



[2016] 68 taxmann.com 315 (Hyderabad-CESTAT )

CESTAT, HYDERABAD BENCH

Balaji Pressure Vessels Ltd.

Vs.

Commissioner of Central Excise

MS. SULEKHA BEEVI C.S., JUDICIAL MEMBER

FINAL ORDER NO. A/30131/2016

APPEAL NO. ST/3319/2012

JANUARY 29, 2016

## CASE REVIEW

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*CCE v. Flowtech Power* 2006 (202) ELT 404 (Mad.) (para 6); *CCE v. Ved Textiles (P.) Ltd.* [2007] taxmann.com 22 (Mum.) (para 6) and *CCE v. Cummins India Ltd.* [2008] taxmann.com 616 (Mum. - CESTAT) (para 6) *relied on.*

## CASES REFERRED TO

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*Advance Steel Tubes Ltd. v. CCE* 2014 (310) ELT 370 (Tri - Delhi) (para 3), *CCE v. Crystal Granite & Marble (P.) Ltd.* 2014 (304) ELT 572 (Tri - Mum.) (para 3), *CCE v. Parle International Ltd.* [2013] 30 taxmann.com 574 (Ahd. - Trib) (para 3), *CCE v. Flowtech Power* 2006 (202) ELT 404 (Mad.) (para 6), *CCE v. Ved Textiles (P.) Ltd.* 2007 taxmann.com 22 (Mum.) (para 6) and *CCE v. Cummins India Ltd.* 2008 taxmann.com 616 (Mum - CESTAT) (para 6).

**Lalit Mohan Chandna**, Adv. *for the Appellant.* **R.K. Raman**, AR *for the Respondent.*

## ORDER

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1. The appellant is aggrieved by the Order passed by Commissioner (Appeals) by which the sanctioned refund was ordered to be credited to the Consumer Welfare Fund, on the ground of being hit by unjust enrichment.

2. The appellants are registered with the service tax department under the category of "Maintenance and Repair service" and other services. A show cause notice was served alleging non-payment of service tax for the period 01-07-2003 to 31-03-2005 for an amount of Rs. 4,44,189/- The appellants paid an amount of Rs.89,150/- prior to issuance of Show cause notice. After due process of law, the original authority passed order confirming the demand interest and penalty. The appellants filed

appeal before the Commissioner (Appeals) and *vide* Order dated 25-09-2008, the entire demand was set aside allowing the appeal with consequential reliefs, if any. The appellants then filed an application for refund of the amount of Rs. 89,150/- paid by them initially and also furnished a Chartered Accountant Certificate. A show cause notice was issued proposing to reject the claim on the ground of being time barred as per Section 11B of the Central Excise Act, 1944. After adjudication, the Original authority *vide* Order dated 30-12-2011 held that the refund claim is filed within the specified time limit of one year from the relevant date. However, the refund claim was rejected observing that appellants have not proved that the burden of duty has not been passed on to other person. The appellants carried the issue before the Commissioner (Appeals) who *vide* the Order impugned herein, sanctioned the refund, but ordered the amount to be credited to be Consumer Welfare fund. Being aggrieved the appellants have preferred the present appeal.

**3.** The learned counsel appearing for the appellant submitted that the sole ground for denying the refund is that the appellant had showed the amount of Rs.89,1507- deposited prior to issuance of show cause notice as expenditure and that therefore, the amount has been indirectly passed on to other person. He submitted that during the relevant period, the services of maintenance and repair service was not taxable. Only due to pressure from the department, the appellant had deposited the said sum of Rs. 89,1507- during investigation and much prior to the show cause notice. It was not paid towards any quantified demand of service tax. The appellant produced the Certificate issued by chartered Accountant to establish that the sum has not been passed on. Further, there was no allegation raised in the show cause notice that the refund claim is hit by the doctrine of unjust enrichment. He relied upon the judgments laid in *Advance Steel Tubes Ltd. v. CCE* 2014 (310) ELT 370 (Tri. - Delhi), *CCE v. Crystal Granite and Marble (P.) Ltd.* 2014 (304) ELT 572 (Tri. - Mum.), *CCE v. Parle International Ltd.* [2013] 30 taxmann.com 574 (Ahd. - Trib). He pleaded that the appeal may be allowed.

**4.** Against this, the learned AR submitted that when the amount is shown as shown as expenditure, it can be inferred that the incidence of tax is passed on to other indirectly as it becomes a part of the cost of production. That then it is the burden of the appellant to produce evidence and establish that the incidence of tax is not passed on to another. The appellants having failed to do so, the Commissioner (Appeals) has rightly ordered the sum to be credited to Consumer Welfare Fund.

**5.1** have heard the rival submissions. The Commissioner (Appeals) has ordered the sanctioned refund to be credited to the Consumer Welfare Fund. It is observed in the impugned order that because, the appellants showed the amount of Rs. 89,1507- as expenditure in the books of account, they have passed on the burden to their customers and therefore, the refund claim is hit by unjust enrichment. Though the appellants produced the Certificate of Chartered Accountant, it is seen that Commissioner (Appeals) has not considered the Certificate of Chartered Accountant furnished by the appellant, which states that the incidence of tax has not been passed on to other. It is for the department to show by adducing some material that the incidence of tax has been passed on. Though the appellants paid the amount of Rs. 89,150/- during investigation they were all along disputing their liability to pay tax. During the relevant period, the said services were not taxable. Thereafter the issue was held in their

favour and the appeal filed by them was allowed. Merely because the amount was shown as expenditure it cannot be concluded that the burden of tax has been passed on to other indirectly. The burden rests upon the department to prove that this amount had been recovered by appellant from buyer as increased price.

**6.** In the case of *CCE v. Flowtech Power* 2006 (202) ELT 404 (Mad.), *CCE v. Ved Textiles (P.) Ltd.* 2007 taxmann.com 22 (Mum.) and *CCE v. Cummins India Ltd.* 2008 taxmann.com 616 (Mum. - CESTAT) the said issue was analysed and the High Court as well as the Tribunal while deciding the above cases have held that merely because the amount was shown as expenditure, it cannot be concluded that the incidence of duty was passed on to the buyers.

**7.** Following the ratio in the above judgments, I find that the claim of refund is not hit by the bar of unjust enrichment. The order directing to credit the sanctioned refund to Consumer Welfare Fund is therefore not sustainable.

**8.** In the result, the impugned order is set aside, to the extent of ordering the sanctioned refund to be credited to the Consumer Welfare fund. I hold that the amount is to be refunded to the appellant.

**9.** In the result, the appeal is allowed with consequential reliefs, if any.