A M/S. HINDUSTAN METAL PRESSING WORKS

v.

COMMISSIONER OF CENTRAL EXCISE, PUNE

FEBRUARY 27, 2003

B [M.B. SHAH AND D.M. DHARMADHIKARI, JJ.]

Central Excise and Salt Act, 1944; Sections 11-A & 11-D:

Exemption Notification No.2/88—Refund of excise duty to assessee for C *a certain period after approval of classification list—Assistant Collector ordering recovery of the amount refunded on the principle of unjust enrichment—Affirmed by the Appellate Authorities/Tribunal—On appeal, held, since assessee had neither filed any application for refund of excise duty nor collected from buyer any amount in excess of duty determined on such excisable* D *goods, principle of unjust enrichment not attracted—Central Excise Rules—Rule 173-I.*

Appellant-assessee had removed certain excisable goods at the existing rate of duty awaiting approval of such goods under classification list for claiming benefit of exemption notification thereon. Revenue E **authorities granted refund of excise duty for certain period after approval of such classification list. However, Assistant collector, after issuing a show cause notice, confirmed the demand for recovery of the refunded amount of duty for the same period applying the principle of unjust enrichment. Appellate authorities as well as Tribunal rejected the appeals of the** F **assessee. Hence the present appeal.**

It was contended for the assessee that since refund order was based on assessment and there was no error in the assessment, the principle of unjust enrichment would not be applicable.

On behalf of the Revenue, it was submitted that assessee had G **continuously collected excise duty at enhanced rate in spite of exemption on such goods and paid the same to Revenue with the intention to get the same by way of refund and thereby enriched itself with the public money, thus, Revenue authorities rightly recovered the same amount of excise duty from the assessee.**

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Allowing the appeal, the Court

HELD: 1. The assessee has not filed any application under Section 11-B of the Central Excise and Salt Act for refund of the excise duty paid by him. Thus, there is no question of application of principles of unjust enrichment as incorporated in Section 11-B of the Act. Other relevant provision, viz., Section 11-D of the Act *inter alia* provides that every person who is liable to pay duty under the Act or the Rules made thereunder, and has collected any amount in excess of the duty assessed or determined and paid on any excisable goods under the Act or the rules made thereunder from the buyer of such goods in any manner as representing duty of excise is required to forthwith pay the amount so collected to the credit of the Central Government. If such amount is not paid to the credit of the Central Government, the Central Excise Officer can serve a notice requiring him to show cause why the said amount should not be paid by him to the credit of the Central Government. In the instant case the amount was refunded to the assessee, hence this provision is also not attracted. Past finalized transaction could not be reopened by holding that refund was erroneously granted as there was unjust enrichment.

[407-B-E]

***Serai Kella Glass Works Pvt. Ltd.* v. *Collector of Central Excise, Patna,* [1997] 4 SCC 641]; *Mafatlal Industries Ltd. and Ors.* v. *Union of India and Ors.*, [1997] 5 SCC 536 and *Sinkhai Synthetics & Chemicals (P) Ltd.* v. *Collector of Central Excise, Aurangabad,* [2002] 9 SCC 416, relied on.**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2050 of 2000.

From the Judgment and Order dated 20.10.1999 of the Central Excise, Customs and Gold (Control) Appellate Tribunal, New Delhi in A. Nos. E/ 779//91-B 1 in F.O. No. 606-607 of 1999-B.

Vikram Nankani, Ramesh Singh, Ms. Divya Roy. Ms. Vanita Bhargava and Ms. Bina Gupta for the Appellant.

N.K. Bajpai, Hemant Sharma and B. Krishna Prasad for the Respondent.

The Judgment of the Court was delivered

SHAH, J. M/s Hindustan Metal Pressing Works removed the excisable goods at the effective rate of duty awaiting approval of their classification list

A No. 2/88 in which they claimed benefit of exemption Notification No.175/86-CE dated 1.3.1986. In pursuance of the approval of the classification list on 21.6.1988. The Range Superintendent granted the refund of excise duty for the months of April 1988 to August 1988.

Thereafter, a show-cause notice dated 22.2.1989 was issued for B recovering the said amount on the ground that it was erroneously refunded. By order dated 8.2.1990, the Assistant Collector, Central Excise confirmed the demand for a sum of Rs. 2,36,515.55 on the basis of principles of unjust enrichment by the assessee. The appeal against the said order was dismissed by the Collector (Appeals) by judgment and order dated 20.11.1990. The C Customs, Excise & Gold (Control) Appellate Tribunal New Delhi (hereinafter referred to as 'the Tribunal') also dismissed the appeal by impugned judgment and order dated 20.10.1999. That order is challenged by filing this appeal.

Learned counsel appearing on behalf of the appellant submitted that the orders passed by the authorities below are, on the face of it, illegal and *de* D *hors* the statutory provision. He contended that the foundation for initiating the proceedings under Section 11-A of the Central Excise Act, 1944 (hereinafter referred to as 'the Act') in the present case is so-called erroneous refund of the excise duty paid by the appellant. At the time when the refund order was passed on the basis of Rule 173-I of the Central Excise Rules (hereinafter referred to as 'the Rules), there was no question of erroneous E refund. It was based on assessment of RT-12. Admittedly, there is no mistake or error in such assessment or refund. Hence, it is his submission that principles of unjust enrichment would not be applicable in the present case.

As against this, it has been pointed out that though classification list F was approved in June 1988, the appellant continued to collect duty of excise on enhanced rate from the beginning of financial year 1988-89 even though they were availing benefit of exemption Notification No. 175/86 in the preceding financial year and, therefore, Assistant Commissioner was justified in coming to the conclusion that the appellant had intentionally paid excise duty with an intent to get the same by way of refund and to become enriched G with the public money.

In the present case, it is admitted that duty was paid in excess of effective rate of duty and the excess duty paid was refunded while assessing the RT-12 Returns. The question, therefore, is—whether the principles of 'unjust enrichment' as incorporated in amended provisions would be applicable H to the facts of the present case?

Admittedly, refund of the excise duty paid in excess was granted in 1989. Thereafter, sub-section (2) of Section 11-B which incorporates the principle of 'unjust enrichment' had come into force w.e.f. 20.9.1991, which *inter alia* provides that duty of excise paid in excess would be refunded if the manufacturer had not passed on the incidence of such duty to any other person. This provision is not at all attracted. There is basic error in approach by the Authorities below as the assessee has not filed any application under Section 11B of the Act for refund of the excise duty paid by him. There is no question of application of principles of unjust enrichment as incorporated in Section 11B. Other relevant provision would be Section 11D which also came into force from 20.9.1991. It *inter alia* provides that every person who is liable to pay duty under the Act or the Rules made thereunder, and has collected any amount in excess of the duty assessed or determined and paid on any excisable goods under the Act or the rules made thereunder from the buyer of such goods in any manner as representing duty of excise is required to forthwith pay the amount so collected to the credit of the Central Government. If such amount is not paid to the credit of the Central Government, the Central Excise Officer can serve a notice requiring him to show cause why the said amount should not be paid by him to the credit of the Central Government. As stated above, the amount was refunded to the assessee in 1989, hence there is no question of application of this provision.

Further, it would be difficult to hold that past finalized transaction could be reopened by holding that refund was erroneously granted as there was unjust enrichment. Considering Rule 173-I of the Rules and Section 11-A of the Act, this Court in *Serai Kella Glass Works Pvt. Ltd.* v. *Collector of Central Excise, Patna,* [1997] 4 SCC 641, held thus:-

> **"Rule 173-I.** ***Assessment by proper officer*** — (1) The proper officer shall on the basis of the information contained in the return filed by the assessee under sub-rule (3) of Rule 173-G and after such further inquiry as he may consider necessary, assess the duty due on the goods removed and complete the assessment memorandum on the return. A copy of the return so completed shall be sent to the assessee.
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> (2) The duty determined and paid by the assessee under Rule 173-F shall be adjusted against the duty assessed by the proper officer under sub-rule (1) and where the duty so assessed is more than the duty determined and paid by the assessee, the assessee shall pay the deficiency by making a debit in the account-current within ten days of receipt of copy of the return from the proper officer and where

A such duty is less, the assessee shall take credit in the account-current for the excess on receipt of the assessment order in the copy of the return duly countersigned by a Superintendent of Central Excise.

16. The assessee is entitled under Rule 173-F to determine his liability for duty on the excisable goods manufactured by him and to remove B such goods on payment of duty on self-assessment in accordance with the provisions laid down in the Rules. But this is only the first step in making of the assessment. The proper officer is empowered to assess the duty on the goods so removed by the assessee and complete the assessment on the return filed by the assessee. A copy C of the return so computed by the proper officer has to be sent to the assessee. The duty assessed and paid by the assessee on self-assessment will be set off against the duty assessed by the proper officer. If the duty paid by the proper officer on final assessment is more than the duty determined and paid by the assessee, the assessee has to pay the deficiency by making a debit in the account current within ten days D of the receipt of the copy of the return from the proper officer. *If the duty on final assessment payable by the assessee is less than what he has actually paid, the assessee is entitled to take credit in the account-current for the excess payment. No question of any show-cause notice under Section 11-A arises* at this stage. The duty has to be paid by making adjustment in the account-current which has to be maintained E by the assessee within ten day's time."

Further, similar contention was specifically dealt with in *Mafatlal Industries Ltd. and Ors.* v. *Union of India and Ors.*, [1997] 5 SCC 536 and it has been held that provisions of Section 11B do not apply where refund has F been finally and unconditionally made. The relevant discussion (in paragraph) 104 is as under:-

"104. Rule 9-B provides for provisional assessment in situations specified in clause (a), (b) and (c) of sub-rule (1). The goods provisionally assessed under sub-rule (1) may be cleared for home G consumption or export in the same manner as the goods which are finally assessed. Sub-rule (5) provides that "when the duty leviable on the goods is assessed finally in accordance with the provisions of these Rules, the duty provisionally assessed shall be adjusted against the duty finally assessed, and if the duty provisionally assessed falls short of or is in excess of the duty finally assessed, the assessee shall H pay the deficiency or be entitled to a refund, as the case may be."

Any recoveries or refunds consequent upon the adjustment under sub-rule (5) of Rule 9-B will not be governed by Section 11-A or Section 11-B, as the case may be....."

Relying upon the aforesaid judgment, in a similar matter, the Court in *Sinkhai Synthetics & Chemicals (P) Ltd.* v. *Collector of Central Excise, Aurangabad,* [2002] 9 SCC 416 allowed the appeal and rejected the contention of the Revenue that the excise duty paid under protest also would be covered by the provisions of Section 11B.

In the result, the appeal is allowed. The impugned order passed by the Tribunal confirming the orders passed by the Assistant Collector and the Collector (Appeals) is set aside. There shall be no order as to costs.

S.K.S. Appeal allowed.