Cce Vs. Kothari Products Ltd.

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Oct-13-2004

Reported in : (2005)(118)LC223Tri(Delhi)

Judge : A T V.K., P Bajaj

Appellant : Cce

Respondent : Kothari Products Ltd.

Judgement :

1. The Revenue has filed the present appeal against the Order-in-Appeal No. 171-CE/Appl/Knp/2004 dated 7.3.2004 by which the Commissioner (Appeals) has allowed the refund of Additional Duty of Excise to M/s.

Kothari Products Ltd. 2. Mrs. K.A. Mishra, learned S.D.R., submitted that the respondents manufacture pan masala containing tobacco which was classified by them under Heading 2404.41 of the First Schedule to the Central Excise Tariff Act and paid Addition Duty of Excise thereon; that the Deputy Commissioner, under Order-in-Original No. 64/01 dated 31.10.2001, changed the classification of pan masala containing tobacco from Heading 2404.41 to Heading 21.06 of the Central Excise Tariff up to 28.2.2001; that as a consequence of change in the classification list, the respondents filed the refund claim of Additional Duty of Excise paid by them during the period from 10.10.2000 to 31.10.2000. The Deputy Commissioner under Order-in-Original No. 147/02 dated 28.2.2002, rejected the refund claim as time-barred since the same was filed beyond the period of one year from the date of payment of Central Excise duty; that on appeal, filed by the Respondents, the Commissioner (Appeals), under the impugned Order, has allowed the appeal. The learned SDR, further, submitted that the duty was paid by the Respondents voluntarily without any protest or request for provisional assessment; that the Department had not forced the Respondents to pay the Additional Duty of Excise and, therefore, the finding of the Commissioner (Appeals), under the impugned Order that the Respondents paid the duty under compulsion, is not correct; that the Respondents had not paid the duty under mistake of law. She, therefore, contended that the refund claim, which was filed on 13.12.2001, is hit by time limit specified under Section 11B of the Central Excise Act as the duty was paid on 19.10.2000 and 3.11.2000.

3. Countering the arguments, Shri K.K. Anand, learned Advocate, submitted that in view of the Judgment of the Hon'ble Supreme Court dated 25.1.2000 holding that the gutkha is a tobacco product, they filed a classification declaration under Rule 173B of the Central Excise Rules, 1944 classifying their product under sub-heading 2404.40 of the Central Excise Tariff; that since then they were regularly requesting the Department for finalisation of the declaration; that as the declaration was not finalised, they submitted a letter dated 9.10.2000 requesting the Department to finalise the declaration; that in the said letter they clearly stated that "as long as our declaration under Rule 173B of the Rules is finalised, we would pay the duty "under protest". The learned Advocate contended that it is thus clear that the duty has been paid by them under protest; that finally the declaration filed by them was finalised vide Order dated 31.10.2001 by which the pan masala containing tobacco was classified under Heading 21.06 only; that as the duty has been paid under protest, the time limit, specified under Section 11B of the Central Excise Act, would not be applicable and refund claim filed by them is not hit by the time limit specified under Section 11B of the Central Excise Act.Dena Stuff (P) Ltd. v.CCE, Chandigarh course of action of the appellants would arise only after the final dispute regarding the classification list had been settled; that the time limit of one year, prescribed under subsection (1) of Section 11B, will apply from the final decision in the assessees' own case.

5. We have considered the submissions of both the sides. Section 11B of the Central Excise Act provides that any person claiming refund of any duty of excise has to make the application before the expiry of one year from relevant date. The expression "relevant date" has been defined in explanation (B) to Section 11B of the Act according to which, in the present case, the relevant date is the date of payment of duty. However, second proviso to Sub-section (1) of Section 11B provides that the limitation of one year will not apply where any duty had been paid under protest. It has not been disputed by the Revenue that the respondents have clearly mentioned in their letter dated 9.10.2000 that they would be paying duty under Heading 2404.40 of the Central Excise Tariff under protest. It has not been disputed by the Revenue that the said letter has not been received by the Department.

In view of the fact that the duty was paid under protest, the refund claim cannot be held to be time-barred. We, therefore, reject the appeal, filed by the Revenue.