Commissioner of Central Excise Vs. Him Cylinders Pvt. Ltd.

Commissioner of Central Excise Vs. Him Cylinders Pvt. Ltd.

SooperKanoon Citation : sooperkanoon.com/43566

Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Sep-01-2006

Reported in : (2006)(112)ECC307

Judge : R Abichandani

Appellant : Commissioner of Central Excise

Respondent : Him Cylinders Pvt. Ltd.

Judgement :

1. This is an appeal preferred by the Revenue against the order of Commissioner (Appeals) made on 30.7.04 partly allowing the appeal and setting aside the order-in-original made on 31.1.95 by the Assistant Collector by which the refund claim of Rs. 1,31,181.62 was rejected on the ground of unjust enrichment. The Commissioner (Appeals) held that in view of the debit notes of the oil companies, deducting the amount for the bills on account of duty, there was no question of raising the issue of unjust enrichment in respect of amount of Rs. 1,06,353/-. The refund claim for Rs. 16,612.54 was, however, rejected as time barred.

2. Earlier, the Tribunal, in appeal No. E/1765/95-A, preferred against the order of the Commissioner of Customs (Appeals) Chandigarh made on 31.8.1995, had remanded the matter by Final Order No. 329/99-A dated 2.2.1999 in the following terms: 3. We have carefully considered the matter. We find that the Commissioner has decided the issue on merits. He has not examined whether the refund claim was barred by time or not. Further more, he has not looked into the aspects with

reference to the unjust enrichment. In view of this, as requested by the Departmental Representative, we are remanding the matter to the concerned Commissioner (Appeals) to examine the above issue and to pass an order in accordance with the law after providing an opportunity to the assessee. Thus, the appeal filed by the Revenue is allowed by way of remand 3. Thereafter the Commissioner (Appeals) made an order on 28.6.2001 pursuant to such remand. In Appeal No. 2094/2001-A, the Tribunal set aside the said order of Commissioner (Appeals) on the ground that the he had not referred to any arguments on behalf of the assessee and had not considered the matter afresh as ordered in the remand order dated 2.2.99. The Tribunal by its order dated 21.1.2002 remanded the matter again, in the following terms: 2. In view of the above, we set aside the order impugned and remand the matter to Commissioner (Appeals) for fresh consideration after giving an opportunity of being herd to the appellant herein. We make it clear that we have not taken any view on the merits of the contentions raised in the appeal. The appeal stands allowed by way of remand.

4. Thereafter, the impugned order has been made by the Commissioner (Appeals) who, after taking note of the earlier orders and observing that the question of unjust enrichment was already considered by the Assistant Commissioner of Central Excise while sanctioning the refund of Rs. 1,06,353/- which was adjusted against the confirmed demand, held that on seeing the debit notes whereby the Oil companies had deducted the amount from the bills on account of duty, there was no question of raising the issue of unjust enrichment and partly allowed the appeal in respect of the refund claim of Rs. 1,06,353/-.

5. The learned authorized representative for the appellant-revenue has argued that the Commissioner (Appeals) has not taken note of the settled legal position that even when duty has been passed on to the customers at the time of clearances, the assessee can still claim refund by issuing the credit notes. Reliance was placed on the decision of the Tribunal in Sangam Processors v. CCE and the other decisions following the said decision, as also on the Larger Bench decision in Grasim Industries (Chem) v.CCE, Bhopal since the view taken by the Tribunal in Sangam Processors was affirmed by the Hon'ble Supreme Court, it was required to be followed and the decision in Thermon Heat Tracers

Ltd. v. CCE, Pune was not a good law.

6. The learned Counsel for the Respondent-assessee submitted that the deductions were made on account of excess excise duty by issuing debit notes which were placed on record. It was argued that the debit notes indicated that the assessee had not passed on the incidence of duty and burden of excess duty remained on assessee and therefore, there was no question of unjust enrichment. The learned Counsel also argued that the Commissioner has not considered the nature of the contract and therefore, the matter may be remanded again. He relied upon the decision of Arctic Engineering Pvt. Ltd. v. CCE, Delhi reported in 2004 (191) ELT 798 (Tri-Del), in which the decision in Grasim Industries was distinguished. In that decision, the Tribunal found it difficult to accept the plea of the Revenue that incidence of duty had been passed on by the appellants to the buyers, since there was mistake of charging the excess price by adding duty and other tax again, and the credit notes were issued for rectifying the mistake as they could not have charged such excess duty. The learned Counsel also relied upon the decision in Universal Cylinders Ltd. v. CCE, Jaipur-I reported in 2004 (178) ELT 898 (Tri-Del), in which the Tribunal observed in para 5 of the judgment, that the undisputed fact was that the contract entered into between the assessee and the customers contained the price variation clause and held that as the customers has not paid the entire payment on price revised downwards and credit notes were issued by the assessee to their customers, the Tribunal did not find any valid reason to interfere with the order of the Commissioner (Appeals) sanctioning the refund.

7. It is unfortunate that even after two remands, the Commissioner (Appeals) has not directed himself to the settled legal position emerging from the decision in Grasim Industries (supra) which was decided on 17.2.03, i.e. before the impugned order was made by the Commissioner (Appeals) on 30.7.04. The Commissioner (Appeals) has only observed that he has seen the debit notes whereby the Oil companies have deducted the amount for the bills on account of duty and therefore, there was no question of unjust enrichment. Admittedly, the clearances of the goods were made between 28.2.93 and 12.3.93 as stated in the adjudication order. The debit notes were issued thereafter, and most of them were

issued in May and September, 1993. There debit notes were issued on 31.3.93. Since mandatory system was adopted at the time of clearance, duty was passed on to the buyer by the supplier. In this background of the facts of this case, the ratio of the decision of the Tribunal in Sangam Processors (supra) which has been affirmed by the Hon'ble Supreme Court and which is required to be followed as held in Larger Bench decision in Grasim Industry, was clearly applicable, though that decision was rendered in the context of the provisions of Section 11C of Central Excise Act, 1944. It will be evident from the provisions of Section 11C that the matter under Section 11C was to be dealt with in accordance with the provisions of Sub-section (2) of Section 11B. Obviously, therefore, the ratio of the decision in Sangam Processors (supra), was to be read in the context of Sub-section (2) of Section 11B. Therefore, since the duty was paid by the customers to the oil companies at the time of clearance, the assessee will not be entitled to claim refund by virtue of subsequent debit notes by the oil company. Since the debit notes were subsequently issued after the duty was passed on at the time of clearances, following the ratio of the Larger Bench decision in Grasim Industries(supra), affirming the ratio of the decision in Sangam Processors even in the context of Sub-section (2) of Section 11B, it is clear that the assessee was not entitled to get the amount of Rs. 1,06,353/- by way of refund. The impugned order, to the extent it is challenged by the Revenue is therefore, set aside and appeal is accordingly allowed.