(2010) 04 KAR CK 0114

In the Karnataka High Court

Case No : C.E.A. No. 63 of 2006

The Commissioner of Central Excise — APPELLANT

Vs

Gem Properties (P) Ltd. — RESPONDENT

Date of Decision : 08-04-2010

Acts Referred:

Citation : (2010) 257 ELT 222

Hon'ble Judges : K.L. Manjunath, J;B.V. Nagarathna, J

Bench : Division Bench

Advocate : B. Pramod, for the Appellant; Parameshwaran Advocate and D.O. Kotresh, for Rao and Joshi Assts., for the Respondent

Final Decision : Allowed

Judgement

K.L. Manjunath, J.—The revenue has come up in this appeal challenging the legality and correctness of the order passed by the CESTAT in CESTAT Final Order No. 389/2005 dt. 11.3.2005 raising the following substantial questions of law:

a) Whether the Appellate Authorities erred in allowing the appeal on the ground that there is "no unjust enrichment" and goods were exempted under notification?

b) Whether the Appellate Tribunal erred in wrongly relying on the judgments of the Supreme Court reported in Union of India and others Vs. I.T.C. Limited, ?

2. The facts leading to this case are as hereunder: The assessee is engaged in the manufacture of HDPE sacks, falling under chapter 6307 of Central Excise Tariff Act, 1985. The assessee had paid duty amounting to Rs. 7,11,039/- for the period 20.11.1986 to 31.3.1987 on HDPE tapes which is an intermediary product in the manufacture of HDPE sacks. The assessee contended that the assessee was not liable to pay the duty and therefore an application came to be filed claiming refund of Rs. 7,11,039/-. The claim of the assessee was rejected by the Asst. Commissioner of Central Excise, in order No. 7/1990 dt. 12.3.1990. Ultimately the jurisdictional Deputy Commissioner of Central Excise conducted a

de novo proceedings and passed an order in CESTAT Final order No. 329/2001 and later held that the assessee was not entitled to claim refund as it would amount to unjust enrichment. Against which an appeal was preferred before the Commissioner of Appeals, which appeal came to be allowed holding that the assessee is entitled for refund. Aggrieved by the same, the revenue filed an appeal before the CESTAT, which appeal came to be dismissed. Being aggrieved by the same, the revenue has preferred this appeal.

3. We have heard the counsel for the parties.

4. The main contention of the learned Counsel for the revenue is that even though the assessee has failed to produce the documents to show that the cost of products sold by him was exclusive of the duty paid by the assessee, the relief has been granted to the assessee by the Commissioner of appeals as well as by the Tribunal on the premises that the assessee has sustained loss during relevant assessment year more than the claim made by him under the refund application. According to him, if the assessee has incurred loss on some other reasons, the same cannot be a ground for the Commissioner to grant relief to the assessee holding that the assessee has not included the duty paid by him while computing the final cost of the product. Therefore, he contends that the Commissioner has committed an error in granting relief to the assessee and a similar mistake has also been committed by the Tribunal. He further contends that even though the Chartered Accountant''s certificate does not disclose that the assessee had not claimed duty while computing the cost of the final product, the relief has been granted by misreading the Chartered Accountant''s certificate.

5. Per contra, the learned Counsel for the assessee contends that when the assessee had produced the certificate of Chartered Accountant and when the Commissioner of Appeals has accepted the same, it is not open for the revenue to contend the assessee has not established that it had not included the duty paid by it while computing the final cost of the product. Therefore, he requests the Court to dismiss the appeal.

6. During the course of arguments, the learned Counsel for the assessee has also produced the Chartered Accountant''s certificate. We have seen the same. On perusal of the Chartered Accountant''s certificate and considering the order passed by all the authorities, we are of the opinion that the questions of law framed in this appeal are to be answered in favour of the revenue for the following reasons: It is not in dispute that the assessee was not liable to pay the duty to be payable to the Department. Therefore, it is evident that the assessee was entitled to make an application for refund of the Excise duty wrongly paid by it. The claim of the assessee has been rejected on the ground that if the application is allowed, it amounts to unjust enrichment because all the materials sold by the assessee was inclusive of the duty. Therefore, the burden was heavy on the assessee to show that while computing the cost of the material it had not included the duty paid by it By looking into the certificate, we are of the opinion while computing the cost of the product, the assessee has calculated the duty. It

is no doubt true that the assessee has sustained loss during relevant assessment year. Merely because the assessee has sustained the loss, cannot be a ground to hold it is not a case of any unjust enrichment as long as the assessee proves before the authorities that assessee has sustained loss on account of non inclusive of the duty. The Chartered Accountant certificate does not depict how the cost of the material is computed. But the document clearly shows that the cost of the duty is also included while computing the cost of production of the material. Therefore, on facts of this case, we have to answer the questions of law in favour of the revenue since the assessee has failed to establish that the assessee has not included the cost of the duty paid by it while computing the cost of the products.

7. In the result, the appeal is allowed. The order passed by the Commissioner of Appeals which has been confirmed by the CESTAT are hereby set aside. The order passed by the original adjudicating authority is restored.