(2024) 01 CESTAT CK 0067

In the Customs, Excise And Service Tax Appellate Tribunal

Case No : Excise Appeal No. 42287 Of 2014

M/s. Kanam Latex Industries Pvt. Ltd — APPELLANT

Vs

Commissioner Of GST & Central Excise — RESPONDENT

Date of Decision : 25-01-2024

Acts Referred:

Central Excise Act, 1944 — Section 3(1), 3(1)(ii)
Finance Act, 2004 — Section 91, 93, 94
Finance Act, 2007 — Section 136, 138, 139
Finance Act, 1994 — Section 66

Citation : (2024) 01 CESTAT CK 0067

Hon'ble Judges : S.S. Garg, Member (J);M. Ajit Kumar, Member (T)

Bench : Division Bench

Advocate : L. Gokulraj, N. Satyanarayanan

Final Decision : Disposed Of

Judgement

M. Ajit Kumar, Member (T)

1. This appeal filed by the appellant M/s. Kanam Latex Industries Pvt. Ltd. is against Order in Appeal No. 157/2014 dated 15.9.2014 passed by the Commissioner of Central Excise (Appeals), Madurai. (impugned order)

2. Brief facts of the case are that the appellant, a 100% EOU are engaged in the manufacture of surgical gloves falling under the Chapter Heading 40 of the CETA, 1985. Apart from export, the appellants are clearing their goods into Domestic Tariff Area (DTA) on payment of central excise duty as per Notification No. 23/2003-CE dated 31.3.2003 read with proviso (ii) to section 3(1) of Central Excise Act, 1944. The Central Excise officers on verification of records of the appellants felt that the appellants had erroneously calculated and discharged the education cess payable on the goods cleared to DTA resulting in short-payment of education cess to the tune of Rs.4,71,108/- for the period from April 2007 to September 2009. On this being pointed out, the appellant has paid the differential amount but did not discharge their interest liability on the delayed

payment of differential education cess. The learned Adjudicating Authority after due process has demanded the interest for the delayed payment of education cess, but refrained from vacating the protest for payment of differential duty. He however dropped the penal action under various provisions of the Central Excise Act. In appeal, Commissioner (Appeals) upheld the order. Hence the appellant is before this Tribunal. 2.1 No cross objections have been filed by the respondent-department.

3. We have heard learned counsel Shri L. Gokulraj for the appellant and Shri N. Satyanarayanan, learned AC (AR) for the Revenue.

3.1 The learned counsel for the appellant submitted that the issue relates to third time cess payable on clearance of imported goods from 100% EOU to DTA. The issue is no longer res integra and is covered by the decision of the Larger Bench of the Tribunal in Kumar Arch Tech Pvt. Ltd. Vs. CCE, Jaipur reported in 2013 (290) ELT 372 (Tri. LB) wherein it has been held that education cess and SHE cess is not includible in the aggregate value. He hence prayed that the impugned order be set aside.

3.2 The learned AR Shri N. Satyanarayanan, Assistant Commissioner reiterated the points given in the order passed by the authorities below.

4. We have gone through the facts of the case and have heard the rival parties. After going through the order of the Original Authority we would prima facie like to state that it is very clear that the appellant has deposited the money primarily to buy peace with the department.

Hence the amount has been paid 'under protest' so that his disagreement on the issue is registered with the department and the amount remains protected from being hit by time bar at a later stage while seeking a refund. In such a situation it was incumbent on the part of the department to vacate the protest through a speaking order at the earliest, after following the procedure as prescribed and following the principles of natural justice. This is because the amount deposited by the Appellant in good faith gets blocked until a decision is rendered in the matter which is a heavy cost for him. Its only after an order is passed vacating the protest that he can move forward by filing a refund claim, if the order is in his favour, or if held against him the Appellant can take up the matter in further appeal. The learned Original Authority has been disingenuous in this case by using the protest to demand interest on the amount voluntarily paid and at the same time refraining from vacating the protest, for which he would have to give detailed reasons. The Hon'ble Apex Court in State of Jharkhand and others v. Brahmaputra Metallics Ltd and others [2021 (1) SCJ 131] held that a decision taken in an arbitrary manner contradicts the principle of legitimate expectation. An authority is under a legal obligation to exercise the power reasonably and in good faith to effectuate the purpose for which power stood conferred.

5. We find that the issue whether educational cess and secondary and higher education cess are chargeable on DTA clearance made by 100% EOU even if such

cess were added while calculating the aggregate duties of customs payable under the Customs Act, 1962 or under any other law in force, has been answered by the Larger Bench of the Tribunal in Kumar Arch Tech Pvt. Ltd. Vs. CCE, Jaipur – II [2013 (290) ELT 372 (Tri. LB)]. The Tribunal at para 10 has stated as under:-

"10. However, we are not in agreement with the stand of the Revenue for another reason. The charging provisions of education cess and S&H cess are Section 91 of the Finance Act, 2004 and Section 136 of the Finance Act, 2007 respectively according to which, this levy is a 'cess' levied as surcharge to enable the Central Government to finance its commitment to provide universalized quality of basic education and secondary and higher education. Surcharge on a tax means additional tax on that tax. As discussed above, though education cess and S&H cess being cess to enable the Government to finance its expenditure on providing basic education and secondary and higher education, is a levy different and distinct from the tax on which it is levied as surcharge, the mode or measure of this levy is surcharge at the rate of 2% and 1% on the existing levies i.e. the taxes being collected by the Government as -

(a) Central excise duties under Central Excise Act, 1944 or any other law in force;

(b) customs duties under Customs Act, 1962 read with Customs Tariff Act, 1975 or any other law in force; and

(c) Service tax levied under Section 66 of the Finance Act, 1994.

Since the cess levied as surcharge under Section 91 of Finance Act, 2004 and Section 136 of Finance Act, 2007 has to be on the existing levies, the existing levies, obviously, would not include this cess. For this reason only, Sections 93 & 94 of Finance Act, 2004 and Sections 138 and 139 of Finance Act, 2007 while defining the measure of education cess and S&H cess in respect of excisable goods and imported goods respectively, specifically provide that the aggregate of duties of excise or aggregate of duties of customs levied by the Central Government in the Ministry of Finance (Deptt. of Revenue), on which this cess is to be levied as surcharge, would not include the education cess and S&H cess. Thus, the intention of the legislature was never to charge education cess on education cess. In fact this is not permissible from very mode of this levy as prescribed in Section 91 of the Finance Act, 2004 and Section 136 of the Finance Act, 2007, as when a new tax is introduced as surcharge on the existing levies, the base on which the new levy as surcharge is to be calculated will include only the existing levies, not the new levy. If the Revenue's stand is accepted, and on the sum of Basic customs duty and Addl. Customs duty, first "cess on imported goods" under Section 94 of Finance Act, 2004 and Section 139 of Finance Act, 2007 is charged as duty of customs and on the aggregate of duties of customs, "cess on excisable goods," under Section 93 of Finance Act, 2004 and Section 138 of Finance Act, 2007 is charged, it would amount to charging education cess on education cess for which there is no sanction in law. Apex Court in case of Jain Brothers v. U.O.I., reported in (1970) 77 ITR 107 has held that there can be no objection for double taxation if the legislature has distinctly enacted it, but while interpreting general words of taxation, the same cannot be so interpreted as to tax the subject twice over to the same tax. In our view, it is this principle which has to be kept in mind while calculating education cess and S&H cess on DTA clearances of a 100% EOU. Since the DTA clearance of a 100% EOU attract central excise duty and in terms of proviso to Section 3(1) of Central Excise Act, 1944, the measure of the excise duty leviable is aggregate of duties of customs charged on import of like goods into India under Customs Act, 1962 read with Indian Customs Tariff Act, 1975 or any other law for the time being in force, this aggregate of duties of customs on which education cess under Section 93 of Finance Act, 2004 and S&H cess under Section 138 of Finance Act, 2007 is to be charged, would not include education cess and S&H cess under Section 94 of Finance Act, 2004 and Section 139 of Finance Act, 2007. In other words, the education cess and S&H cess would be chargeable only once under Section 93 of Finance Act, 2004 and Section 138 of Finance Act, 2007 on the sum of basic customs duty and Additional customs duty."

5. The order squarely covers the facts in issue in this case. In the light of the above judgment, judicial discipline requires that we abide with the same. We hence set aside the impugned order and allow the appeal with consequential relief, if any, as per law. The appeal is disposed of accordingly.

