

Gmp Finishing Vs. Cce

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Mar-29-2007

Reported in : (2007)(119)ECC141

Judge : R Abichandani

Appellant : Gmp Finishing

Respondent : Cce

Judgement :

1. The appellant has challenged the order of the Commissioner (Appeals) made on 29.03.2005 upholding the order-in-original to the extent that the refund of Rs. 5,22,000/-, which was sanctioned against the refund claim dated 19.06.2003, was ordered to be credited to the Consumer Welfare Fund.

2. It appears that, on the basis of the decision of the Hon'ble Supreme Court in CCE, Jaipur v. Sangam Processors (Bhilwara) Ltd. , holding that the length of galleries was not to be included in the chambers for the purpose of capacity determination, the initial provisional capacity determination @ 1.5 lac per chamber per month came to be accordingly finalized at the same rate. Since, in the meanwhile, the appellant had paid excess duty, as set out in the order-in-original on the galleries attached to the chamber installed in the factory, a refund claim was filed under Section 11B of the Act to get the amount back. The appellant had claimed refund of Rs. 5,22,000/-, being the duty paid on galleries during the months from June, 1999 to March, 2000 (except September, 1999). A show cause

notice was thereafter issued on the appellant as to why the claim should not be rejected since the original documents evidencing the payment of duty were not submitted and the appellant had recovered the duty paid from the customers and, therefore, it was not liable to be refunded to the appellant on the ground of unjust enrichment.

3. The Assistant Commissioner, entertaining the application for refund, came to a finding that, the refund claim was required to be sanctioned since the duty on galleries had been shown debited by them under protest. However, on the aspect of unjust enrichment, it was held that the appellant had failed to establish that the duty incidence in respect of the duty paid on galleries was not passed on to the customers. Accordingly, while sanctioning the refund, the amount was ordered to be credited to refund.

4. The Appellate Commissioner, relying upon the ratio of the decision of the Hon'ble Supreme Court in CCE, Mumbai-II v. Allied Photographics India Ltd. unjust enrichment could be validly invoked. It was further held that, since composite price was shown in the invoice in view of the Compounded Levy Scheme, the duty incidence was included in the price.

It was also held that, since there was no separate provision for claiming refund under Rule 96ZQ, the refund claim was governed by Section 11B of the Act. Relying upon the provisions of Section 12B of the Act, which cast the burden on the assessee to prove that the incidence of duty had not been passed on, it was held that, since the appellant failed to discharge the onus, the doctrine of unjust enrichment debarred the appellant from taking the amount of refund. The order of the Original Authority directing the refund amount to be credited to the Consumer Welfare Fund was, therefore, upheld.5. The learned Authorized Representative for the appellant contended that, since there was no provisional assessment made, no question of unjust enrichment would arise. He relied upon the decision of the Hon'ble Supreme Court in Mafatlal Industries Ltd. v. Union of India , more particularly, on paragraph 95 of the judgment, in support of this proposition. He also argued that, the show cause notice was issued for earlier period and the duty was paid under protest in respect of the galleries and, therefore, there was no

possibility of the duty being passed on to the customers. He placed reliance on the decision of the Tribunal in *Commissioner of Central Excise, Jaipur-II v. A.K. Spintex* 6. The learned Authorized Representative for the Department, on the other hand, submitted that, the ratio of the decision in *Mafatlal Industries Ltd. v. Union of India* (supra), was being wrongly invoked, because, as held by the Hon'ble Supreme Court in *CCE, Mumbai-II v. Allied Photographies India Ltd.* (supra), there was nothing in para 104 (equivalent to para 95 in the ELT report) in the case of *Mafatlal Industries Ltd. v. Union of India* (supra), to suggest that payment of duty under protest does not attract bar of unjust enrichment.

7. The procedure to be followed by the independent processor of textile fabrics was laid down in Rule 96ZQ, as per which the duty amount was required to be debited at Rs. 1.5 lac per chamber per month or Rs. 2 lacs per chamber per month, as the case may be, on the annual capacity of production as determined under the Hot Air Stenter Independent Processors Annual Capacity Determination Rules, 1998. The amount of duty payable under Sub-rule (1) of Rule 96ZQ was required to be paid by the 5th of each calendar month as provided by Sub-rule (3). Under Sub-rule (4) of Rule 3 of the said Rules of 1998, pending verification of the declaration furnished by the independent processor, the Commissioner may determine the annual capacity of production on provisional basis and the annual capacity could thereafter be finally determined. Payment of such fixed duty amount, on the annual capacity of production base, does not involve provisional assessment under Rule 9B, which would apply, where the assessee is unable to determine the value of the excisable goods on account of non-availability of any document or information; or where the assessee is unable to determine the correct classification of the goods, as contemplated by Clauses (a) & (b) of Sub-rule (1) of Rule 9B of the Central Excise Rules, 1944.

Therefore, there was no question of making a refund order under Sub-rule (5) of Rule 9B. This is why the appellant made an application for refund under Section 11B of the Act after the decision of the Hon'ble Supreme Court in *CCE, Jaipur v. Sangam Processors (Bhilwara) Ltd.*, supra, holding that galleries were not part of chamber. Such an application claiming refund under Section 11B was obviously required to be decided in accordance with the said provision, making the doctrine

of unjust enrichment incorporated thereunder, relevant. In this view of the matter, the decision of the Hon'ble Apex Court in *Mafatlal Industries Ltd. v. Union of India* (supra), cannot assist the appellant.

As held by the Hon'ble Supreme Court in *CCE, Mumbai-II v. Allied Photographics India Ltd.* (supra), there was nothing in the decision of the Hon'ble Supreme Court in *Mafatlal Industries Ltd. v. Union of India* (supra), to suggest that payment of duty under protest does not attract bar of unjust enrichment. Moreover, since the claim of the appellant was an independent refund claim under Section 11B, it would obviously be governed by that provision, even as per the ratio of the decision in *Mafatlal Industries Ltd. v. Union of India* 8. As regards the contention that the duty burden could not have been passed on to the assessee because the show cause notices were issued for earlier period and the amount of duty in respect of galleries was paid under protest, it would appear that the question of not passing of the duty burden was required to be determined in the contest of the presumption raised under Section 12B of the said Act which provided that, every person who had paid the duty of excise on any goods under the said Act, shall, unless the contrary is proved by him, be deemed to have passed on full incidence of such duty to the buyer of such goods.

As rightly held by the authorities below in their concurrent findings, the appellant did not adduce any reliable material on record to show that the duty paid by it in respect of the galleries, had not been passed on to the buyers of the goods. There is, therefore, no valid ground made out for any interference with the impugned order. The appeal is, therefore, dismissed.

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