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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Mumbai

Decided On : Feb-15-2008

Reported in : (2008)13STJ262CESTAT(Mum.)bai

Judge : M Ravindran

Appellant : The Commissioner of Central

Respondent : Pauls Engineering Industries

Judgement :

1. This appeal is filed by the revenue against the order-in-appeal No.PII/BKS/45/07 dated 29/03/2007 vide which the Ld. Commissioner (Appeals) has set aside the order-in-original which sanctioned the refund of the respondents, but credited the same to the Consumer Welfare Fund.

2. The brief facts of the case are that the respondents were manufactures of engineering goods and utilized the services of Goods Transport Operators and had to pay the Service Tax for the period 16/11/97 to 01/06/98 as service receiver after the retrospective amendment were made. While paying such service tax, the respondents did not realize that they were eligible for the benefit of the Notification No. 43/97-CE dated 05/11/97, which, exempted a SSI unit, registered with DIC from payment of Service Tax on receipt of services of GTO and filed refund claim. The adjudicating authority sanctioned the refund claim and credited the same to the Consumer Welfare Fund under the provisions of Section 12C of the Central Excise Act, 1944. The respondent preferred an appeal to the Commissioner

(Appeals), who allowed the refund in cash. Against such order of the Commissioner (Appeals), the revenue came in appeal before the Tribunal and the Tribunal vide its order No. A/223/C-IV/SMB/2007 dated 08/01/2007 remanded the matter back to the Commissioner (Appeals), with specific direction "to verify whether the amount paid by the assessee is shown as expenditure for the year ending 31/03/2003 and whether it has gone into cost of production during the next year and examine the case afresh". The current impugned order is passed by the Commissioner (Appeals) on such remand proceedings.

3. Ld. SDR submits that the refund claim is hit by the unjust enrichment clause. It is his submission that there is no denial as to the fact that the respondents had shown this amount of refund claim as an expenditure in the profit and loss account. It is his submission that once it is shown as an expenditure, the question of unjust enrichment has to be satisfied by the respondent. He submits that though the respondents have produced Chartered Accountant certificate, the evidentiary value of the such certificate does not hold good as is held by the Tribunal in the case of Weikfield Products Co. (I) Ltd., in final order No. A/205/08/WZB/SMB/C-I dated 30/01/2008. He specifically reads the following para: I have heard both sides and find no merit in the appeal of the assessee for the reason that there is nothing on record to rebut the presumption in law that the duty burden has been passed on by the assessee to their customers. Therefore, it has rightly been held by the Commissioner (Appeals) that the refund amount was shown as expenditure in profit and loss account and therefore has gone into the costing of the finished products and indirectly passed on to their customers. This view is supported by the decision of the Tribunal in the case of Rajasthan Spinning & Weaving Mills 2006 (194) ELT 254 (Tri-Del.). The chartered accountant's certificate relied upon by the assessee, therefore, loses its evidentiary value as well authenticity in the light of the above decision of the Tribunal. Following the ratio of the above decision, I hold that there is no warrant to interfere with the impugned order and accordingly uphold the same and reject the appeal.

4. It is also his submission that since the issue involved in this case is contradicting many cases, the matter maybe referred to a Larger Bench.

5. The Ld. Counsel appearing on behalf of the respondents on the other hand submits that the issue in this case is squarely covered by the judgment and order of the Tribunal in final order No.A/670/C-IV/SMB/2007 dated 23/04/2007 in the case of CCE, Pune v. BG Chitale. It is his submission that the issue involved in that case and the issue involved in the current case are identical. It is his submission that the amount of service tax, which was paid by the respondents during the period, when the retrospective amendment was in force, but they did not consider the exemption notification. He submits that the Ld. Commissioner (Appeals) on the remand proceedings sought for second certificate from the Chartered Accountant. He produces a certificate dated 13/03/2007, which was issued by the very same Chartered Accountant. It is his submission that the issue is now squarely covered even by the recent judgment of the Tribunal in the case of CCE Pune v. Cummins India Ltd., as reported in 2008 (221) ELT 525 (Tr.-Mum). It is his submission that the Chartered Accountant certificate given in the first instance and the second instance are not challenged by the revenue in the grounds of appeal either in earlier proceedings or in the current proceedings.

7. It is undisputed that the respondents herein had paid the service tax for receipt of the services from the Goods Transport Agencies. This service tax was paid by the respondent on 16/12/2002, subsequent to the retrospective amendment, which made the recipient of the goods transport services liable to pay the service tax. It is also undisputed that the respondent is eligible for exemption of the service tax as per the Notification No. 43/97-CE dated 05/11/97. On this background, in the remand proceedings, the Commissioner (Appeals) held as under: I find that as per Section 12B of the Central Excise Act, 1944, this is the parameter to measure whether the incidence of duty has been paid or not. Here, I find that the invoices issued for sale during the year 2003 not show the recovery of service tax of Rs. 29,441/- as it was for the period 16/11/97 to 01/06/98 and was paid in 2003-2004. The adjudicating authority himself has admitted the same in his findings. Profit and loss account and balance sheet are the documents, which indicate the true financial position of the unit and whether the business is in profit or in loss. They have nothing to do with the working out of the cost of final product. The Cost accountant after taking into consideration all related expenditure does costing of the product. It has not been presumed that the expenses of past period must have

been considered cost of goods. The Tribunal decision in the case of Sunbeam Auto Ltd. v. CCE is 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 sales expenses and deducted the same out of their profits, the refund claim not deniable. Further, I find that the appellants have also produced a CA certificated dated 13/3/2007 from M/s. BC Abhyankar & Co. certifying that appellants had borne the incidence of Service Tax and had not passed on burden of Service Tax to the customers and had also not recovered the same from the transporters during the financial years 2002-2003 and 2003-04. In view of the above facts and in view of CA Certificate, the bar of unjust enrichment will be applicable. Therefore, the refund of Rs. 29,441/- is admissible to appellants.

8. On perusal of the Chartered Accountant's certificate produced before the Ld. Commissioner (Appeals) and now produced before me, I find that reliance was placed by Ld. Commissioner (Appeals) on that certificate, as it was produced on his direction.

9. It has been rightly pointed out by the Ld. Counsel that in the case of BG Chitale (supra), I sitting, singly, took a view that the Chartered Accountant's certificate having verified the entire books of accounts and having come to the conclusion that the incidence of duty has not been passed on to the recipients, in a case, has to be considered as correct. In view of the fact that already a view on the issue has taken by this Court, I find that the order of the Commissioner (Appeals) is correct and does not suffer any infirmity. As regards the claim of Ld. SDR as to reference to Larger Bench, I find that the view expressed by this Bench in the case of BG Chitale (supra) was in respect of an identical issue i.e., Service Tax paid on the GTA service and subsequent refund. The case law referred by the SDR is in respect of the excise duty paid, subsequently claimed as a refund by the respondent.

10. As such, since the issue involved in this case is of refund of the service tax, which was subsequently paid by the assessee, due to the retrospective amendment, as regards the service tax liability as recipient of services GTA, I find

that issue is squarely covered in favour of the respondent and the Commissioner (Appeals) has come to correct conclusion. Accordingly, the appeal filed by the revenue is rejected.

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