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Commissioner of Central Excise Vs. the Simplex Mills Company

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Mumbai

Decided On : Oct-18-2005

Reported in : (2006)(104)ECC611

Judge : J Balasundaram, Vice, A M Moheb

Appellant : Commissioner of Central Excise

Respondent : The Simplex Mills Company

Judgement :

1. The issue pertains to refund of duty paid in pursuance of an order of final assessment. The respondents paid Rs. 65,05,506/- (Rupees Sixty five Page 0613 lacs five thousand five hundred six only) in pursuance of an order of the Deputy Commissioner of Central Excise dated 8th September 2005 and preferred an appeal against the said order to Commissioner (Appeals). The Commissioner remanded the matter for denovo consideration. The respondents claimed a refund of the above said amount on the ground that the amount paid by them represented a deposit made and since the order of the Deputy Commissioner was set aside by the Commissioner, they are eligible for the refund of pre-deposit made.

This application for refund was rejected by the Deputy Commissioner on the ground that the matter has not reached finality as the denovo proceedings were still pending. The respondents therefore, preferred an appeal against the order of rejection. In the impugned order the Commissioner ordered refund of the amount. The Revenue is aggrieved by his order and are in appeal before us.

(a) The Commissioner erred in ordering refund of duty even when denovo proceedings before the Deputy Commissioner were pending.

(b) The Commissioner erred in holding that the sum of Rs. 65,05,506/-(Rupees Sixty five lacs five thousand five hundred six only) paid by the respondents is in the nature of deposit under Section 35F. The said amount was paid in pursuance of an order finalizing provisional assessment. The amount was not paid as pre-deposit ordered by the Commissioner.

(c) Provisions of Section 11B governing refunds would apply in full force when an application for refund is made against the order of final assessment. In the present case Rs. 65,05,506/- (Rupees Sixty five lacs five thousand five hundred six only) was determined as duty payable when the provisional assessment was finalized. Refund of amounts paid in pursuance of such an order can be made under Section 11B alone [Maftlal Industries v. Union of India 1997 (89) ELT 257 SC relied upon].

(d) The Commissioner erred in ordering refund by observing that the Deputy Commissioner did not hold bar of unjust enrichment or time bar against the respondents. The question of unjust enrichment is irrelevant when the adjudication itself has to be done denovo in pursuance of an earlier order of Commissioner (Appeals). An application for refund can arise only after denovo proceedings are completed.

4. The entire controversy can be put in a narrow compass. The respondents paid duty in pursuance of an order of assessment and preferred an appeal against the order. The Commissioner who entertained the appeal set aside the order of assessment and ordered denovo proceedings. The respondents then applied for the refund of duty paid.

It is settled law that when an order passed by a lower authority is set aside, all sums paid in pursuance of the lower authority's order have to be refunded. The Deputy Commissioner in Page 0614 this case rejected the application for refund on the ground that the denovo proceedings are pending. We are of the opinion that this contention is wrong.

Whether the denovo proceedings are pending or not is irrelevant to the issue. When the respondents applied for refund the order of the lower authority merged in the order of the appellate authority. The result is that no demand lies against him. The respondent, therefore is right in seeking refund of duty paid against a non-existing order. Refund therefore is admissible. However, refund itself is governed by the provisions of unjust enrichment. The Supreme Court in the case of Sahakari Khand Udyog Limited 2005 (67) RLT 225 (SC) made this aspect very clear (para 47 of the order of the Hon'ble Supreme Court refers) that all refunds have to be granted subject to the bar of unjust enrichment is crossed.

5. The appeal of the appeal of the Revenue is disposed off in the above terms.

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