SUPREME COURT OF INDIA

Commnr.of Central Excise, Chennai-III

Vs.

Grasim Industries

C.A.No.8359 of 2003

(A.K.Sikri and Rohinton Fali Nariman JJ.)

13.03.2015

JUDGMENT

A.K. SIKRI, J.

The issue involved in the present case pertains to the applicability of the doctrine of unjust enrichment in the case of refund of duty paid on 'capital goods' used captively. The factual matrix under which the aforesaid issue arises for consideration is taken note of, in short, hereinbelow:

The respondent herein purchased Electro Static Precipitators (ESPs for short) from M/s. BHEL, Ranipet. In terms of Notification No.78/1990-CE dated 20.3.1990, the respondent was entitled to buy the said ESPs at concessional rate of duty which was 5% ad valorem in contra distinction to the normal rate of 15% ad valorem duty. This concession rate becomes payable on the condition that an officer not below the rank of Deputy Secretary in the Ministry of Environment and Forests (MoEF) certifies that the goods manufactured are meant for pollution control purpose. The dispute arose as to whether the respondent was entitled for concessional rate of duty or not. It paid the duty at normal rate and fought for refund of the extra duty paid on the ground that only concessional rate of duty at 5% could have been charged. Respondent succeeded in its attempt before the judicial fora. In view thereof, question of refund of duty paid which was in the tune of Rs.27,66,970/-, arose for consideration. The Revenue/appellant herein, refused to release this refund and rejected the application of the respondent in this behalf on the ground that the respondent had passed on the burden and therefore refunding the extra duty paid would result in unjust enrichment to the respondent. Against that order the respondent filed the appeal before the Commissioner of

Central Excise (Appeal) Chennai, who also dismissed the said appeal vide order dated 21.9.2000. Challenging that order the respondent filed further appeal before the CESTAT. In this appeal the respondent has succeeded as vide impugned judgment dated 17.6.2003, the CESTAT has allowed the appeal and set aside the order of the Commissioner (Appeal) thereby directing the refund of the additional duty paid by the respondent.

A perusal of the order of the CESTAT would reveal that the CESTAT was grapping with the question as to whether the doctrine of unjust enrichment will be applicable in case of refund of duty paid on capital goods, which are used captively. The CESTAT has taken note of certain judgments including judgment of this Court in case of Union of India vs. Solar Pesticides Pvt. Ltd. (2000 (2) SCC 705 which was relied upon by the Revenue. However, the said judgment is distinguished as not applicable in the instant case on the ground that this Court in the said case was not concerned with the issue of unjust enrichment in connection with capital goods used captively.

It is in this backdrop the issue, as formulated in the first para above, arises for consideration.

Since the judgment Solar Pesticides Pvt. Ltd. has been distinguished and held not applicable to the facts of the present case, we shall start our discussion by analysing the said judgment. In the said case the question which was formulated for decision was as under:

"Whether the doctrine of unjust enrichment is applicable in respect of raw material imported and consumed in the manufacture of a final product is the question which arises for consideration in these appeals."

The Court in detail discussed the principle of unjust enrichment. At the outset it took note of the Constitution Bench judgment in Mafatlal Industries Ltd. and Others vs. Union of India and Others (1997 (5) SCC 536) and the principles laid down therein. Thereafter the position in law on this aspect is succinctly summed up in paras 17 to 20 which are reproduced below:

> "17. Section 11-B, along with Section 11-A, was introduced by Customs, Central Excises and Salt and Central Board of Revenue (Amendment) Act, 1978 with effect from 17-11-1980, a fact mentioned hereinbefore. Until the enactment and enforcement of Sections 11-A and 11-B, the recovery and

refund of excise duties was governed by the Rules. Rule 11 which dealt with claims for refund of duty, as in force prior to 6.8.1977 read as follows.

11. No refund of duties or charges erroneously paid, unless claimed within three months.-- No duties or charges which have been paid or have been adjusted in an account current maintained with the Collector under Rule 9, and of which repayment wholly or in part is claimed in consequence of the same having been paid through inadvertence, error or misconstruction, shall be refunded unless the claimant makes an application for such refund under his signature and lodges it with the proper officer within three months from the date of such payment or adjustment, as the case may be."

18. Rule 11 was amended with effect from 6-8-1977 and it remained in force till the coming into force of Section 11-B. Rule 11, as it obtained during the said period, read as follows:

11.Claim for refund of duty.--

(1) Any person claiming refund of any duty paid by him may make an application for refund of such duty to the Assistant Collector of Central Excise before the expiry of six months from the date of payment of duty.

Provided that the limitation of six months shall not apply where any duty has been paid under protest.

Explanation.-- Where any duty is paid provisionally under these rules on the basis of the value or the rate of duty, the period of six months shall be computed from the date on which the duty is adjusted after final determination of the value or the rate of duty, as the case may be.

(2) If on receipt of any such application the Assistant Collector of Central Excise is satisfied that the whole or any part of the duty paid by the applicant should be refunded to him, he may make an order accordingly.

(3) Where as a result of any order passed in appeal or revision under the Act, refund of any duty becomes due to any person, the proper officer may refund the amount to such person without his having to make any claim in that behalf.

(4) Save as otherwise provided by or under these rules no claim for refund of any duty shall be entertained.

Explanation. -- For the purposes of this rule, `refund' includes rebate referred to in Rules 12 and 12A."

19. We may now set out Section 11-B, as amended by Act 40 of 1991. (Even subsequent to 1991, there have been certain minor amendments to the said section.) As it stands today, Section 11-B reads as follows (portions not necessary for the purposes of the present controversy omitted):

"11B. Claim for refund of duty.-- (1) Any person claiming refund of any duty of excise may make an application for refund of such duty to the Assistant Commissioner of Central Excise before the expiry of six months from the relevant date in such form and manner as may be prescribed and the application shall be accompanied by such documentary or other evidence including the documents referred to in section 12A as the applicant may furnish to establish that the amount of duty of excise in relation to which such refund is claimed was collected from, or paid by, him and the incidence of such duty had not been passed on by him to any other person:

Provided that where an application for refund has been made before the commencement of the Central Excises and Customs Laws (Amendment) Act, 1991, such application shall be deemed to have been made under this sub-section as amended by the said Act and the same shall be dealt with in accordance with the provisions of sub-section (2) substituted by that Act:

Provided further that the limitation of six months shall not apply where any duty has been paid under protest.

(2) If, on receipt of any such application, the Assistant Commissioner of Central Excise is satisfied that the whole or any part of the duty of excise paid by the applicant is refundable, he may make an order accordingly and the amount so determined shall be credited to the Fund:

Provided that the amount of duty of excise as determined by the Assistant Commissioner of Central Excise under the foregoing provisions of this sub-section shall, instead of being credited to the Fund, be paid to the applicant, if such amount is relatable to--

(a) rebate of duty of excise on excisable goods exported out of India or on excisable material used in the manufacture of goods which are exported out of India;

(b) unspent advance deposits lying in balance in the applicant's account current maintained with the Commissioner of Central excise;

(c) refund of credit of duty paid on excisable goods used as inputs in accordance with the rules made, or any notification issued, under this Act;

(d) duty of excise paid by the manufacturer, if he had not passed on the incidence of such duty to any other person;

(e) the duty of excise borne by the buyer, if he had not passed on the incidence of such duty to any other person;

(f) the duty of excise borne by any other such class of applicants as the Central Government may, by notification in the Official Gazette, specify:

Provided further that no notification under clause (f) of the first proviso shall be issued unless in the opinion of the Central Government the incidence of duty has not been passed on by the persons concerned to any other person.

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

Explanation.-- For the purposes of this section, ... (B) `relevant date' means --

(f) in any other case, the date of payment of duty."

20. The said Amendment Act also amended Section 11-C, besides introducing Section 11-D and an entire new chapter, Chapter II-A. Since Section 11-C does not fall for our consideration, we need not refer to it. Section 11-D reads as follows:

11D. Duties of excise collected from the buyer to be deposited with the Central Government (1) Notwithstanding anything to the contrary contained in any order or direction of the Appellate Tribunal or any court or in any other provision of this Act or the rules made thereunder, every person who has collected any amount from the buyer of any goods in any manner as

> representing duty of excise, shall forthwith pay the amount so collected to the credit of the Central Government.
>
> (2) The amount paid to the credit of the Central Government under sub-section (1) shall be adjusted against duty of excise payable by the person on the finalisation of assessment and where any surplus is left after such adjustment, the amount of such surplus shall either be credited to the Fund or, as the case may be, refunded to the person who has borne the incidence of such amount, in accordance with the provisions of section 11B and the relevant date for making an application under that section in such cases shall be the date of the public notice to be issued by the Assistant Commissioner of Central Excise."

Two things which emerge from the reading of the aforesaid judgment and need to be emphasized are as under:

> (i) in attracting the principle of unjust enrichment it is not only the actual burden which is passed on to the another person that would be taken into consideration even if the incident of such duty had not been passed on by him to any other person;
>
> (ii) the principle of unjust enrichment shall be applicable in the case of captive consumption as well. According to the Court the principle of unjust enrichment would be applicable in both the circumstances.

This case, therefore, makes it clear that the principle of unjust enrichment is applicable even when the goods are used for captive consumption. No doubt, in the said case the goods with which the Court was concerned was raw material, imported and consumed in the manufacture of the final product. The question is as to whether this principle would be extended to capital goods also, as it was in respect of raw material. This was left open in Mafatlal Industries case. As it falls for determination in the present case, we are addressing this issue. To answer this issue, we may drawn some sustenance from the judgment of this Court in the case of Indian Farmers Fertiliser Coop.Ltd. vs. C.C.E.Ahmedabad (1996 (86) ELT 177 (S.C.). Though that case is concerned with the exemption of Raw Naptha was used to produce ammonia which is used in effluent treatment plant. Notification No.187/61-CE provided for exemption to such Raw Naptha as is used in the manufacture of ammonia provided such ammonia is used elsewhere in the manufacture of fertilizers. The question was as to whether the ammonia used in the off-site plants is also ammonia which is used elsewhere in the manufacture of

fertilizers. The court answered the question in the affirmative thereby holding that exemption provided under Notification 187/61-CE shall be available to the assessee.

However, what follows from the reading of the said judgment is that if a particular material is used for manufacture of a final product, that has to be treated as the cost of the product. Insofar as cost of production is concerned, it may include capital goods which are a part of fixed cost as well as raw material which are a part of variable cost. Both are the components which come into costing of a particular product. Therefore it cannot be said that the principle laid down by the Court in Solar Pesticides would not extend to capital goods which are used in the manufacture of a product and have gone into the costing of the goods. In order to come out of the applicability of the doctrine of unjust enrichment, it therefor becomes necessary for the assessee to demonstrate that in the costing of the particular product, the cost of capital goods was not taken into consideration. We, thus, are of the opinion that the view taken by the Tribunal is not correct in law.

We also find from the reading of the judgment of Tribunal that the Tribunal has observed that capital goods viz. ESPs have been only used captively for pollution control purpose and the same is not used for processing or manufacturing of any final product and therefore there is no question of passing on the burden of duty to any one. These observations are clearly erroneous in law in view of the judgment of this Court in Indian Farmers Fertilisers COOP. Ltd.

Accordingly, the judgment of the Tribunal is set aside. However, in the facts of the present case we are of the opinion that one opportunity should be granted to the respondent to demonstrate to the assessing authority that the cost of the capital goods was not included in the costing of the machinery. Only if the respondent is able to prove the aforesaid aspect it shall be entitled to the refund and not otherwise.

The appeal is allowed in the above terms.