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Cce Vs. Ambay Indus.

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Dec-02-2003

Reported in : (2004)(93)ECC393

Judge : P Bajaj

Appellant : Cce

Respondent : Ambay Indus.

Judgement :

1. None has come present on behalf of the respondents in spite of service of notice on them for today's hearing, No request for adjournment has been also received from them. Therefore, I proceed to decide the appeal on merits after hearing the learned JDR.2. The Revenue in this appeal had made challenge to the impugned Order-in-Appeal vide which the Commissioner (Appeals) has reversed the Order-in-Original and allowed the refund claim of the respondents by holding that the doctrine of unjust enrichment was not applicable to their case.

3. The learned JDR has contended that the adjudicating authority disallowed the refund claim on the ground that the respondents had failed to prove that they had not passed on the incidence of duty to the customers, after following the remand order of the Tribunal, but the Commissioner (Appeals) has not gone into that aspect of the matter and reversed the order simply by holding that since duty was paid under protest, the principle of unjust enrichment did not apply.

4. I have gone through the record and heard the JDR. In my view, the impugned order of the Commissioner (Appeals) cannot be legally sustained. The perusal of the record shows that the respondents filed the refund claim on account of differential duty paid by them under protest for the clearances effected by them during the period April to August, 1990 on account of dispute regarding the classification of their iron & steel products. The adjudicating authority rejected the refund claim by applying the principle of unjust enrichment, but that order was set aside by the Commissioner (Appeals) and the matter was sent back by him for examining the relevant record with reference to doctrine of unjust enrichment. On filing the appeal by the Department against that order of the Commissioner (Appeals), the Tribunal also remanded the matter for fresh decision by taking into account the decision of the Apex Court in the case of Mafatlal Industries, 2002 (83) ECC 85 (SC) : 1997 (89) ELT 247. After the remand, the adjudicating authority again rejected the refund claim by holding that the respondents have failed to furnish the tangible evidence/proof for having not passed on the incidence of duty to the consumers. But the learned Commissioner (Appeals) without examining the correctness of these findings of the adjudicating authority has reversed the order simply by observing that the principle of unjust enrichment, was not attracted to the case of the respondents for having paid the duty under protest. He has sought support for passing this order from the ratio of the law laid down in the case of Sinkhai Synthetics & Chemicals Ltd. v.CCE, Aurangabad, 5. In my view, the learned Commissioner (Appeals) could not legally take such a view for reversing the Order-in-original of the adjudicating authority. The remand order of the Tribunal was specific that the refund claim of the respondents should be examined in the light of the law laid down by the Apex Court in the case of Mafatlal Indus. Ltd. (supra). The respondents were, therefore, duty bound to adduce sufficient evidence to prove that the duty element had not been passed on by them to the consumers. The perusal of the Order-in-Original shows that the only plea taken up by them was that they had not shown the duty element separately in their invoices/gate passes and as such it should be presumed that they had not passed on the incidence of duty. But this plea, in my view, had been rightly rejected by the adjudicating authority as in the case of Mafatlal Indus. Ltd., supra, the Apex Court has observed that "mere non-mention of the duty element separately in the

invoices by an assessee did not lead to any conclusion that he had not passed on the incidence of duty to the consumer." The Apex Court has rather observed in para 76, "that preparation of the invoices is always in the hands of an assessee and no manufacturer would offer the sale of its product at loss. The price of the goods mentioned in the invoices normally includes the cost of manufacture, margin of profit plus the duty element". The adjudicating authority being not satisfied with the above-said plea of the respondents had disallowed the modvat credit through the Order-in-Original.

6. The Commissioner (Appeals) in the above circumstances was duty bound to examine the correctness of the findings recorded by the adjudicating authority regarding the failure of the respondents to prove the non-passing of the duty element to the consumers. He could not work on a different wave length and allow the refund claim of the respondents by holding that the principle of unjust enrichment was not applicable to their case, when this was not at all an issue after the remand of the case by the Tribunal. Moreover, it is not a case where the duty was paid under protest on account of provisional assessment in terms of Rule 9(b) of the Rules, so as to attract the ratio of the law laid down in the case of Sinkhai Synthetics & Chemicals Ltd., supra, relied upon by the learned Commissioner (Appeals).

7. In view of the discussion made above, the impugned order of the Commissioner (Appeals) is set aside and the matter is sent back to him for fresh decision in the light of the discussion made above. The appeal of the Revenue is allowed by way of remand.

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