

Commissioner of Central Excise Vs. Bhp Engineers Ltd.

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Aug-14-2006

Reported in : (2006)(111)ECC645

Judge : R Abichandani

Appellant : Commissioner of Central Excise

Respondent : Bhp Engineers Ltd.

Judgement :

1. This appeal is preferred by the Revenue against the order in appeal dated 21.7.04 made by the Commissioner (Appeals) setting aside the order-in-original directing that the amount of Rs. 2,46,210/- being the amount of refund payable to the assessee should be diverted to the consumer welfare fund under Section 11B read with Section 12C of the Central Excise Act, 1944 on the ground of unjust enrichment.

2. The assessee was issued demand cum show cause notice in respect of Central Excise duty amount of Rs. 2,46,210/-, on the ground that the notional interest accrued for advances received by the assessee from their customers was not included in the assessable value, which resulted in short payment of duty. The demand came to be confirmed by order dated 6.1.97 pursuant to which the assessee debited the amount on 31.3.97 under protest and preferred the appeal. In the appeal, admittedly the amount was treated as pre-deposit under Section 35F of the Act. The assessee ultimately succeeded in the appeal and made a

refund claim for the amount. However, since, according to the Deputy Commissioner, the amount paid on 31.3.97 for which refund was sought, was shown as expenditure in the profit and loss account in the year 1996-1997 under the head 'excise duty', it was held that the refund of the amount was "hit by unjust enrichment". The Appellate Commissioner held that the amount which was deposited on 31.3.97 pursuant to the order-in-original and was treated as pre-deposit under Section 35F of the Act, could not have been passed on to any other person and, therefore, the question of unjust enrichment did not arise.

3. The learned authorised representative for the revenue argued that under Section 12B of the Act, there was a presumption that the amount was deemed to have been passed on and the assessee did not produce any evidence to rebut that presumption. He submitted that since the amount was shown as expenditure under heading 'excise duty', the assessee is deemed to have passed on that amount to its customers. The learned authorised representative for the department relied upon the decision of High Court of Andhra Pradesh in *ITW Signode India Ltd. v. Assistant Commissioner of Customs & Central Excise, Hyderabad*, for the proposition that the deposit made as a condition precedent for availing of appeal remedy pursuant to the direction of the Court was to be treated as a part of the duty and that all refunds, except those which are unconstitutional levies, are governed by Section 11B of the Act.

4. The learned authorised representative for the respondent-assessee supporting the reasoning and findings of the Commissioner (Appeals) argued that, the entry in expenditure account was made consequent upon the amount deposited pursuant to the order-in-original. However, since the notional interest on advance amount was not includible in the assessable value on the ratio of the decision of the Supreme Court in *VST Industries Ltd. v. CCE, Hyderabad* reported in 1998 (97) ELT 395 (Supreme Court), there was no question of passing on the incidence of duty which was not payable on such notional interest and which was earlier held by the Commissioner (Appeals) not to be so payable, resulting in the refund claim of the assessee.

5. Admittedly, the notional interest on the advance amount taken from the customers was not includible in the assessable value. It appears from the record that the invoice covering the sale of disputed goods indicated the duty chargeable, which was paid by the customers to the assessee. The invoice value did not include any such amount of notional interest, which was not payable and which could never be added in the value of the goods. Therefore, when the transaction took place, excise duty was paid by the customers on the invoice value, there was no other amount payable by the customers, in respect of the goods sold to them by the assessee, towards excise duty. Pursuant to the order-in-original made, much after the transactions, taking into account the notional interest on the advances, the amount as ordered was paid, but it was treated as pre-deposit under Section 35F of the Act for the purpose of the appeal to the Commissioner (Appeals). Such subsequent payment of the pre-deposit could not have been taken as passing on the burden of erroneously fixed additional amount of excise duty retrospectively from the date of the transactions, which were on the basis of invoice value on which the excise duty was already recovered without reference to any notional interest on advances. There is, therefore, no warrant for interference with the impugned order of the Commissioner (Appeals).

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