

Commissioner of Central Excise Vs. B.G. Chitale

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Mumbai

Decided On : Apr-23-2007

Reported in : (2007)11STJ63CESTAT(Mum.)bai

Judge : M Ravindran

Appellant : Commissioner of Central Excise

Respondent : B.G. Chitale

Judgement :

1. This appeal is directed against order-in-appeal dt. 17.7.2006. Vide which the Ld. Commissioner (Appeals) set aside the order-in-original which rejected the refund claim filed by the respondents.

2. Considered the submissions made in detail by both sides and perused the records. The issue involved in this case is regarding the refund claim filed by the respondent of Service Tax paid by them on services received from goods transport operators. The said amount was paid by the respondents on 14.11.2003 "under protest". The respondent's contention before the lower authorities was that they are not liable to pay the amount of service tax as a recipient of goods transport operators on the ground that they are small scale industries.

Notification No. 43/97-ST dt. 5.11.1997 granted exemption to small scale industries from payment of service tax as recipient of services of goods transport operator. The perusal of the records shows that this contention of the was

accepted by the lower authorities without being contested by the Revenue in higher forum. If that be so, service tax amount paid by the respondent which is not a tax, cannot be held by the revenue as the said amount is not payable by the respondent. The refund claim of the respondent was rejected by the adjudicating authority on the ground of unjust enrichment. The Commissioner (Appeal) in his order in appeal dt. 17.7.06 on perusal of the records held as under: I have carefully gone through the case records and the various submissions made by the appellants. The adjudicating authority has rejected the refund claim on the ground of unjust enrichment holding that the appellants had debited the Service Tax amount of Rs. 7,88,225/- in their Profit & Loss Account treating the same as normal expenditure for the year 2003-04; that it is obvious that they must have included the Service Tax amount in the cost of the final product and hence the burden is passed on to the customer indirectly. The appellants have stated that as per Accounting Standard AS-5, when refund is received the same will be shown in the year of receipt; that there are no principles of costing as per where 'prior period expenditure' is to be included in the cost of production/sale; that C.A. Certificate dated 14.12.2004 from M/s. BC Abhyankar & Co., Sangli has certified that the incidence of Service Tax has not been passed on. In this regard, I find that the Service Tax amount of Rs. 7,88,2.25/- for the period for 16.11.97 to 01.06.98 was paid much later in the year 2003-04 (vide TR6 challan No. 01/03-04 on 14.11.2003). In such a situation, the ratio laid down by Tribunal in the case of Silvester Textile Pvt. Ltd. v. CCE and Panjab Beverages Pvt. Ltd. Sunbeam Auto Ltd. v. CCE Delhi III also applicable wherein it is held that merely because the amount is mentioned as sales expenses, the bar of unjust enrichment is not applicable; that even if the assessee is keeping such amount in their Account as sales expenses and deducted the same out of their profits, the refund claim is not deniable. Further I find that the appellants had also produced before the adjudicating authority a C.A. Certificate dated 14.12.2004 from M/s. B.C. Abhyankar & Co.

certifying that the appellants had borne the incidence of Service tax and had not recovered the same from the customer. In view of the above facts and in view of the C.A. Certificate from M/s. Abhyankar & Co. the bar of unjust enrichment will not be applicable in the case. The other case laws relied upon by the appellants

are also applicable to this case. There is therefore, no merit in the stand of the department. The refund of Rs. 225/- is therefore, admissible to the appellants.

As against the above reproduced findings of the Ld. Commissioner (Appeals), the Revenue has not adduced any evidence contradicting the certificate of the Chartered Accountant produced by the respondents before the Commissioner (Appeals). The said certificate was shown to me by the Ld. Advocate for the respondent. I may read the same: This is to certify that, on verification of the books of accounts of M/s. B.G. Ghitale, Bhilawadi Station, Dist: Sangli the said firm has borne the Service Tax incidence of Rs. 7,88,225/- (Rs. Seven lacks eighty eight thousand two hundred twenty five only) for period 16.11.97 to 2.6.98 and paid on 14.11.2003 Rs. 7,88,225/- that they have not passed this burden of Service Tax to the customers and they have not recovered the same from its transporters.

It can be noticed from the above reproduced certificate that the Chartered Accountant before issuing certificate had verified the entire books of accounts and has come to a categorical conclusion that respondent has not passed on burden of service tax to the customers and nor they have recovered the amount from the transporters. The certificate also categorically states that the respondent had borne the incidence of service tax. Further, I find that the issue in this case is squarely covered by the order of the Tribunal in the case of Sunbeam Auto Ltd. v. CCE, Delhi-III reported as . The Tribunal in that case was dealing with the issue as is in the current case and on the issue of the amount of service tax paid being debited to the account of sale expenses, the Tribunal held as under: Further the appellant is only mentioning this amount in sale expense. As the amount in question is deposited by the appellant after the period in dispute and that was after the clearance of the goods, therefore, in view of the decision of the Tribunal, the principles of unjust enrichment are not applicable. Further the appellants is keeping this amount in their account as sale expenses are some were deducted out of their profit, therefore the refund claim cannot be denied on this ground also. The impugned order is set aside and the appeal is allowed.

The learnt Commissioner (Appeals) after checking the records was satisfied with the evidences which were produced before, him as regards the non passing of the

incidence of service tax by the respondents to their customers. The Revenue in their appeal has not produced any contrary evidence to this said findings nor there is any challenge to the Chartered Accountant Certificate.

3. Accordingly, in the facts and circumstances of the case, the impugned order is correct and legal and does not require any interference. The appeal filed by the Revenue is dismissed.

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