

**Collector of Central Excise Vs. Eskay Engineers (P) Ltd.**

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**Court :** Customs Excise and Service Tax Appellate Tribunal CESTAT Mumbai

**Decided On :** Sep-22-1995

**Reported in :** (1995)LC578Tri(Mum.)bai

**Appellant :** Collector of Central Excise

**Respondent :** Eskay Engineers (P) Ltd.

**Judgement :**

1. The appeal from the Revenue is against the order of the Collector (Appeals) bearing No. V-2 (Ch. 84) 31/B.III/91, dated 12-6-1991 allowing the appeal of the respondents.

2. The facts of the case are that the respondents were availing modvat credit in respect of certain inputs. The Department objected to this, on the ground that the inputs were not covered by a proper declaration.

The demand was raised for an amount of Rs. 20,326.78 by the Superintendent, while assessing the RT. 12 returns. When this demand was sought to be enforced, the respondents approached the Collector (Appeals), who held that since no appeal was filed against the assessment order and the appeal has been filed only against the letter written by the Superintendent seeking to enforce the demand, he rejected the appeal. When the matter came up before the Tribunal, the Tribunal (vide Order No. 170/90-WRB, dated 8-2-1990) held that the demand cannot be enforced against the respondents. It is a settled law that mere endorsement on the RT.12 returns without issue of show cause notice cannot be enforced. Moreover,

in this case, when the assessee has approached the Asstt. Collector within a reasonable period from the date of receipt of the RT. 12 returns, requesting the Asstt. Collector to issue show cause notice and no show cause notice was issued by the Department, the Superintendent's endorsement on the RT. 12 returns cannot be enforced. Since the demand made on the RT. 12 returns was sought to be enforced by the Superintendent the respondents have paid the duty of Rs. 20,326.78 before coming in appeal before the Tribunal.

Subsequent to the decision of the Tribunal, they claimed refund of the duty paid, which was again rejected by the Asstt. Collector on the ground that the amount was not paid under protest and the refund claim is time barred. However, on an appeal before the Collector (Appeals) he allowed the appeal of the respondents. The present appeal from the revenue is against the aforesaid order.

3.1 After hearing both the sides, I find that the Department's appeal is not only sustainable (sic.) on any of the grounds pleaded but also indicates that the order of the Tribunal is sought to be circumvented by resorting to methods not permissible under law. First of all let me deal with the objection of the Asstt. Collector holding the refund claim as time barred.

3.2 Right from the time, when the amount was demanded on the allegation of irregular availment of modvat credit, the respondents have been seeking for issue of show cause notice. This has not been done. Not satisfied with this demand, the respondents pursued the matter with the Collector (Appeals) and then with the Tribunal. The Tribunal found substance in their contention and allowed the appeal and set aside the demand. The amount paid pursuant to the demand would have to be given back as a consequential relief. It is needless to point out that for filing an appeal, it is subject to the condition of the pre-deposit of the duty or penalty amount. Hence, if the amount has been paid, it is done only to comply with the statutory requirement. In such a case, letter of protest is also not called for, since right from the beginning the demand is contested before all the authorities.

4. Now coming to the grounds of appeal filed by the revenue, there are two grounds; one of the grounds is that the Tribunal has not ordered consequential relief; but have only set aside the demand. When the demand has already been

paid without protest and the refund claim has been filed beyond six months, hence the refund claim is hit by time bar. This ground is only to be recorded for dismissal, because of the fact that when a demand has been set aside on the ground of illegality, any payment made pursuant to the demand for complying with the statutory requirement for filing the appeal, has to be refunded, irrespective of the fact whether the consequential relief has been ordered or not. The next ground urged by the revenue is on the ground of unjust enrichment, if the refund is sanctioned. This argument also does not carry any conviction; because of the admitted position that the basic issue relates to an allegation that certain inputs received have not been covered by proper declaration and subsequently they filed the proper declaration and during the period when the proper declaration was not in existence, the demand has arisen. There is no dispute that these inputs are otherwise eligible for modvat credit. The Supdt's endorsement on RT. 12 return is with reference to availment of modvat credit, which was sought to be reversed. Otherwise, the respondents have cleared the goods at the rate of duty as applicable and only that amount of duty would have been recovered from the consumer, irrespective of the fact whether the duty has been paid through PLA or through RG. 23A Part II. There is no evidence produced by the Department that the amount of demand paid by the respondents pursuant to endorsement on RT. 12 return has been recovered over and above the duty already paid by way of debit in RG. 23A or PLA. Hence, the principle of unjust enrichment appears to have been mechanically pleaded in this case.

In the result, I would advise the Department to stop the recycling of the issue again and again, just to deny the benefit extended by the Tribunal in the form of an appellate order. If the Department feels that the order of the Tribunal is not justified on any point of law, there is a provision in the law for making a reference application. But the law does not provide for such recycling the same issue by subsequent adjudication orders, making the assessee to run to the appellate forum again and again.

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