CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
REGIONAL BENCH AT HYDERABAD
Division Bench
Court – I

Appeal No. E/1219/2010

(Arising out of Order-in-Appeal No. 01/2009 (H-II) (D) CE dated 30.10.2009 passed by Commissioner of Customs, Central Excise & Service Tax (Appeals-II), Hyderabad)

Commissioner of Central Excise,
Hyderabad - II …..**Appellant(s)**

Vs.

M/s VST Industries Ltd., …..**Respondent(s)**

Appearance
Shri Dass Thavanam, Superintendent (AR) for the Revenue.
Ms L. Maithili, Advocate for the Assessee.

Coram:
Hon'ble Mr. M.V. RAVINDRAN, MEMBER (JUDICIAL)
Hon'ble Mr. P. VENKATA SUBBA RAO, MEMBER (TECHNICAL)

Date of Hearing: 04/07/2018
Date of Decision: 04/07/2018

FINAL ORDER No. A/30848/2018

[Order per: P. Venkata Subba Rao]

This appeal is filed by the Revenue against Order-in-Appeal No. 01/2009 (H-II) (D) CE dated 30.10.2009. The respondent filed a memorandum of cross objections which has been connected as an appeal and considered.

2. Heard both sides and perused the records.

3. The facts of the case, after filtering out unnecessary details, are that the respondent herein manufactured cigarettes for M/s ITC on job work basis during period from August, 1979 to September, 1982. The Respondent filed price lists for these goods claiming normal sale price at the factory gate and claiming abatement of Post Manufacturing Expenses (PME). The price lists were provisionally approved under Rule 9B of Central Excise Rules, 1944, pending finalization of post manufacturing expenses. The Original Authority vide Order No. 03/2009 dated 20.03.2009, finalized the price lists as per the judgment of the Hon'ble Supreme Court in the case of *Ujagar Prints Pvt. Ltd.,* [1989 (39) ELT 493 (S.C.)] applicable for job work. He held that the normal prices as well as PME do not apply in this case. The Original Authority found that as a result, an excess duty of Rs. 67,05,743.44/- was paid by the assessee and since the assessee failed to prove that they absorbed the cost, ordered it to be credited to the Consumer Welfare Fund. The Department preferred an appeal against this order and the Commissioner (Appeals) rejected the Department's appeal. It is the case of the respondent, that the price lists were finalized correctly but the refund was wrongly denied to them since unjust enrichment was not applicable during the relevant period. It is also their contention that an amount of Rs. 25,00,000/- claimed as refund pertains to certain ad-hoc payments towards duty made during the period of

provisional assessment, was not taken into consideration at the time of finalization of the assessment.

4. The Revenue's appeal is on the ground that provisional assessment was for the limited aspect of duty liability on post manufacturing expenses claimed as abatement by the assessee and the remaining part of the assessment declared by the assessee in the price list was final. The Order-in-Original passed by the Deputy Commissioner has traversed beyond the show cause notice inasmuch as the provisional assessment was finally assessed based on the decision of the Hon'ble Supreme Court in the case of *Ujagar Prints Limited* which applies to the case is manufactured under job work. The pricelists, according to them, were effectively, revised after a period of 13 years which is not permissible. Therefore, the Order-in-Original must be treated as non-est. The Learned Commissioner (Appeals) had failed to consider these aspects in the impugned order. The Learned Commissioner (Appeals) had rejected the Department's contention with regard to the valuation as well as the assessee's reply in their memorandum of cross objections regarding to non-applicability of unjust enrichment.

5. No appeal has been filed by the assessee before this Bench. However, they have filed memorandum of cross objections in which they have raised the issue of inapplicability of unjust

enrichment for the relevant period. The memorandum of cross objections filed by the assessee before us has been accepted has an appeal. We now proceed to decide the issue on merits.

6. The issue to decided is whether the assessment which was kept provisional during the relevant period should be treated as provisional for the limited period of determining the post manufacturing expenses claimed as abatement by the assessee or it should be treated as provisional for all purposes. It is not in dispute this was a case of manufacture on job work basis. During the relevant period, the valuation of goods manufactured on job work basis is governed by the formula laid down by the Hon'ble Supreme Court in the case of *Ujagar Prints Ltd.,* [1989 (39) ELT 493 (S.C.)]. The Order-in-Original was correct in finalizing the assessments as per principles laid down by the Hon'ble Supreme Court. It is also well settled, that assessment which is provisional is provisional for all purposes and all issues can be decided at the time of finalizing the assessment. There is no provision in the Central Excise Act for limited provisional assessment in respect of each aspect of calculation of the assessable value.

7. The second issue to be decided is whether the question of unjust enrichment would apply in the case of provisional assessment for the period prior to introduction amendment of Section

11B of the Act. Section 11B of the Central Excise Act was amended w.e.f. 01.08.1998 introducing the concept of unjust enrichment. In this case the goods were cleared prior to the introduction of concept of unjust enrichment, i.e., for the period August, 1979 to September, 1982. However, the assessments were finalized subsequent to this date in 2009. The question is whether the principles of unjust enrichment under Section 11B apply to such cases. The constitutional Bench of Apex Court in the case of *Mafatlal Industries Ltd.,* [1997 (89) ELT 247 (S.C.)] it was held that the bar of unjust enrichment would not apply to refunds arising on finalization of provisional assessment for the period prior to the introduction of the concept of unjust enrichment in Section 11B. Therefore, the assessee herein is entitled to refund as consequence of finalization of provisional assessment. The third question to be decided is whether an amount of Rs. 25 lakhs which is claimed by the assessee made during the interim period should also be considered the collected amount of duty during the period of provisional assessment. We find that there cannot be any dispute at all amounts paid before finalizing the assessment. Accordingly, the amount must be taken into consideration.

8. Consequently, the Revenue's appeal is rejected and the cross objections on the appeal filed by the respondent are converted into an appeal and allowed on the question of inapplicability of unjust

enrichment. The amount of Rs. 25 lakhs said to be deposited by the assessee should also be taken into account while calculating the amount of refund which the assessee entitled to as a consequent to finalization of the assessment.

(Operative part of this order was pronounced in open court
on conclusion of hearing)

P. VENKATA SUBBA RAO
MEMBER (TECHNICAL)

M.V. RAVINDRAN
MEMBER (JUDICIAL)

Lakshmi….