs. 3,34,155,73, being the refund of duty paid in excess over the duty actually payable for the period 1986-87 to 1990-91. In other words, the duty paid by including the various items in the prices which were allowed as deductions was refunded.

5. Now the Assistant Collector issued the impugned show cause notice on the ground that an amount of Rs. 3,34,155.73 was erroneously refunded which has been taken as credit in the PLA as the petitioner- company has not passed on the incidence of duty to the customer and proposing to recover the amount credited to the fund created for the purpose of "Customers Benefit" under sub-section (3) of Section 11 of the Central Excises and Salt Act, 1944.

6. Challenging the above show cause notice, the present writ petition is filed. The main grievance of the petitioner is that since the refund has already been granted, the Assistant Collector has no jurisdiction to review his order which has become final. It is also contended that the show cause notice is barred by limitation.

7. From a reading of the notice, it appears that it was issued in exercise of the power conferred u/s 11A read with Section 11B of the Central Excises and Salt Act, 1944, on the ground that the refund granted and adjusted in PLA, is erroneous as the petitioner- company has not passed on the incidence of duty to the customers.

8. Section 11A confers jurisdiction on the Central Excise Authorities to recover duty erroneously refunded and u/s 11B(3) of the Act, notwithstanding anything to the contrary contained in any judgment, decree, order or direction of the Appellate Tribunal or any Court or in any other provision of the Act or the rules made thereunder or any other law for the time being in force, no refund shall be made except as provided in sub-section (2) of Section 11B of the Act. Section 11B of the Act provides that when an application for refund of any duty of excise is made, the Assistant Collector of Excise shall satisfy himself that the claimant has not passed on the incidence of duty to any other person. Therefore, there is a duty cast on the Assistant Collector to satisfy himself that the claimant has not passed on the incidence of duty to any other person, while granting refund of duty to the claimant. From a reading of the show cause notice, it appears that according to the department the refund already made and adjusted in PLA, is erroneous as the petitioner-company has not (?) passed on the incidence of duty to the customer. We are of the view that the Assistant Collector has jurisdiction to issue the show cause notice u/s 11A read with Section 11B of the Act.

9. In this context we may refer to the decision of the Supreme Court in *Union of India and others Vs. Jain Spinners Ltd.* and another, . Briefly, the facts in the said case are as follows : The respondents filed a classification list in respect of Cellulosic Spun Yarn claiming concessional rate of duty. The classification lists were approved granting concessional rate of duty. subsequently, a show cause notice was issued proposing to disallow the concessional rate of duty and to

recover an amount of Rs. 1,10,81,405.94. The Assistant Collector confirmed the demand. The manufacturer challenged the order of the Assistant Collector by way of a writ petition and also filed an appeal before the Collector. In the Writ Petition, an interim order was passed directing the manufacturer deposited the amount in the High Court and the Union of India received the said amount between 24th February, 1986 and 14th August, 1986. The Collector in the meanwhile allowed the appeal of the manufacturer. In other words, the claim of the manufacturer for concessional rate of duty was allowed. The manufacturer then filed a claim for refund of duty deposited in pursuance of the interim order of the High Court and received by the Union of India, before the Assistant Collector. The manufacturer also approached the High Court in the Writ petition that was pending for a direction to the Assistant Collector to refund the duty deposited by them in pursuance of the interim order of the Court. The Union of India resisted the refund claim on the ground that it amounts to unjust enrichment as the manufacturer has not passed on the incidence of duty to the customer. The High Court allowed the manufacturer's petition for refund of duty deposited in the Court on the ground that while directing the manufacturer to deposit the amount in court, the Court permitted withdrawal of the amount by the Union of India subject to the condition that the Union of India would pay interest at bank rate and refund the amount with interest within two months of the decision in the writ petition. Against the said order, the Union of India filed an appeal before the Supreme Court. The Supreme Court held that when an application for refund of duty of excise is made, the Assistant Collector of Central Excise would satisfy himself that the claimant had not passed on the incidence of duty to any other person. This obligation is cast on the Assistant Collector even in respect of applications made before the commencement of the amended provisions of the Act. The amended provisions apply notwithstanding anything to the contrary contained in any judgment, decree order or direction of the Appellate Tribunal or any court or in any other provisions of the said Act or the rules made there-under or any other law for the time being in force. The Supreme Court also held that the manufacturers are not entitled to take advantage of the order dated 19-2-1986 of the High court, under which the duty deposited by the manufacturers was permitted to be withdrawn by the Union of India subject to the condition that the Union of India should pay interest and refund the duty within two months in case the manufacturers succeed, unless they succeed in showing to the statutory authorities that they had not passed on the whole or any part of the duty in question to others.

10. It is true that the Supreme court was considering a case where an application for refund is pending whereas in the present case, the refund has already been effected. However, Section 11A read with Section 11B of the Act confers jurisdiction on the authorities to recover duty alleged to have been erroneously refunded and it is for the manufacturer to prove that the refund is not erroneous. Therefore, we are unable to accept the contention of the petitioner-company that the Assistant Collector has no jurisdiction to issue the show cause notice. It is

open to the petitioner to raise all the objections raised in this writ petition before the Assistant Collector and the authorities shall consider them and pass appropriate order.

11. The Writ Petition, is, therefore, dismissed. There shall be no order as to costs.