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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT

Decided On : Jun-26-2006

Reported in : (2006)(112)ECC73

Judge : S Peeran, J T T.K.

Appellant : Triveni Engineering and

Respondent : The Commissioner of Central

Judgement :

1. In both these appeals, the issue is one and the same. Therefore, we are taking up them together for disposal. The goods are cleared on payment of duty and also by availing benefit of exemption notifications. In respect of goods that are cleared availing exemption, the appellants pay an amount equal to 8% of the sale price of the exempted final products in terms of Rule 57GC/57AD The said amount is credited to the Government account by debiting in the PLA/Cenvat account maintained by the appellants. This position is not in doubt.

Since the amount of 8% is paid to the Government, the appellants collect the same from their customers. Show Cause Notices have been issued proposing to demand the amount paid under Rule 57CC to the Government and collected from the buyers under Section 11D of the Central Excise Act, 1944. The contention of the Revenue is that the amount of 8% representing excise duty has been collected from the buyer and, therefore, the said amount is to be paid to the Government under Section 11D of the Central Excise Act, 1944. The adjudicating authorities

confirmed the proposals in the Show Cause Notice. The Commissioner (Appeals) confirmed the order passed by the adjudicating authority. The impugned Orders are strongly challenged by the appellants.

2. S/Shri G. Shiva Dass and Anil Kumar B., Ramesh Ananthan, the learned Advocates appeared for the appellants and Shri R.K. Singla, the learned JCDR for the Revenue.

3. The learned Advocates S/Shri G. Shiva Dass and Anil Kumar B., urged the following points: (i) Demand under Section 11D will arise only if the person liable to pay the amount has not paid it to the Government but has retained the same with him. In the present case, the amount has actually been paid to the Government either from the PLA or from the Cenvat account. Hence, demand under Section 11D is not sustainable.

(ii) Reliance is placed on the case of Nu-Wave Shoes v. CCE, New Delhi 2001 (138) ELT 331(Tri.-Del.) wherein it is held that Section 11D is not sustainable in a case where the assessee had paid to the Government the amount of 8% collected by him from the buyers in respect of exempted goods. This Bench has also held in CCE, Hyderabad-I v. Pennar Industries Ltd. that Section 11D would be attracted only when duty is collected and not paid to the exchequer. A contrary view was taken by the West Zonal Bench of the Tribunal in the case of P.T. Steel Industries v. CCE, Ahmedabad 2004 (177) ELT 1117(Tri-Mumbai). The matter was referred to the Larger Bench as reported in the case of Unison Metals Ltd. v. CCE, Ahmedabad 2004 (62) RLT 95(CESTAT-Mum.). The Larger Bench observed that the question of law as referred in the reference did not arise for consideration and hence referred it back to the Regular Bench.Mafatlal Industries Ltd. v. UOI has held that the section contemplates payment of duty only once and not twice over.

(iv) The learned Advocates argued that the following conditions are necessary for invoking Section 11 D: d. There should be a representation to the customer that an amount in excess of the actual amount of duty payable is payable by the customer as duty e. The amount collected from the customer should be adjusted against the amount actually payable as excise and the surplus if any has to be credited to the Fund.

(v) Rule 57CC does not prohibit collection of the amount from the customer. The Circular dated 12.11.2001 of the Board to the extent it says that the Rule does not envisage collection of the amount from the customer is incorrect and does not represent the correct position in law. The Apex Court, in the case of CCE Bombay v. Kores (India) Ltd. and in the case of CC, Calcutta v. Indian Oil Corporation Ltd. has held when a Circular is erroneous, it cannot bind the assessee, who can argue that it is erroneous.

(vi) In terms of Section 11D(1) of the Central Excise Act, 1944, every person who is liable to pay duty under this Act and collects an amount in excess of the duty assessed or determined and paid on any excisable goods, in any manner as representing duty of excise, shall forthwith pay the amount so collected to the credit of the Central Government.

The above provisions, therefore, contemplate a situation where a manufacturer is liable to pay duty but actually collects an amount representing duty in excess of what he has actually paid to the department.

Each of the condition above have been examined and settled in various decisions as explained below.

The Hon'ble Tribunal in the case of CCE v. Perfect Refractories has held that in a situation where the assessee is not liable to pay any duty at all, the collection of an amount describing them as surcharge in addition to the price of the goods, cannot be considered as a collection representing excise duty payable on the goods warranting its payment to the Central Government under Section 11D of the Act.

The above decision of the Tribunal has been followed by this Bench in the case of Rashtriya Ispat Nigam Ltd., in Final Order No. 750/2005 dated 5.5.2005.

As the appellants are exempted from payment of duty, which is the reason why they pay 8% as an amount under Rule 57CC/Rule 6, they are not persons liable to pay duty and, therefore, are not covered under Section 11D. The next condition is that Section 11D would apply only where an assessee who is liable to pay 'duty' collected any amount representing as 'excise duty'.

The CBEC, vide F.No. B-42/1/96-TRU dt: 27.9.1996 (based on which the Mumbai Commissionerate issued a Trade Notice No. 70/96 dated 14.10.96 reported in 1996 (17) RLT M18), had clarified that the amount reversed under Rule 57CC/57AD is not by way of payment of excise duty.

The above Circular of the CBEC was taken note of by the Tribunal in the case of CCE Chennai v. Megatech Controls Ltd. 2003 (55) RLT 77 (CEGAT-Che.).

Further, the CBEC vide Circular dated 12.11.2001 which has been relied upon by the lower authorities themselves, has clearly clarified that whether the amount collected is collected as excise duty or not has to be ascertained on the basis of documents and that when it is collected as an amount, Section 11D would not get attracted. In this case, the appellants have sufficiently demonstrated that they have collected the amount of 8% under Rule 57CC/57AD read with Notification 6/2000-CE. Since the amount paid by the Appellants and also collected under Rule 57CC/57AD is not represented as duty at all, the provisions of Section 11D are not applicable to this case.

The expression "paid on any excisable goods" represents the actual payment of duty as held by the Apex Court in the case of CCE v. Dhiren Chemical Industries reported in 2001 (47) RLT 881 (SC).

Therefore wherever the expression 'paid' is used in Section 11D, it has to represent actual payment of duty and not a fictional payment of duty.

The provision of Section 11D(3) and 11D(4) makes it further clear that the assessee should in the first place pay excise duty as the goods in question collect an amount representing excise duty at the time of selling the said goods. There has to be a further assessment of the duty payable determining the excise duty actually payable etc.

This position has been explained in the case of Bipranil Industries Limited v. Commissioner of C.Ex., Bangalore . The reference application filed by the Revenue has been rejected by the Hon'ble High Court of Karnataka which has approved the decision of the Tribunal.

(vii) The Appellants submit that in this case, the department while raising the demand has calculated the amount of 8% on the amount of 8% also paid to the department.

The Appellants submit that this method is incorrect as the Rule clearly envisages that the amount of 8% is to be calculated on the sale price agreed between the parties and not on the total realization from the customer. Once the amount of 8% is calculated on the sale price, then a further calculation of 8% does not arise as such a calculation will be endless. In fact such a calculation would mean either altering the sale price or demanding an amount of 8.64% on the sale price both of which is beyond the scope of Rule 57CC.4. Shri Ramesh Ananthan, the learned Advocate, appeared on behalf of the appellant M/s. Kinematic Transmission Pvt. Ltd. He submitted that the Commissioner misconstrued the clarification given by the Central Board of Excise & Customs in Board's Circular No. 599/36/2001 wherein in paragraph 2(c), the Board has clearly stated when 8% amount is shown separately on an invoice as excise duty, then Section 11D would get attracted. In the case of the appellant, in the invoice, the amount of 8% has been shown under the Heading "Cenvat Reversed". As such, the Commissioner erred in applying the Board's Circular.P.T. Steel Industries v. CC, Ahmedabad 2000 (117) ELT 1117(Tri-Mumbai)Process Pumps (India) P. Ltd. v. CCE, BangaloreG.S. Pharmabutor (P) Ltd. v. CCE, Jaipur 2005 (182) ELT 167(Tri.-Del.)GTC Industries Ltd. v. CCE, Vadodara 2004 (176) ELT 728(Tri.-Del.) 6. We have gone through the records of the case carefully. In both these cases, the appellants availed Cenvat on inputs. The goods were cleared on payment of duty and also under exemption. Since separate account of inputs meant for dutiable goods and exempted goods were not maintained, Rules 57CC/57AD of Central Excise Rules, 1944 and Rule 6 of Cenvat Credit Rules, 2001/2002 come into play. Under the provisions of the above Rules, an amount of 8% of the sale value of the exempted goods was reversed/paid. A perusal of the invoices issued by the appellants indicates that these amounts have been collected from the buyers of the goods. In the case of M/s. Triveni Engineering & Industries Ltd., this 8% is collected as Excise Duty at 8% payable under Rule 57AD. In the case of M/s, Kinematic Transmission Pvt. Ltd., there is an indication in the invoices that 8% is reversed under Rule 6 and separately this 8% has been collected. There is no mention that the amount of 8%

represents duty.

6.1 The contention of the Revenue is that the appellants are not expected to collect this amount of 8% from the buyers. Moreover, this amount has been collected as Excise duty. Therefore, the Revenue contends that Section 11D is attracted and the amount collected, representing Excise Duty, has to be paid to the Government.

6.2 We find that the appellants complied with the requirement of reversing an amount of 8% of the sale value of the exempted goods in accordance with Rule 57CC/57AD of CE Rules and Rule 6 of Cenvat Credit Rules. Even though, the amount of 8% was collected from the buyers, that amount has not been retained with them. It is not the case of the department that the appellants collected an amount in excess of the amount of 8% payable to the Government. There is also no provision in the Central Excise Law debarring the appellants from collecting the amount of 8% from the buyers. This stand is taken in the following decisions cited supra.

However, contrary view was taken in the following decisions cited by the learned JCDR.Therefore, the matter was referred to the Larger Bench for resolving the issue in Unison Metals Ltd. v. CCE, Ahmedabad 2004 (62) RLT 95(CESTAT-Mum.).

6.3 The Larger Bench, in the Misc. Order No. 313/05-Ex dated 5.9.05 has observed as follows: Before deciding the issue whether the amount of 8% debited from RG.23A Part II Account in terms of the provisions of Rule 57CC(1) and collected from the Customer is required to be deposited with the Govt. in terms of the provisions of Section 11D of Central Excise Act, the issue whether the amount of 8% was collected by the assesses from their customer or not. (sic). If the amount is not collected, the applicability of Section 11D will not arise, therefore, the matter is referred back to the regular Bench as on the facts given in the referral order, the question of law as referred does not arise, therefore, reference is returned. Appeal be placed before Regular Bench.

7. With reference to the above observations of the Larger Bench, in the present appeals, it is seen that the amount is collected from the buyers. We have perused the invoices. In our view, the question of Jaw arises to view of the conflicting decisions cited supra. Therefore, we have no other option but to refer this matter to the Hon'ble President for constituting a Larger Bench to resolve the issue.

"Whether the amount of 8% reversed/paid on the sale value of the exempted goods in accordance with Rule 57CC/Rule 57AD of Central Excise Rules, 1944/Rule 6 of Cenvat Credit Rules 2001/2002, by the appellants, and collected from the buyers attracts provisions of Section 11D of the Central Excise Act, 1944?