

Commissioner of Central Excise, Vs. Milton Plastics Ltd.

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Mumbai

Decided On : Jun-27-2001

Reported in : (2002)(147)ELT689Tri(Mum.)bai

Appellant : Commissioner of Central Excise,

Respondent : Milton Plastics Ltd.

Judgement :

1. Application 479 and 480 taken on record with consent of counsel for the respondents. There being no objection from the counsel for the respondent, the miscellaneous application for amending the ground of the stay application and adding to the grounds of appeal are allowed.
2. The Commissioner (Appeals) had held in his order that the provisions of sub-section (2) of section 11B of the Act requiring evidence that the incidence of duty had not been transferred to any other duty would not apply to the refund which he found admissible to the applicant for the reason that the refund arose as a result of finalisation of provisional assessment.
3. The challenge to this conclusion is one the ground that there was no formal order issued under Rule 9B and therefore the assessment were not provisional. The respondent filed a classification list in 1996, claiming that no duty was payable in terms of exemption notification.

This was modified by the Asst. Commissioner without giving an opportunity to the manufacturer, denying the benefit of the exemption.

On an appeal by the manufacturer, the Commissioner (Appeals) set aside this order, and remanded the matter to the Asst. Commissioner for passing orders in accordance with law. These orders by the Asst.

Commissioner holding that the benefit of exemption was available were passed in 1989. On the face of it, the ratio of the judgement of the Supreme Court in *Samrat International Pvt. Ltd. vs. CCE 1992 (58) ELT 561* that any payment of duty between the filing of a classification list and approval must be held to be in pursuance of a provisional assessment would apply to the facts before us. Therefore, prima facie notwithstanding the absence of a formal order under rule 9B, the assessment must be considered provisional.

4. The conclusion of the Commissioner (Appeals) cannot therefore be interfered with at this stage. The application for stay of the operation of the order is dismissed.

5. Having regard to the somewhat uncertain position relating to the functioning of the two benches and the amount involved of Rs. 17 lakhs, we decline to accept the prayer for early hearing. The Commissioner is however at liberty to revive the application.

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