Cce Vs. Parekh Platinum Ltd.

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Mumbai

Decided On : Jan-11-2008

Reported in : (2008)(129)ECC76

Judge : A T K.K.

Appellant : Cce

Respondent : Parekh Platinum Ltd.

Judgement :

1. This is revenue's appeal. The brief facts of the case are that the appellant have initially filed a refund claim for Rs. 11,25,046/- in respect of duty paid by them as per directions of the department.

Appellants were clearing their goods by claiming exemption under Notification No. 4/97 dated 1.3.97 under Sr. No. 163 and 164. However show cause notice was issued to them stating that this exemption was not available to them and accordingly during the investigation they paid an amount of Rs. 10,54,713/- and another amount of Rs. 70,333/- on 11.7.98. The proceedings were ultimately dropped by Commissioner (Appeals) vide his order dated 1.9.99 on appeal against the order of the Assistant Commissioner. Respondents therefore filed a refund claim for Rs. 11,25,046/- on 17.9.99 paid by them on the impugned goods and this claim was rejected by the Assistant Commissioner on the ground that the claim was time barred as duty was not paid under protest as the procedure prescribed under Rule 233B was not followed. This order was challenged by the respondents before the Commissioner (Appeals) and the Commissioner (Appeals) vide his order dated 23.3.2000 set aside the order by upholding that the show cause notice itself recognized that duty was paid under protest and therefore the refund cannot be denied.

This order was never challenged by the revenue. Subsequently, the refund of Rs. 11,25,046/- was sanctioned by the Assistant Commissioner but later on a show cause notice was issued stating that out of this an amount Rs. 70,333/- was not covered by protest letter and therefore the same was time barred. An appeal was also simultaneously filed against the order of Assistant Collector sanctioning the refund. The show cause notice was adjudicated by the Assistant Commissioner who denied the refund on twin grounds i.e. the amount was not covered by the protest letter and that the respondents failed to produce any evidence to show that the incidence of duty was not passed on by them. This order was again challenged by the respondents and the Commissioner has set aside the order of the lower authority on the ground that once Commissioner (Appeals) vide his order dated 23.3.2000 has held that the duty was paid under protest which order was not challenged by the revenue, the plea that the duty was not paid under protest cannot taken now.

2. Revenue in its appeal has submitted that the amount of Rs. 70,333/- was never paid under protest and further contented that in view of the Apex Court decision in the case of M/s Sahakari Khand Udyog , respondents have to prove that the incidence of duty has not been passed on and on their failure to do so refund cannot be sanctioned.

3. I have considered the submissions. I find that originally the refund was denied on the ground that duty was not paid under protest and this order was set aside by the Commissioner (Appeals) vide his order dated 22.3.2000 which was not challenged by the revenue. A new plea regarding unjust enrichment cannot be taken in appeal when this ground was not there in the earlier show cause notice or before the Assistant Commissioner. Since the Commissioner (Appeals) vide his order dated 22.3.2000 has held that entire amount of Rs. 11,25,046/- was paid under protest which order was not challenged by the revenue, it cannot

subsequently take a stand that part of this amount was not covered by protest letter and therefore cannot be considered as payment under protest. In view of this I find no merits in the revenue's appeal and accordingly dismiss the same.