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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Dec-05-2005

Reported in : (2006)(105)ECC167

Judge : M T K.C.

Appellant : Hero Cycle Ltd.

Respondent : Cc

Judgement :

1. The appellants had filed a refund claim of Rs. 45,330/- on the ground that by mistake the invoice value was taken in US$ instead of Canadian $ while calculating the duty. The refund claim was sanctioned by the Dy. Commissioner of Customs but he credited the amount to the Consumer Welfare Fund on the ground that the claimant had failed to substantiate that incidence of duty for which refund has been claimed has not been passed on to the buyer as provided under Section 27(1)(b) of the Customs Act. The appeal against the order of the Dy.

Commissioner was rejected by the Commissioner (Appeals) relying on the decision of the Supreme Court in the case of Union of India v. Raj Industries , where the apex court has held that the principles of unjust enrichment applies to cases of captive consumption as well. If a claim is found to be justified on merits, even then it has to be examined from the unjust enrichment point of view. In the appeal petition, it is pleaded that in case of Union of India v. Raj Industries (supra), the Hon'ble Supreme Court had remanded the case back to the original authority

to adjudicate whether the burden of customs duty passed on to the third party or not. In the present case, the capital goods imported by the appellants are still with him, and he has not sold them in the market, therefore, question of passing on of incidence of customs duty to the buyer does not arise. The appellant has not passed on the burden of excess duty paid by him to the buyer and hence they are entitled for refund. In response to the hearing notice, the appellants stated that they are relying on the decisions of CESTAT in the following cases: (2) Toyo Engg. India Ltd. v. CC, Mumbai 2004 (157) ELT 793 (Tribunal-Mumbai)Design Classics Exports (P) Ltd. v. CC, Chennai which support their case and the appeal may be decided on the basis of these decisions. Along with the appeal petition, certificates dated 13.9.2001 and 6.12.2001 were also submitted where it was certified by the Chartered Accountant that the spare parts imported by the appellants are installed in 6-Hi Mill at their factory premises and the same has not been sold by the Company and no credit towards payment of CVD was availed.

2. On behalf of the Revenue, it was pleaded that the Commissioner (Appeals) has rightly observed that the appellants have not placed any document on record to indicate that the amount claimed remains recoverable from the customers in any of their books of accounts including the balance sheet of the relevant period. The Section 28(D) of the Act places a clear onus on the appellants to adequately rebut the presumption of unjust enrichment.

3. I have considered the submissions made by both the sides. I find that the refund claim has been rejected on the ground that the appellants could not produce any document to support that the incidence of duty has not been passed on to the customers. I find that the appellants have submitted certificates of Chartered Accountant dated 13.9.2001 and dated 6.12.2001 that the appellants had not availed any credit towards payment of CVD on the capital goods mentioned under Bill of Entry No. 219965 dated 23.8.99 and these spare parts are installed in 6-Hi Mill at their factory premises and the same has not been sold by the company. The items imported under the Bill of Entry was absolute displacement transducer which is spare part of the machinery. I find that the issue has been decided by the Larger Bench of this Tribunal in the case of Toyo Engg. India Ltd. v. CC, Mumbai reported in 2004 (175) ELT 793 (Tribunal-Mumbai), where it has been held that "the capital

goods used by the appellants for setting up a plant are not goods which have been consumed in the manufacture of final products. In this factual background, the Tribunal's order in case of Black Diamond Beverages reported in 2002 (148) ELT 1016 holding that the doctrine of unjust enrichment in Section 27 of the Customs Act is not attracted in the case of capital goods imported and used in the manufacture of final products but not consumed thereby, is clearly attracted". In case of Design Classics Exports (P) Ltd. v. CC, Chennai , the Tribunal had decided that "the principles of unjust enrichment under Section 27 of the Customs Act is not applicable to the claim for refund of duty of customs paid on capital goods in question. The appellants are entitled to the cash refund of the duty".

Following the above said decisions of this Tribunal, I Page 0171 find that in the present case, the goods have not been sold by the appellants and these are within the factory and these are not consumed in the factory. Therefore, the certificate submitted by them have to be accepted and the refund, instead of crediting to the Consumer Welfare Fund, is required to be given to the appellants.