

Konark Cylinders Vs. Commissioner of Central Excise,

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Calcutta

Decided On : Feb-18-2002

Reported in : (2002)(81)ECC733

Judge : A Wadhwa, N T C.N.B.

Appellant : Konark Cylinders

Respondent : Commissioner of Central Excise,

Judgement :

1. Tribunal vide its Order No. A-580-Cal/2000, dated 10-5-2000 [2001 (136) E.L.T. 325 (Tribunal)] allowed the appeal filed by the appellants with consequential relief to them. The appellants during the pendency of the appeal before the Tribunal had deposited the amount of Rs. 3,02,869/-, in terms of provisions of Section 35F of the Central Excise Act, 1944. With allowing of their appeal, they became entitled to the refund of the said amount, for which purposes they approached the Revenue. Inasmuch as the Revenue was not implementing the Tribunal's Order, the appellants filed a Miscellaneous Application before the Tribunal seeking direction to the proper officer for doing the needful.

The said Miscellaneous Application was disposed of vide Order No.M-949/Kol./2001, dated 25-9-2001 directing the Revenue to implement the Tribunal's Order within a period of one month from that date.

Thereafter, the appellants again approached the Revenue for the refund of the pre-deposited amount. However, they received a letter from the Superintendent dated 13-11-2001 informing the appellants that the CEGAT's Order has been implemented by the Department by rejecting the refund claim.

2. Shri S.C. Mohanty, Id. Advocate appearing for the appellants submits that the refund claim has been rejected by the Deputy Commissioner on the point of limitation as also on the unjust enrichment. Drawing our attention to the said order passed by the Deputy Commissioner; he submits that the same is non-est in the eyes of law inasmuch as the same has been passed by the Deputy Commissioner without having any jurisdiction to do so. For the above, he relies on the earlier decision of the Tribunal in the case of Wazir Steel Industries v. CCE reported in 1997 (95) E.L.T. 45 (Tribunal). He submits that it is well-settled proposition of law that the amounts pre-deposited in terms of the provisions of Rule 35F of the Act are not hit by bar of limitation or by unjust enrichment. The course adopted by the Deputy Commissioner is dilly-dallying tactis for delaying refund. As such, he submits that further direction be passed to the proper officer for grant of refund along with interest amount.

4. It is seen that the Tribunal vide its order dated 10-5-2000 had allowed the appeal on the point of limitation. It was observed in the said order as under :- "Accordingly, we feel that the demand raised in November, 1992 for the period April, 1988 to February, 1992 is barred by limitation of six months. We hold accordingly and allow the appeal with consequential relief to the appellants without expressing our opinion on the classification of the product in question." The above order of the Tribunal was not challenged by the Revenue before Higher Appellate Forum. As such admittedly the appellants became entitled to refund of duty amount deposited by them in terms of provisions of Section 35F of the Central Excise Act, 1944, which requires the appellants to deposit the amount as a pre-condition of hearing of their appeal unless the same is dispensed with by the Tribunal. It is very surprising to note that instead of implementing the Tribunal's Order read with subsequent order dated 25-9-2001, the Deputy Commissioner has chosen to pass the adjudication order rejecting the refund claim. It is more surprising to find out the observations of the Deputy Commissioner in respect of

order passed by the Tribunal. He has observed that ".....regarding the question whether the claim is matured, I find the Tribunal instead of going into merits of the case has disposed the matter on technicality of limitation. Since the appeal period is not over and it is still open for the Department to consider of filing appeal against the impugned order of the Tribunal, action cannot be taken on the basis of Tribunal Order. Hence any decision on the refund claim will be premature." The above para reproduced from the order of the Deputy Commissioner is in utter disregard of the judicial discipline which requires the lower authorities to follow the order passed by the Higher Appellate Forum.

It was not open to the Deputy Commissioner to disregard the order passed by the Tribunal by observing that the same has been allowed on the point of limitation alone without going into the merits of the case. We make it clear that the Deputy Commissioner was not sitting in appeal over the Tribunal's Order and as such it was not open to him to comment upon the sustainability or correctness of the same.

5. As regards the question of limitation or unjust enrichment on the basis of which refund has been rejected by the Deputy Commissioner, we find that it is well-settled law that the amounts deposited in terms of provisions of Section 35F of the Act are neither hit by limitation nor by unjust enrichment. In fact, we find that the Deputy Commissioner has observed that even if the incidence of duty was not passed on at the time of removal of goods, nothing prevented the claimants to collect the duty by raising separate bill later. However, the above observation is only in the arena of assumption and presumption inasmuch as there is no evidence that the appellants collected the amount in question from their customer at a later stage. As such, we are in agreement with the Id. Advocate that the Deputy Commissioner has passed the order dated 29-3-2001 in utter disregard of judicial principles of law.

6. We also find that the Tribunal in the case of Wazir Steel Industries has held that such type of order passed by the lower authorities, after the allowing of the appeal by the Tribunal, rejecting the refund claim on the point of limitation and unjust enrichment are without any jurisdiction. It has been observed in the said order that

the Tribunal has got necessary power under Rule 41 of the CEGAT (Procedure) Rules, 1982 to get its orders implemented and as a matter of practice, the Tribunal is invoking the power under Rule 41 to entertain such Miscellaneous Application. The Assistant Commissioner's Order being without jurisdiction was held to be nullity and the same was formally set aside. The Commissioner (Appeals) was also directed not to get cognizance of appeal filed by the appellants against the Assistant Commissioner's order. By following the ratio of the said order, we set aside the order passed by the Deputy Commissioner as having been passed in excess of his jurisdiction and direct him to implement the Tribunal's Order within a period of four weeks from today and report compliance on 21-3-2002. It is made clear that in case the Deputy Commissioner does not implement the Tribunal's Order, he should cause appearance before the Tribunal on the said date to explain his stand and for the Tribunal to decide further course of action against the Revenue in this regard.

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