

**IN THE CUSTOMS, EXCISE & SERVICE TAX
APPELLATE TRIBUNAL, CHENNAI**

Excise Appeal No.42355 of 2014

(Arising out of Order in Appeal No. 72/2014 (M-IV) dated 6.8.2014 passed by the Commissioner of Central Excise (Appeals), Chennai)

M/s. Raman Sinhas Electricals

P.B. No. 6979

Door No. 22, 137

Kaikankuppam Main Road

Alwarthirunagar, Chennai – 600 087.

Appellant

Vs.

Commissioner of GST & Central Excise

Chennai Outer Commissionerate

Newry Towers, 12th Main Road

Anna Nagar, Chennai – 600 040.

Respondent

APPEARANCE:

Smt. Radhika Chandrasekar, Advocate for the Appellant

Shri M. Selvakumar, Authorized Representative for the Respondent

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Hon'ble Shri M. Ajit Kumar, Member (Technical)

Final Order No. 41070/2024

Date of Hearing : 18.07.2024

Date of Decision: 09.08.2024

The present appeal arises out of Order in Appeal No. 72/2014 (M-IV) dated 6.8.2014 passed by the Commissioner of Central Excise (Appeals), Chennai.

2. Brief facts of the case are that the appellant is engaged in the manufacture of railway carriage fans falling under Heading No. 8414 of the CETA, 1985. They filed three refund claims totalling Rs.30,34,895/- under sec. 11B of the Central Excise Act, 1944 in respect of the duty earlier paid under protest. After due process of law, the original authority rejected the refund claims on the ground that they were not

eligible for refund as the same was hit by the bar of unjust enrichment and vacated the payment of duty paid under protest and credited it to Consumer Welfare Fund under sec. 12C of the Central Excise Act, 1944. Aggrieved by the said order, the appellants filed appeal before Commissioner (Appeals) who vide the order impugned herein rejected the appeal filed by the appellants. Hence the present appeal.

3 Smt. Radhika Chandrasekar, learned Advocate appeared for the appellants and Shri M. Selvakumar, learned Authorized Representative appeared for the respondent.

3.1 The Ld. Counsel for the appellant submitted that the appellant as per the contract with the principal contractor M/s. Siemens (India) Ltd, Mumbai, had manufactured Railway Carriage Fans falling under Chapter 84 of the Central Excise Tariff Act, 1985 and cleared the goods to Integral Coach Factory, Chennai for Mumbai Railway Vikas project (MRVC project) of the Ministry of Railways under World Bank funding. The appellant had initially paid the excise duty under abundant caution under protest but later filed 3 refund claims on 20.08.2010 for an amount of Rs.30,34,895/- (Rs.21,46,723/-, Rs.7,82,102/- & Rs.1,06,070/-) seeking refund of excise duty paid on removal of the final product since the product could be cleared without payment of duty in terms of Notification No.108/1995 dated 28.08.1995 as the MRVC project was funded by the World Bank. She stated that;

- 1) The invoice raised against M/s. Siemens (India) Ltd by the Appellant clearly mentions that the duty is paid under protest, thereby informing the principal contractor that the duty collected is subject to refund.

- 2) The OIO in Para 14 acknowledges that the contract is covered under the exemption provided under Notification No. 108/1995 and that it does not require any duty payment.
- 3) The Appellate Authority records the undisputed fact that the Appellant received letters from the principal contractor which informed that the contract is covered by the Notification so the duty already collected would be recovered from the Appellant and requested not to collect duty in the future. The Appellate Authority also acknowledges that an amount which exceeds the amount claimed under the 3 Refund Applications was withheld by the principal contractor.
- 4) The principal contractor vide letter dated 12.06.2009 has informed the Appellant that in terms of Notification No.108/1995, the final product can be cleared without payment of duty and requested the Appellant to not charge excise duty on supplies made to the principal contractor.
- 5) The principal contractor vide letter dated 12.06.2009 had informed that the duty already collected by the Appellant would be recovered by the principal contractor.
- 6) The principal contractor had executed an indemnity bond dated 01.10.2009 indemnifying the Appellant against damages for non-payment of excise duty in light of Notification No.108/1995.
- 7) The principal contractor had withheld payment which exceeds the amount claimed as refund in order to adjust the excise duty already paid to the Appellant.

- 8) There is no reason to believe that the burden of duty has been passed on to subsequent customers, especially since the goods are supplied to the Ministry of Railways.
- 9) Reliance is placed on the decision of the Hon'ble Supreme Court in the case ***CCE Vs. Addison & Co Ltd (2016) 339 ELT 177 (SC)*** held that where it is clear that the Assessee has borne the burden of duty, it cannot be said that the Assessee is not entitled for the refund of the excess duty paid.

3.2 The learned Authorized Representative for the respondent reiterated the findings in the impugned order.

4. I have heard the submissions made by both the parties. There is no dispute that the appellant was eligible for the duty exemption under Notification No.108/1995 dated 28.08.1995 as the MRVC project was funded by the World Bank. In fact, the amount claimed as refund was credited to the Consumer Welfare Fund under sec. 12C of the Central Excise Act, 1944, by the Proper Officer. It was the view of the Proper Officer that the appellant was not eligible for the refund claims on the ground that the same was hit by the bar of unjust enrichment as the appellant did not file any documentary proof to the effect that the appellant has not passed on the full incidence of duty to M/s. Siemens (India) Ltd at any point of time and that as per Section 12B of the Central Excise Act, 1944, any person who has paid the excise duty shall unless the contrary is proved, be deemed to have passed on the full incidence of such duty to the buyer of such goods. The appellant on the other hand is of the opinion that they are due for receiving the refund since M/s. Siemens (India) Ltd, the principal contractor, vide letter dated 12.06.2009 had informed that the duty already collected

by the Appellant would be recovered by the principal contractor. The principal contractor had withheld payment which exceeds the amount claimed as refund in order to adjust the excise duty already paid to the Appellant.

5. The doctrine of unjust enrichment or unjust benefit which is at the heart of section 12B, is meant to prevent a person from retaining the duty collected from another, for example his customer, on the one hand and also collect the same money paid as duty from the State on the ground that it has been collected from him contrary to law. I find that the issue of unjust enrichment has been dealt with elaborately under the landmark nine Judge verdict of the Hon'ble Supreme Court in **Mafatlal industries Ltd Vs Union of India** [1997 (89) E.L.T. 247 (S.C.)], decided by a majority of 8:1. Relevant portion of the same is reproduced below;

“DECISIONS OF THIS COURT WHICH HAVE APPLIED THE DOCTRINE OF UNJUST ENRICHMENT

43. Shiv Shanker Dal Mills etc. v. State of Haryana & Ors. etc. [1980 (1) S.C.R. 1170] arose with reference to market fees collected under a provision which was struck down by this Court in Kewal Krishan Puri v. State of Punjab & Ors. [1979 (3) S.C.R. 1217]. The enhancement of market fee from two to three percent was held to be bad, whereupon the traders demanded refund of the excess market fee collected from them. This Court held that though refund of the fee so collected may be legally due to the traders, the traders may be repaid amounts only to the extent they have not passed on the burden to their customers. To the extent they have passed on, it held, they were not entitled. This principle was deduced from the concept of distributory justice underlying Articles 38 and 39 of the Constitution of India as also from the discretionary nature of the power under Article 226 of the Constitution. Following the principle enunciated by this Court in Newabgunj Sugar Mills v. Union of India & Ors. [1976 (1) S.C.R. 803], the Court devised a scheme of refund by the market committees providing for refund of amounts to those from whom illegal collections had been made by the traders.

44. Amar Nath Om Prakash v. State of Punjab & Ors. etc. [1985 (2) S.C.R. 72] was also a case arising with reference to market fee, i.e., an indirect tax. Section 23A of the Punjab Agricultural Produce Markets Act enabled the market committees to “retain the fee levied and collected by it from a licensee in excess of that leviable under

Section 23, if the burden of such fee was passed on by the licensee to the next purchaser of the Agricultural Produce in respect whereof such fee was levied and collected". The validity of the said provision was called in question in this case. This Court negated the challenge holding that the primary purpose of the said section was to prevent refund of licence fee to dealers who have already passed on the burden of such fee to purchasers and who want to unjustly enrich themselves by obtaining refund from the market committee. **The said provision, it was held, recognised that the consumer public who have borne the ultimate burden are the persons really entitled to refund** and since the market committee represents their interests, it is entitled to retain the amount. It was pointed out that the provision for retention by market committee had to be made because of the practical impossibility of tracing the individual purchasers and consumers who have ultimately borne the burden. It was held that it was "really a law returning to the public what it has taken from the public, by enabling the Committee to utilise the amount for the performance of services required of it under the Act. Instead of allowing middlemen to profiteer by illgotten gains, the legislature has devised a procedure to undo the wrong item that had been done by the excessive levy by allowing the Committees to retain the amount to be utilised hereafter for the benefit of the very persons for whose benefit the Marketing legislation was enacted." The Court observed the Section 23A was akin to the provision concerned in *Orient Paper Mills Limited v. State of Orissa* [1962 (1) S.C.R. 549] which too disabled a dealer from claiming a refund of the fee paid by him, in case he has already passed on the burden to the next purchaser. The approach adopted by this Court in this case meets our respectful approval.

45. *State of Madhya Pradesh v. Vyankatlal & Anr.* [1985 (3) S.C.R. 561] marks a definite milestone in the application of the doctrine of unjust enrichment. In exercise of the power conferred upon him by the Madhya Bharat Essential Supplies (Temporary Powers) Act, 1948, the Director of Civil Supplies, issued a notification fixing ex-factory prices of sugar for different sugar factories. The supply price was a little higher than the ex-factory price. The notification required the difference between the supply price and the ex-factory price to be credited to the Madhya Bharat Government Sugar Fund. Pursuant to the demands made by the State, the sugar mills deposited certain amounts into the said Fund **under protest** and then instituted suits for refund of the amounts so deposited. The High Court upheld the plea of the sugar mills that the Director of Civil Supplies had no authority in law to fix the ex-factory prices. This meant that the sugar mills were entitled to the refund of the amounts paid by them into the Fund. The State appealed to this Court against the said decision. Following the principle of *Shiv Shankar Dal Mills* and *Amar Nath Om Prakash*, this Court held that even though there is no specific provision in Madhya Bharat Act providing that **the sugar mills are not entitled to refund in case they have passed on the burden to the purchasers**, the said principle can safely be applied to the facts of the case before them. The Court observed :

"The burden of paying the amount in question was transferred by the respondents to the purchasers and, therefore, they were not entitled to get a refund. **Only the persons on whom lay the ultimate burden to pay the amount would be entitled to get a refund of the same.** The amount deposited towards the

Fund was to be utilised for the development of sugarcane. If it is not possible to identify the persons on whom had the burden been placed for payment towards the Fund, the amount of the Fund can be utilised by the Government for the purpose for which the Fund was created, namely, development of sugarcane. There is no question of refunding the amount to the respondents who had not eventually paid the amount towards the Fund. Doing so would virtually amount to allow the respondents unjust enrichment.”

46. We express our respectful agreement with the above approach.

47. The same approach was adopted in the case of entry tax in *Indian Aluminium Company Ltd. v. Thane Municipal Corporation* [1991 (55) E.L.T. 454 (SC) = 1992 Suppl. (1) S.C.R. 480], *Indian Oil Corporation v. Municipal Corporation, Jalandhar* [1993 (1) S.C.C. 333] and in *Entry Tax Officer v. Chandanmal Champalal* [1994 (4) S.C.C. 460].

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73. Sub-section (2), it may be noted, expressly makes the said provision applicable to duty of customs and duties of excise on goods. This fact was also recognised by the Federal Court in *The Province of Madras v. M/s. Boddu Paidanna & Sons* [1942 F.C.R. 90] and by this Court in *R.C. Jall v. Union of India* [1962 Suppl. S.C.R. 436]. In such a situation, it would be legitimate for the court to presume, until the contrary is established, that a duty of excise or a customs duty has been passed on. It is a presumption of fact which a court is entitled to draw under Section 114 of the Indian Evidence Act. It is undoubtedly a rebuttable presumption but the burden of rebutting it lies upon the person who claims the refund (plaintiff/petitioner) and it is for him to allege and establish that as a fact he has not passed on the duty and, therefore, equity demands that his claim for refund be allowed. This is the position *de hors* 1991 (Amendment) Act - and as we shall point out later, the said Amendment Act has done no more than to give statutory recognition to the above concepts. This is the position whether the refund is claimed by way of a suit or by way of a writ petition. It needs to be stated and stated in clear terms that the claim for refund by a person who has passed on the burden of tax to another has nothing to commend itself; not law, not equity and certainly not a shred of justice or morality. In the case of a writ petition under Article 226, it may be noted, there is an additional factor : the power under Article 226 is a discretionary one and will be exercised only in furtherance of interests of justice. This factor too obliges the High Court to enquire and find out whether the petitioner has in fact suffered any loss or prejudice or whether he has passed on the burden. In the latter event, the court will be perfectly justified in refusing to grant relief. The power cannot be exercised to unjustly enrich a person.”

(emphasis added)

6. As stated in the judgment, in the case of an indirect tax that is paid under a mistake of law or fact, its only the persons on whom the ultimate burden to pay the duty amount rests, who would be entitled

to get a refund of the same. Hence unjust enrichment can be invoked when monies paid under a mistake constitute an expense to those who have paid it and they in turn have passed it on to someone else. Hence a rebuttable presumption lies upon the person who claims the refund to establish that as a fact he has not passed on the duty and that there is no double benefit being enjoyed down the line and his claim for refund be allowed.

7. We find that in the instant case the appellant agrees that the duty paid by mistake to government had been passed on to the principal contractor under protest. Its their argument that the principal contractor has later withheld payment which exceeds the amount claimed as refund in order to adjust the excise duty already paid to the appellant. No factual proof of the same has been given or placed before the proper officer nor has it been shown that the duty paid by the principal contractor for whom the amount is an expense in turn have not passed it on to someone else or have not taken credit of the same and set it off against duties to be paid. This could have been done by way of a Chartered Accountant certificate as is in vogue in the case of certain refunds under a well-defined procedure. The averment made by the counsel that the Commissioner (Appeals) has acknowledged that an amount which exceeds the refund claim was withheld by the principal contractor is not correct. The Commissioner (Appeals) only refers to certain letters as contended by the appellant and rejects them and rejects them as not being upto standard (of proof). In fact, the impugned order categorically mentions that the unjust enrichment hurdle has not been crossed. No request has been filed to present these factual details before the Bench and discharge their onus, even at this

distant date. The appellant has hence failed to discharge the burden cast upon them.

8. In the circumstances the impugned order is upheld. The appeal stands rejected and is disposed of accordingly.

(Order pronounced in open court on 09.08.2024)

(M. AJIT KUMAR)
Member (Technical)

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