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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Jan-17-2005

Reported in : (2005)(100)ECC389

Judge : A T V.K., P Bajaj

Appellant : interach Building Products (P)

Respondent : Commr. of C. Ex.

Judgement :

1. In this appeal which has been directed against the impugned order in appeal, the issue relates to the applicability of principle of unjust enrichment to the refund claim of the appellants.

2. The lower authorities have rejected the refund claim of the appellants by applying this principle. The learned Counsel has contended that the principle of unjust enrichment is not attracted to the case of the appellant for having not passed on the incidence of duty to the buyers, as there had been no change in the price of their goods at the time when they were not paying excise duty and thereafter when they started paying the duty under protest and that the reflection of duty element separately in the invoice was only to meet the requirement of law and not for charging the duty from the buyers.

Therefore, the impugned order deserves to be set aside.

3. On the other hand, the learned SDR has reiterated the correctness of the impugned order and contended that the appellants having passed on the incidence of duty to the ultimate buyers, are not entitled to the refund of duty amount under the principle of unjust enrichment.

5. From the record, we find that during the period 1985-1986 to 1990-1991, the appellants were engaged in the manufacture of aluminium shapes and sections. They claimed classification of their goods under the elsewhere Tariff Item 27(3), (sub-heading 7604.29 of the new Tariff) and claimed exemption from payment of duty on the products under Notification No. 183/1984, dated 1-8-1984. The Department disputed this classification and propounded the same under Tariff Item 68 and intimated the appellants that the exemption under the above said notification, was not available to them. The appellants thereafter started paying the duty under protest. The classification dispute was however, finally resolved by the Tribunal vide order dated 28-3-1990 [1990 (49) E.L.T. 147 (Tribunal)] in favour of the appellants and that order was also upheld by the Apex Court [1992 (59) E.L.T. A97 (S.C.)].

The appellants thereafter filed six refund claims for refund of duty in all of Rs. 64,51,359.31 P, for the period 1985-1986 to 1990-1991. The Revenue however, issued show cause notice to the appellants proposing the rejection of their refund claims being hit by principle of unjust enrichment.

6. The learned Counsel, had no doubt, referred to the chart submitted by the appellants which is at page 126 of the paper book No. 1, to corroborate his contention that the price of the goods of the appellants before payment of duty and thereafter had remained the same during the period in dispute, but he has not disputed that in the invoices, the copies of which had been placed on record, the duty element has been separately shown by the appellants, besides the price.

Even otherwise, we are unable to accept the contention of the Counsel that due to non-variation in the price, it should be presumed that the incidence of duty had not been passed on by the appellants to the buyers. The law on this point is now well settled in the light of the observations made by the Apex Court in this regard in *Mafatlal Industries v. Union of India* [1997 (89) E.L.T. 247] (para 91) as under :

"Ordinarily, no manufacturer will sell his products at less than the cost price plus duty. He cannot survive in business if he does so.

Only in case of distress sales, such a thing is understandable but distress sales are not a normal feature and cannot, therefore, constitute a basis for judging the validity or reasonableness of a provision. Similarly, no one will ordinarily pass on less excise duty than what is exigible and payable. A manufacturer may dip into his profits but would not further dip into the excise duty component. He will do so only in the case of a distress sale again.

Just because duty is not separately shown in the invoice price, it does not follow that the manufacturer is not passing on the duty.

Nor does it follow therefrom that the manufacturer is absorbing the duty himself. The manner of preparing the invoice is not conclusive.

While we cannot visualize all situations, the fact remains that, generally speaking, every manufacturer will sell his goods at something above the cost price plus duty. There may be a loss-making concern, but the loss occurs not because of the levy of the excise duty - which is uniformly levied on all manufacturers of similar goods - but for other reasons. No manufacturer can say with any reasonableness that he cannot survive in business unless he collects the duty from both ends." 7. This very principle of law has been followed and applied by the Tribunal in the case of JCT v. Commissioner [2004 (163) E.L.T. 467] wherein it has been observed that keeping of prices stable even after payment of duty by the assessee, would not lead to an irresistible conclusion that he himself had borne the duty burden and not passed on to the consumers. Therefore, simply because the appellants in the present case, did not bring any change in price, it is difficult to conclude that they had not passed on the duty to the consumers. It is hard to accept that they sold the goods at a lesser price or cost incurred by them in the manufacture of the same. Rather it can be reasonably inferred that they brought down their profit margin and kept the price stable in order to compete in the market for marketing their goods. No details as to what was the profit margin of the appellants before payment of duty by them and thereafter when duty was paid by them, had been furnished.

8. In the invoices as observed above, duty element has been separately shown while clearing the goods. We are unable to subscribe to the contention of the Counsel that it was done only with a view to meet this statutory requirement of showing the duty separately in the invoices. Rather, from this fact of showing the duty separately in the invoices, it can be safely inferred that appellants had passed on the incidence of duty to the customers/buyers. In none of these invoices, it was indicated that the duty element separately shown by them was only a formality and that it was not to be charged from the buyers.

When they were paying the duty under protest, it is difficult to accept that they did not charge duty from their customers. They in fact indicated the duty separately in their invoices while clearing the goods only with an intention to make it known to their customers/buyers, the duty involved on the cleared goods and requiring them to pay the same. The affidavit of Shri K.C. Sharma, General Manager of M/s. Lloyds Industries, copy of which is at page 84 of the paper book, referred by the Counsel, does not in any manner prove that the incidence of duty was not passed on by the appellants at the time of sale of goods to that company. He has only deposed that his company placed the order with the appellants and the price agreed was inclusive of all taxes and duties and that the rate of duty was not relevant for placing the order. He had not disclosed as to what was the price agreed upon and how much was the duty element therein. When the duty element, as observed above, had been separately shown, besides the price, in the invoices, by the appellants, that itself is enough to make his affidavit meaningless.

9. The duty was no doubt paid by the appellants under protest but still they were under legal obligation to cross the bar of unjust enrichment by showing that they had not passed on the incidence of duty to the buyers, for claiming the refund, in view of the latest pronouncement by the Apex Court in the case of *CC, Mumbai v. Allied Photographies India Ltd.* [2004 (166) E.L.T. 3].

10. Having failed to prove the non-passing of the incidence of duty to the buyers, the refund claims of the appellants have been rightly held to be hit by the principle of unjust enrichment. The appellants cannot be permitted to enrich themselves by collecting the duty from both ends i.e. Government as well as the

consumers/buyers.CCE, Calcutta v. Nicco Corporation Ltd.CCE, Calcutta v. Panihati Rubber - [2004 (172) E.L.T. 310 (Cal.)] = [2004 (61) RLT 19] referred to by the Counsel during the course of arguments, is not attracted to the case of the appellants. In the first case, the duty was borne by the assessee by reducing the profit margin and there was nonpayment of duty by the customers. In the second case, the contract price was inclusive of duty and no duty was paid by the buyers. Keeping the facts and circumstances of these cases, it was observed by the Tribunal that the bar of unjust enrichment was not attracted. But such is not the position in the present case. Moreover, the law laid down in both those cases being contrary to the law pronounced by the Apex Court in Mafatlal Industries and CCE, Mumbai v. Allied Photographies India Ltd. (supra) referred to above, cannot be applied to the case of the appellants.

12. In the light of discussion made above, we do not find any illegality in the impugned order and the same is upheld. The appeal of the appellants is dismissed.

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