(2014) 09 MAD CK 0035

In the Madras High Court

Case No : Civil Miscellaneous Appeal No. 1761 of 2007

TTK Textiles Ltd. APPELLANT

Vs

Commissioner of C. Ex., Madurai RESPONDENT

Date of Decision : 25-09-2014

Acts Referred:
Central Excises and Salt Act, 1944 — Section 11B(1), 11B(2)

Citation : (2015) 315 ELT 511

Hon'ble Judges : R. Sudhakar, J;G.M. Akbar Ali, J

Bench : Division Bench

Advocate : Arun Kurien Joseph, Advocates for the Appellant; A.C. Mani Bharathi, SC, Advocates for the Respondent

Judgement

R. Sudhakar, J.—This Civil Miscellaneous Appeal, filed by the assessee as against the order of the Customs, Excise and Service Tax Appellate Tribunal, was admitted by this Court on the following substantial questions of law:

"1. Whether in the facts and circumstances of the case, the Tribunal was right in holding that the incidence of duty on intermediate products captively consumed is to be treated as having been passed on to the customer of the final product, even though there was no change in the price of the final product before during and after the relevant period?

2. Whether in the facts and circumstances of the case, the Tribunal was right in applying the case law pertaining to incidence of duty on the final product, to the present case, where the issue is one of the incidence of duty on intermediate products captively consumed?"

The brief facts are as follows:

The appellant/assessee had preferred a refund claim for Rs. 1,52,092.99 being the duty paid on ferrules made out of G.I. sheets, tin sheets, stainless sheets and brass sheets and end caps made out of C.R. sheets manufactured at their factory and consumed captively for the manufacture of paper ring tubes and defence container respectively during the period from 1-3-1986 to 15-11-1986. They claimed refund of duty paid on the intermediate products on the ground that these products were exempted from payment of duty under the old tariff based on relevant notifications. The Department issued a show cause notice dated 29-12-1986 on the appellant to show cause as to why the claim of refund should not be rejected, more particularly with regard to the ground on doctrine of unjust enrichment.

2. After going through the records and the reply filed by the assessee, the Original Authority held that the intermediate products on which duty has been wrongly paid are not the goods sold as such in the market and is used in the manufacture of paper ring tubes and hence the intermediate products are used as part of paper ring tubes and paper containers. Thereafter, the Original Authority passed an order of refund, however, based on the statement of one Thomas Zacheria, Vice-President of the company, the Original Authority denied refund, as the assessee had failed to show evidence to prove that the duty on the above item has not been passed on to the customers and consequently, the said refund was credited to the Consumer Welfare Fund. The relevant portion of the order of the Original Authority reads as follows:

"As per this office records both the above items have been consumed captively within the factory and that the same has not been sold to the outside buyers. On market enquiry on the buyers of the paper ring tubes it is reported that ferrules are not sold as such in the market and is used only in the manufacture of paper ring tubes. There is no separate market for ferrules as such and is Used as an end part of the paper ring tubes. There is no evidence on file to show that ferrules and end caps are sold/marketed as such in the open market. Hence, it is an intermediate products used as part of paper ring tubes and paper containers. There is no separate market for the same.

The value of the above ferrules and end caps have already been included in the value of paper ring tubes and paper containers. The duty cannot be refunded as the same is hit by the doctrine of unjust enrichment. On a specific query at the time of personal hearing Shri Thoman Zacheria, Vice-President of M/s. TTK Textiles Ltd., Virudhunagar has stated that he has no evidence to prove that the duty on the above items has not been passed on to the customers. Since the value of final product namely paper ring tubes and paper container includes the value of ferrules and caps which is inclusive of excise duty it is proved that the duty paid on ferrules and end caps have been passed on to the consumer, in other words the incidence of duty on these products would go into the cost of the final product and thus the incidence of duty was passed on and recovered from the ultimate buyers at the time of sale of the finished goods. Hence, it is hit by the doctrine of unjust enrichment, under Section 11B(2) of Central Excise Rules, 1944. Hence, I pass the following order.

ORDER

I sanction a refund of Rs. 1,52,092.99 under Section 11B(1) of Central Excise Act, 2002. However, the refund amount of Rs. 1,52,092.99 is credited to the Consumer Welfare fund under Rule 11B(2) of Central Excise Rules, 1944 & Central Excise Act, 2002."

3. Aggrieved by the order of the Original Authority, the assessee preferred an appeal before the Commissioner of Central Excise (Appeals), who passed an order in favour of the assessee holding that the cost of the final end product, namely, paper ring tubes, before, during and after the impugned period remained the same and therefore, they were eligible for the refund claim. The Commissioner of Central Excise (Appeals), while disposing of the appeal filed by the assessee, held as follows:

"6. I have gone through the records of the case and carefully considered the submissions of the appellants. The appellants contend that the duty now claimed as refund has not been passed on to the customers because the price of paper tubes before the refund period, during the refund period and after the refund period has remained the same and therefore there is no question of passing on the duty incidence to the customers. In support of their above claim, they have furnished certificate from a Chartered Accountant along with extract of the Party''s Ledger. In Order-in-Appeal No. 180/2003, dated 9-5-2003 in A. No. 371/98 (MDU) involving the present appellants I have held as below.

"If the appellants have maintained the same pricing structure before, the during and after the impugned period, the refund would not be hit by the ground of unjust enrichment. Accordingly the appellants will be eligible for the refund claim."

In view of what has been stated above, the impugned Order-in-Original is set aside and the Deputy Commissioner of Central Excise, Virudhunagar Division is directed to decide the issue of refund after verifying the veracity of the claim of the appellants that the prices have remained constant prior to the refund period, during the refund period and after the refund period. The appeal is disposed of accordingly."

4. Aggrieved by the order of the Commissioner of Central Excise (Appeals), the Revenue pursued the matter before the Tribunal. The Tribunal placed reliance on the decisions of the Supreme Court in the case of Union of India and others Vs. Solar Pesticide Pvt. Ltd. and Another, , Commissioner of Central Excise, Mumbai-II Vs. Allied Photographics India Ltd., to hold that the issue as to whether incidence of duty has been passed directly or indirectly has to be considered and that uniformity in price, before and after assessment does not lead to an inevitable conclusion that the incidence of duty has not been passed on to the buyer. The Tribunal also placed reliance on the decision of the Mumbai Tribunal in the case of Jyoti Structures Ltd. v. Commissioner of Customs & Central Excise, Aurangabad reported in 2003 (156) E.L.T. 853 (Tri.-Mumbai) , to hold that if the price remained constant, it does not lead to an automatic presumption.

Accordingly, the Tribunal following the above-said decisions, allowed the appeal filed by the Revenue.

5. Aggrieved by the order of the Tribunal, the assessee has filed the present Civil Miscellaneous Appeal.

6. Learned counsel appearing for the assessee submits that when the incidence of duty was on an intermediate product and the assessee is the consumer of the intermediary product, passing on the duty to any third party would not arise. The user of the goods on which duty was paid in this case is the appellant/assessee, hence the question of passing on the incidence of duty to another person does not arise and consequently refund is justified. The Commissioner of Central Excise (Appeals) is correct in granting the benefit to the assessee.

7. Per contra, learned Standing Counsel appearing for the Revenue pointed out to the specific finding of the Original Authority that no evidence was produced by the Authorised Person of the appellant before the Original Authority. Hence, without any evidence, the benefit of refund could not be granted to the appellant/ assessee.

8. Heard learned counsel appearing for the appellant and learned Standing Counsel appearing for the respondent and perused the materials placed before this Court.

9. It is not in dispute that the assessee had produced some materials before the Commissioner of Central Excise (Appeals) seeking refund. Those documents are not before us. In any event, the question whether the incidence of duty has been passed on to the buyer is the issue which has to be decided in the light of the documents submitted and in the light of the decisions already cited supra. We, therefore, are inclined to remand the matter back to the Original Authority to re-consider the issue in the light of the documents said to be filed by the appellant before the Commissioner of Central Excise (Appeals) and in accordance with the law as decided. In view of the aforesaid reasoning, the matter is remanded back to the Original Authority for fresh consideration in view of certain documents produced before the Commissioner of Central Excise (Appeals) by the appellant. This Civil Miscellaneous Appeal stands disposed of. No costs.