

Commissioner of C. Ex. Vs. Samurai Electronics Pvt. Ltd.

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Feb-11-2000

Reported in : (2000)(119)ELT420TriDel

Appellant : Commissioner of C. Ex.

Respondent : Samurai Electronics Pvt. Ltd.

Judgement :

1. The Revenue has filed the above application under Section 35G(1) of the Central Excise Act, 1944 for reference of the following questions of law stated to have arisen out of Tribunal's Final Order Nos. A 823-824/97-NB, dated 17-10-1997: "Whether Central Excise duty paid by the assessee in pursuance of the adjudication orders passed by the original quasi-judicial authority is refundable even when the assessee had not challenged the orders within the appeal period; and (2) Whether the refund claim is not hit by limitation if the duty was paid 'under protest' in pursuance of an appealable order passed by an Adjudicating Authority but subsequently the assessee did not challenge the order of lower authority and never filed any appeal before the appropriate Appellate authority with the result the order of the lower authority had become final " 2. The brief facts leading to the filing of the Reference application are that the respondents who are manufacturers of Video Cameras and Electronic Game Cartridges, were issued two show cause cum demand notices for Rs. 78,694/- and Rs. 1,40,566. 30P for short payment of duty on electronic game cartridges on the ground that the product was chargeable to duty at the rate of 25% ad valorem BED instead of 15% ad valorem BED paid

by them, for the reason that the benefit of Notification No. 96/86-CE., dated 10-2-1986 was not available to the product. The Assistant Collector vide Order-in-Original No. 40/89, dated 10-5-1989 and No. 43/89, dated 13-6-1989, confirmed the demands in pursuance of such orders, the assessee deposited the duty amounts under protest. They did not file any appeal to the Collector (Appeals) against the Order-in-original Nos. 40/89 and 43/89. However, they filed two appeals before the Collector (Appeals) against two Orders-in-Original No. 71/88, dated 8-4-1988 and No. 83/88 dated 17-11-1988 involving the similar issue but pertaining to a prior period. The Collector (Appeals) rejected these appeals and hence the assessee filed an appeal before the Tribunal which remanded the case for de novo adjudication. In the de novo proceedings, the Assistant Collector dropped the proceedings vide Order-in-original No. 37/94, dated 27-9-1994, holding that electronic game cartridges were not electronic machines. On the basis of this Order-in-original, the assessee filed refund claim for refund of Rs. 78,694/- and Rs. 1,40,566.30 P on dated 9-8-1994 and 19-8-1994 pertaining to the period covered by Order-in-original No. 40/89, dated 10-5-1989 and No. 43/89, dated 13-6-1989. The refund claim was rejected by the Assistant Collector under cover of his order No. 24/95, dated 29-3-1995. The Commissioner (Appeals) vide Order-in-Appeal, dated 15-2-1996, upheld the Assistant Collector's order and rejected the assessee's appeal. The assessee preferred appeals 679-680/96-NB which were allowed by the Tribunal vide its order, dated 13-10-1993 and directed the Assistant Commissioner to grant re fund subject to the applicability of the bar of unjust enrichment. It is this final order of the Tribunal which has given rise to the present Reference application.

3. I have heard Shri Mewa Singh, learned DR and perused the records.

None appeared for the respondents in spite of notice.

4. It is the contention of the Revenue that the purpose of paying duty under protest became redundant as soon as the last date for filing appeals against Order-in-original Nos. 40/89 and 43/89 expired. It is the submission of the DR that the refund claim is not maintainable on the basis of the Tribunal's decision in favour of the assessee's on similar issue relating to a different period, unless and until

consequential relief has been sought by the assessee and granted in respect of the specific period. A question of law therefore, certainly arises in this case on the correct interpretation of proviso to Rule 223B of the Central Excise Rules. Since there is no authoritative pronouncement by any Court on this question, I agree with the learned DR that question of law arising from the final order of the Tribunal, is required to be referred to the jurisdictional High Court. The following question is referred to the Hon'ble Rajasthan High Court at Jaipur for its considered opinion: "Whether claim for refund of duty paid under protest in pursuance of appealable order passed by an Adjudicating authority is barred by limitation when such order has not been challenged in appeal by the assessee, resulting in finality of the order of the Adjudicating Authority?"

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