
(2012) 03 BOM CK 0027
In the Bombay High Court
Case No : Central Excise Appeal No. 6 of 2011

Western Coalfields Ltd.

APPELLANT

Vs

CESTAT

RESPONDENT

Date of Decision : 02-03-2012

Acts Referred:

Central Excises and Salt Act, 1944 — Section 11B(1), 12B, 35G

Citation : (2013) 288 ELT 203

Hon'ble Judges : P.D. Kode, J;B.P. Dharmadhikari, J

Bench : Division Bench

Advocate : T. Ramesh and S.C. and A.S. Mehadia, for the Appellant; S.K. Mishra, ASGI, for the Respondent

Judgement

B.P. Dharmadhikari, J.—By this appeal filed u/s 35G of Central Excise Act, 1944, the appellant has questioned the refusal by the Customs Excise and Service Tax Appellate Tribunal, Principal Bench, New Delhi, vide its order dated 3-8-2010 [2011 (273) ELT 153], to refund the excess excise duty paid on the ground of unjust enrichment. The questions of law sought to be raised are:

1. In the facts and circumstance where the price of the coal is fixed by the Government of India in the official gazette on the basis of the quality of the coal excavated and not on the basis of the cost of the production, whether the 1st Respondent-Tribunal is correct in holding that the Appellant has passed on the duty paid on the conveyor beltings.
2. In the facts and circumstance where the conveyor belting is a capital goods and it was categorically held by Hon'ble Madras High Court that unjust enrichment is not applicable to capital goods used, whether 1st Respondent-Tribunal is correct in holding that unjust enrichment is applicable to the facts of the present case.
3. In the facts and circumstances where the cost of conveyor belting is not taken into consideration while fixing the price of the coal on the basis of the grade or

quality, whether, 1st Respondent is correct in holding that the Appellant has passed on the duty element paid on the capital goods, conveyor belting.

4. In the facts and circumstances where the coal is not leviable to excise duty, whether the Tribunal is correct in holding that duty paid on the capital goods has been passed on to the purchaser of coal.

5. In the facts and circumstances where the cost of production during the disputed period is higher than the price fixed by the Ministry, whether the Tribunal is correct in holding that unjust enrichment is applicable to the present case.

Looking to the nature of controversy and with the consent of respective parties, we have taken up the matter for final hearing in order to find out whether such questions of law arise for consideration.

The basic facts show that the appellant M/s. Western Coalfields Limited, a Government of India, undertaking engaged in mining of coal has got its mines in Maharashtra and Madhya Pradesh. Coal is not exigible community and price at which it is to be sold by the appellant is determined by the Ministry of Energy, Union of India, vide notifications. It is the case of the appellant that on many occasions, the ultimate production cost of coal is higher than the price so fixed. They have pleaded that "sometimes the appellant has also incurred losses". PVC impregnated colliery conveyor belting is part of material handling equipment and a capital goods. The appellant purchased the same from M/s. Dunlop India Ltd., Shahganj, on various dates between 1986 to September 1993. These goods were classified under sub-heading 3920.11/3920.12 of First Schedule to the Central Excise Tariff Act, 1985, and though M/s. Dunlop India Limited, challenged this classification, it paid that duty under protest. The dispute was settled by the Hon"ble Apex Court vide its judgment dated 28-3-1985 reported at Fenner (India) Ltd. Vs. Collector of Central Excise, Madurai, . The Hon"ble Apex Court accepted the contention of M/s. Dunlop India Limited, & hence, duty paid under protest turned out to be in excess. The appellant had paid that excise duty as belting was purchased by them and as such, they claimed its refund on 15-4-1997. The amount of which refund is sought is Rs. 60,05,316/- and the appellant contends that the goods were capital goods and as no duty is payable on the final product, there is no question of the appellant passing on the burden of that duty to its customers. They also contend that while fixing price of coal, Government of India has not taken or included the cost of conveyor belting in price of coal.

2. The Assistant Commissioner of Central Excise, Chandannagore Division, proposed dis-allowance of the refund claim and issued show cause notice accordingly. The appellant filed its reply and said authority vide order-in-original dated 11-7-2011, rejected refund on the ground of unjust enrichment and also on limitation. The appellant then filed the appeal before the Commissioner (Appeals), Kolkata, who on 28-2-2005, held that claim for refund was not barred

by limitation but still dismissed the appeal on the ground of unjust enrichment. The appellant then filed further appeal before the Customs Excise and Service Tax Appellate Tribunal (CESTAT) (1st Respondent) and said Tribunal on 3-8-2010 dismissed it vide Final Order No. 638 of 2010 [2011 (273) ELT 153]. It is this order which is questioned before us.

3. We have heard Shri Ramesh, Senior Advocate (Chennai) with Shri Mehadia, learned counsel for the appellant and Shri Mishra, Additional Solicitor General of India, learned counsel for the respondents.

4. Shri Ramesh, learned counsel has relied upon the status of the appellant as undertaking of Central Government, to urge that concept like unjust enrichment is not applicable to it. He relies upon the judgment in the case of The Commissioner of Central Excise Vs. Karnataka State Agro Corn Products Ltd., , for said purpose. As final product is not exigible, there is no occasion for passing over the burden and hence principle of unjust enrichment is again not relevant. To support this, he relies upon the judgment in the case of HMM Ltd. and another Vs. The Administrator, Bangalore City Corporation, Bangalore and another, . As coal price is determined by Central Government and not by the appellant, the question of passing over burden cannot arise and hence the denial of refund is erroneous. He has relied upon the judgment in the case of State of Rajasthan and Others Vs. Hindustan Copper Ltd., , to substantiate this contention. He argues that presumption u/s 12B of Central Excise Act, 1944, is rebuttable and the assessee in present matter has produced necessary material to show that presumption is not be applicable. He contends that thus, law as explained by Rajasthan High Court in the case of Union of India (UOI) Vs. A.K. Spintex Ltd. and Another, is squarely attracted.

5. The division Bench judgment of Madras High Court in the case of Collr. Of Cus. Vs. Indo-Swiss Synthetic Gem Mfg. Co. Ltd., is relied upon to contend that when capital goods are involved and the same are not used in any way, in final product, the theory of unjust enrichment has no application. He has also pointed out that SLP against it has been dismissed by the Hon"ble Apex Court [2003 (157) E.L.T. A89(S.C.)]. According to him, therefore, the questions of law formulated by him in appeal memo and reproduced by us above, squarely arise and need to be answered in favour of the appellant.

6. Shri Mishra, learned counsel, on the other hand has contended that Section 11B(1) dealing with claim for refund of duty, casts obligation upon the appellant to file documents along with its application for refund showing that the burden of that duty has not been passed on by it to any other person. Here, the three authorities below have concurrently found that no such documents were filed and this being finding of fact, does not call for any interference. He has contended that bar of unjust enrichment is universal and in present circumstances, presumption u/s 12B has not been rebutted. Therefore, no questions of law arise and the appeal needs to be dismissed. He is relying upon the judgment in the case of Union of India v. Rai Industries, reported at 2000 (120) E.L.T. 50 (S.C.)

for said purpose.

7. After hearing respective counsel and after perusal of records, we find that burden was upon the appellant to rebut presumption u/s 12B. When Section 11B(1) is read along with Section 12B, it is apparent that the Parliament has acted upon the normal course followed in all commercial transactions and, therefore, there is a presumption that expenditure incurred by persons like appellants, has been recovered by them while selling their product. Because of this normal business practice, not passing burden of taxes to consumer is an exception & therefore, Section 11B(1) requires person claiming refund to produce along with his application for refund, documentary or other evidence showing that incidence of such duty had not been passed by him to any other person. Here, the findings concurrently reached show that the appellant did not submit any such documentary or other material, hence the application u/s 11B(1) itself was not complete.

8. The judgment of Karnataka High Court in the case of C.C.E., Bangalore-II v. Karnataka State Agro Corn. Products Ltd., (supra) shows that in para 6 of judgment of Hon''ble 9 Judges of the Hon''ble Apex Court in the matter of Mafatlal Industries Ltd. and Others Vs. Union of India (UOI) and Others, , has been looked into and a finding has been recorded that there cannot be any unjust enrichment by State Government. The said objection of department was, therefore, not accepted. The facts there show that food products manufactured by assessee were supplied to various departments of Government and while clearing those articles, assessee raised invoice and collected excise duty for making it over to Central Government. Thereafter it was found that the assessee was not liable to pay Central Excise duty. It then sought refund and the refund claimed was rejected. Appeal against it was also rejected and CEGAT, Chennai, then allowed further appeal of the assessee. After that appeal was allowed, the Assistant Commissioner examined the issue and rejected refund on the ground of unjust enrichment. Then again appeal reached Tribunal, which ordered refund. This order of refund was questioned before the High Court. Thus, entitlement to refund had already crystallized and thereafter the refund was being refused on the ground of unjust enrichment. It is, therefore, clear that view taken is in peculiar facts. The perusal of judgment of the Hon''ble Apex Court delivered later in the case of State of Maharashtra and Others Vs. Swanstone Multiplex Cinema (P) Ltd., , clearly shows the law that neither tax levier (State) nor tax collector is entitled to retain such duty. The above judgment of Karnataka High Court, therefore, has no application in present facts. The principle of unjust enrichment is therefore relevant here & needs to be applied.

9. The contention that as final product is not exigible, there is no scope for application of principle of undue enrichment, is equally misconceived. The perusal of judgment in the case of HMM Ltd. v. Administrator, Bangalore City Corporation, (supra) shows that there the assessee HMM Ltd. used to import within octroi limits milk powder in bulk containers only for the purposes of

packing in its packing station at Bangalore. After that packing in glass bottles, the same were exported outside the Municipal limits. The refund of octroi duty was sought by assessee for the quantity which was thus exported outside municipal limits. That refund was rejected. The Hon''ble Apex Court has found that octroi could not have been levied or collected in respect of goods not used or consumed or sold within Municipal limits and hence that collection itself was without authority of law. The authority collecting octroi had no right to retain that amount and same was refundable within the period of limitation. Thus, facts there clearly show that initial levy of octroi itself has been found without jurisdiction. Here, that is not the position. Thus, the fact that ultimate product of appellant viz., coal is not exigible, has got no significance insofar as this judgment is concerned and it does not advance the case of present appellant.

10. It is not in dispute that price of coal is fixed by the Ministry of Energy. The perusal of one such notification dated 8-1-1986 shows that the Pit-Head prices of coal were exclusive of royalty, cess, taxes and levy of Government, local authorities and cess, duties, sales tax etc. The provision in its clause 11 also clarifies that the colliery owners are entitled to add to price so determined, the amount equal to such royalty, cess or excise duty or tax.

11. The judgment of the Hon''ble Apex Court in the case of *State of Rajasthan & Ors. v. Hindustan Copper Ltd.*, (supra) shows that there the prices of final product viz., copper was fixed by Mineral and Metal Trading Corporation on the basis of prices determined by London Metal Exchange. It was, therefore, held that in this situation, there was no question of any unjust enrichment and the respondent-assessee was entitled to refund of excise duty paid on rectified spirit. Thus, prices were determined after study of prices prevailing in London Metal Exchange. Here, the appellant has not demonstrated that Ministry of Energy determines coal prices without any regard to cost of manufacture. Their statement in this regard in appeal memo reproduced by us above is very guarded. If it was their case that cost of coal arrived at by Ministry of Energy had no bearing on cost of manufacture and that Ministry never considered cost of manufacture as a relevant norm while fixing the prices, the appellant ought to have filed necessary material on record as required by Section 11B(1) of Excise Act. This judgment of the Hon''ble Apex Court, therefore, does not help the cause of the appellant.

12. *Union of India v. A.K. Spintex Ltd.*, (supra), is the judgment of Division Bench which considers the provisions of Section 12B. However, discussion therein in para 10 shows that the burden is upon the assessee and it can shift to revenue only if assessee leads reliable evidence about his not passing burden on to the purchaser. This judgment also, therefore, is of no assistance.

13. The judgment of *Collr. of Cus., Madras v. Indo-Swiss Synthetic Gem Mfg. Co. Ltd.*, (supra) is again of no use in present facts. Shri Ramesh, learned counsel, has relied upon paras 29 and 30 of said judgment. We find that Silica crucibles were captively used for manufacture of synthetic gems and the finding of fact

recorded is, assessee had not directly passed on Silica crucibles as imported to the customers or buyers. It is in this background, the Division Bench has found that question of passing on incidence of duty paid on Silica crucibles did not at all arise. The SLP against this judgment of Madras High Court has been dismissed but that by itself is of no help to present appellant. The Madras High Court was not required to find out whether the expenditure on Silica crucibles was forming part of price of synthetic gems. In this situation, merely because conveyor belting system is not supplied to its customer by the appellant and it forms part of capital goods, that by itself is not sufficient to sustain claim for refund. The capital goods are being used as part and parcel of manufacturing process and in normal business transactions, any manufacturer will include his expenditure on manufacturing process while computing the price of final product to be sold in market. Burden to show to the contrary was upon the appellant & they avoided/ failed to discharge it.

14. The plea & argument that appellant has at times sustained loss is not sufficient to grant refund. The loss suffered may be on account of various factors and if while determining market price of coal, the expenditure on manufacturing process has been looked into, such subsequent loss becomes irrelevant.

15. As pointed out by Shri Mishra, learned ASGI and as held by the Hon"ble Apex Court in the case of Union of India v. Raj Industries, (supra), there cannot be any refund until and unless unjust enrichment is ruled out.

16. Here, all the authorities have concurrently found that the appellant-assessee has failed to discharge that burden. We do not see any perversity in that finding. In the light of questions of law noted by us above, it is clear that these findings need to be maintained. No substantial questions of law, therefore, arise in this matter and hence present appeal as filed u/s 35G of the Act is misconceived. The same is accordingly dismissed. However, in the facts and circumstances of the case, there shall be no order as to costs.