CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
ALLAHABAD

REGIONAL BENCH - COURT NO.I

Excise Appeal No.59895 of 2013

(Arising out of Order-in-Appeal No.92/CE/APPL/Noida/2013 dated 29/04/2013 passed by Commissioner (Appeals) Customs, Central Excise & Service Tax, Noida)

M/s Eveready Industries India Ltd., ...Appellant
(B-1/2, Sector-80, Phase-II, Noida-201305)

VERSUS

Commissioner of Central Excise, Noida ....Respondent

(C-56/42, IV Floor, Sector-62, Noida)

APPEARANCE:

Shri Dhruv Tiwari, Advocate for the Appellant
Shri A.K. Choudhary, Authorised Representative for the Respondent

CORAM: HON'BLE MR. P.K. CHOUDHARY, MEMBER (JUDICIAL)
HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)

FINAL ORDER NO.70002/2025

DATE OF HEARING : 23 July, 2024
DATE OF PRONOUNCEMENT : 06 January, 2025

SANJIV SRIVASTAVA:

This appeal is directed against Order-in-Appeal No.92/CE/APPL/Noida/2013 dated 29/04/2013 passed by Commissioner (Appeals) Customs, Central Excise & Service Tax, Noida. By the impugned order, Commissioner (Appeals) has upheld the rejection of refund claim on the ground that appellant have failed to justify that the burden of central excise duty paid by them and have not been passed on to the customers.

2.1 Appellant is a manufacturer of Dry Cell Batteries, falling under Chapter Heading No.85061000 of first schedule to Central Excise Tariff Act, 1985.

2.2 They have filed a refund claim on 13.07.2012 as per Section 11B of Central Excise Act for the reason that the refund claim related to excess payment of excise duty on 1015 MJ Battery-AA R6/1.5V-Packed: Special Promotional Pack:2U(Pcs) free with select Eveready CFLs from their factory.

2.3 The said refund claim was verified and range superintendent submitted that refund would not be admissible to the appellant. A show cause notice dated 30.11.2012 was issued to the appellant asking them to show cause as to why the refund claim filed by them for Rs.15,31,742/- should not be rejected.

2.4 Assistant Commissioner vide Order-in-Original dated 31.12.2012 rejected the refund claim both on merits and also on the ground of unjust enrichment.

2.5 Aggrieved appellant have filed appeal before Commissioner (Appeals), which has been dismissed as per the impugned order. Aggrieved appellant have filed this appeal.

3.1 We have heard Shri Dhruv Tiwari learned Counsel appearing for the appellant and Shri A.K. Choudhary learned Authorized Representative appearing for the revenue.

3.2 Arguing for the appellant learned Counsel submits that-

- The issue is no longer res-integra, goods which are supplied free of cost (FOC) are not meant for retail sale, therefore, cannot be assessed under section 4a of the Excise Act. Reliance is paced on the following decisions-
    - Jayanti Food Processing (P) Ltd. [2007 (215) E.L.T. 327 (S.C.)].
    - Calcutta Chemical Company Ltd. and Commissioner of Central Excise, Trichy v. CCE,Chennai-II and Henkel Spic India Ltd. 2016 (4) TMI 13 - CESTAT CHENNAI,
    - Jewel Consumer Care Pvt Ltd. [2023 (3) TMI 534 - CESTAT AHMEDABAD,
    - Contemporary Targett Pvt Ltd. [2019 (5) TMI 871 - CESTAT Ahmedabad]
    - Nestle India Ltd. [2018 (9) G.S.T.L. 71 (Tri. - Mumbai)],
    - Jocil Ltd [2019 (2) TMI 747 - CESTAT Hyderabad],

  - Mistair Health & Hygiene (P) Ltd. [2010 (256) E.L.T. 422 (Tri. - Mumbai)];
  - VVF Ltd. [2009 (236) E.L.T. 604 (Tri. - Ahmd.)].
- Doctrine of unjust enrichment is not applicable on refund of Central Excise duty on free supplies in the present case.
- Bar of unjust enrichment is not applicable when the impugned batteries are cleared on FOC basis. Reliance is paced on the following decisions-
  - Erbis Engineering Co. Ltd. [2010 (254) E.L.T. 192 (Tri. - Chennai)]
  - Sarabhai Chemicals Pvt. Ltd. [2004 (168) E.L.T. 70 (Tri. - Mumbai)]
  - German Remedies Ltd. [2005 (186) E.L.T. 328 (Tri. - Del.)]
  - Alembic Ltd. [2009 (233) E.L.T. 534 (Tri. - Ahmd.)]
  - Trinity Pharmaceuticals (I) Pvt. Ltd. [2006 (195) E.L.T. 224 (Tri. - Bang.)]
- The expert opinion in the form of Chartered Accountant certificate has to be given credence in the absence of any contra evidence by the Department. Reliance is paced on the following decisions-
  - M/s HIL Ltd. [2023 (11) TMI 252 – CESTAT Allahabad];
  - M/S India Steamship [2021 (12) TMI 183 - CESTAT Kolkata]
  - Gawar Construction Ltd. [2020 (373) E.L.T. 298 (P & H)].
- Chartered Accountant certificate dated 24.08.2023 be taken in record.

3.3 Learned Authorized Representative reiterates the findings recorded in the orders of the lower authorities.

4.1 We have considered the impugned orders along with the submissions made in appeal and during the course of argument.

4.2 For dismissing the appeal the First Appellate Authority in the impugned order records as follows:-

"5.2 The issue involved in the case is the rejection (in terms of Section 11-B(2) of Central Excise Act, 1944) of the appellant's claim of refund of Central Excise Duty which, the appellant have submitted, has arisen on account of excess payment of such duty made due to wrong valuation of goods as per the provisions of Section 4A of the Central Excise Act, 1944 on the basis of Maximum Retail Price (hereinafter referred to as MRP whereas they instead should have determined the value under Rule 8 & 11 of the Central Excise Valuation (Determination of Price of Excisable Goods), Rules 2000 ie., on the basis of production cost of the goods as calculated by CAS-4 method.

5.3 The adjudicating authority vide their impugned order have rejected the appellants refund claim mainly on the ground given below:

(i) The price of CFLs include the price of the goods in question ie. batteries supplied FOC. Moreover, as the party has supplied the said goods to "Eveready Industries India Ltd." situated at different location, to be supplied with the promotional sale of their CFLs, by no stretch of imagination, it can be termed as institutional sale not involving retail sale or not meant for retail sale.

(ii) If any of the goods is required to print MRP under the Legal Metrology Act, 2009 or the rules made there under, the valuation is to be determined under provisions of section 4A (1) of the Central Excise Act, which reads as under-

"The Central Government may, by notification in the official Gazette, specify any goods, in relation to which it is required under the provisions of Legal Metrology Act, 2009 or the rules made there under, or under any other law for the time being in force, to declare on the packages thereof the retail sale price of such goods, to which the provisions of sub section (2) shall apply."

(iii) It is observed that, the goods ie. batteries supplied by the party are required, under provisions of the Legal Metrology Att, 2009 or the rules made there under, to declare on packages thereof the retail sale price of such goods and in such cases provisions of section 4A 'Valuation of excisable goods with reference to retail sale price' of the Central Excise Act, 1944 (hereinafter referred to as the Act, 1944) are undoubtly applicable.

(iv) Further, the appellants have not submitted/referred to any provision of said Legal Metrology Act, 2009 or the rules made there under or any other law for the time being in force which exempts the goods in question from applicability of the provision contained therein.

(v) The appellants did not submit any proof to the effect that no MRP was printed on the subject goods. They did not provide copy of invoice and details of such clearance from their depot to substantiate their claim or any proof that they were exempt from MRP or the Individual Items do not contain any such inscription. ***It is well settled practice that even the individual items i.e. the CFL and Batteries if are not be sold separately, however are capable of being sold separately at the MRP printed on the individual pieces, then the aggregate of the MRP's of the pieces comprising the multi-pack would be considered for payment of duty on the multi-pack under section 4A.***

(vi) Although the appellants submitted that these goods ie., batteries were meant for promotions and were supplied free with Eveready CFLs it is clear that the price of CFLs included the price of such goods which were supplied FOC and therefore sale of such CFL also corresponds to the sale of batteries too.

In such a situation the appellants have charged a single price for both the goods and ultimate consumer paid a single price for both of these two goods and it is not the *case that they do not pay any amount at all. Thus* ***there is an element of sale in this transaction****.*

(vii) Every appellant has to pass through the acid test prescribed for claiming the refund of excise duty under Section 11 B of the Act. It is a fact that no manufacturer will sell the goods at a loss and the amount spent on FOC goods being for promotion of CFLs is actually attributable towards marketing/advertisement charges.

Since they did not provide copies of the invoice issued from their depot, their claim of not passing of duty is not sustainable It is the assessee who has to prove, before claiming the refund of the duty that he has not passed on the burden of duty to the customers. As the assessee have received duty element from the combined value of the goods supplied which is equal to value of CFL s sold from the customers, as provided under section 12A of the said Act, they appear to have failed to cross the hurdle provided by Section 11 AB of the Act.

In this case they appear to have reduced their margin of profit to compete in the market or have booked the price of FOC goods towards marketing/advertising expenses. In this case, the invoices were issued by the party and the goods were sold by their other destination/depot at cum-duty price based on market conditions, therefore as provided under section 12B of the Act, 1944, the duty paid by them be deemed to have been passed in full to the buyer of such goods.

6. The appellants have submitted their grounds of appeal against the observations I have gone through the various legal provisions and citations quoted by them including provisions of Section 4A of the Central Excise Act, 1944, Rule 8 & Rule 11 of the Central Excise Valuation Rules, 2000, Rule 3 of Legal Metrology (Packaged Commodities) Rules, 2011, contents of the Circular No. 625/16/2002-CX, Dt 28.02.2002 issued by CBEC and their applicability to the present case

Consequently I find that all the above provisions become relevant / applicable only on crossing the hurdle / acid test as provided under Section 11B(2) of the Central Excise Act, 1944 read with the provisions of Section 12 B of the said Act. And contrary to the appellants' assertion / submissions they have not been able to establish through any documentary testimony that the incidence of such amount of duty of excise in relation to which such aforementioned refund is being claimed has not been passed on by them to any other person.

Thus their plea that 'the conclusion by the adjudicating authority about application of the Principle of unjust enrichment for alleged failure to prove of non-passing of duty is erroneous', is not sustainable.

6.1 As per Section 11 B of the Central Excise Act, 1944 'Any person claiming refund of any duty of excise and interest, if sny, paid on such duty may make an application for refund of such duty and interest, if any, paid on such duty to the Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise before the expiry of one year from the relevant date in such form and manner as may be prescribed and the application shall be accompanied by such documentary or other evidence (including the documents referred to in section 12A) as the applicant may furnish to establish that the amount of duty of excise and interest, if any, paid on such duty in relation to which such refund is claimed was collected from, or paid by. him and the incidence of such duty and interest, if any, paid on such duty had not been passed on by him to any other person.'

Although the appellants have submitted the invoices issued by them under Rule 11 of Central Excise Rules, 2002 relating to the 'stock transfer to Eveready Industries India Ltd., Lucknow to substantiate the payment of Central Excise Duty by them, they haven't submitted any invoice *issued from this location to the retail customer so as to refute the allegation of unjust enrichment. They have indeed submitted few Tax Invoice in respect of sale to retail customer but these invoice relate either to 'Pune Sales Godown' or 'Cuttack Sales Godown' or at other is in respect of 'Dankuni Sales Godown, Hooghly.*

6.2 The provisions of Section 128 of the Central Excise Act, 1944 also become relevant which reads as follows:

> *"Every person who has paid the duty of excise on any goods under this Act shall, unless the contrary is proved by him, be deemed to have passed on the full incidence of such duty to the buyer of such goods."*

As it is, as per the above provisions the onus is squarely upon the appellants who are to prove, before claiming the refund of the duty, that they have not passed on the burden of duty to the customers. But in the instant case they have not substantiated their claim by submitting any documentary evidence relating to sale to retail customers from their godown at Lucknow to which dispatch were made and in respect of which this refund claim relates and that which has been listed in the shart submitted by the appellants (page 15 of Annexure A to the paper book of this appeal), Moreover, they have also not been able to establish that the Incidence of such excise duty for which they are claiming refund has not been passed on by them to any other person.

6.3. Moreover, as per the provisions of Section 12A of the Central Excise Act, 1944, which reads ***as 'Price of goods to indicate the amount of duty paid thereon****- Notwithstanding anything contained in this Act or any other law for the time being in force, every person who is liable to pay duty of excise on any goods shall, at the time of clearance of the goods, prominently indicate in all the documents relating to assessment, sales invoice, and other like documents, the amount of such duty which will form part of the price at which such goods are to be sold.*

As the appellants have received duty element through the realisation of the total value of goods sold to the customers which is equal to the combined value of CFL and batteries they have failed to cross successfully the hurdle provided by Section 11 AB of the Act."

4.3 In the present case appellant have paid the duty of self assessment basis. Whether the issue with regards to applicability of Section 4A or Section 4 for making assessment of duty could not have been raised by the appellant in these proceedings of refund in terms of Section 11B of Central Excise Act, 1944needs to be considered in the light of decision of Hon'ble Supreme Court in the case of M/s ITC Ltd. Vs Commissioner of Central Excise, Kolkata-IV 2019 (368) ELT 216 (SC). Hon'ble Supreme Court has specifically records as follows:-

"7. *The facts of the case of ITC Limited are that the appellants manufacture paper from both conventional and unconventional raw materials. In the course of the manufacturing activity, waste paper/broke arises which are recycled in the manufacturing process by making pulp. Sometimes, after entry in the RG 1 register, the paper is found to be defective and incapable of being sold and as such is required to be reprocessed and if that is not possible, then it is rejected and has to be re-pulped and recycled.*

8. *The appellant had been paying duty on paper cleared from its factory. The rate of duty of paper manufactured from conventional and unconventional raw material differed. The appellants availed exemption under Notification No. 67/95-C.E., dated March 16, 1995 as to the duty in respect of waste paper/fresh broke. By Notification No. 6/2000-C.E., dated March 1, 2000 complete exemption was granted in respect of paper up to the specified quantitative limit manufactured from unconventional raw materials. Upon receipt of a letter* *dated March 30, 2001 from the Superintendent of Central Excise, the Appellant examined the matter and realized the mistake committed by it in availing the exemption under Notification No. 67/95-C.E. in respect of waste paper/broke utilized in the manufacture of paper cleared at 'nil' rate of duty under Notification No. 6/2000-C.E. From May 2001 onwards, the appellant stopped availing the exemption and started payment of duty on waste paper/broke.*

9. *The relevant period involved in the appeal i.e. July 2001 to March 2002. The Appellant's assessments for this period were provisional and these entries were finalized on 30-1-2003. The provisional assessment order was passed on 1-3-2002. The appellant has claimed that at the time of the said final assessment order dated 30-1-2003, it was not aware of the Notification No. 10/96-C.E. or the said Circular dated 1-3-2001 and as such, no claim thereunder was made by it till that time nor was any such claim so considered or decided in the said final assessment order.*

10. *On July 18, 2003, the appellant filed a refund claim for an amount of Rs. 28,73,120/- in respect of the duty paid on the said waste paper/broke during the period from July 2001 to March 2002. The said refund claim was filed under Section 11(b) of the Central Excise Act, 1944 (for short, referred to as "the 1944 Act") and within the statutory period of limitation.*

11. *A show cause notice was issued as to why the said claim be not rejected to which a reply was filed. The assessment committee rejected the said claim. The Commissioner of Appeals dismissed the appeal. Thereafter, successive appeal was preferred before the Tribunal. The Tribunal has rejected the refund claim of the appellant. Hence, the appeal has been preferred under Section 35(b) of the 1944 Act.*

12-38. ------------------

39. *In Collector of Central Excise, Kanpur v. Flock (India) Pvt. Ltd. - 2000 (120) E.L.T. 285 (S.C.) = (2000) 6 SCC 650, the question which came up for consideration before this Court was non-challenge of an appealable order where the adjudicating authority had passed an order which is appealable under the statute, and the party aggrieved did not choose to file an appeal. This Court held that it is not open to the party to question the correctness of the order of the adjudicating authority subsequently by filing a claim for refund on the ground that the adjudicating authority had committed an error in passing the order. The provisions of the Central Excise Act, 1944 came up for consideration. The Court has observed :*

> *"10. Coming to the question that is raised, there is little scope for doubt that in a case where an adjudicating authority has passed an order which is appealable under the statute and the party aggrieved did not choose to exercise the statutory right of filing an appeal, it is not open to the party to question the correctness of the order of the adjudicating authority subsequently by filing a claim for refund on the ground that the adjudicating authority had committed an error in passing its order. If this position is accepted then the provisions for adjudication in the Act and the Rules, the provision for appeal in the Act and the Rules will lose their relevance and the entire exercise will be rendered redundant. This position, in our view, will run counter to the scheme of the Act and will introduce an element of uncertainty in the entire process of levy and collection of excise duty. Such a position cannot be countenanced. The view was taken by us also gains support from the provision in sub-rule (3) of Rule 11 wherein it is laid down that*

> *whereas a result of any order passed in appeal or revision under the Act, refund of any duty becomes due to any person, the proper officer may refund the amount to such person without his having to make any claim in that behalf. The provision indicates the importance attached to an order of the appellate or revisional authority under the Act. Therefore, if an order which is appealable under the Act is not challenged then the order is not liable to be questioned and the matter is not to be reopened in a proceeding for the refund which, if we may term it so, is in the nature of execution of a decree/order. In the case at hand, it was specifically mentioned in the order of the Assistant Collector that the assessee may file an appeal against the order before the Collector (Appeals) if so advised."*

(emphasis supplied)

40. *In Priya Blue Industries Ltd. v. Commissioner of Customs (Preventive) - 2004 (172) E.L.T. 145 (S.C.) = (2005) 10 SCC 433, the Court considered unamended provision of Section 27 of the Customs Act and a similar submission was raised which was rejected by this Court observing that so long as the order of assessment stands, the duty would be payable as per that order of assessment. This Court has observed thus :*

> *"6. We are unable to accept this submission. Just such a contention has been negatived by this Court in Flock (India) case (2000) 6 SCC 650. Once an order of assessment is passed the duty would be payable as per that order. Unless that order of assessment has been reviewed under Section 28 and/or modified in an appeal, that order stands. So long as the order of assessment stands the duty would be payable as per that order of assessment. A*

refund claim is not an appeal proceeding. The officer considering a refund claim cannot sit in appeal over an assessment made by a competent officer. The officer considering the refund claim cannot also review an assessment order.

7. We also see no substance in the contention that provision for a period of limitation indicates that a refund claim could be filed without filing an appeal. Even under Section 11 under the Excise Act, the claim for refund had to be filed within a period of six months. It was still held, in Flock (India)'s case (supra), that in the absence of an appeal having been filed no refund claim could be made.

8. The words "in pursuance of an order of assessment" only indicate the party/person who can make a claim for refund. In other words, they enable a person who has paid duty in pursuance of an order of assessment to claim the refund. These words do not lead to the conclusion that without the order of assessment having been modified in appeal or reviewed a claim for refund can be maintained."

(emphasis supplied)

41. *It is apparent from provisions of refund that it is more or less in the nature of execution proceedings. It is not open to the authority which processes the refund to make a fresh assessment on merits and to correct assessment on the basis of mistake or otherwise.*

42. *It was contended that no appeal lies against the order of self-assessment. The provisions of Section 128 deal with appeals to the Commissioner (Appeals). Any person aggrieved by any decision or order may appeal to the Commissioner (Appeals) within 60 days. There is a* *provision for condonation of delay for another 30 days. The provisions of Section 128 are extracted hereunder :*

> ***"128. Appeals to [Commissioner (Appeals)].** — (1) Any person aggrieved by any decision or order passed under this Act by an officer of customs lower in rank than a [Principal Commissioner of Customs or Commissioner of Customs] may appeal to the [Commissioner (Appeals)] [within sixty days] from the date of the communication to him of such decision or order :*
>
> *[Provided that the Commissioner (Appeals) may, if he is satisfied that the appellant was prevented by sufficient cause from presenting the appeal within the aforesaid period of sixty days, allow it to be presented within a further period of thirty days.]*
>
> *[(1A) The Commissioner (Appeals) may, if sufficient cause is shown, at any stage of hearing of an appeal, grant time, from time to time, to the parties or any of them and adjourn the hearing of the appeal for reasons to be recorded in writing :*
>
> *Provided that no such adjournment shall be granted more than three times to a party during hearing of the appeal.]*
>
> *(2) Every appeal under this section shall be in such form and shall be verified in such manner as may be specified by rules made in this behalf."*

43. *As the order of self-assessment is nonetheless an assessment order passed under the Act, obviously it would be appealable by any person aggrieved thereby. The expression 'Any person' is of wider amplitude. The revenue, as well as assessee, can also prefer an appeal aggrieved by an order of assessment. It is not only the* *order of re-assessment which is appealable but the provisions of Section 128 make appealable any decision or order under the Act including that of self-assessment. The order of self-assessment is an order of assessment as per Section 2(2), as such, it is appealable in case any person is aggrieved by it. There is a specific provision made in Section 17 to pass a reasoned/speaking order in the situation in case on verification, self-assessment is not found to be satisfactory, an order of re-assessment has to be passed under Section 17(4). Section 128 has not provided for an appeal against a speaking order but against "any order" which is of wide amplitude. The reasoning employed by the High Court is that since there is no lis, no speaking order is passed, as such an appeal would not lie, is not sustainable in law, is contrary to what has been held by this Court in Escorts (supra).*

44. *The provisions under Section 27 cannot be invoked in the absence of amendment or modification having been made in the bill of entry on the basis of which self-assessment has been made. In other words, the order of self-assessment is required to be followed unless modified before the claim for refund is entertained under Section 27. The refund proceedings are in the nature of execution for refunding amount. It is not assessment or re-assessment proceedings at all. Apart from that, there are other conditions which are to be satisfied for claiming exemption, as provided in the exemption notification. Existence of those exigencies is also to be proved which cannot be adjudicated within the scope of provisions as to refund. While processing a refund application, re-assessment is not permitted nor conditions of exemption can be adjudicated. Re-assessment is permitted only under Section 17(3)(4) and (5) of the amended provisions. Similar was the position prior to the amendment. It will virtually amount to an order of assessment or re-*

> *assessment in case the Assistant Commissioner or Deputy Commissioner of Customs while dealing with refund application is permitted to adjudicate upon the entire issue which cannot be done in the ken of the refund provisions under Section 27. In Hero Cycles Ltd. v. Union of India - 2009 (240) E.L.T. 490 (Bom.) though the High Court interfered to direct the entertainment of refund application of the duty paid under the mistake of law. However, it was observed that amendment to the original order of assessment is necessary as the relief for a refund of claim is not available as held by this Court in Priya Blue Industries Ltd. (supra)."*

4.4 Nothing has been brought on record to show that the self assessment made by the appellant at the time of clearance of these goods was ever appealed against by the appellant before the Commissioner (Appeals) in terms of Section 35 of Central Excise Act, 1944 or the order of self assessment has been modified. In absence of such modification the submissions made by the appellant in these proceedings under Section 11B challenging the self assessment made for claiming this refund cannot be said to be proper. In view of the above referred decision of Hon'ble Supreme Court were in it has been specifically held that refund proceedings under Section 11B are executionary in nature.

4.5 Further, it is observed that appellant has in this case through a very Circuitous method sought to establish that burden of duty paid by them has not been passed on them to their customers. It is settled law that the point at which it has to be determined is a point at the time of clearance of goods from the factory premises. On the basis of the documents prepared at the time of clearance, any subsequent documentation would not be relevant for determining whether the said partition has been passed on. In the present case the duty has been paid by the appellant on the basis of documents prepared at the time of clearance of the goods and in terms of Section 12B of Central

Excise Act. The burden of said duty should be held to be passed on their customers.

4.6 Appellant in his admission emphasized on the relevance of the expert evidence, there seems to be no denial of the fact that expert evidences should be given due credence in the present case. Appellant have give a Chartered Accountant certificate dated 24.08.2023 which is reproduced bellow:-

1

MANISH KUMAR MISHRA & ASSOCIATES
CHARTERED ACCOUNTANTS

TO WHOM IT MAY CONCERN

We hereby confirm that Eveready Industries India Ltd sold CFL with / without batteries without any change in MRP which establish the fact that there were no price charged for batteries supplied free of cost.

We have verified the Sales Invoices as shown in the attached Table Chart marked as Annexure - A.

The attached Comparison itself certifies that price of batteries was not charged as well as the cost of such batteries was never transferred to consumers.

For Manish Kumar Mishra & Associates
Chartered Accountants
Firm Regn No. 023141C

MANISH KUMAR MISHRA & ASSOCIATES

Shashi Bhushan Kumar
Partner
M. No: 530784
Udin: 23530784BGSDZS4142

Date: 24.08.2023
Place: Noida

HEAD OFFICE: H NO - 494/1 NAYA NAGAR SIRWARA ROAD, SULTANPUR, UTTAR PRADESH-228001
BRANCH OFFICE: FLATE NO.205, BLOCK-A1, PANCHSHEEL GREENS 1, SEC-16B,GREATER NOIDA WEST, UTTAR PRADESH, INDIA
BRANCH OFFICE: BRANCH -75, BASEMENT, GUJRAT VIHAR, DELHI-110092
E-MAIL: camanish1981@gmail.com Ph.: 9818118403
Website: www.camkm.com

4.7 In this case refund claim is filed for the period February, 2012 to June 2012 and the impugned order is of 29.04.2013, production of such a certificate which is letter than ten years, the date when the impugned order was passed, do not serve any purpose and the same was never ever produced before the Original Authority or before the First Appellate Authority. It was not even the case of the appellant that the Chartered Account certificate has certified with this regard. Such certificate should be considered nothing but an afterthought exercise, the same needs to be rejected without any further consideration.

4.8 Hon'ble Supreme Court in the case of Addison & Co. Ltd. [2016 (339) ELT 177 (SC)] have specifically records as follows:-

> *"**16.** In the instant case, the Assessee has admitted that the incidence of duty was originally passed on to the buyer. There is no material brought on record to show that the buyer to whom the incidence of duty was passed on by the Assessee did not pass it on to any other person. There is a statutory presumption under Section 12B of the Act that the duty has been passed on to the ultimate consumer. It is clear from the facts of the instant case that the duty which was originally paid by the Assessee was passed on. The refund claimed by the Assessee is for an amount which is part of the excise duty paid earlier and passed on. The Assessee who did not bear the burden of the duty, though entitled to claim deduction, is not entitled for a refund as he would be unjustly enriched.*
>
> > *It will be useful to refer to the relevant para of Mafatlal Industries v. Union of India (supra) in this connection.*
> >
> > *"108. (iii) A claim for refund, whether made under the provisions of the Act as contemplated in Proposition (i) above or in a suit or writ petition in the situations contemplated by Proposition (ii) above, can succeed only if the petitioner/plaintiff alleges and establishes that he has not passed on the burden of duty to another*

> *person/other persons. His refund claim shall be allowed/decreed only when he establishes that he has not passed on the burden of the duty or to the extent he has not so passed on, as the case may be. Whether the claim for restitution is treated as a constitutional imperative or as a statutory requirement, it is neither an absolute right nor an unconditional obligation but is subject to the above requirement, as explained in the body of the judgment. Where the burden of the duty has been passed on, the claimant cannot say that he has suffered any real loss or prejudice. The real loss or prejudice is suffered in such a case by the person who has ultimately borne the burden and it is only that person who can legitimately claim its refund. But where such person does not come forward or where it is not possible to refund the amount to him for one or the other reason, it is just and appropriate that that amount is retained by the State, i.e., by the people. There is no immorality or impropriety involved in such a proposition.*
>
> *The doctrine of unjust enrichment is a just and salutary doctrine. No person can seek to collect the duty from both ends. In other words, he cannot collect the duty from his purchaser at one end and also collect the same duty from the State on the ground that it has been collected from him contrary to law. The power of the Court is not meant to be exercised for unjustly enriching a person. The doctrine of unjust enrichment is, however, inapplicable to the State. State represents the people of the country. No one can speak of the people being unjustly enriched".*

17. *Section 11B(2) of the Act contemplates that the amount of refund determined by the Authorities shall be credited to the fund. The Proviso to Section 11B(2) permits the refund to be paid to the applicant instead of being credited to the fund if such amount is relatable to the manufacturer, the buyer or any other such class of applicants as notified by the Central Government.*

18. *Mr. Venkatraman interpreted the said provision to mean that the only persons who were entitled for claim of refund are the manufacturer, his buyer and any other class of persons as notified by the Central Government. There is no dispute about the fact that no notification has been issued by the Central Government as contemplated in Clause (f) to proviso to Section 11B(2) of the Act. He contested that the claim for refund can be made only by the manufacturer or his buyer and any enquiry pertaining to unjust enrichment should be restricted only to the manufacturer and his buyer. The ultimate buyer/consumer will not figure in the scheme of Sections 11B, 12A, 12B and 12C of the Act. This submission was accepted by the High Court in the impugned judgment. We do not approve the findings of the High Court in this regard.*

19. *The sine qua non for a claim for refund as contemplated in Section 11B of the Act is that the claimant has to establish that the amount of duty of excise in relation to which such refund is claimed was paid by him and that the incidence of such duty has not been passed on by him to any other person. Section 11B(2) provides that, in case it is found that a part of duty of excise paid is refundable, the amount shall be credited to the fund. Section 2(ee) defines Fund to mean the Consumer Welfare Fund established under Section 12C. There is a proviso to Section 11B(2) which postulates that the amount of excise duty which is refundable may be paid to the applicant instead of being credited to the fund, if such amount is relatable to the duty of excise paid by the manufacturer and he had not passed on the incidence of such duty to any other person. Clause (e) to proviso of Section 11B(2) also enables the buyer to receive the refund if he had borne the duty of excise, provided he did not pass on the incidence of such duty to any other person. There is a third category of a class of applicants who may be specified by* *the Central Government by a notification in the official gazette who are also entitled for refund of the duty of excise. A plain reading of Clauses (d), (e) and (f) of the proviso to Section 11B(2) shows that refund to be made to an applicant should be relatable only to the duty of excise paid by the three categories of persons mentioned therein i.e. the manufacturer, the buyer and a class of applicants notified by the Central Government. Clause (e) refers to the buyer which is not restricted to the first buyer from the manufacturer. The buyer mentioned in the above Clause can be a buyer downstream as well. While dealing with the absence of a provision for refund to the consumer in the rules this Court in Mafatlal Industries v. Union of India (supra) held as follows :-*

> *"98. A major attack is mounted by the learned counsel for petitioners-appellants on Section 11B and its allied provisions on the ground that real purpose behind them was not to benefit the consumers by refusing refund to manufacturers (on the ground of passing on the burden) but only to enable the Government to retain the illegally collected taxes. It is suggested that the creation of the Consumer Welfare Fund is a mere pretence and not an honest exercise. By reading the Rules framed under Section 12D, it is pointed out, even a consumer, who has really borne the burden of tax and is in a position to establish that fact, is yet not entitled to apply for refund of the duty since the Rules do not provide for such a situation. The Rules contemplate only grants being made to Consumer Welfare Societies. Even in the matter of making grants, it is submitted, the Rules are so framed as to make it highly difficult for any consumer organisation to get the grant. There is no provision in the Act, Shri Nariman submitted, to locate the person really entitled to refund and to make over the money to him. "We expect a sensitive Government not to bluff but to hand back the amounts to those entitled thereto", intoned Shri Nariman. It is a colourable device - declaimed Shri Sorabjee - "a*

> *dirty trick" and "a shabby thing". The reply of Shri Parasaran to this criticism runs thus : It ill-becomes the manufacturers/Assessees to espouse the cause of consumers, when all the while they had been making a killing at their expense. No consumers' organisation had come forward to voice any grievance against the said provisions. Clause (e) of the proviso to sub-section (2) of Section 11B does provide for the buyer of the goods, to whom the burden of duty has been passed on, to apply for refund of duty to him, provided that he has not in his turn passed on the duty to others. It is, therefore, not correct to suggest that the Act does not provide for refund of duty to the person who has actually borne the burden. There is no vice in the relevant provisions of the Act. Rules cannot be relied upon to impugn the validity of an enactment, which must stand or fall on its own strength. The defect in the Rules, assuming that there is any, can always be corrected if the experience warrants it. The Court too may indicate the modifications needed in the Rules. The Government is always prepared to make the appropriate changes in the Rules since it views the process as a "trial and error" method - says Shri Parasaran".*

20. *There was a further submission which was considered in the said judgment about the convenience/difficulty for the ultimate consumer to make applications for refund. In that connection it was held as follows :-*

> *"99. We agree with Shri Parasaran that so far as the provisions of the Act go, they are unexceptionable. Section 12C which creates the Consumer Welfare Fund and Section 12D which provides for making the Rules specifying the manner in which the money credited to the Fund shall be utilised cannot be faulted on any ground. Now, coming to the Rules, it is true that these Rules by themselves do not contemplate refund of any amount credited to the Fund to the consumers who may have borne the burden; the Rules only provide for "grants" being made in favour of consumer organisations for being*

spent on welfare of consumers. But, this is perhaps for the reason that clause (e) of the proviso to sub-section (2) of Section 11B does provide for the purchaser of goods applying for and obtaining the refund where he can satisfy that the burden of the duty has been borne by him alone. Such a person can apply within six months of his purchase as provided in clause (e) of Explanation B appended to Section 11B. It is, therefore, not correct to contend that the impugned provisions do not provide for refunding the tax collected contrary to law to the person really entitled thereto. A practical difficulty is pointed out in this behalf by the learned counsel for appellants-petitioners: It is pointed out that the manufacturer would have paid the duty at the place of "removal" or "clearance" of the said goods but the sale may have taken place elsewhere; if the purchaser wants to apply for refund - it is submitted - he has to go to the place where the duty has been paid by the manufacturer and apply there. It is also pointed out that purchasers may be spread all over India and it is not convenient or practicable for all of them to go to the place of "removal" of goods and apply for refund. True it is that there is this practical inconvenience but it must also be remembered that such claims will be filed only by purchasers of high-priced goods where the duty component is large and not by all and sundry/small purchasers. This practical inconvenience or hardship, as it is called, cannot be a ground for holding that the provisions introduced by the 1991 (Amendment) Act are a "device" or a "ruse" to retain the taxes collected illegally and to invalidate them on that ground - assuming that such an argument is permissible in the case of a taxing enactment made by Parliament. (See R.K. Garg [(1981) 4 SCC 675 : 1982 SCC (Tax) 30 : AIR 1981 SC 2138] and other decisions cited in paras 87 and 88.)"

21. *That a consumer can make an application for refund is clear from paras 98 and 99 of the judgment of this Court in Mafatlal Industries (supra). We are bound by the said* *findings of a Larger Bench of this Court. The word 'buyer' in Clause (e) to proviso to Section 11B(2) of the Act cannot be restricted to the first buyer from the manufacturer. Another submission which remains to be considered is the requirement of verification to be done for the purpose of finding out who ultimately bore the burden of excise duty. It might be difficult to identify who had actually borne the burden but such verification would definitely assist the Revenue in finding out whether the manufacturer or buyer who makes an application for refund are being unjustly enriched. If it is not possible to identify the person/persons who have borne the duty, the amount of excise duty collected in excess will remain in the fund which will be utilized for the benefit of the consumers as provided in Section 12D."*

4.9 Hon'ble Supreme Court in the case of Allied Photographics India Ltd. [2004 (166) ELT 3 (SC)] has obsereved as follows:-

*"**17.** On the above facts, the short point which arises for determination is - whether incidence of duty was passed on by NIIL to its distributor M/s. AGIL and whether M/s. AGIL in turn passed on the burden to its dealers. On the first point, NIIL conceded in the earlier proceedings before the High Court that it had passed on the duty burden to its distributor M/s. AGIL. Therefore, the only question which we are required to decide is - whether M/s. AGIL in turn had passed on the duty burden to its dealers as alleged. In the present case, it was argued on behalf of the Department before the authorities below that 20% of the total price paid by M/s. AGIL represented the duty recovered by NIIL as a part of the sale price. It is important to note that M/s. AGIL was the sole distributor of NIIL. Therefore, it is highly improbable for a distributor to incur cost of purchase which included 20% element of duty in addition to the purchase price without passing on the burden to its dealers. From the record, it appears that*

during the disputed period 1974 to 1984, M/s. AGIL were in trading which further supports the above improbability. In the present case, there is no material placed on record by M/s. AGIL as to how it had accounted for the cost of purchase in its books and the accounting treatment it gave to the said item at the time of payment of the purchase price. No record as to costing of that item has been produced. This material was relevant as in the present case NIIL conceded that it had passed on the burden of duty to its distributor M/s. AGIL (buyer) and it was the buyer who claimed refund. It has been urged on behalf of the respondent and which argument has been accepted by the authorities below that 20% of the total price paid by M/s. AGIL to NIIL represented total excess excise duty levied and not the excess duty collected by NIIL in the form of sale price from its distributor M/s. NIIL. It was argued that excess duty collected by NIIL represented only 1.62% of the total price. It was argued that resale price charged by M/s. AGIL to its dealers had no relevance to excess excise duty paid by M/s. AGIL to NIIL at the time of purchase as the sale price charged by M/s. AGIL to its dealers was based on the prevailing market price. We do not find any merit in this argument. In the present case, the refund claim is made by a buyer and not by the manufacturer. The buyer says that he has not passed on the burden to its dealers. The buyer has bought the goods from the manufacturer paying the purchase price which included cost of purchase plus taxes and duties on the date of purchase. In such cases, cost of purchase to the buyer is a relevant factor. None of the authorities below have looked into this aspect. Even the Appellate Tribunal has not gone into this relevant factor. It has merely quoted the passages from the order of the lower authority, whose order was impugned before it. Costing of the goods in the hands of the distributor, the cost element and the treatment given to purchases by the buyer in his own *account were relevant circumstances which the authorities below failed to examine. It was submitted that cost of purchase was not a relevant factor. It was submitted on behalf of the respondent that the resale price charged by the buyer was not a relevant factor. It was submitted that since the sale price of the goods before and after the assessment remained the same the burden of excess duty was absorbed by the respondent. It was submitted that in any event the sale price of the goods increased much less than the amount of duty (differential) involved in this case and, therefore, incidence of duty was not passed on to the consumers. In this connection, reliance was placed on several judgments of the Tribunal. We have gone through these judgments. They are not applicable to the facts of this case. In the present case, we are concerned with the distributor buying the products from the manufacturer and reselling them to its dealers. Hence, the cost of purchase is a relevant factor. The facts of the cases before the Tribunal deal with sale by manufacturer to the consumer. They deal with assessees' invoice bearing a composite price. They are the cases which dealt with the claim of refund by the manufacturer. They did not deal with claim of refund by the buyer. Hence, they have no bearing on the facts of the present case.*

18. *Before concluding, we may state that uniformity in price before and after the assessment does not lead to the inevitable conclusion that incidence of duty has not been passed on to the buyer as such uniformity may be due to various factors. Hence, even on merits, the respondent has failed to make out a case for refund. Since relevant factors stated above have not been examined by the authorities below, we do not find merit in the contention of the respondent that this Court should not interfere under Article 136 of the Constitution in view of the concurrent finding of fact."*

4.10 In view of the above discussion, we do not find any merits in the submissions made by the appellant or the decisions relied upon by the appellant in their support. We have based our discussions by placing reliance on the decision of Constitution Bench of Hon'ble Supreme Court on the issue, we are not recording any finding separately on each of decision relied upon.

4.11 We do not find any merits in this appeal.

5.1 Appeal is dismissed.

(Pronounced in open court on-06 January, 2025)

(P.K. CHOUDHARY)
MEMBER (JUDICIAL)

(SANJIV SRIVASTAVA)
MEMBER (TECHNICAL)

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