

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
38, MG Marg Civil Lines, Old Red Building, Allahabad-211001
Regional Branch, Allahabad

Dated: 09/08/2017

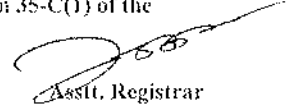
To

Appellant as per address in table below

Respondent as per address in table below

Final Order No. **A/70748-70749/2017-SM[BR]** dated 04/08/2017

I am directed to transmit herewith a certified copy of order passed by the Tribunal under section 35-C(1) of the Central Excise and Salt Act, 1944.


 Asstt. Registrar

Application	Appeal	Name and Address of Appellant
1	E/1320/2011	BIRLA CORPORATION LTD., UNIT RAEBARELI CEMENT WORKS, D-9 TO D-15, INDL. AREA, PHASE-II, AMAVAN ROAD, RAEBARELI (U.P.)
2	E/1824/2010	Birla Corporation Ltd Unit Raebareli Cement Works, Upside Indl Area, phase-ii, Amawan Road RAEBARELI, UP
		Name and Address of Respondent
3		C.C.E. & S.T.-Lucknow 7-A...ASHOK MARG, LUCKNOW, UTTAR PRADESH-226001
4		-C.C.E. LUCKNOW 7-A, Ashok Marg, Lucknow.

Other Appellants and Respondents as per Annexure

Copy To

5 Advocate(s) / Consultant(s):

Ms. Stuti Saggi, (Adv.) (ALLD)
102, MAHALAXMI ENCLAVE
(ADJ. INCOME TAX OFFICE),
STANLEY ROAD, CIVIL LINES,
ALLAHABAD (U.P.)-211001

6 Bar Association, CESTAT, Allahabad

7 Director Publications, Customs, Excise. I.P. Estate, Delhi

8 M/s Centax Publications Pvt. Ltd., 1512-B, Bhishm Pitamah Marg, New Delhi-3

9 Company Law Institute of India Pvt. Ltd., No.2 (old no.36), Vaithiyaram Street, T. Nagar, Chennai-17

10 Taxmann Allied Service Pvt. Ltd., 59/32, New Rohtak Road, New Delhi-110005

11 LAWCRUX Advisors Pvt. Ltd., LAW House, 1-8, Sector-10, Faridabad 121003 (Haryana)

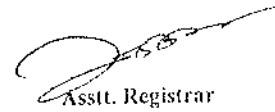
12 TaxIndiaOnline.com Pvt. Ltd., 2nd Floor, Vasant Arcade, Vasant Kunj, New Delhi - 110070

13 Mark Professional Services Pvt. Ltd., 108, Everest Block, Aditya Enclave, Hyderabad - 38

14 The ICAI society, 52, Nagarjuna Hill, Punjagutta Hyderabad.-500082

15 M/S Knowledge Processing Pvt. Ltd.(taxmanagementindia.com), FF-19, 1st Floor, Cross River Mall, CBD Ground, Near Karkardooma Court, Delhi-110032

16 C.D.R. 17 Office Copy 18 Guard File



Asstt. Registrar

IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE
TRIBUNAL
REGIONAL BENCH : ALLAHABAD
COURT No. I

APPEAL Nos. E/1824/2010 & E/1320/2011-EX[SM]

(Arising out of Order-in-Appeal No. 79-CE/LKO/2010 dated 31/03/2010 (in Appeal No. E/1824/2010) and Order-in-Appeal No. 30-CE/LKO/2011 dated 23/02/2011 (in Appeal No. E/1320/2011) both passed by Commissioner of Central Excise (Appeals), Lucknow)

Birla Corporation Ltd.

Appellant(s)

Vs.

Commissioner of Central Excise, Lucknow

Respondent(s)

Appearance:

Ms. Stuti Saggi (Advocate)

for Appellant

Shri Rajeev Ranjan Joint Commissioner (DR)

for Respondent

CORAM:

Hon'ble Mr. Anil Choudhary, Member (Judicial)

Date of Hearing : 04/08/2017

Date of Decision : 04/08/2017

FINAL ORDER NOS. 70748-70749/2017

Per: Anil Choudhary



The issue in these appeals by the appellant assessee is whether the doctrine of unjust enrichment is attracted where the appellants have cleared the goods on MRP based assessment, as required under Section 4A of the Central Excise Act.

2. The brief facts are that the appellants are engaged in manufacture of Portland Cement falling under Chapter Heading No. 2523 of Central Excise Tariff Act, 1985 and were paying duty leviable thereon as per Notification No. 4/2006-

CE dated 01 March, 2006, as amended, @ 12% of MRP or Rs. 400/- per M.T. Subsequently Notification No. 4/2006-CE was further amended vide Notification No. 58/2008-CE dated 07 December, 2008 by which effective rate of duty applicable in the case of appellant's product was further reduced from 12% of MRP of Rs. 400/- per M.T. to @ 8% of MRP of 290/- per M.T. Due to the fact that the said Notification No. 58/2008-CE came into knowledge of the appellant on 08 December, 2008, the assessee continue to clear the goods manufactured by them on 07 December, 2008 at the higher rate of duty other than rate of duty applicable by Notification No. 58/2008-CE. Thus, the appellant paid Central Excise Duty on the clearances made on 07 December, 2008 at the higher rate of 12% instead of the lower rate of 8%, as the said Notification No. 58/2008-CE came into effect from 07 December, 2008. The amount of duty so paid in excess Have been worked out by the appellant and refund to this effect was submitted by their letter dated 29 January, 2009 to the Deputy Commissioner of Central Excise, Raebareli and claiming therein refund of Rs. 2,49,303/- as excess amount of duty paid by them. Pursuant to issue of show cause notice dated 22 April, 2009, the matter was adjudicated by the Deputy Commissioner by order dated 25 August, 2009, wherein the refund was sanctioned under Section 11 B of the Act. The amounts of refund was allowed to be taken as credit in the Cenvat account. Being aggrieved with the Order-in-

Original, Revenue filed appeal before the Commissioner (Appeals) on the grounds that the invoices issued by the respondent-assessee on 07 December, 2008, separately indicate the amount of duty paid by the customer, which is the higher rate. Therefore, the full incidence of duty which is at higher rate has been passed over to the buyer. Further assessee have not proved that incidence of excess duty at higher rate has been returned to the buyers. The assessee filed cross objections to the effect that they had paid duty at higher rate and as the duty liability is payable on the basis of MRP/RSP, preprinted on each cement bags. Further, the invoices noticed by the Revenue are only "Excise Invoice" in which only duty 'payable' has been shown for the purpose of payment of Excise Duty to the Government. There is no doubt that in these invoices any amount payable by the customer has been shown. Therefore, the customers have not paid any amount on the basis of the Excise Invoices. That in the commercial invoices assessee is mentioning the duty amount only to show that the impugned goods are duty paid and corresponding excise invoice number is also mentioned. The amount shown as excise duty, had no relation with the commercial value and showing the same to match the price of cement as per the prevailing market rates. Therefore, the contention of Revenue that the assessee is showing higher rate of duty in the invoice is not tenable as the same have no relation with the commercial value of the cement. Since the



duty of excise was paid in accordance with MRP/Value of the cement bags, no inference can be drawn that the excess duty paid by the appellant assessee had been passed on to the customer. It is also pointed out that before passing the Order-in-Original, verification report on the genuineness of the claim was called from the Jurisdictional Superintendent, who had reported as follows :-

"In this connection, it is also to be submitted that M/s Birla Corporation Ltd., clears their goods on MRP based assessment and they charge the price from the parties/customers on the basis of contracts made between them and customers. Therefore, in this case the excise duty which is paid by them does not fluctuate for the recovery from the customers. Thus, unjust enrichment is not applicable in this case."

3. The learned Commissioner (Appeals) taking notice of the Provisions of Section 11B of the Central Excise Act and further considering the ruling of the Apex Court in Mafatlal Industries Ltd versus Union of India reported at 1997 (89) ELT 247 (SC) wherein it was held that all claims of refund, except where levy is held to be unconstitutional, to be referred and adjudicated upon under Section 11B of the Act or under Section 27 of the Customs Act and subject to the claimant establishing that the burden of duty has not been passed on to the third party. Further, reference was made to the ruling in the case of Sahkari Khand Udyog Mandal Ltd. v/s CCE



reported at 2005 (03) LCX 008 (SC) where it is laid down the principle that it has to be proved beyond doubt by the person claiming refund, that the burden of duty is not passed on to the customers. It is further observed that the appellant assessee have not fulfill the requirement of Statutory Provisions of law in the instant case and as such the refund was not admissible to them.

4. Being aggrieved the appellant assessee is before this Tribunal on the ground that the clearances made on the basis of MRP which was preprinted on each cement bag. There is no question of passing on the excess duty erroneously paid. Therefore, by no stretch of imagination it can be said that the duty was borne by the customers or in the alternative passed on to the buyers of the goods. Therefore, they relied upon the rulings of this Tribunal in the case of Amadalavalasa Cooperative Sugars Ltd. v/s CCE, Visakhapatnam reported at 2007 (219) ELT 526 (Tri.-Bang.) and in the case of Girish Foods & Beverages (P) Ltd. v/s CCE, Pune reported at 2007 (211) ELT 388 (Tri.-Mumbai).

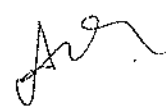
5. It is further urged that the findings of the Adjudicating Authority based on the verification report of the Range Superintendent have not been found untrue and as such the order of the learned Commissioner is cryptic and non-speaking. It is not the case that the Adjudicating Authority did not consider the doctrine of unjust enrichment, as observed by the learned Commissioner (Appeals) rather the



fact on record is that after due consideration of the doctrine of unjust enrichment, as required under Section 11B of the Act, the Adjudicating Authority held that the appellant assessee have not passed on the duty under the facts and circumstances and have allowed the refund, which cannot be faulted with.

6. Learned AR for the Revenue have relied on the impugned order.

7. Having considered the rival contentions I find that this Tribunal in the case of Amadalavalasa Cooperative Sugars Ltd (supra) and in the case of Girish Foods & Beverages (supra) have held that where clearances were based on MRP or fixed-price it have been held that the duty differential burden was not passed on and accordingly, unjust enrichment is not attracted. Another Coordinate Bench of this Tribunal in Girish Foods & Beverages Pvt. Ltd v/s CCE 2007 (211) ELT 388, where payment was made under protest and the protest and was lodged at the time of first payment of duty, though elaborate procedure for payment under protest was not followed, this Tribunal held that it cannot be said to have paid the subsequent duty voluntarily and held that limitation for refund is inapplicable under Section 11 B of the Act. As regards unjust enrichment, under the fact that payment of duty was based on MRP valuation, where price remained constant irrespective of fact of payment of higher duty and MRP in respect of other franchisee holder, who were availing

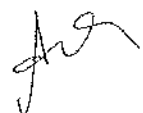


exemption also remained the same. It was held that no conclusion can be drawn that value of final products fluctuated on account of payment of differential duty. Further it was held that the duty burden was borne by the manufacturer from his own pocket and as such unjust enrichment is not applicable. In the said ruling this Tribunal considered the ruling of Hon'ble Supreme Court in Commissioner v/s Allied Photographics India Ltd 2004 (166) ELT 3 (S.C). It was also observed that duty based upon MRP on the final products, which remained constant in spite of the fact of payment of higher duty. As such when the product is leviable to duty in terms of MRP, it cannot be concluded that the value of the final products fluctuated on account of payment of differential duty. The appellant also relied on the ruling of Hon'ble Supreme Court in the case of CCE v/s Panihati Rubber Ltd 2006 (202) ELT 41 wherein the assessee manufacturer was supplying goods manufactured to the Railways. The goods were manufactured in terms of the agreement and specification and supplies were made against the specific contracts. The assessee used to pay 30% Basic Excise Duty and 15% Special Duty. The goods came to be classified under sub heading 4009.92. The said classification was in dispute. The contention of the assessee was that it is classifiable under sub heading 4009.99. The lis ended in favour of manufacturer holding that the goods are classifiable under sub heading 4009.99. The assessee filed two



applications for refund for payment of excess duty. The said applications were rejected by the authority observing that the same would amount to unjust enrichment. The Apex Court held on the issue of unjust enrichment, despite laws of excise duty in a given situation being held to be illegal, in the event is found that the assessee in fact passed on burden of excise duty to its customers, applying principle of unjust enrichment, court would not ordinarily direct refund thereof. We also notice that the supplies were made against specific contracts and the certificate issued by the Railways, that supply was against fixed-price under the contract and did not provide for an element towards excise duty. It was also not the case of Department that while arriving at its finding, that the assessee had not passed on excise duty, the Tribunal had considered all the relevant facts. Hon'ble Supreme Court also observed that if the price of supply in respect of contract did not include the element of excise duty, the same being nil, the Tribunal may be correct in its opinion that the question of excise duty having been passed on by the respondent assessee to the Railway Administration, would not arise.

8. Having considered the rival contentions and the case laws referred to hereinabove, it is an admitted fact that the appellant have received the same price/MRP for clearances of goods on 06 December, 07 December, 08 December, and so on. Accordingly I hold that there can be no presumption that the appellant have passed on the excess duty deposited



erroneously on 07 December, to the buyer of the goods. Accordingly, I hold that the doctrine of unjust enrichment has been satisfied by the appellant assessee and I hold them entitled to refund of the amount in question.

9. The Adjudicating Authority is directed to grant the refund within a period of 60 days from the date of receipt of the copy of this order along with interest as per rules.

10. Thus, the appeals are allowed

(Dictated and pronounced in Court)



(ANIL CHOUDHARY)
MEMBER (JUDICIAL)

Ankur

प्रमाणित प्रति/Certified True Copy

सहायक पंजीकार/Asstt. Registrar

सीमाशुल्क, उत्पादशुल्क एवं सेवा कर

अपील अधिकरण/(C.E.S.T.A.F.)

38, एम. जी. मार्ग, इलाहाबाद-211001

38, M. G. MARG, ALLAHABAD-211001

