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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Oct-08-2002

Reported in : (2002)(84)ECC863

Judge : S T G.R., P Bajaj

Appellant : Maurya Udyog

Respondent : Cce

Judgement :

1. The above-captioned appeals have been directed against a common order-in-appeal dated 20.12.2001. Appeal No. E/1138/02-A has been filed by the Revenue against that part of the impugned order vide which the Commissioner (Appeals) has partly allowed the refund claim of the respondents to the extent of Rs. 39,44,755, while appeal No. E/987/02-A has been filed by the assessee against that portion of the impugned order vide which their refund claim of Rs. 12,87,318 for the period 1.7.99 to 24.11.99 had been held to be time barred.

2. The facts are not much in dispute. The assessees are manufacturers of LPG cylinders. They filed a refund claim on 24.11.2000 on account of price reduction by the oil companies to whom the cylinders were supplied by them under the supply orders. The adjudicating authority disallowed the refund claim of Rs. 39,44,755 by following the ratio of the law laid down in MRF Ltd. v. Collector of Central Excise wherein it has been held by the Apex Court that once the goods are cleared on the basis of a price at the time of removal, subsequent reduction in price would not

affect the excise duty. For the balance amount of Rs. 12,87,318 the adjudicating authority disallowed the claim holding it to be time barred, for the period 1.7.99 to 24.11.99.

3. The Commissioner (Appeals) has upheld the order of the adjudicating authority regarding rejection of the claim on the question of limitation, but has reversed the order regarding the rejection of refund claim of Rs. 39,44,755 holding that it was a case of reduction of mutually agreed price after clearance of excisable goods.

4. So far as appeal No. E/987 is concerned which has been preferred by the assessee, the same has not been contested before us by the Counsel.

Counsel has fairly conceded that the refund claim of Rs. 12,87,318 for the period 1.7.99 to 24.11.99 has been rightly held to be time barred, as the same was filed after the expiry of one year. Therefore, this appeal of the assessee stands dismissed.

6. The learned SDR has contended that the present case squarely stands covered by the Apex Court Judgment in the case of MRF Ltd. v. Collector of Central Excises, Madras 1997 (92) ELT 309 (SC), wherein it has been observed that "the subsequent reduction in price would not affect the excise duty once paid on the goods cleared from the factory at the indicated price." He has also further contended that there had been no compliance with the requirement of Rule 9B of the Rules by the assessees as they never requested for provisional assessment knowing fully well that the price agreed upon between them and the buyers i.e.

the oil companies of the LPG cylinders, was provisional, Therefore, their refund claim on account of subsequent reduction in the price is not maintainable. In support of this contention, he has referred to the Larger Bench decision of the Tribunal in Rajiv Mardia v. Commissioner of Central Excise, Indore 7. On the other hand, the Counsel for the assessee has argued that since the price of the cylinders as per the terms of the supply orders agreed between them and the oil companies, were provisional, the assessee are legally entitled to claim the excess duty paid by them on the initial sale price, on account of subsequent reduction in the prices made by the oil companies. Counsel has placed reliance on the law laid down by the Tribunal in two cases, namely, Utkal Polyweave Indus. Pvt. Ltd. 2001 (136) ELT 818 and Hindustan Engineering and Industries Ltd. v. CCE, Kolkata 2002 (50) RLT 88, wherein the Tribunal allowed the refund of duty on account of subsequent reduction in the sale price of the goods.

8. True that the agreement under which the LPG cylinders were cleared by the assessees for sale to the oil companies contained a variation clause regarding the prices. But this fact was very much within the knowledge of the assessees at the time of clearance of goods and still they did not follow the procedure laid down in Rule 9B of the Rules. In other words, they never made any formal request for provisional assessment on the ground that the prices of the goods cleared by them were only provisional. The assessments of their RT 12 returns, were final. No inference that since the prices of the cylinders as per the supply orders were provisional the assessments were also provisional can be legally drawn for want of any material on the record to show that they ever made any formal request for provisional assessment in terms of Rule 9B of the Rules to the Excise Department. They never followed the procedure laid down in the said Rule for provisional assessment. Their assessments rather admittedly were final. That being so, their refund claim for the refund of the duty on the ground that subsequently there had been reduction in the prices, is liable to fall on this short ground alone, in view of the ratio laid down by the Larger Bench of the Tribunal in Rajiv Mardia case (supra), wherein it has been observed by the Bench that "the compliance with the requirements of Rule 9B is required to be established before claiming the refund of the excess duty allegedly paid by the assessees." 9. The case of the assessees also stands squarely covered by the ratio of the law laid down by the Apex Court in MRF Ltd. case (supra). In that case the Apex Court has observed as under: Once the assessee has cleared the goods on the classification and price indicated by him at the time of the removal of the goods from the factory gate, the assessee becomes liable to payment of duty on that date and time and subsequent reduction in prices for whatever reason cannot be a matter of concern to the Central Excise Department insofar as the liability to payment of excise duty was concerned. Therefore, subsequent fluctuation in the prices of the commodity can have no relevance whatsoever so far as the liability to pay excise duty is concerned, unless it is shown that there was some agreement in this behalf with

the Government and the latter had agreed to refund the excise duty to the extent of the reduced price.

The Apex Court has in that case approved the Judgment of the Tribunal in the case of Indo Hacks Ltd. v. Collector 10. No doubt, the Kolkata Bench of the Tribunal in Utkal Polyweave Indus. Pvt. Ltd. (supra) had allowed the refund of the duty to the assessee on account of reduction in the prices later on by the Government, by holding that the said Judgment of the Apex Court was not attracted to that case. The Bench in that case held that "when the price reduction was not a voluntary act on the part of the contract holder of the assessee, but was a result of a reduction by the Government, the refund for the excess paid duty was not deniable even when the price list was finally approved." The Apex Court judgment had been distinguished by that Bench by observing that the roll back of the prices was done in the case before the Apex Court as a result of meeting with the tyre manufacturers and the Government, and there existed neither a statutory price nor a contract price, while in the case before the Bench, the reduction was not done voluntarily but on the direction of the Government. But we are, however, unable to persuade ourselves to adopt the distinction brought out by that Bench in the judgment of the Apex Court in MRF Ltd. case, for not following the same. In our view, the present case of the assessee is squarely covered by the said judgment of the Apex Court. The judgment of the Apex Court is very much clear and above any distinction on the issue involved in the appeal, before us.

11. The argument of the Counsel that if the distinction pointed out in that judgment of the Apex Court, by the Kolkata Bench, is not followed, then the matter should be referred to the Larger Bench, cannot be accepted. For not merely adopting the reasons put forth by the Kolkata Bench in Utkal Polyweave Indus. P. Ltd. for not following the ratio of law laid down by the Apex Court in MRF Ltd. case (supra), no case for reference to the Larger Bench is made out. The Apex Court judgment has to take precedence over the judgment rendered by any Bench of the Tribunal. Moreover, each case has to be decided keeping in view its facts and circumstances. If in the view of the Kolkata Bench, the Apex Court judgment was not applicable to the case before them, it was their view and we are not bound to adopt that very view especially when the facts and circumstances of the case

before us do not warrant the taking of such a view. The case of the assessees, in our view, is fully covered by the ratio of the law laid down by the Apex Court in the MRF Ltd. case as well as the law laid down by the Larger Bench of the Tribunal in Rajiv Mardia case (supra). The Kolkata Bench has not even taken note of the Larger Bench decision in Rajiv Mardia case (supra).

12. Similarly, the view of the Kolkata Bench expressed in another case namely, Hindustan Engineering and Industries Ltd. (supra) that "though the assessment was not provisional under Rule 9B of the Rules, since as per the contract, the price was provisional and was to be finalised subsequently, the assessees were entitled to the refund of the excess duty on finalisation of the lower price, cannot at all be adopted and followed as it runs contrary to the Larger Bench decision in Rajiv Mardia case and the Apex Court judgment in MRF Ltd. case. Both these judgments were in fact never brought to the notice of that Bench.

13. Keeping in view the above ratio of the law laid down by the Larger Bench in the Rajiv Mardia case and the Apex Court in MRF Ltd. case referred to above, and the facts and circumstances of the case discussed above, in our view, the refund claim of the appellants has been wrongly allowed by the Commissioner (Appeals). The impugned order passed by him is illegal, suffers from legal infirmity. We, therefore, set aside the same.

14. In view of the discussion made above, the impugned order of the Commissioner (Appeals) allowing the refund claim of Rs. 39,44,755 to the assessee is set aside. The appeal of the Revenue (E/1138/2002/A) accordingly stands allowed. The appeal of the assessee, (E/987/2002-A) stands dismissed.