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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Feb-03-2005

Reported in : (2005)(191)ELT552TriDel

Judge : K Mamgain

Appellant : Birla Ericsson Optical Ltd.

Respondent : Cce

Judgement :

2. Shri P.C. Jain, learned Advocate, pleaded that the prices of PIJF Cables supplied to DOT/MTNL were provisionally approved and the same were finalized in March, 1999 and the Superintendent of Central Excise determined that the amount of Rs. 1,12,025/- has been paid extra. The appellants accordingly filed refund claim in September, 1999. The refund claim was rejected by the lower authorities on the ground that the appellants have not produced any proof that incidence of duty has not been passed on to the buyers. Shri Jain pleads that the amendment in Rule 9B was made from 29.6.1999 by adding the proviso to Sub-rule 5 by which the provision of unjust enrichment were made applicable to the refund claim. He also pleads that provisional assessment was made for two months i.e., April and May, 1995 and the assessment was finalized in March, 1999 much before the amendment in Rule 9B. Therefore, the principles of unjust enrichment are not applicable in this case. He has relied on the Supreme Court's decision in the case of CCE, Mumbai-II v.Allied Photographies India Ltd. where it was held that "the judgment of this Court in the case of TVS Suzuki Ltd. (supra),

therefore, supports the view which we have taken herein above that refund consequent upon finalisation of provisional assessment did not attract the bar of unjust enrichment." 3. Shri V. Valte, learned SDR pleaded that in this case, the refund application was filed in September, 1999. Therefore, the principles of unjust enrichment are applicable. He relied on the decision of the Supreme Court in the case of CCE, Chennai v. T.V.S. Suzuki Ltd. .

4. I have carefully considered the submissions made by both the sides.

I find that in this case the provisional assessment was finalized before the amendment made in Rule 9B and the amount of excess duty paid by the appellants was determined before such amendment which was required to be refunded to the appellants. Therefore, irrespective of the date of filing of the refund application, the appellants were entitled for the refund as refund arose prior to amendment of Rule 9B.Therefore, the appellants are entitled for refund and this position has been upheld by the Supreme Court in the case of CCE, Chennai v. T.V.S.Suzuki Ltd. (Supra) where the Supreme Court has observed that merely because the departmental authorities took a long time to process the application for refund, the right of the appellant does not get defeated by the subsequent amendment made in Rule 9B(5). In the present case, since the department itself took a long time in finalization of the provisional assessment but the duty paid extra was determined much before amendment. Therefore, the refund should be allowed to the appellants and the amendment made in the provisions to Rule 9B(5) will not be applicable in the present case. Accordingly, the appeal is allowed with consequential relief, if any, to the appellants.

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