

(2011) 01 MAD CK 0111

In the Madras High Court

Case No : Writ Petition No. 3169 of 2008 and M.P. No. 1 of 2008

The Supreme Industries Limited

APPELLANT

Vs

The Assistant Commissioner of Central Excise Puducherry
Division No. 14

RESPONDENT

Date of Decision : 18-01-2011

Acts Referred:

Central Excise Rules, 1944 — Rule 173L

Central Excises and Salt Act, 1944 — Section 11B

Citation : (2011) 01 MAD CK 0111

Hon'ble Judges : Vinod K. Sharma, J

Bench : Single Bench

Advocate : Mohammed Shaffi, for G.R.M. Palaniappan, for the Appellant; K. Ravi Anantha Padmanabhan, for the Respondent

Final Decision : Allowed

Judgement

Vinod K. Sharma, J.—The Petitioner has invoked the extraordinary writ jurisdiction of this Court to challenge the show cause notice issued

u/s 11-B of the Central Excise Act, 1944 by the Assistant Commissioner of Central Excise, Puducherry I Division vide C. No. V/39/18/04/02-RF

PF-1 dated 16.11.2007.

2. The facts leading to the filing of the writ petition are that the Petitioner is a company registered under the Companies Act, 1956 and is engaged

in manufacture of plastic furniture including chairs. The Petitioner company is registered under the Central Excise Act and is assessed on the file of

the Respondent. The Petitioner earlier had two units i.e. Unit - I situated at R.S. No. 112/4,5,6,7,8&9, Sedarapet Industrial Area, Sedarapet,

Puducherry and Unit - II situated at the above mentioned address and subsequently Unit-I was closed. The Petitioner during the year 1999 to

2001 cleared plastic chairs manufactured at their factory at Pondicherry duly discharging the liabilities. The case of the Petitioner is that, in case the

chairs cleared suffers from any defects, the same are returned to the factory and the Petitioner with respect to such goods is entitled to refund as

per the procedure laid down under Rule 173-L of the Central Excise Rules, 1944. The Petitioner, by complying with the Rule, filed a Refund

Claim before the Respondent. The claim of the Respondent was declined by the Assistant Commissioner of Central Excise, Puducherry Division

vide his order in Original No. 76/2001 dated 07.12.2001, Order in Original No. 2/2001 dated 14.03.2001 and Order in Original No. 43/2002

dated 20.08.2002. The Petitioner, aggrieved by the order filed an appeal before the Assistant Commissioner of Central Excise, Central Excise

Division, Coubert Avenue, Pondicherry - 605 001, wherein the relief was claimed with regard to the following claim:

4. The reground chips along with virgin material were used in the manufacture of final goods which were cleared on payment of duty to their

customers. Refund claim of duty paid on the returned goods were filed by the applicants under Rule 173-L of the Central Excise Rules, 1944, and

show cause notices were issued proposing rejection of the refund claims u/s 11-B of the Central Excise Act, 1944 as detailed below:

Date of filing Amount Show cause notice

Sl.

of refund of refund Claim C.No. issued vide

No.

claim requested C.No./Date

V/94/18/11/2000- V/94/18/11/2000-

1. 13.1.2000 3,94,312

RF RF Dated 5.4.2000

V/94/18/50/2000- V/94/18/11/2000-

2. 02.03.2000 2,33,607

RF RF Dated 7.4.2000

V/94/18/60/2000- V/94/18/11/2000-

3. 28.03.2000 3,98,132

RF RF Dated 5.4.2000

V/94/18/61/2000- V/94/18/11/2000-

4. 28.03.20003,65,216

RF RF Dated 5.4.2000

V/94/18/62/2000- V/94/18/11/2000-

5. 28.03.20004,65,051

RF RF Dated 5.4.2000

V/94/18/115/2000-

V/94/18/115/2000-

6. 22.6.2000 2,83,697 RF Dated

RF

25.7.2000

V/94/18/115/2000-

V/94/18/116/2000-

7. 22.6.2000 3,18,343 RF Dated

RF

25.7.2000

V/94/18/115/2000-

V/94/18/117/2000-

8. 22.6.2000 4,00,221 RF Dated

RF

25.7.2000

V/94/18/115/2000-

V/94/18/118/2000-

9. 22.6.2000 2,63,888 RF Dated

RF

25.7.2000

V/94/18/115/2000-

V/94/18/119/2000-

10. 22.6.2000 3,51,667 RF Dated

RF

25.7.2000

V/94/18/157/2000-

V/94/18/157/2000-

11. 21.11.20003,54,965 RF Dated

RF

04.12.2000

V/94/18/157/2000-

V/94/18/158/2000-

12. 21.11.20002,34,361 RF Dated

RF

04.12.2000

V/94/18/157/2000-

V/94/18/159/2000-

13. 21.11.20003,32,299 RF Dated

RF

04.12.2000

V/94/18/157/2000-

V/94/18/160/2000-

14. 21.11.20001,96,601 RF Dated

RF

04.12.2000

V/94/18/258/2001-

V/90/18/258/2001-

15. 01.10.20013,47,151 RF Dated

RF

02.11.2001

V/94/18/258/2001-

V/90/18/259/2001-

16 01.10.20013,50,416 RF Dated

RF

02.11.2001

V/94/18/258/2001-

V/90/18/260/2001-

17. 01.10.20014,42,420 RF Dated

RF

02.11.2001

3. The question as to whether the relief could be declined to the Petitioner on the ground of undue enrichment was also considered by the appellate

authority, namely The Commissioner of Customs and Central Excise (Appeals), No. 1, Williams Road, Cantonment, Trichirapalli-620 001 in A.

Nos. 65/2001, 19/2002 & 229/2002-TRY and it was ordered as under:

14. As regards the question of unjust enrichment, I find that it has been categorically held by the Hon"ble CEGAT in the cases of Asea Brown

Boveri Ltd. v. CCE, Bangalore and CCE, Indore v. Medi Caps Ltd. that the doctrine of unjust enrichment is not applicable to the refund claims

under Rule 173-L and the ratio of the said decisions is squarely applicable to the instant case.

4. As already observed the appeals were allowed and by setting aside the orders, the Petitioner was permitted to avail consequential relief, if any.

5. The Petitioner being dissatisfied with the order passed by the appellate authority referred to above, approached the Customs, Excise & Service

Tax Appellate Tribunal, South Zonal Bench at Chennai by way of Appeal Nos. E/129, 130, 131/2003/MAS. The Tribunal also dismissed the

appeal. The Petitioner, thereafter, filed Civil Miscellaneous Appeal No. 2340 of 2005 to challenge the order of the Customs, Excise and Service

Tax Appellate Tribunal. When the case came up for hearing in this Court, permission was sought to withdraw the appeal with liberty to prosecute

the rectification application filed by the Revenue on 15.03.2005 before the Hon"ble CESTAT. The rectification application was also dismissed

vide order dated 12.10.2004. In view of the orders referred to above, the Petitioner made an application for consequential refund on the basis of

orders passed in favour of the Petitioner.

6. It was at this stage, the impugned show cause notice was issued u/s 11-B of

the Central Excise Act, 1944 to show cause as to why the claim application not to be rejected on the ground of undue enrichment.

7. The learned Counsel for the Petitioner challenged the impugned show cause notice on the ground that once an order has attained finality upto

Hon"ble High Court, it was not open to the Respondent to issue show cause notice, as it would be hit by principle of res judicata or under Order

II Rule 2, as it was open to the revenue to invoke Section 11-B to deny benefit.

8. The learned Counsel for the Petitioner also contended that the question whether the principle of undue enrichment would be applicable or not

already stood decided by the appellate authority. Therefore it is not open to the authorities to reopen the issue of refund by invoking Section 11-B.

9. The writ petition is opposed by the Respondent primarily by referring to sub Clause (3) of Section 11-B, which reads as under:

(3) Notwithstanding anything to the contrary contained in any judgment, decree, order or direction of the Appellate Tribunal of any Court in any

other provision of this 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).

10. The contention of the learned Counsel for the Respondent is that the refund under sub Clause (2) is subject to the condition that the refund

should not cause undue enrichment to the party claiming the refund. In view of Sub-clause (3) of Section 11-B, it is open to the Respondent to

issue show cause notice to the Petitioner u/s 11-B of the Central Excise Act, 1944, calling upon Assessee to justify whether a refund would not

result in undue enrichment.

11. It is also the contention of the learned Counsel for the Respondent that the findings of the appellate authority referred to above were in the

nature of obiter only, as it was not a question in issue before the appellate authority. The findings of the appellate authorities therefore cannot come

in the way of exercising of statutory powers u/s 11-B of the Central Excise Act, 1944

12. The learned Counsel for the Respondent in support of his contention that inspite of entitlement to refund, it can be refused in case it is proved

to be a case of undue enrichment, placed reliance on the judgment of the Hon"ble Supreme Court in Union of India v. Raj Industries reported in

2000 (120) E.L.T. 50 (S.C.), wherein the Hon''ble Supreme Court was pleased to hold as under:

7. However, the further question remains in the meantime the amount of duty collected in excess, which is already refunded to the Respondent-firm

pursuant to the impugned order of the High Court can be retained by it or not on the principle of unjust enrichment. Thus this limited question now

survives for consideration.

8. In support of this contention learned Counsel for the Appellants referred to a Constitution Bench decision of this Court in the case of Mafatlal

Industries Ltd. and Others Vs. Union of India (UOI) and Others, at page 634. Learned Counsel for the Respondents, on the other hand,

submitted that the format order framed by this Court pursuant to the aforesaid decision does not cover this controversy. He strongly relied upon

the format order at page 2 of the paper book which mentions that proceedings for examining this aspect would survive in contingencies referred to

therein. We may not go into this wider question for the simple reason that in the light of the aforesaid Constitution Bench decision of this Court it is

well settled that where a claim for refund of any duty or tax paid arises for consideration of the authorities apart from the merits of the claim and

even if on merits it is found to be a justified claim, the principles of unjust enrichment has also to be kept in view before directing the refund. It is no

doubt true that the Respondent-firm while importing the concerned consignments did pay the disputed import duty but when it raised the claim for

refund it was entitled to point out that the duty collected in excess was not justified in law. But even if that was so found as ultimately seen in the

present appeal, further question would still survive whether the refund could have been ordered to the Respondents by the impugned order if the

burden of duty was already passed on to purchasers from the Respondents. As that has not been examined by the High Court the decision of the

learned Single Judge directing refund of the whole amount and as confirmed by the Division Bench requires to be set aside only on this limited

ground. Thus, while upholding the plea of the Respondents that the disputed import duty paid by it was not legally payable, still the question

survives for consideration as to whether refund could have been ordered to it if the burden of duty was passed on to third parties. Only for

deciding this limited question the proceedings will have to be remanded to the Assistant Collector from whose order the proceedings arose in writ

petition before learned Single Judge and ultimately went before the Division Bench which disposed of the same by the impugned order.

13. As already observed over, the learned Counsel for the Respondent further also contended that the observation by the appellate authority was

based on the judgment of the CEGAT in the case of Asea Brown Boveri Ltd. v. Commissioner of C. Ex., Bangalore and therefore the reading of

the said judgment would show that no benefit can be drawn by the Petitioner from the said judgment, as the finding of the appellate authority can

be held to be obiter which would bar the Revenue from invoking Section 11-B.

14. The learned Counsel for the Respondent also contended that on true interpretations of the order, it has to be held that the question of undue

enrichment was not decided, as it was made clear by the appellate authority that the Petitioner would be entitled to consequential benefit, if any,

which means that the question as to whether it was the case of undue enrichment was left open to be decided subsequently.

15. This contention of learned Counsel for the Respondents also deserves to be noticed as rejected, as question of undue enrichment will not apply

to this case, in case of positive findings by the appellate authority, against which appeal was filed by the Petitioner but this finding was not

challenged.

16. On consideration of the matter, I find force on the contention raised by the learned Counsel for the Petitioner. The question of refund stands

decided in favour of the Petitioner up to this Court and the order has attained finality.

17. The question of undue enrichment was also considered and decided in favour of the Petitioner by the appellate authority by recording that the

principle of undue enrichment would not apply to claim under Rule 173-L of the Central Excise Rules, 1944.

18. The Petitioner was at liberty to challenge this finding before the CEGAT, in the appeal filed. The appeal was dismissed, the Petitioner there

after failed in the appeal filed in this Court, as it was withdrawn and the order attained finality.

19. It is not open now to the Petitioner to invoke provisions of Section 11-B of

the Central Excise Act, 1944. Respondent also cannot derive any benefit from the judgment of the Hon''ble Supreme Court in the case Union of India (UOI) and Another Vs. Raj Industries and Another, , as in that case, the refund was ordered by way of interim order of the High Court, the Hon''ble Supreme Court, therefore, held that the question as to whether the Petitioner would be entitled to actual refund, was still to be determined. The order of refund had not attained finality. But, as already observed over in the present case, the matter of refund including the question of undue enrichment already stands decided in favour of the Petitioner, which has attained finality. Therefore, the impugned show cause notice is liable to be quashed.

20. This view of mine finds support from the judgment of the Hon''ble Supreme Court in the case of Triveni Chemicals Limited Vs. Union of India (UOI) and Another, , wherein it was held as under:

We have noticed hereinbefore that the application for refund was rejected by the Assessing Authority. It was, however, allowed by the Appellate Authority. It is not in dispute that no further appeal was taken therefrom. The said order, therefore, attained finality. It matters little as to whether the application for refund was in the prescribed form or not. The Respondents herein could raise all contentions before the Appellate Authority. In fact, before the original authority, a plea of unjust enrichment was raised. Such a plea, however, appears to have not been raised before the Appellate Authority. If no such plea was raised, only because the Appellant herein filed an application to be dealt with on the administrative side for refund subsequently, the same would not, in our considered view, attract the provisions of Section 11B as inserted by the Amending Act of 1991.

21. In view of the findings recorded above and in view of the judgment of Hon''ble Supreme Court it has to be held that the matter which stand concluded, finally between the parties cannot be reopened by invoking Section 11-b of the Central Excise Act, 1944.

22. For the reasons stated, the writ petition is allowed and the impugned Show Cause Notice C. No. V/39/18/04/02-RF PF-1 dated 16.11.2007 issued by the Respondent, is quashed. However, there shall be no order as to costs. Consequently, the connected miscellaneous petition is closed.