(1991) 12 CAL CK 0001

Calcutta High Court

Case No: Matter No. 922 of 1991

Indo Metal Industries		APPELLANT
	Vs	
Asstt. Collector of Central Excise		RESPONDENT

Date of Decision: Dec. 20, 1991

Acts Referred:

- Central Excises and Salt Act, 1944 - Section 11A, 11B, 11B(2), 11B(3), 37B

Citation: (1992) 59 ELT 35

Hon'ble Judges: Ruma Pal, J

Bench: Single Bench

Final Decision: Allowed

Judgement

@JUDGMENTTAG-ORDER

Ruma Pal, J.
The subject matter of this writ application is an order dated 6th March 1991 passed by the Assistant Collector of Central Excise Calcutta rejecting the petitioner''s application for refund of monies paid by the petitioner to the Excise Authorities in excess of what was lawfully due.

2. The petitioner carries on business of copper coating and coiling of welding wires, anodizers and electro-platings (hereinafter referred to as the goods). In 1975 the Excise Authorities conducted a raid on the petitioner''s factory and seized the goods on the ground that the petitioner was carrying on business in violation of the provisions of the Central Excises and Salt Act, 1944 (hereinafter referred to as the Act). Proceedings were commenced against the petitioner and an adjudication order was passed classifying the goods produced by the petitioner under Tariff Item No. 50 of the First Schedule of the Act as it then stood. The petitioner preferred an appeal from the adjudication order. The appeal was rejected. The petitioner preferred a further appeal to the Customs, Excise and Gold (Control) Appellate Tribunal (referred to as CEGAT) against the order of the Appellate Collector. The

Tribunal held that the goods did not fall under the Tariff Item No. 50 of the First Schedule to the Act. The Order of the Appellate Collector was accordingly set aside. The Department was given the option to consider classification of the goods either under Tariff Item 26AA (ia) or Item 68 of the First Schedule to the Act.

3. By letters dated 7-12-1983, 17-12-1983, 4-1-1984 and 1-2-1984 the petitioner prayed for reclassification of the goods and consequent refund of excess Central Excise duty paid by the petitioner.

4. The Excise Authorities, however, preferred an appeal from the order of the Tribunal before the Supreme Court. By an order dated 27-2-1984 the Supreme Court dismissed the appeal. During this entire period the petitioner had continued to pay excise duty on the goods on the basis that they were excisable under Tariff Item No. 50 of the Schedule to the Act under protest.

5. On 3rd December 1986, the Assistant Collector classified and approved the Classification List submitted by the petitioner in respect of the goods for the periods 1-3-1986 to 21-3-1986 and from 1-4-1986 onwards. The goods were classified under Heading No. 7213.90 of the Schedule to the Central Excise Tariff Act, 1986 (hereinafter referred to as the 1986 Act) being equivalent to Tariff Item No. 26AA (ia) of the erstwhile First Schedule to the Act.

6. On 25-2-1987 the petitioner filed an application for refund claiming the refund of the Central Excise duties which had been paid by the petitioner on the basis that the goods were classifiable under Item No. 50 of the erstwhile First Schedule to the Act. By an Order dated 1/23-8-1989, the Assistant Collector rejected the petitioner''s application. The petitioner preferred an appeal from the order of rejection. The appeal was allowed by the Collector of Central Excise (Appeals) on 11-4-1990. The Assistant Collector was directed by the Collector to "reconsider the case of the appellant for refund on merits in the light of the clear orders of the CEGAT".

7. No steps were however taken by the Assistant Collector to comply with the orders of the Collector (Appeals). By letters dated 25-4-1990, 12-6-1990 and 12-7-1990, the petitioner wrote to the Assistant Collector to dispose of the petitioner''s application for refund. The Assistant Collector did not respond. Being aggrieved by the inaction on the part of the Assistant Collector, the petitioner filed a writ petition before this Court (referred to as the first writ petition) for inter alia a direction on the respondents to consider the petitioner''s application for refund. The first writ petition was disposed of by an order dated 12-2-1991 by this court. That order provides as follows:

"This application is disposed of by directing the adjudicating authority being the respondent No. 1 to reconsider the case of the petitioner for refund on merits in the light of the orders of the Tribunal as stated in the Collector of Central Excise (Appeals'') Order dated 2-8-1990 within a period of 4 weeks from date. The petitioner will be at liberty to raise all points taken in this writ petition before the

adjudicating authority. The adjudicating authority will pass a reasoned order within the time specified above after giving the petitioner an opportunity of being heard. In the event the respondent No. 1 comes to the conclusion that refund is due of any amount to the petitoner such refund shall be made within a period of 4 weeks from the date of the order which the petitioner will accept without prejudice to its rights and contentions. Since no affidavit has been filed it is recorded that the allegations contained in the petition are not admitted."

No appeal has been preferred from this order.

8. The Assistant Collector gave the petitioner a hearing and disposed of the petitioner''s application for refund finally by an order dated 6th March 1991. In that order the Assistant Collector held that the petitioner''s claim for Rs. 15,23,530.30 was not justified but that the petitioner should have claimed for refund for the amount of Rs. 10,70,973.04. This was done on the basis that prior to the classification under the 1986 Act the goods were liable to excise duty under Tariff Item 26AA (ia) of the erstwhile First Schedule to the Act. However, the Asstt. Collector rejected the petitioner''s claim for refund on the grounds that the petitioner was not the actual payer of Central Excise duty. According to the Assistant Collector the actual payer of the duty was the ultimate actual consumer of goods. According to the Assistant Collector only the actual payer of the Central Excise duty could be the claimant for refund.

9. The petitioner has impugned this decision of the Assistant Collector and has contended:

i) that the petitioner was entitled to refund in terms of Section 11B(3) of the Act.

ii) that the petitioner could not be refused the refund of duty on the ground that the burden of duty had been passed on to the customers. Reliance has been placed on the following decisions in this connection:

(a) Orient Paper and Industries Ltd. Vs. Union of India (UOI) and Others,

(b) Triveni Sheet Glass Works v. Union of India, 1981 Taxation Law Report 2796.

(c) Bombay Burmah Trading Corpn. Ltd. Vs. Union of India,

(d) Gonterman Peipers (India) Limited Vs. Additional Secretary to the Government of India,

(e) Radheshyam Tulsian Vs. Collector of Customs and Others,

(f) Unreported Decision of this Court dated 18-1-1991 in Matter No of 1991: Girdhar Gopal Modi v. Collector of Customs and Ors.

(g) Dulichand Shreelal Vs. Collector of Central Excise and Others,

(h) Dayapara Tea Co. Ltd. Vs. Assistant Collector of Central Excise and Others,

The petitioner has also relied upon a Circular issued by the Central Board of Excise & Customs dated 28-3-1990 which states that "there is no provision in the Central Excises & Salt Act, 1944, or the rules framed thereunder empowering the Department to reject the refund claims on the grounds that sanction of the claim would result in a fortuitous benefit to the manufacturers".

iii) That the refund to the petitioner could not have been refused in view of the specific direction of this Court on the first writ petition.

10. On behalf of the respondents it had been contended that-

i) Disputed questions of fact were involved and therefore the application should not be entertained by the court in its writ jurisdiction.

ii) The petitioner had an alternative remedy available to it under the Act.

iii) If the refund was allowed to the petitioner it would be detrimental to the actual consumers who had ultimately paid the duty. Furthermore it would unjustly enrich the petitioner.

11. None of the contentions raised by the respondents is acceptable. The facts as related above have not been disputed by the respondents in their affidavit-in-opposition. The petitioners are, in fact, not claiming the amount of Rs. 15,23,536.30 but only the amount of Rs. 10,70,973.04 as determined by the Assistant Collector himself. There is thus no dispute whatsoever justifying rejection of the writ petition.

12. Secondly this court had specifically directed the respondent No. 1 to refund the amount which was found due. It was not open to the Assistant Collector to sit in appeal on the direction of this Court as directed in the order dated .12-2-1991 passed on the first petition. Furthermore, this court has already expressed its view in Girdhar Modi (supra) relating to refund of taxes - that it was not within the domain of the Assistant Collector to go into the question of unjust enrichment etc.

13. The law on the subject is well established as far as this court is concerned and there would be no justification for further delaying matters by sending the matter back to the authorities to determine the issue. In any event the Court has entertained the application and the affidavits have been filed. As held by the Supreme Court in the case of L. Hirday Narain Vs. Income Tax Officer, Bareilly, the Court should not reject the writ application at this stage merely on the ground of alternative remedy.

14. With regard to the third contention of the respondents in my view having found that an amount of Rs. 10,70,973.04 was refundable, the Assistant Collector had no jurisdiction to deny payment of the amount to the petitioner contrary to the directive of this Court. The refusal of the Assistant Collector is also otherwise unjustified.

15. As held by a Single Learned Judge of this Court in the case of Orient Paper and Industries Ltd. (supra)

"If the excise authority thereafter refused to refund the amount which was unlawfully realised from the petitioner, that will be morally and legally a wrongful act. If the petitioner''s claim is denied, it will be unlawful enrichment on the part of the Government."

16. Again in Gonterman Peipers (India) Ltd. (supra) another Learned Judge of this Court held

"If there is a short levy of duty it is the manufacturer who would be liable to pay the same on demand being raised by the Central Excise Authority u/s 11A of the said Act. In such a case, Central Excise Authority will not consider whether the manufacturer would be entitled to realise the short levied duty subsequently from the customers. According to the Excise Authorities this is not a relevant consideration in demanding short levied duty. By the time such duty is demanded the manufacturers may have sold the goods and they cannot realise it from the customers. This hardship has not been a ground for not imposing the burden on the manufacturer. If this is an irrelevant consideration, on a parity of reasoning if there is an excess payment it is the manufacturer who shall be entitled to refund u/s 11B of the said Act."

17. I respectfully adopted this reasoning expressed by both Learned Judges.

18. Moreover the scheme of Section 11B of the Act clearly shows that the refund is to be made to the person from whom excise duty has been collected by the Excise Authorities. Section 11B(2) provides as follows:-

"(2) ... If no receipt of any such application the Assistant Collector of Central Excise is satisfied that the whole or any part of the duty of excise paid by the applicant should be refunded to him, he may make an order accordingly." (Emphasis supplied).

19. As far as the Excise Authorities are concerned the excise duty is paid by the assessee. Section 11B(3) provides as follows:-

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

The phrase ''such person'' refers to the applicant for refund.

20. The refund in this case became due to the petitioner by virtue of the order of CEGAT. This was clarified by the order of the Collector (Appeals) on 11-4-1990. The respondents were therefore, under a statutory duty to refund the amount to the petitioner.

21. Finally the circular issued by the Central Board of Excise and Customs dated 28-3-1990 addressed to all Principal Collectors of Customs and Central Excise reads as follows:-

"... I am directed to invite your attention to Board''s telex F. No. 390/93/88-AU dated 22-9-88 and 10-11-89 and letter of even number dated 18-11-89 and letter of even number dated 18-11-88 regarding various Court pronouncements for denying refund of Central Excise duties on the ground of fortuitous benefits and undue enrichment.

... In this connection, attention is invited to Board''s instructions issued vide F. No. 210/30/81-CX.6 dated 10-8-81 wherein it has been clarified that there is no provision in the Central Excises & Salt Act, 1944, or the rules framed thereunder empowering the department to reject refund claims on the ground that sanction of the claim would result in fortuitous benefit to the manufacturer.

... The matter has been examined by the Board once again and it has been decided to reiterate instructions dated 10-8-81. A telex in this connection was already sent on 21-3-90 (F. No. 390/30/88-AU) to all concerned.

... All pending refund cases may be decided in the light of the above instructions F. No. 210/30/81-CX.6 dated 10-8-81."

22. These instructions are binding on all Central Excise Officers u/s 37B of the Act.

23. Accordingly this writ application is allowed. The impugned order dated 6th March 1991 is set aside insofar as it denies the refund of Rs. 10,70,973.04 to the petitioner. The respondents are directed to forthwith grant the refund of the amount of Rs. 10,70,973.04 to the petitioner by 15th January, 1992. Having regard to the facts of this case the petitioner will be entitled to the costs of this application which are assessed at 25 GMs.

24. Let xerox copy of this judgment be given to the parties upon the undertaking to apply for the certified copy of the judgment and payment of usual charges.