S. Kumar'S Ltd. Vs. Commissioner Of Central Excise

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Feb-17-2003

Reported in : (2003)(88)ECC516

Judge : K Usha, N T C.N.B., P Chacko

Appellant : S. Kumar'S Ltd.

Respondent : Commissioner Of Central Excise

Judgement :

1. The above appeal has come up for consideration before Larger Bench by way of reference made by Single Member in Misc. Order No. M/79/02/NB (SM), dt. 16-4-2002 [2002 (143) E.L.T. 641 (Tribunal)].

2. Reference was necessitated since two co-ordinate Division Benches of this Tribunal have taken divergent views on the question whether post-clearance adjustment like issuance of credit notes or cheques by the assessee who is claiming refund, to buyer of the goods, taking back the burden of duty on the goods would help the assessee to get over the bar of unjust enrichment under Section 11B of the Central Excise Act.

3. The appellants were job workers for M/s. Dhvani Terrifabs Export Pvt. Ltd. (for short M/s. DTE). They received raw material (grey fabrics of cotton) from M/s. DTE and after processing the same, supplied the processed fabrics (falling under Chapter 60 of the Schedule to the Central Excise Tariff Act, 1985) to M/s. DTE.

During the period 5-3-97 to 30-8-97, the appellant cleared processed fabrics to M/s. DTE on payment of Additional Excise Duty (AED) in lieu of sales tax @ 8% ad valorem under the Additional Duties of Excise (Goods of Special Importance) Act, 1957. The total duty so paid was Rs. 8,43,041/-. Later on realizing that under Notification No. 9/96-C.E., dt. 23-7-96, the goods were exempt from such duty, the appellant sent to M/s. DTE a cheque dt. 3-9-97 for Rs. 7,08,520/- which is equivalent to the amount of duty, the appellants had collected from M/s. DTE at the time of clearance of the goods. It is to be noted that the appellant had not collected the differential amount of Rs. 1,34,521/- from M/s. DTE at the time of clearance of the goods.

4. The appellants, therefore, filed an application for refund with the Asstt. Commissioner on 4-9-97. Relying on the decision of the Tribunal in the case of CCE v. Addison & Co., 1997 (93) E.L.T. 429 a SCN was issued to the appellant proposing to reject the claim. One of the reasons shown therein was that the refund of any duty amount made by the appellant to M/s. DTE subsequent to clearance of the goods was of no consequence for the purpose of Section 11B and the claim was hit by principles of unjust enrichment. The adjudicating authority rejected the claim. The appeal filed by the assessee was dismissed by the Commissioner (Appeals) holding that in the light of the Tribunal's decision in CCE, Jaipur v. Adarsh Guar Gum Udyog, 2000 (120) E.L.T. 138 as well as Board's Circular No. 317/33/97/CX, dated 18-6-97, the refund claim was hit by the principles of unjust enrichment under Section 11B.5. It was contended by the ld. Counsel for the appellant that the decision of this Tribunal in the case of CCE, Madras v. Addison & Co., 1997 (93) E.L.T. 429 was reversed by the Hon'ble Madras High Court in Addison & Co. v. CCE, Madras, 6. The main issue that was convassed before us by the ld. Counsel for the appellant was that dismissal of the appeal in Sangam Processors (Bhilwara) Ltd. v. CCE, 1994 (71) E.L.T. 989 by the Supreme Court cannot be treated as a binding precedent since the order of the Supreme Court does not give detailed reasons. In support of the above contention ld. Counsel Shri B.L. Narsimhan relid on the two decisions of the Supreme Court in Sun Export Corporation, Bombay v. Collector of Customs, Bombay,S.Shanmugavel Nadar v. State of T.N. and Anr., 7. On the other hand ld. Senior Counsel Shri M. Chandrashekhran who appeared on behalf of the Revenue

pointed out that the issue is directly covered by the decision of the Supreme Court in Kunhayammed and Ors. v. State of Kerala and Anr., 2001 (129) E.L.T. 11 (S.C.) = 2000 (6) SSC 359. In this decision of the Supreme Court, there is an elaborate consideration on the question of merger as well as the binding nature of the decision of the Supreme Court as a precedent when Special Leave Petition and appeals are dismissed without reasoned order. Paragraph 4.1 of the above judgment reads as follows : "41. Once a special leave petition has been granted, the doors for the exercise of appellate jurisdiction of this Court have been let open. The order impugned before the Supreme Court becomes an order appealed against. Any order passed thereafter would be an appellate order and would attract the applicability of doctrine of merger. It would not make a difference whether the order is one of reversal or of modification or of dismissal affirming the order appealed against. It would also not make any difference if the order is a speaking or non-speaking one. Whenever this Court has felt inclined to apply its mind to the merits of the order put in issue before it though it may be inclined to affirm the same, it is customary with this Court to grant leave to appeal and thereafter dismiss the appeal itself (and not merely the petition for special leave) though at times the order granting leave to appeal and dismissing the appeal are contained in the same order and at times the orders are quite brief. Nevertheless, the order shows the exercise of appellate jurisdiction and therein the merits of the order impugned having been subjected to judicial scrutiny of this Court".

8. The above would clearly show that when a Civil Appeal is dismissed even though without assigning reasons it will have an effect of binding precedent unlike in the case of dismissal of a special leave petition.

We are not therefore inclined to accept the contention raised by the ld. Counsel for the appellant that dismissal of the appeal by the Supreme Court challenging the decision of the Tribunal in Sangam Processors (Bhilwara) Ltd. has no value as a binding precedent. It is submitted before us at the bar that the decision of the Madras High Court in Addison & Co. has been taken in appeal and the matter is pending before the Supreme Court.

9. In the light of the above, we hold that the view taken in Thermon Heat Tracers Ltd., is not good law and the ratio in the decision of Sangam Processors (Bhilvara) Ltd., which had been affirmed by the Apex Court has to be followed. In the result, the claim for refund made by the appellant to the extent of Rs. 7,08,520/- is declined. As far as the claim for refund of Rs. 1,34,521/- is concerned since there is no dispute of the fact that this amount of duty had not been collected by the appellant, it is not hit by the principles of unjust enrichment.

Subject to the above clarification, the appeal stands dismissed.