Shivagrico Implements Limited Vs. Cce

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Dec-12-2005

Judge : M T K.C.

Appellant : Shivagrico Implements Limited

Respondent : Cce

Judgement :

1. The appellants are manufacturer of iron and steel ingots covered by the Annual Capacity Determination Rules, 1997. A scheme of payment of duty on the basis of annual capacity of production was announced by the Government which was made effective from 1.8.1997 but subsequently, the date of effect was changed to 1.9.1997 vide Notification No. 57/97-CE dated 30.8.1997. For the month of August, 1997, duty became chargeable at the rate of Rs. 600- PMT under notification No. 50/97-CE dated 1.8.97. The appellants came to know about the change of date of the implementation of the scheme of payment duty based on Annual Capacity Determination Rules after August. Therefore, they paid duty during the month of August based on the Annual Capacity Determination Rules. The duty for the month of August was paid on 4.9.97. When they came to know about the payment of duty for the month of August, at the rate of Rs. 600/- PMT, they filed a refund claim for the duty paid in excess during the month of August, 1997. During the month of August, 1997, they cleared 149.710MT of ingots for home consumption. This stock was sold at the prevailing market rate.. They consumed 269.750 MT for further processing in their Rolling Plant and Forging

Plant. The refund claim was examined by the Assistant Commissioner and he observed that during the month of August, they were required to pay duty of Rs. 2,51,676/- only whereas they have paid duty of Rs. 3,95,161/-. The total quantity cleared during the month of August and total duty paid in that month if taken into consideration then it works out to Rs. 942.07 PMT.Therefore, for home consumption the duty on the quantity of 149.710 MT at the rate of Rs. 942.07 PMT works out to Rs. 1,41,037/-, whereas the duty was payable at the rate of Rs. 600/- PMT which works out to Rs. 89,826/-. Thus, balance amount of Rs. 51,211/- is refundable which is required to be credited to the Consumer Welfare Fund. He sanctioned refund of Rs. 92,274/- for the duty paid in excess for the goods captively consumed. When this order was challenged before the Commissioner (appeals), he in respect of the amount of refund of Rs. 51,211/- credited to Consumer Welfare Fund, observed that the question to be answered is what was the duty which was actually passed on to the buyer in the case of sales made to the various parties. This aspect has not been gone into in the impugned order. He, therefore, set aside the order of the Assistant Commissioner relating to amount of Rs. 51,221/- and remanded back the matter to the adjudicating authority for passing a fresh order. The adjudicating Page 0602 authority in its fresh order came to the conclusion that from the remarks kept on each of the invoices issued during the month of August, 1997 that the goods cleared under Section 3A vide notification 33/97-CE(NT) dated 1.8.97, which required payment of duty at the rate based on Annual Capacity Determination Rules, 1997. The duty element was though not indicated in the invoices separately yet it is deemed to be included as the assessee could not prove that the duty burden was completely absorbed by them during the month and that the price hike was due to rise in price of the final product. He, therefore, held that that the provisions of unjust enrichment are applicable in the instant case as the assessee realized the entire amount of value shown in their invoices issued during the month of August, 1997 from their; buyers, which included the higher incidence of duty. He, therefore, sanctioned the refund claim of Rs. 51,211/- but credited it to the Consumer Welfare Fund in terms of Section 11B(2) read with Section 12C of the Central Excise Act. On appeal against this order, the Commissioner (appeals) under the impugned order held that the Adjudicating Authority has correctly credited the amount of refund to the

Consumer Welfare Fund.

2. It was pleaded on behalf of the appellants that the Commissioner(appeals) in the Order-in-appeal No. 544 (KDT) CE/JPR-II/2000 dated 2.6.2000 had directed the original authority to pass a fresh order on the question of what was the duty which was actually passed on to the buyer in the case of sales made to the various parties. It was pleaded that this question was not examined by the Adjudicating Authority in the (de-novo proceedings properly.

According to their calculation, as given in para 8 of their appeal memo, duty payable in August, 97 was at the rate of Rs. 600/- PMT whereas the duty actually paid is at the rate of Rs. 942/- PMT After taking into consideration the fact of non-availment of Modvat credit of Rs. 867/- in the month of August, 97, there was a hike of Rs. 394/- in the PMT sale price in the said month whereas the duty element in the month of August under Section 3A of the Central Excise Act works out to be Rs. 942.60 and the appellants had passed on a burden of duty of Rs. 394/- PMT only against the duty of Rs. 600/- PMT payable by the appellants. Thus, the burden of duty of Rs. 342/- PMT paid in excess of what was payable in the month of August, 1997 by the appellants was never passed on to the buyer. Reliance was placed on the decision of the Tribunal in the case of the case of Kothi Steel Ltd. v. CCE, Vadodara, "considering the fact that the sale price has not changed and the appellants were paying duty at a fixed rate under the compounded levy scheme without having any relation to the actual clearance, the question of applying the bar of unjust enrichment in such a case cannot arise. As such, we are of the view that the appellants are entitled to refund of the excess duty." In view of this decision of the Tribunal, it was pleaded that when the appellants had paid duty in August, 1997 at the rate prescribed under the compounded levy scheme, determined under the Annual Capacity Determination Rules, they became entitle for refund.

3. On behalf of the Revenue, it was pleaded that in his Order-in-original No. 147/2000-CE dated 20/21.9.2000 in para 6 of his findings the adjudicating authority has given clear reason that sale prices in the month of August were more than the prices in the month of July, The assessee was admittedly not aware

during 8/97 that rate of duty as per Section 3A would be made effective from 1.9.97 instead of 1.8.97 and hence they ought to have included the duty element to that higher extent in the value of the final product cleared/sold during the month of August, 97. This aspect was also kept in view while fixing the price of the final product sold during 9/97 and therefore, the price of 8/97 and 9/97 are at par. The prices fixed in the month of September, 1997 were showing that duty incidents has been passed on to the customers. Therefore, the appellants are not entitled for refund and the amount of refund has rightly been credited to the Consumer Welfare Fund. Reliance was also placed in the case of K.B. Rolling Mills v.CCE, Hyderabad-I, that "the contention of the appellant is that the provision relating to unjust enrichment could not apply to payments made under Compounded Levy Scheme. We have perused the relevant sections and rules and heard both sides. It is clear that payment made under Section 3A (Compounded Levy) is also duty of excise. Therefore, refund of such amounts would attract provisions of Section 11B, including the provisions relating to unjust enrichment. The appellant has not brought on record any evidence to show that the higher duty paid has not been passed on to the buyers.

No evidence by way of differential pricing or otherwise is available on record. The amount paid in excess is also insignificant i.e. Rs. 1,600/- per month. In the absence of evidence it has to be held that the claim is not substantiated." 4. I have considered the submissions made by both sides. I find that in this appeal, the main issue is whether the bar of unjust enrichment is applicable to the goods cleared on payment of duty under Section 3 A of the Central Excise Act when the price is inclusive of it and duty element has not been shown separately in the invoice. Prima-facie when the duty element is passed on to the buyers then bar of unjust enrichment will be applicable. However, since two contradictory decisions of the Division Bench, one of Mumbai Bench in the case of Kothi Steel Ltd. v. CCE, Vadodara and another of Bangalore Bench in the case of K.B. Rolling Mills v. CCE, Hyderabad-I (Supra) are before me.

In the earlier case, it is held that bar of unjust enrichment is not applicable whereas in the latter case it is held that bar of unjust enrichment is applicable. In these circumstances, to resolve the controversy, the following question of law is

referred to the Larger Bench.

Whether bar of unjust enrichment will apply on refunds arising out of the clearances of goods from a unit working under Compounded Levy Scheme based on capacity of production.

The matter be placed before the Hon'ble President for constituting larger bench.