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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Aug-16-2004

Reported in : (2005)(98)ECC279

Judge : S Kang, Vice, N T C.N.B.

Appellant : Sona Udyog Ltd.

Respondent : Cce

Judgement :

1. The applicant filed these applications in pursuance to the order dt 2.9.03 passed by the Hon'ble Supreme Court in Civil Appeal No. 1458/03.
2. Brief facts of the case are that the appellant claimed the refund of differential duty and the refund was rejected by the adjudicating authority as well as by the Commissioner (Appeals).
3. On appeal filed by the appellant, the Tribunal vide Final Order No.253/02-D dt. 10.10.02 dismissed the appeal by observing that on the unjust enrichment issue, it has been clearly found by the Ld.

Commissioner (Appeals) that no evidence was adduced by the appellants to show that the burden of duty on the subject clearance for the material period had not been passed on to their customers. This finding of fact has not been challenged in the present appeal, nor has any evidence been adduced before us by the appellants to discharge their burden of proof under Section 11B of the Central

Excise Act.

4. On appeal filed by the appellant, Hon'ble Supreme Court dismissed the appeal by making following observations: "It will be open to the appellant, however, to urge before the Tribunal that the recording that the appellant had not questioned the finding of fact by the appellant authorities and that evidence had been produced that the incidence of the higher levy had not been passed on to the customers was incorrect".

5. In pursuance to the above order passed by the Hon'ble Supreme Court, the applicant filed these applications. The contention of the appellant is that the issue on unjust enrichment was specifically raised before the Tribunal and the finding that no such plea was raised, is a correct finding. The contention of the appellant is that specific issue was raised regarding unjust enrichment by saying that when no change has been taken place in the price structure, it cannot be said that the incidence of duty has been passed on to their customers. The contention is that in the invoices, the consolidated price has been mentioned during the period when the appellants are paying higher rate of duty and same price is mentioned the month where they were paying less duty.

The applicants are also relied upon the decision of the Tribunal in the case of Cimmco Ltd. v. CCE, Jaipur, 1998 (61) ECC 535 (T) : 1999 (107) ELT 246 which was followed by the Tribunal in the case of Panihati Rubber Ltd. v. CCE, Calcuta-II, 2001 (127) ELT 742. The contention is that when the price of the goods remains same during the period, the manufacturer paid higher duty and the period where they are paying no duty, the manufacturer was taking the burden and not passing on to their customers.

6. We find that Hon'ble Supreme Court in the order while dismissing the appeal observed that the appellants are at liberty to urge before the Tribunal that the recording that the appellant had not questioned the finding of the fact by the appellant authorities and evidence had been produced that the incidence of higher levy had not been passed on to the customers. We find that in the grounds of appeal that the appellants are making averment that in case there is no change in the price structure, it cannot be said that the incidence of duty has been passed on

to the customer. The appellant relied upon the invoices where consolidated price has been mentioned and there is no change in the price when the appellants were paying higher duty. We find that this issue is now settled by the Hon'ble Supreme Court in the case of CC v.Allied Photographics India Ltd., 2004 (166) ELT 3. Hon'ble Supreme Court held that uniformity in price before and after the assessment does not lead to the inevitable conclusion that incidence of duty has not been on to the buyer as such uniformity may be due to various factors para 18 of the judgment is reproduced below: "Before concluding, we may state that uniformity in price before and after the assessment does not lead to the inevitable conclusion that incidence of duty has not been passed on to the buyer as such uniformity may be due to various factors. Hence, even no merits, the respondent has failed to take out a case for refund. Since relevant factors stated above have not been examined by the authorities below, we do not find merit in the contention of the respondent that this Court should not interfere under Article 136 of the Constitution in view of the concurrent finding of fact".

7. In the present case the contentions are that the above decision of the Hon'ble Supreme Court is not applicable to the facts of the case on the ground that the Supreme Court was dealing a case where the invoices in question are not of manufacturers. We find that as the Supreme Court was dealing the issue regarding unjust enrichment and the law laid down by the Supreme Court is in respect of the specific plea that in case price remains same, the burden on payment of duty has not been passed on to the buyer and this issue is decided in favour of the Revenue by the Supreme Court, therefore, we find no merit in this argument of the applicant. As the issue raised by the appellant in specific answer by the Supreme Court, therefore, we find no merit in these applications, the same are dismissed.

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