(2010) 11 P&H CK 0351

In the Punjab And Haryana At Chandigarh

Case No : C.E.S.R. No. 5 of 2010

The Commissioner of Central Excise	APPELLANT
Vs	
Jai Bharat Steel Inds. and Another	RESPONDENT

Date of Decision : 01-11-2010

Acts Referred:

Central Excises and Salt Act, 1944 — Section 11(B), 11(B)(3), 11BB, 12(B), 35(H)
Customs Act, 1962 — Section 27

Citation : (2010) 11 P&H CK 0351

Hon'ble Judges : Rakesh Kumar Jain, J;Adarsh Kumar Goel, J

Bench : Division Bench

Judgement

Adarsh Kumar Goel, J.—Following questions of law were treated to have been referred for opinion of this Court u/s 35H of the Central Excise Act, 1944 (for short, "the Act") vide order of this Court dated 29.7.2010 arising out of order of the Customs, Excise and Gold Control Appellate Tribunal, New Delhi dated 2.11.2000 in Appeal No. E/161/2000/MB(SM):-

Whether the issue involved in the instant CEGAT order was not a case of pending proceedings and appropriately falls under the ambit of proviso I of Section 11B meriting considering of unjust enrichment brought about in law.

When at no stage the impugned proceedings have attained finality by way of grant/sanction/final rejection of refund, is not this case covered under ambit of proviso I of Section 11B of Central Excise Act, 1944?

2. The assessee applied for refund on 10.7.1989 on the ground that it was not liable to pay excise duty on the product in question in view of judgment of the Hon''ble Supreme Court dated 27.10.1988 in C.A. Nos. 1571 to 1587 of 1987. The application was rejected but this Court, vide order dated 22.4.1991 in C.W.P. No. 773 of 1990 upheld the plea of the assessee. Accordingly, the assessee made fresh application dated 19.10.1995 which was rejected as barred by principle of unjust enrichment. The amount was credited to consumer welfare fund. This view was upheld on appeal but on further appeal, the Tribunal upheld the claim

for refund. It was observed:-

(c) In this view of the legal position, I find no reason or force in Revenues Argument to reject the refund settled by CEGAT decision 20.12.09 as stated in the SCN dated 25.10.95 and also WP No. 773/1990 dated 22.4.91 as the amendment came only in 1991 (witheffect 20.9.91) on basis of unjust enrichment by the impugned orders.

(d) I find that the refund, which is otherwise eligible, should be granted with interest as per Section 11BB.

7. In view of my findings, the orders are set aside as regards unjust enrichment clause and appeals allowed with consequential relief.

3. We have heard learned Counsel for the revenue.

4. Learned Counsel for the revenue submits that amendment by way of Sections 11B and 12B introduced on 20.9.1991 applied to pending applications. Refund had not been made though order had been passed by this Court. Bar of unjust enrichment could certainly apply. The finding of the Tribunal is in direct conflict with the law laid down by the Hon''ble Supreme Court in Mafatlal Industries Ltd. and Others Vs. Union of India (UOI) and Others, , which has not been properly appreciated.

5. It is clear that the amendment came into force on 20.9.1991. The application for refund was made by the assessee on 19.10.1995, even though in earlier round, application held to be time barred by authorities was held to be in time by this Court. This being the position, on the date of application itself the amendment had already came into force. The said application had to be dealt with as per the amended provision. After the amendment, refund could not be allowed without considering the bar of unjust enrichment. It is a different matter that refunded amounts could not be reclaimed. Reference may be made to the following observations in Mafatlal Industries Ltd.:-

108. (viii) The decision of this Court in Sales Tax Officer, Banaras and Others Vs. Kanhaiya Lal Mukundlal Saraf,) must be held to have been wrongly decided insofar as it lays down or is understood to have laid 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 Kanhaiya Lal have also been wrongly decided to the above extent. This declaration - or the law laid down in Propositions (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 Court 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 any authority, Tribunal or Court or otherwise.

xx xx xx xx xx (xi) Section 11B applies to all pending proceedings notwithstanding the fact that the duty may have been refunded to the petitioner/plaintiff pending the proceedings or under the orders of the Court/Tribunal/Authority or otherwise. It must be held that Union of India and others Vs. Jain Spinners Ltd. and another, and Union of India and others Vs. I.T.C. Limited, have been correctly decided. It is, of course, obvious that where the refund proceedings have finally terminated - in the sense that the appeal period has also expired - before the commencement of the 1991 (Amendment) Act (19-9-1991), they cannot be reopened and/or governed by Section 11B(3) [as amended by the 1991 (Amendment) Act.]. This, however, does not mean that the power of the appellate authorities to condone delay in appropriate cases is affected in any manner by this clarification made by us.

(xii) Section 11B does provide for the purchaser making the claim for refund provided he is able to establish that he has not passed on the burden to another person. It, therefore, cannot be said that Section 11B is a device to retain the illegally collected taxes by the State. This is equally true of Section 27 of the Customs Act, 1962.

6. The Tribunal, thus, misconstrued the judgment of the Hon''ble Supreme Court in Mafatlal Industries Ltd.

7. We, accordingly, answer the question in favour of the revenue and against the assessee.

8. The reference is disposed of.

