

Commissioner of Central Excise, Vs. Instrumentation Ltd.

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Jan-04-2002

Reported in : (2002)(140)ELT518TriDel

Judge : P Chacko

Appellant : Commissioner of Central Excise,

Respondent : instrumentation Ltd.

Judgement :

1. Examined the records. In this appeal of the Revenue, the challenge is against the order of the Commissioner (Appeals) allowing the assessee's appeal preferred against an order passed by the adjudicating authority. The Assistant Commissioner, by order dated 4-9-2000, allowed a claim for refund of Rs. 94,080/- but set off the same against a demand of duty of over Rs. 3 lakhs confirmed against the assessee under his earlier order dated 27-1-98. The assessee preferred appeal against the Assistant Commissioner's order dated 4-9-2000 to the Commissioner (Appeals) on the ground that the order dated 27-1-98 was under appeal to the Commissioner (Appeals) and that their stay application was also pending before the appellate authority and, therefore, appropriation of the refundable amount of Rs. 94,080/- towards the duty confirmed under order dated 27-1-98 was unwarranted. The lower appellate authority allowed the assessee's appeal (against the A.C.'s order dated 4-9-2000) on the ground that operation of the Board's Circular on the strength of which the above demand of duty had been confirmed by the Assistant Commissioner had been stayed by the High Court of

Delhi in the case of TVS Elecronics v. Government of India [CWP No. 5644/98]. Hence the present appeal of the Revenue.

3. Ld. JDR, Sh. Hitesh Shah reiterates the grounds of the appeal. He submits that any Circular issued by the Board forbidding coercive action to realize duty of excise is subordinate to the provisions contained in Section 11 of the Central Excise Act, 1944 which provides that the officer empowered by the Board to levy any duty payable by an assessee to the Central Government under any of the provisions of the Act or of the Rules made thereunder may deduct the amount of duty so payable, from any money owing to the assessee. In the present case, Id.

DR points out, an amount of Rs. 94/080/-was due to the respondents by virtue of the refund order while an amount of over Rs. 3 lakhs was due from them to the Revenue under the order dated 27-1-98 of the Assistant Commissioner. Therefore, it was permissible for the Assistant Commissioner under Section 11 to deduct the amount covered by the refund order from the amount of duty confirmed under the order dated 27-1-98. According to Id. DR, no Circular of the Board would prevail over this statutory provision. He prays for setting aside the order of the Commissioner (Appeals).

4. Ld. CA, Sh. S.K. Gupta for the respondents submits that the amount of over Rs. 3 lakhs cannot be considered to be recoverable from, or payable by, the respondents inasmuch as the appeal filed by them against the Assistant Commissioner's order of confirmation of duty demand was pending before the Commissioner (Appeals) and their application for stay of operation of the Assistant Commissioner's order was also pending before that authority. As the duty amount was not recoverable or payable, the adjustment made by the Assistant Commissioner was not warranted under Section 11 of the Act. The CA has drawn support to this plea from the decision of the M.P. High Court (Indore Bench) in National Steel Industries Ltd. v. Union of India [2001 (134) E.L.T. 616 (M.P.)]. He urges that the Revenue's appeal be rejected.

5. Examined the submissions. It is not in dispute that the Assistant Commissioner's order dated 27-1-98 confirming a demand of duty of over Rs. 3 lakhs was under appeal to the Commissioner (Appeals) and that an application for

stay of the A.C's order was also pending before the appellate authority when the adjudicating authority passed its order on the refund claim. The Board's Circular No. 396/29/98-CX, dated 2-6-98, mentioned in the memorandum of the Revenue's appeal, had forbidden departmental coercive action for recovery of duty dues (covered by order passed by adjudicating authority) during the pendency of assessee's appeal and stay application before the Commissioner (Appeals). I do not agree with Id. DR's submission that this Circular is in conflict with the provisions of Section 11 of the Central Excise Act. Section 11 has authorised the competent officer of Central Excise to deduct any duty payable by any assessee to the Central Government under any of the provisions of the Act or of the Rules thereunder, from any money owing to such assessee. In the instant case, the Assistant Commissioner had, by order dated 27-1-98, confirmed a demand of duty of over Rs. 3 lakhs against the respondents and the latter had preferred appeal against the same to the Commissioner (Appeals) and had also filed a stay application. In the light of the Board's Circular, when the stay application was pending before the Commissioner (Appeals), no coercive action could have been taken against the assessee to recover the duty confirmed by the adjudicating authority, To recover any duty by way of deduction under Section 11 of the Act during the pendency of the assessee's appeal and stay application before the statutory appellate authority is a coercive action. The Circular only meant that the duty was not recoverable from the assessee when their appeal and stay application were pending. Therefore, it cannot be said that the Board's Circular is in conflict with Section 11 of the Act. On the other hand, it was binding on the Assistant Commissioner. Furthermore, the High Court of M.P., in the cited case has specifically held that, when an order passed by an adjudicating authority confirming a demand of duty against an assessee is under challenge in appeal before the Commissioner (Appeals) and also the assessee's application for stay is pending before the appellate authority, the amount of duty cannot be said to be recoverable or due from the assessee. Section 11 of the Act can be pressed into service only when the amount of duty is recoverable or due from the assessee under the provisions of the Act or the Rules thereunder. In the instant case, the duty confirmed against the respondents under the A.C's order dated 27-1-98 was not recoverable from them on account of the pendency of their appeal and stay

application against that order before the Commissioner (Appeals) and, therefore, Section 11 was not invocable. Section 11 was erroneously applied by the adjudicating authority and the order passed by that authority has been correctly set aside by the lower appellate authority. The present appeal of the Revenue has no merits. The appeal is rejected.

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