CASE NO.:
Appeal (civil) 3980 of 2006

PETITIONER:
Commnr. Of Central Excise, Calcutta

RESPONDENT:
M/s. Panihati Rubber Ltd

DATE OF JUDGMENT: 08/09/2006

BENCH:
S.B. Sinha & Dalveer Bhandari

JUDGMENT:
J U D G M E N T
(Arising out of SLP(C)No.17735/2004)

S.B. Sinha, J.

Leave granted.

The respondent, which is a Company incorporated and registered under the Indian Companies Act, manufactures 'Hose Pipe'. It supplies goods manufactured by it to the Indian Railways. The goods are manufactured in terms of the specifications of the railway administration. Supplies are, however, made against specific contracts. The respondents used to pay 30% basic excise duty and 15% special duty. The goods came to be classified under Sub-Heading 4009.92. The said classification was in dispute. The contention of the manufacturers was that it is classifiable under Sub-Heading 4009.99. The lis ended in favour of the respondent. It, however, obtained clearance of the goods on payment of duties under protest as the products had been classified under classification 4009.92. The respondent filed two applications for refund of Rs.6.30 lakhs, which had already been paid by way of excise duty. The said applications were rejected by the authorities under the Act (Central Excise and Salt Act, 1944) opining that the same would amount to unjust enrichment. The respondent preferred an appeal before the Customs, Excise & Gold (Control) Appellate Tribunal, which was registered as Appeal No.E/R-79/98. The question, which arose before the Tribunal, was : "As to whether the goods supplied to the railway administration included the element of excise duty?" The Tribunal for determining the issue went through the correspondences exchanged by and between the contracting parties, as also the certificate issued by the railway administration and held :

"I have perused the records and considered the rival submissions. According to the contract, the prices were inclusive of excise duty. The subsequent letter from the railways indicated that no amount was provided towards excise duty while pricing was worked out. One letter specifically stated "E.D.-Nil". This would suggest that the price fixed under the contract did not provide for an element towards the Central Excise duty."

While arriving at the said finding, the Tribunal relied upon its own judgment in Cimmco Ltd. Vs. Collector of Central Excise, Jaipur [1999 (107) ELT 246 (Tribunal)], wherein it was held :

"We have given careful consideration to the rival submissions. The clue to the problem in this case lies in a proper understanding of the provisions in the work order particularly with reference to the rates. There is an apparent conflict in what is stated in different parts of the schedule of rates. Thus, as against a note that the rates

are inclusive of all duties, taxes and to and fro handling charges in one place there is another remark regarding the rates under the caption condition of contract which is more elaborate than the earlier referred to sentence. This reads as follows :

(1) Rates

The rates are inclusive of all materials, labour, equipment, lifts, leads, Sales tax, octroi required in connection with completion of work to the entire satisfaction of the Corporation. All the materials are to be supplied by the Contractor unless otherwise stated.

(2) Rates shall be valid till the entire work is 100% complete, and no escalation will be considered at any stage."

An application for reference was filed by the appellant herein before the Calcutta High Court. The Tribunal was directed to refer to the High Court the following questions:

"(i) Whether or not the bar of unjust enrichment will be attracted in a case where duty has been passed on to the buyer of goods not separately as duty but by inclusion in the price as one component of the same?

(ii) Whether the Learned Tribunal was justified in holding that the bar of unjust enrichment would not be attracted when the price is inclusive of duties and taxes following the case of CIMMCO Ltd. Reported in 1999 (107) ELT 246 (Tribunal)?

(iii) Whether the Hon'ble Tribunal was justified in passing the order ignoring the principles of law laid down in the case of Mafatlal Industries reported in 1997 (89) ELT 247 (SC) and the findings of the department indicated in the order in original?"

The High Court, by its impugned judgment, affirmed the findings of the Tribunal, holding :

"Having regard to the definite view expressed by the learned Tribunal that the bar of unjust enrichment was not attracted in the instant case the questions as framed in our view do not require any answer since we agree that having paid the excise duty under protest and there being a subsequent finding that no excise duty was payable in respect of the goods, the respondent company was entitled to refund and there was no question of unjust enrichment in the instant case."

Mr. Harish Chander, learned Senior Counsel appearing on behalf of the appellant submitted that \026

(i) The Tribunal and consequently, the High Court committed an error in passing the impugned judgment in so far as they failed to take into consideration that the question, 'As to whether the price included excise duty or not?', was a comprehensible one, having regard to the terms of the contract.

(ii) Subsequent correspondence by and between the respondent and the railway administration were wholly irrelevant.

Mr. K.V. Vishwanathan, learned counsel appearing on behalf of the respondent, on the other hand, contended\026

i) The findings of the Tribunal being findings of fact, this Court should not interfere therewith.
ii) The question as to whether the assessee has passed on the element of excise duty to its customers, being essentially question of fact, this Court may not exercise its jurisdiction under Article 136 of the Constitution of India.

It is now well settled that despite levy of excise duty in a given situation being held to be illegal, in the event it is found that the assessee in fact passed on the burden of excise duty to its customers, applying the principle of unjust enrichment, the Court would not ordinarily direct refund thereof.

The question whether the excise duty had been passed on to the consumer, however, is essentially a question of fact. It is not in dispute that prior to 1993 goods were being classified under the Sub-Heading 4009.92 of the Schedule appended to the Central Excise Tariff Act, 1985 attracting @30% advalorem as basic excise duty and 15% as special basic duty. It is furthermore not in dispute that the Bombay High Court in the case of M/s. Rubber Products Ltd. vs. Union of India, reported in 1992 (43) ECR 520 held :

"The duty was recovered from the Company on the basis that the product manufactured attracts sub-heading 4009.92 of the Tariff and that was the basis of order passed by the Assistant Collector. The order of the Assistant Collector was set aside by the Appellate Collector and it was ordered that the duty is payable under sub-heading 4009.99 of the Tariff. The order of the Appellate Collector has acquired finality and, therefore, excess duty recovered by the Department is liable to be refunded."

In this case also, the respondent had, in view of the decision rendered by the excise authorities as affirmed by the High Court in M/s. Rubber Products Ltd. (supra), filed a revised classification list. It is only during the pendency of the said application it received four orders from the Railway Administration. The prices fixed for the goods were as under :

"Order Date — Price per unit
16.02.1993 — Rs. 48.90 p.
18.02.1993 — Rs. 46.90 p.
06.04.1993 — Rs. 47.90 p.
10.05.1993 — Rs. 48.65 p."

The excise duty was specified as 'Nil' in the order dated 10th May, 1993. So far as the order dated 6th April, 1993 is concerned, no excise duty was specified. However, in the order dated 16th February, 1993 a stipulation was made by the Railway Administration that the price was inclusive of duty, with a view to avoid the claim made by the respondent at a later stage on the ground that a duty had to be paid. It is also not in dispute that clarifications were obtained by the respondent from the Railway Administration specifically in this behalf. The railway administration by its letter stated :

"Assistant Controller
Central Excise Department
Khardah Division
4,Barabourne Road
Calcutta-700 001

Controller of Stores
N. Rly.
Bonda House
New Delhi.

Sub : This Office Purchase order of 07938759101595
Dt. 10.5.93 for the supply of Hose Pipe VB-504/

M Fix 10,000.

Ref : Firm Letter No.BPE/Sales/M2 (19-D-11-7-01).

This Office Purchase order 07923259101595 dated 10-5-93 for the supply of Hose Pipe VB-504/M @Rs. 48.65 each and 4/CST \026 E.DC Nil Spare copy of the same enclosed for your ready reference :-

Sd/- Illegible
For Controller of Stores"

A certificate was also issued by the Railway Administration on 26.9.1994 stating :

"This is to certify that M/s. BAJORIA RUBBER INDUSTRIES LIMITED, CALCUTTA had supplied the full quantity of 7,000 Nos. of Vaccum Hose Pipe VB-504/M at Rs.48.90 each (inclusive of Excise Duty) plus CST 4%. It is confirmed that the firm has supplied the materials at the ordered rate and payment has been arranged at contracted rate which was always payable irrespective of the Central Excise Duty rate being NIL or otherwise. No separate payment has been arranged for actual CED."

In a letter dated 18.7.1995, the Eastern Railway Administration furthermore contended as under :

"To Dated 18.7.95.

The Assistant Collector
Central Excise
Khardah Division,
4, Braboune Road,
Calcutta-700001.

Dear Sir,

Sub: Purchase from M/s. Bajoria Rubber Industries Ltd. 27, Bentinck Street Calcutta-1.

Ref: Letter No. i) Case No.V(18)\026KDH/BRU/94/ 2600 dt. 21.6.95.

ii) Case No.V(18) 1\026KDH/BRU/ 94/57 dt.4.1.95.

In case of Purchase order No.11/98/23/4/1/81288 dated .4.93, the rate was Rs.47.90 each and WBST @ 4.6% extra, Ex. duty not mentioned in the said P/O payment was made to the diem as purchasers of the P/O.

In case of P.O. No. 11/93/2313/1/78290 dated 18.2.93, the rate was Rs. 46.90 each inclusive of Excise duty and WBST @ 4.6% extra. Payment made accordingly."

If the price for supply of Hose Pipes in respect of the contract dated 10th May, 1993 being @ Rs. 48.65p. did not include the element of excise duty, the same being 'Nil', the Tribunal may be correct in its opinion that the question of excise duty having been passed by the respondent to the Railway Administration would not arise. In respect of the other three orders, wherein the rates quoted was Rs.46.90p., Rs.47.90p. and Rs.48.65p. also the said question would not arise as the rate included the element of excise duty.

The respondents, in our opinion, rightly contended that as the Central Excise Authorities were unwilling to accept the classification under the Sub-Heading 4009.99 with 'Nil' rate of duty, they had no other option but to clear the said goods upon payment of duty under protest, wherein they were required to compute the value in terms of Section 4(4)(d) of the Central Excise Act, 1944.

The respondent, in his counter affidavit, categorically stated :

".....According to the said provision, the value on which duty was payable did not include the amount of excise duty payable. Accordingly, though the contract price did not include any amount on account of duty, the respondent had to deduct from the contract price the amount of duty it was required by the Central Excise Authorities to pay under sub-heading No. 4009.92 in order to arrive at the value and the amount paid under protest was worked out accordingly. In the Central Excise gate-passes in form No. GP-1 and the Central Excise price-lists filed under rule 173C of the Central Excise Rules, 1944 (hereinafter referred to as "the Rules"), the respondent mentioned the assessable value and duty in accordance with the provisions of Section 4(4)(d)(ii) by breaking up the contract price although the same did not include any amount on account of excise duty. In the invoices raised on the Railways, the respondent mentioned the contract-price without any break-up. In this connection, specimen copies of excise gate-passes in form GP-1 and corresponding invoices raised on the Railways are annexed hereto and collectively marked "D"."

It is well settled that the findings of fact arrived at by the Tribunal should ordinarily be accepted by this Court. It is not the case of the appellant that while arriving at its finding that the respondent had not passed the amount of excise duty, the Tribunal had not considered all relevant facts. The contention of the appellant herein that the railway administration colluded with the respondent herein in issuing the aforementioned letters and certain certificate is, in our considered opinion, wholly misconceived. We have no hesitation to reject the same.

Our attention has been drawn to a decision of this Court in Commissioner of Central Excise, Mumbai-II vs. Allied Photographics India Ltd. [(2004) 4 SCC 34], wherein this Court opined that the doctrine of unjust enrichment would be attracted, although, the duty might have been paid under protest. In that case the manufacturer has passed on the burden of duty to the distributor. The question, therefore, which fell for consideration was : "Whether the distributor in turn passed on a duty burden to its dealers?" It was in the said factual matrix held :

"\005\005.It is important to note that M/s AGIL was the sole distributor of NIIL. Therefore, it is highly improbable for a distributor to incur cost of purchase which included 20% element of duty in addition to the purchase price without passing on the burden to its dealers. From the record it appears that during the disputed period 1974 to 1984, M/s AGIL was in trading which further supports the above improbability. In the present case, there is no material placed on record by M/s AGIL as to how it had accounted for the cost of purchase in its books and the accounting treatment it gave to the said item at the time of payment of the purchase price. No record as to costing of that item has been produced. This material was relevant as in the present case NIIL conceded that it had

passed on the burden of duty to its distributor M/s AGIL (buyer) and it was the buyer who claimed refund. It has been urged on behalf of the respondent and which argument has been accepted by the authorities below that 20% of the total price paid by M/s AGIL to NIIL represented total excess excise duty levied and not the excess duty collected by NIIL in the form of sale price from its distributor M/s NIIL. It was argued that excess duty collected by NIIL represented only 1.62% of the total price. It was argued that resale price charged by M/s AGIL to its dealers had no relevance to excess excise duty paid by M/s AGIL to NIIL at the time of purchase as the sale price charged by M/s AGIL to its dealers was based on the prevailing market price. We do not find any merit in this argument. In the present case, the refund claim is made by a buyer and not by the manufacturer. The buyer says that he has not passed on the burden to its dealers. The buyer has bought the goods from the manufacturer paying the purchase price which included cost of purchase plus taxes and duties on the date of purchase. In such cases, cost of purchase to the buyer is a relevant factor. None of the authorities below have looked into this aspect. Even the Appellate Tribunal has not gone into this relevant factor. It has merely quoted the passages from the order of the lower authority, whose order was impugned before it. Costing of the goods in the hands of the distributor, the cost element and the treatment given to purchases by the buyer in his own account were relevant circumstances which the authorities below failed to examine. It was submitted that cost of purchase was not a relevant factor. It was submitted on behalf of the respondent that the resale price charged by the buyer was not a relevant factor. It was submitted that since the sale price of the goods before and after the assessment remained the same, the burden of excess duty was absorbed by the respondent. It was submitted that in any event the sale price of the goods increased much less than the amount of duty (differential) involved in this case and, therefore, incidence of duty was not passed on to the consumers."

The said decision, therefore, was rendered on its own facts. We, however, as noticed hereinbefore, are not in a position to agree with the contention of the appellant that the finding of fact arrived at by the tribunal is based on no material.

There is, thus, no merit in this appeal. It is accordingly dismissed. The appellant is directed to comply with the Tribunal’s order within four weeks from today. The appellant shall bear the costs of the respondent which is assessed at Rs.10,000/-.