

(2013) 06 MAD CK 0012

Madras High Court

Case No: C.M.A. No. 3508 of 2005

Commissioner of
Central Excise

APPELLANT

Vs

Subhah Engineers P.
Ltd.

RESPONDENT

Date of Decision: June 14, 2013

Citation: (2013) 298 ELT 168 : (2013) 22 GSTR 561

Hon'ble Judges: K.B.K. Vasuki, J; Chitra Venkataraman, J

Bench: Division Bench

Advocate: K. Mohanamurali, for Central Government, for the Appellant;

Final Decision: Disposed Off

Judgement

Chitra Venkataraman, J.

The Revenue is on appeal as against the order of the Customs, Excise and Service Tax Appellate Tribunal

passed in No. 298/2005, dated March 2, 2005 raising the following substantial questions of law:

1. Whether the Appellate Tribunal is correct in holding that the amount of Rs. 621 does not include the excise duty when the purchase order and

the relevant Central excise invoices indicate that the price of Rs. 621 is inclusive of excise duty?

2. Whether the Appellate Tribunal has failed to take into consideration that the excise duty was passed on to the buyer and hence the respondent is

not entitled for unjust enrichment and for refund of excise duty?

In spite of service of notice on the assessee there is no representation either in person or through counsel. After hearing the learned standing

counsel for the Revenue and on going through the records, the present order is passed.

2. The assessee herein is a SSI unit, manufacturing small arms components falling under Chapter Heading 93.05 of the Central Excise Tariff Act,

1985. Evidently, the assessee obtained a supply order from the Ordnance Factory, Trichy for the supply of carrier breech block assembly. The

assessee quoted the price of Rs. 621 per piece inclusive of excise duty. It is seen from the facts that during Budget 2001, as Chapter 93.05 was

taken out of the SSI exemption purview, vide Notification No. 8/2001, dated March 1, 2001, carrier and breech block assembly falling under

Chapter 93.05 was brought into excise net. It is not disputed by the Revenue that the exemption withdrawn was restored vide Notification No.

47/2001, dated October 1, 2001 by incorporating the said chapter under the SSI exemption. Considering the withdrawal of the exemption and the

restoration, the Government held that clearance of goods falling under Chapter 93.05 of the Act, 1985 and parts falling under Heading 93.06 or

93.07 before the 1st day of October 2001, would not come for refund of duty if the duty was included in the aggregate value of clearance.

3. The assessee filed a refund claim on October 3, 2001 on the duty paid for the clearance effected. The assessing officer viewed that the assessee

had not enclosed documentary proof regarding the duty element not being passed over to the customers; consequently, a show-cause notice was

issued proposing to deny the refund claim. The assessee objected to the said view and pointed out that as per the agreement and purchase order

of the Ordnance Factory, the assessee was under an obligation to supply the goods not later than December 31, 2000; on account of certain

difficulties, they could not comply with the same, they sought for extension, which was granted up to January 31, 2001; a further extension was

granted up to August 31, 2001 and the purchaser made it clear that no increase be allowed on the price on account of statutory increase or on

fresh imposition of duties. Thus, the request of the assessee to include 33 per cent. excise duty was rejected by the Ordnance Factory. It is stated

that the assessee supplied goods on October 3, 2001 without knowing that the exemption already withdrawn was restored with effect from

October 1, 2001. In the context of this, the assessee submitted that there being no liability, the payment received at Rs. 621 per piece was without

inclusion of any duty and that they had not passed on any liability to the purchaser.

4. The assessing officer, however held that the purchase order dated October 27, 2000 showed that the price of Rs. 621 per piece was inclusive

of excise duty. The assessee had raised three invoices dated October 3, 2001, wherein, the basic duty was declared as Rs. 470.46. Thus, the

excise duty had been charged separately; in the circumstances, he rejected the refund claim.

5. Aggrieved by the same, the assessee went on appeal before the Commissioner of Central Excise (Appeals), who, confirmed the rejection order.

Aggrieved by this, the assessee went on further appeal before the CESTAT.

6. On a perusal of the documents, the CESTAT held that even though the price charged stated that it was stated to be inclusive of excise duty, yet,

there was no liability to pay excise duty when the exemption was there in force. The request of the assessee was that the Government of India

restored the exemption with effect from October 1, 2001. The assessee had paid the excise duty treating Rs. 621 per piece as cum-duty, not

knowing that the Government had once again reintroduced the exemption provision. In the circumstances, the question of the assessee having any

liability and thereby made an unjust enrichment did not arise. The Tribunal further pointed out that the buyer had specifically pointed out that they

would not pay more than Rs. 621. Thus this indicated that the said amount did not include the duty at the rate of 33 per cent, which was paid by

the assessee. In the circumstances, the CESTAT held that the assessee was entitled to refund. Aggrieved by this, the present appeal by the

Revenue.

7. Learned standing counsel appearing for the Revenue strenuously argued that considering the fact that the assessee had charged the price as

inclusive of duty would show that irrespective of the duty exemption, the assessee had intended charging of duty; thus, on facts, the CESTAT

committed serious error in granting relief to the assessee. He pointed out that when the assessee did not dispute the fact that the price was

inclusive of duty, the one and only inference that could be drawn is that the duty element had been collected from the buyer; hence, the refund of

duty could not be granted.

8. We heard the learned standing counsel for the Revenue as well as gone through the records.

9. We do not think that the claim of the Revenue could be sustained straight away. We may point out herein that neither the assessee nor the

Revenue had placed full facts even to appreciate the arguments of the Revenue herein.

10. The assessee is a SSI unit. It obtained a supply order from Ordnance Factory, Trichy for the supply of carrier breech block assembly, falling

under Chapter 93.05. The assessee, a SSI unit enjoyed the SSI exemption. This exemption was available at least till the Budget 2001. When

Budget 2001 took this entry out of Heading 93.05, vide Notification No. 8/2001, dated March 1, 2001, it means on and from March 1, 2001,

there was no exemption. As the price charged by the assessee was inclusive of duty, it stands to reason that the assessee had passed on the duty

element to the purchaser and that any claim of refund necessarily had to fail, by reason of the above said fact.

11. It is an admitted fact that the exemption revoked was once again reintroduced on October 1, 2001. Thus, for the period prior to March 1,

2001 and from October 1, 2001, there being no liability to pay any duty, even if the price had stated as duty inclusive, as no liability could be

passed on, the question of refund does not arise unless the same had been levied at the hands of the assessee on the sum charged. The question of

refund, hence, would arise only if and when there is a liability and not otherwise. On the admitted facts, for the period prior to March 1, 2001,

there could be no valid claim for refund.

12. As far as the present case is concerned, for the period covering the purchase order dated October 27, 2000, the price Rs. 621 per piece is

inclusive of excise duty, thus, there being no liability, there could be no passing of a liability to the customer. Thus it is difficult to hold that there was

passed-on liability on the price of Rs. 621. As far as the three invoices dated October 3, 2001 is concerned, being covered by the reintroduction

of the exemption, the question of passing on of the liability hence has to be seen. The adjudicating authority pointed out that the assessee had

declared Rs. 470.46 as a basic price and that excise duty element had been charged separately. The assessee had accepted this during the

personal hearing that they had received full payment from Ordnance Factory at Rs. 621 per piece. If the assessee had charged Rs. 470.46 apart

from what has been charged as duty and paid it, the question of refund has to be considered based on the facts as to whether the assessee had

passed on the liability to the purchaser. If the amount had been paid by the assessee and not been passed on to the purchaser, then the question of

rejection of refund does not arise.

13. In the circumstances, we hold that the facts being not clear in this case, the matter has to be remanded back to the assessing officer for

working out as to whether the claim can be considered for the period after October 1, 2001. In the circumstances, we direct the assessing

authority concerned to look into this and pass orders in accordance with law on the claim of the assessee herein. Consequently the civil

miscellaneous appeal is disposed of. No costs.