
(2011) 03 KAR CK 0274
In the Karnataka High Court
Case No : C.E.A. No. 30 of 2009

Sudhir Papers Ltd.

APPELLANT

Vs

Commissioner of C. Ex., Bangalore-I

RESPONDENT

Date of Decision : 28-03-2011

Acts Referred:

Companies Act, 1956 — Section 11 B, 11 B (1), 11 B (2)
Sale of Goods Act, 1930 — Section 64 A, 72

Citation : (2012) 276 ELT 304

Hon'ble Judges : Ravi Malimath, J;N. Kumar, J

Bench : Division Bench

Advocate : K.S. Ravi Shankar, for the Appellant; M.R. Bhaskar, for the Respondent

Judgement

N. Kumar, J.—This appeal is by the assessee challenging the order passed by the Tribunal [2009 (234) E.L.T. 368 (Tribunal)] upholding the order of the appellate authority and declining to order refund of excess excise duty paid to them on the ground of bar of limitation as well as on the ground of unjust enrichment.

2. The assessee is a Company incorporated under the Companies Act, 1956, and engaged in the manufacture of coated papers falling under Chapter heading 4810.10 of the Central Excise and Tariff Act, 1985 and holding Central Excise Registration. During the relevant period the assessee was offering quantity discount, cash discount and dealers discount to their customers. The case of the assessee is that these discounts would not be known at the time of clearance of goods to the customers, but would be offered only later. Once the party becomes entitled to quantity discount, the assessee issues credit notes. As regards cash discounts based on the scheme, the buyers would deduct discount at the time of payment of price for the goods. Therefore, the assessee applied to the Superintendent of Central Excise, Bangalore-II Division, on 20-7-2000 requesting for provisional assessment as the discounts were known only after a lapse of certain time and were not known at the time of dispatch of goods from the

factory. In pursuance of such requests he was called upon to execute B-13 bond with the Deputy Commissioner for provisional assessment.

3. During the period from 1-11-2000 to 31-3-2001 and 1-4-2001 and 31-12-2001, the assessee offered discounts to their customers. For the period from 1-1-2000 to 31-3-2001 they filed an application for refund on 29-11-2001, a second claim for the period from 1-4-2001 to 31-12-2001 was filed on 22-2-2002. The Department in reply stated that the refund claim was not in order as necessarily the documents were not filed. Hence, the assessee withdrew his claim for refund filed on 29-11-2001 and on 22-2-2002. However, he filed a fresh claim on 6-3-2002 and it was acknowledged on 7-3-2002. In support of his claim for refund he also produced the credit notes which were issued subsequent to the invoices. The adjudicating authority rejected the said claim of refund on the ground of unjust enrichment relying on the Judgment of CESTAT in the case of Addison v. Commissioner of Central Excise. The appeal preferred against the said order was dismissed. The appeal to the Tribunal was also dismissed. Aggrieved by the same, the assessee is before this Court.

4. The learned counsel appearing for the assessee assailing the impugned order contends that the refund claim made on 29-11-2001 was in-time. Because the Department pointed out certain defects and called for certain documents, instead of complying with the said request the assessee withdrew the claim on 20-7-2002 with an intention to file a fresh claim with all the necessary documents. Accordingly a fresh claim was filed on 6th March 2002 which was acknowledged on 7-3-2002. Though 7-3-2002 is beyond the period of limitation of one year it is nothing but a continuation of the earlier claim. Therefore, the authorities have taken a too technical view and were in error in rejecting the said application.

5. Secondly he contended on merits that admittedly, the assessee levied and collected excise duty on a higher rate. Depending on the performance of customers/dealers he has passed on the benefit of deduction in the price of the goods. Corresponding excise duty payable is also reduced. He has raised the credit notes and passed on the said benefit to the customer. In other words, the burden of higher excise duty which he has paid for is not passed on to the customers. Therefore, the authorities were not justified in denying the claim on merits. Relying on the Judgment of the CESTAT earlier passed in the case of Addison he further submitted that the Judgment rendered by the Tribunal in Addison's case has been set aside by the Madras High Court Addison and Co. Vs. Commissioner of C. Ex., and therefore the Tribunal was not justified in taking note of the Judgment of the Madras Court solely on the ground that against the said decision the revenue has preferred an appeal to the Apex Court [2003 (152) E.L.T. A94 (S.C.)] and the same is pending. Therefore he submits that the order requires to be interfered with. Even otherwise even if the first claim is held to be barred by time still the cash claim would not be barred by time. It is only the claim anterior to 7-3-2001 which will be barred by time and the assessee

would be entitled to refund for the period from 7-3-2001 to 31-3-2001.

6. Per contra, the learned counsel appearing for the revenue submitted that once a claim made is withdrawn and a fresh claim is made it cannot be treated as a continuation of the earlier claim and therefore the order passed by the authorities holding that the claim is barred by time cannot be interfered with. In so far as the claim on merits is concerned any credit note raised subsequent to the raising of the invoice and clearing of the goods cannot be taken note of in deciding whether the benefit has been passed on to the customers or not. That is the view expressed by the CESTAT in the case of Addison, though it is set aside by the Madras High Court, now the matter is pending in appeal before the Apex Court and therefore the Tribunal was justified in following its earlier Judgment and denying the relief to the assessee. Therefore two substantial questions of law which arise for consideration in this appeal are as follows :

(1) If the claim made is refunded on defects being pointed out and a fresh claim is made curing such defects whether the said claim may be treated as a continuation of the earlier claim?

(2) Whether the credit note raised after clearance of the goods under an Invoice paying higher excise duty is the assessee entitled to refund of excise duty and the said burden is not passed on to the customer?

Point No. 1

It is not in dispute that the claim for refund is for the period from 1-11-2000 to 31-3-2001. The claim for refund of excise duty paid was made on 29-11-2001, that is well within the time. However, when the revenue issued a notice pointing out the defects in the said claim and also called upon the assessee to produce the supporting documents it was open to the assessee to produce the supporting documents or file an amended claim but the assessee did not choose to amend the claim or produce the supporting documents. It chose to withdraw the earlier claim made to cure the defect and filed a fresh claim. The said withdrawal was made on 27-2-2002. After the said withdrawal a fresh claim was made on 6-3-2002 but was acknowledged on 7-3-2002. The claim which is made, on 7-3-2002 is a fresh claim. It is not a continuation of earlier claim. If there was no defect earlier and when the earlier claim was pending consideration if one more claim Petition is filed giving correct facts to substantiate the said claim interpreting this provision liberally it is possible for this Court to take a view so far as limitation is concerned the date to be reckoned from 30-12-2001. When the claim was made and the subsequent claim is only in the nature of an amendment to, the chargeable claim the question of limitation could have been held to be in favour of the assessee. But once when the defects are pointed out instead of complying with the same by producing the documents to substantiate the claim, the claimant withdrew the earlier claim, then the claim for refund ceases to exist. Therefore when a fresh claim is made on 7-3-2002 the limitation is to be computed from that day. If limitation is to be computed from that day

the claim for refund from 1-1-2002 up-to 6-3-2002 was clearly barred by time. However, the claim for refund from 7-3-2002 up-to 31-3-2002 was well within the time. Therefore though the authorities justified in holding that claim is barred by time to the extent of rejecting the claim from 7-3-2001 to 31-3-2001, the said order is incorrect. To that extent, the order passed by the authorities requires to be modified.

Point No. 2

The claim for refund of excise duty pre-supposes that excise duty in excess of what is legally due has been paid. The demand on which the excise duty is paid is on the clearance of the goods. Necessarily that is paid on the amount mentioned in the invoice. The claim for refund arises when subsequently if it is shown that what is paid is an excess of what is legally payable. Section 11-B deals with claim for refund of duty. Sub-section (1) Section 11-B provides that any person claiming refund of any duty of excise paid on such duty may make an application for refund of such duty to the appropriate authority before the expiry of one year from the relevant date in the prescribed form and the application accompanied by such document to establish that the amount of duty of excise if any paid, in relation to which it refund is claimed or collected from or paid by him and the extent of such duty has not been passed on to him by any person. Therefore the condition precedent for making a claim for refund of duty is that the incidence of such duty had not been passed on by the assessee to any other person. Sub-section (2) of Section 11-B provides that if the appropriate authority is satisfied that the appeal or any part of duty of excise paid by the applicant is refundable completely he may make an order accordingly and the amounts so determined shall be credited to the Fund. Therefore if the authority is satisfied that the assessee is entitled to a refund after holding that he is not entitled to receive it shall be credited to the Fund. The proviso to sub-section (2) of Section 11-B in terms of Clause (d) provides that the duty of excise paid by the manufacturer, if he had not passed on the incidence of such duty to any other person, then instead of the said excise duty being credited to the Fund is to be paid to the assessee /applicant. The relevant date has been defined in the explanation to that Section to mean the date of payment of duty, if he does not fall within any of the instances set out therein. The said provision has been the subject matter of interpretation by the Apex Court from time to time. Even before the introduction of the said provision, in fact a Nine Member Bench of the Apex Court had an occasion to consider this aspect of the matter while dealing with the two other Constitutional Bench Judgments and in the case of Mafatlal Industries Ltd. and Others Vs. Union of India (UOI) and Others, has laid down the law on the point.

The doctrine of unjust enrichment is just and statutory doctrine. No person can seek to collect the duty from both the ends. In other words, he cannot collect the duty from the purchaser at one end and also collect the same duty from the State on the ground that it has been collected from him contrary to law. The

power of the Court is not meant to be exercised for unjustly enriching person. The doctrine of unjust enrichment, is, however, inapplicable to the State. State represents the people of the country. No one can speak of the people being unjustly enriched.

A claim for refund made under the provisions of the Act can succeed only if the assessee alleges and establishes that he has not passed on the burden of the duty to any person/other persons. His refund claim shall be allowed/decreed only when he establishes that he has not passed on the burden of duty or to the extent he has not so passed on, as the case may be. Where the burden of duty has been passed on, the claimant cannot say that he has suffered any real 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 ultimately claim its refund. But whether such person does not come forward or where it is not possible to refund the amount to him for one or the other reasons, it is just and appropriate that that amount is retained by the State, that is, by the people. There is no immorality or impropriety involved in such proposition.

Where such a claim is made, it would be wholly permissible for the Court to call upon the assessee to establish that he has not passed on the burden of duty to a third party and to deny the relief of refund if he is not able to establish the same, as has been done by this Court in I.T.C. In this connection it is necessary to remember that whether the burden of the duty has been passed on to a third party is a matter within exclusive knowledge of the manufacturer. He has the relevant evidence - best evidence - in his possession. Nobody else can be reasonably called upon to prove that fact. Since the manufacturer is claiming refund and also because the fact of passing on the burden of duty is within his special and exclusive knowledge, it is for him to allege and establish that he has not passed on the duty to a third party. This is the requirement which flows from the fact that Section 72 is equitable provision and that it incorporates a rule of equity. This requirement flows not only because Section 72 incorporates a rule of equity but also because both the Central Excise duties and Customs duties are indirect taxes which are supposed to be and are permitted to be passed on to the buyer. That these dues are indirect taxes, meant to be passed on, is statutorily recognized by Section 64-A of the Sale of Goods Act. In view of the specific provision contained in Section 11-B of the Act it would be legitimate for the Court to presume, until the contrary is established, that a duty of excise or a customs duty has been passed on. It is a presumption of fact which a Court is entitled to draw u/s 114 of the Indian Evidence Act. It is undoubtedly a rebuttable presumption but the burden of rebutting it lies on the person who claims the refund and it is for him to allege and establish that as a fact that he has not passed on the duty, and therefore equity demands that his claim for refund be allowed. This is the position de hors 1991 Amendment Act. Amendment Act has done no more than to give statutory recognition to the above concepts.

7. Therefore the law on the point is well settled. As is clear from Section 11-B of the Act when a claim for refund is made within the period stipulated, if the appropriate authority on consideration of such claim comes to the conclusion that the applicant has paid excess duty, after holding so, he should pass an order directing crediting of the said excise duty to the welfare fund. It is only if the assessee claims refund on the ground that he has not passed on the burden of duty to his customer by a specific plea and substantiating the same by producing acceptable evidence, then the appropriate authority shall direct payment of the refund amount to the assessee. The question whether the burden of duty has been passed onto the customer or not is purely a question of fact. The burden of proving the said fact is exclusively on assessee. It is only on discharge of the said burden the assessee would be entitled to the refund of the said amount. The finding of the CESTAT that the events subsequent to the clearance of the goods, raising of the invoice are relevant in deciding the question of refund of duty is not warranted from any of the statutory provisions. On the contrary, the basis for claim for refund is excess duty is to be paid at the time of clearance. As indicated in the invoice, it is only a subsequent event which makes that demand illegal, not warranted, not authorized and gives the assessee a right to seek for refund. In that context, if credit notes are raised and benefit is passed on to the customer, thus not passing on the burden of excise duty the assessee is entitled to refund of the same. Though the adjudicating authority or the appellate authority denied relief relying on the Judgment of the CESTAT in Addison's case, when that Judgment has been set aside by the Madras High Court, the Tribunal was in total error in following the Judgment and dismissing the appeal of the assessee. Merely because the matter is now pending before the Apex Court, that is not a reason to disregard the Judgment of the High Court. The High Court has set aside the Judgment rendered by the CESTAT and the said Judgment is not operating and therefore the Tribunal was wrong in ignoring the Judgment of the Madras High Court. In that view of the matter, the first question of law raised is answered in favour of the revenue and against the assessee and the second question of law is answered in favour of the assessee and against the revenue. Ordered accordingly. Therefore, the finding of the Tribunal as well as the lower authorities cannot be sustained and accordingly is hereby set aside. Hence, we pass the following :-

(1) The appeal is partly allowed.

(2) The rejection of the claim for the period from 1-11-2000 up-to 7-3-2001 is upheld as barred by time.

(3) The assessee would be entitled to refund of excess demand made from 8-3-2001 to 31-3-2001.

(4) In so far as the claim for the period from 1st April 2001 to December 2001 is concerned the entire claim is well within time and the claimant is entitled to refund.