Commissioner of Central Excise Vs. Kores India Ltd.

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Mumbai

Decided On : Jun-02-2003

Judge : S T Gowri, G Srinivasan

Appellant : Commissioner of Central Excise

Respondent : Kores India Ltd.

Judgement :

1. Kores India Ltd., the appellant in 1568 and respondent to the appeal E/1800/02 filed by the Commissioner, was engaged in the manufacture of carbon paper. We are concerned in this appeal with the duty paid by the assessee between 1992 and 1997. The duty was paid provisionally pending determination of the eligibility to deduction from the sales price claimed from the price list that the assessee has filed. By four orders passed between January and March 1997, the Asst. Commissioner disallowed many of the items claimed for deduction. The assessees appealed this orders. The Commissioner (Appeals) passed orders either remanding in one case the matter to the Asst. Commissioner for allowing the appeal. The Asst. Commissioner passed common order in 1999 in which he allowed some of the deduction and disallowed some others. (It appears that the assessees have not questioned this element by the Asst. Commissioner). On this the Jurisdictional Superintendent passed orders on March 2000 ordering finalising assessment under Rule 173I.The sheet attached to these order that some of it had been paid in excess, thereupon filed on 4.4.2000 claims for refund totalling Rs. 63.90 lakhs approx. The Asst. Commissioner passed orders, after issue of notice

considering the claim that it had not been shown that duty which has been claimed refund as not been passed on any other person in Sub-section (2) of Section 11B of the Act and ordered payment of the refund into the Consumer Welfare Fund.

2. The assessee appealed this order. The Commissioner (Appeals) held that the requirement contained in Section 11B had been specified with regard to duty paid on the goods cleared by the assessee from its depot, but not specified with regard to duty paid on goods cleared from the factory. He thus allowed part of the refund. Both the assessee and department are against that part of the order adverse to it.

3. We have heard the elaborate argument by the department and counsel for the appellant from various dates. The Commissioner (Appeals) in his order allowing refund has relied upon the decision of the single member of the Tribunal in CCE v. Corona Cosmetics Ltd., 2000 (118) ELT 356. In this decision the Tribunal while noting that the invoice issued by the assessee showed the "composite price" of the goods, concluded that since the price of the goods remand the same, during the period in question and prior to that "the instance had been shown not have been passed on". The Commissioner however does not say that the price of the goods has remained the same. He says that since the invoice showed "composite price" the extent of duty had not been passed on. It is not possible to endorse this view. All invoices in fact would show the composite price i.e. The total price payable by the buyer although in terms of Rule 12A, the invoice are required to show separately the amount of duty which would form part of the price. Presumably what the Commissioner (Appeals) evidently meant is that this price has not been shown. This cannot by any means lead to the conclusion that incidence of duty had not been passed on and the Commissioner (Appeals) order therefore cannot be upheld.4. Counsel for the appellant however takes before us various contentions in support of his claim that incidence of duty had been passed on with regard to both types of clearance from the factory gate as well as from the depot. Refund arose in pursuance of finalisation of provisional assessment and has been held in paragraph 95 of the judgment of the constitution bench of the Supreme Court in Mafatlal Inds. v. UOI 1997 (89) ELT 247 the requirement contained in Section 11B(2) will not apply to arising out of finalisation of provisional assessment. The Commissioner (Appeals) has thus refused to accept this point

holding that by addition to proviso under the rule on 25.6.99, applying the provisions of Section 11B(2) to refund which fall due under this rule refund arising as a result of assessment cannot be paid to an assessee unless he discharges the burden under Section 11B(2). It is contended by the appellant that it has a vested right to the refund which arose when it paid the duty in excess and that any amendment to the statute cannot operate so as to deprive a person of his vested right. The judgement of the Supreme Court in Govinddas v. Income Tax Officer 1976 (103) ITR 123 and of the Bombay High Court in Universal Drinks Pvt. Ltd. v. UOI 1984 (18) ELT 207 are relied upon in support.

5. One of the questions that was for consideration before the bench of the Supreme Court in Mafatlal Industries whether Section 11B of the Act was retrospective in effect. In paragraph 87 of the judgment reported in the Excise Law Times the court while dealing with this contention said that there was no doubt at any time said that there was no vested right to refund. It said as follows "Even without Section 12B, the true position is the same, as held by us in the earlier part of this judgment. The obligation to prove that duty has not been passed on to another person is always there as a pre-condition to claim of refund.

It cannot also be said that by giving retrospective effect to Section 11B any vested rights or substantive rights are taken away. The deprivation if at all is not real. The manufacturer has also concluded that duty from his purchaser and thus reimbursed itself. By applying for refund yet he is trying to read a windfall. A deprivation of that cannot be said to be real or substantial prejudice or loss. A manufacturer has no vested legal right to refund even when he has passed on the burden of duty to others. No law confirmed such a right in him, not Article 265 nor Section 11B. It was only on account of an incorrect view of law taken in Kanhaiyalal and that cannot be treated as a vested legal right. conversion of vested/substantive right of judicial error does not amount to deprivation. Even in cases where the burden is not passed on there is no prejudice; he could always get refund.

6. These sentences in our view do not permit consideration of the claim that the proviso under Rule 9B has to be so construed as not to apply to claim that arose

prior to its enactment. There having been no vested right, conferred on a manufactured for refund, the proviso does not take away any such right. The other judgment cited by the counsel for the assessee therefore would not apply to the situation.

7. There was a feeble argument, it is next contended that was raised relying upon the judgment of the Madras High Court in Dollar Co., Madras v. GOI 1986 (24) ELT 245, that when the price prior to, and subsequent to, the different rates is the sam,e it has been shown that the incidence of duty has not been passed on. The Commissioner (Appeals) no doubt records that from the fact that the price remained the same before and after despite the change in the rate of duty the incidence of duty ha snot been passe don. We have in our decision in CCE v. Christine Hoden (I) Pvt. Ltd. in appeal E/1522/00 considered this argument and not found it possible to accept. We had noted that the price charged to buyers composite of many elements which duty was only one. It is perfectly possible for the price charged to the buyers to remand the same to number of factories. The manufacturer for example, may reduce the manufacturing costs, and by using cheaper raw material or by streamlining the operation reduced the price. It is also possible he may sacrifice all or part of his profit. This last aspect has been examined in detail in Mafatlal Industries in paragraph 91 of the reported order. The Court had noted that ordinarily no manufacturer will sell his product at cost plus duty since he cannot survive in business if he does so. The manufacturer would not dip into profit but into excise duty components. As we have noted in Christine Hoden the possibility that incidence of duty has been passed and price remain the Same. Section 11B(2) does not require us to deal with possibility. It requires the claimant of refund to duty that the incidence of duty that has not been passed on. We cannot, as we are asked, to convert a possible presumption into a real fact. We do not find the Madras High Court's judgment an authority for the proposition canvassed by the assessee. It was concerned exemption excise duty with an interpretation of the notification 162.66 and not whether that incidence of duty had been passed on or not.

8. Reliance is placed on paragraph 7 of the judgment of the Hindustan Metal 2000 (153) ELT 11 in support of the contention in order to say that the assessee could

have taken refund of the suo moto of the excess. In this paragraph of the judgment, the Supreme Court cited paragraph 16 in Serai Kella Glass Works Pvt. Ltd. v. CCE 640. We are not concerned with this aspect. The question arises why the assessee found it necessary to file claim for refund. It is thus claimed for refund that is under consideration by us.

9. Accordingly, the department's appeal is allowed and the order of the Commissioner (Appeals) set aside and the adjudicating authority's appeal allowed. The assessee's appeal is dismissed.