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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Jan-02-2008

Reported in : (2008)(128)ECC48

Judge : P Das

Appellant : Nanda Devi Sharma and ors.

Respondent : Cce

Judgement :

1. The relevant facts of the case are that the appellants procured coal ash from M/s. Nepa Ltd., which they sold to their customers. M/s. Nepa Ltd. paid duty under protest. The appellant filed refund claim before the adjudicating authority based on the Hon'ble Gujarat High Court judgment dt.4.4.2000. The adjudicating authority allowed the refund claim as the issue of unjust enrichment was settled in favour of the assessee by the Commissioner(Appeals) in identical case of one of the appellant Manoj Kumar Agarwal vide order-in-appeal No. IND-I/121/2004 dt.17.3.04 which was upheld by the Tribunal vide Final Order No.1797/05-SM dt.24.8.05. The revenue filed an appeal before the Commissioner(Appeals). Commissioner(Appeals) set aside the adjudication order on the ground that the appellant failed to establish that the incidence of duty had not passed on to any other person. Hence, the appellant filed these appeals before the Tribunal.

2. Ld. Advocate submits that the Commissioner(Appeals) while passing the order, had totally ignored the final order dt.24.8.05 of the Tribunal. He further submits

that the Commissioner(Appeals) proceeded on the basis that the appellant earned higher profit margin in this case. He also submits that the Tribunal discussed in the Final Order dt.24.8.05 on this issue and rejected the appeal filed by the revenue.

2.1. Ld. DR reiterates the findings of the Commissioner(Appeals). He submits that in all these cases, the sale price of coal ash is much higher than the purchase price including excise duty and sales tax element, which indicate that the appellants have passed the excise duty to the customers. He also submits that mere filing of affidavit of the appellant can not serve the purpose of unjust enrichment.

3. After hearing both the sides and on perusal of the record, I find that the adjudicating authority allowed the refund claim following the decision of the Tribunal on the similar issue. The relevant portion of the order dt.24.8.05 of the Tribunal is reproduced below: I find that Commissioner(Appeals) in the impugned order after going the account books gave a finding of fact that the respondents have taken the excise duty paid to the manufacturer under the category of 'amount receivable' and that entire amount collected from their buyers over and above the purchase price (without tax) has been taken as gross profit for the income tax purposes. The Commissioner(Appeals) held as under: From the details given above it is clear that the appellant have consciously not passed on the excise duty element to their buyers and hence it cannot be concluded that they have passed on duty element in the guise of profit and hence not eligible for refund. As already stated above, the sale price was much below the purchase price including the tax element during the period November, 2002 to Jan'03 and that only from Feb'03 onwards the amount of sale price was higher than the purchase price including the tax elements by about 10% but this does not mean that the excise duty has been passed on to the buyers for the reason that the appellants have clearly indicated in their books of accounts that the excise duty paid to Nepa Ltd. under the category of 'amount receivable' (from the department as refund) and that they had taken the difference between the purchase price from Nepa Ltd. (without tax) and their selling price to subsequent buyers as gross profit liable to Income Tax. Accordingly based on the material available on the record, I am of the view that the tax burden borne by the appellants in respect of their purchases of Coal Ash(cinder) from M/s. Nepa

Ltd. during the period Nov'02 to Feb'03 has not been passed on their buyers and that they are eligible for the refund claimed.

In view of the finding of the Commissioner(Appeals) which is based on the account books maintained by the appellant, I find no infirmity in the impugned order, the appeal is dismissed. The cross objections are also disposed of in the same manner.

4. On perusal of the impugned order, it is seen that the Commissioner(Appeals) rejected the refund claim on the ground that the profit margin of the appellants are on the higher side. The Tribunal in the case of CCE, Indore v. Shri Manoj Kumar Agrawal vide order dt.

24.8.05 observed that the entire amount collected from the buyers over and above the purchase price(without tax) has been taken as gross profit for income tax purpose. So, the refund claim cannot be rejected simply on the ground that the appellant earned higher profit margin which has already been taken care by the Income Tax authorities.

5. In view of the above, the order of the Commissioner(Appeals) is set aside and the adjudication order is restored. The appeals are allowed with consequential relief.

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