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CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
PRINCIPAL BENCH, WEST BLOCK No.2, R.K.PURAM, NEW DELHI - 110066
EXCISE APPEAL BRANCH

Appeal No. E/2962/2004 - EX[DB] Date 22/01/2009

Assistant Registrar
C.E.S.T.A.T, New Delhi

To :
M/S BHILWARA PROCESSORS LTD.
P.O.NO-16,MANDPAM BHILWARA RAJASTHAN

M/S BHILWARA PROCESSORS LTD. Appellant
Vs
C.C.E.JAIPUR-II Respondent

I am directed to transmit herewith a certified copy of **Final order No.** 56/2009-**EX[DB]** dated 16-1-09 passed by the Tribunal under Section 35-C(1)of Central Excises Act, 1944

Assistant Registrar
(Excise Appeal Branch)

Copy to :
1. Respondent
   C.C.E.JAIPUR-II
   N.C.R.B.STATUE CIRCLE C-SCHEME JAIPUR
2. Adv. / Consult
   SH. RAVI RAGHAVAN, ADV.,
   B-6/10, S. J. ENC. N. DELHI-29
3. S.D.R
4. ~~J.C.D.R.~~
5. Bar association, CESTAT, New Delhi
6. M/s. Deeparchi Publications, M-93, Marg. 46, Saket, New Delhi 110017
7. M/s Centax Publictions (P) Ltd., 1512-B, Bhishm Pitamah marg, Opp. ICICI Bank of Defence Colony, New - 3
8. Excise & Customs cases, B-37, Sector -1, NOIDA - 201301 Gautam Budh Nagar, (U.P.)
9. Raghuraman's 44-B, Regal Flat,Shipra Suncity, Indirapuram - 201010,Ghaziabad, DT, U.P.
10. Nidheshak publications, I.P.Estate, new Delhi
11. Taxmann Allied Service Pvt Ltd., 21/35, West Punjabi Bagh, New Delhi - 110026
12. Commercial Laws of India Pvt Ltd Post Bag No. 1033, No.70(Old No. 88), Thyagaraya Road, T. Nagar,Chennai
13. Taxindiaonline.com Pvt.Ltd, B-XI/8183,Vasant Kunj, New Delhi - 110070
14. Easy Service Tax Online Dot Com Pvt.Ltd.407A,Iscon Mall,Above Star India Bazar,Satellite Road,Ahmedabad-15
15. Office Copy
16. Guard file

Assistant Registrar
(Excise Appeal Branch)

IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
West Block No. 2, R.K. Puram, New Delhi – 110 066.
Principal Bench, New Delhi

COURT NO. II

Excise Appeal No. 2962 of 2004

M/s Bhilwara Processors Ltd. Appellant
[Shri Ravi Raghavan, Advocate]

Versus

CCE, Jaipur Respondent
[Shri R.K. Verma, Auth. Rep. (DR)]

CORAM : **Hon'ble Shri D.N. Panda, Judicial Member**
Hon'ble Shri Rakesh Kumar, Technical Member

DATE OF HEARING : 14/01/2009.

Final Order No. 56/09-Ex. Dated : ____________

Per. D.N. Panda :-

Learned Counsel Shri Ravi Raghavan submits that while the appeal was pending before the Tribunal, the Hon'ble High Court of Rajasthan, which is the Jurisdictional High Court has delivered a judgment in the case of **Union of India vs. M/s A.K. Spintex Ltd. & Anr.** reported in **2009-TIOL-12-HC-RAJ-CX.** He submits that this judgment comes to his rescue. He explains the facts in the manner that this appellant is a job worker who receives the raw material from the principal and the raw material so received under goes processing by the appellant. The appellant was discharging duty liability on the basis of the assessable value determined following the ratio laid down in the Ujagar Print's case. He further submits that consequent upon resolution of certain disputes in the industry itself, this appellant was bound to issue credit notes to the principal who supplied the raw materials. The reason of issuance of the credit note was that this appellant has to pay some money to the principal for the transaction due to decrease of price. Therefore, when this appellant suffered, it was bound to get back the refund of the duty it paid on the goods manufactured for the principal and there was slash of the assessable value. But the learned Appellate Authority having no advantage of reading the Jurisdictional High Court judgment delivered on November 26, 2008, he decided against the appellant. He further submits that the facts of the case of the appellant are in similar parameteria and covered by the judgment.

2. Learned DR submits that this appellant is not entitled to refund, in view of the decision of the learned Appellate Authority in para '6'. The duty paid was ultimately passed on by the appellant to customers at the time of clearance of goods. Therefore, he supports the order of the Appellate Authority below.

3. Heard both sides and perused the records.

4. We significantly noticed that there was no clearance made by this appellant to customers directly. Rather the job worked goods had again gone back to the principal. When the credit note was issued by the appellant to the principal, this implies that this appellant has to suffer for the payment covered by the credit notes and the principal shall pay him sale proceed lower that was earlier charged in the invoices. It appears that appellants claim has arisen because of high duty liability incurred in past. When the suffering is for the duty liability, whether such a suffering requires any mitigation is to be examined. We are unable to find whether any thorough examination was done by the learned Appellate Authority since manner of examination was not satisfactory. Nature of the credit note, legitimacy of the credit note and if anything that shall be payable by the appellant to the principal need

to be brought to record in no uncertain terms. It is necessary to examine that the methodology adopted to get less amount from the principal whether gives rise to refund is to be brought to record. Thorough examination of the entire fact being necessary on the touchstone of the law, the learned Adjudicating Authority is directed to provide reasonable opportunity of hearing to the appellant and thoroughly examine the manner how refund, if any, arises to the appellant and while examining he is required to take into consideration the judgment of the Jurisdictional High Court and also any applicable decision of the Apex Court. If an exercise is carried out to demonstrate by speaking and reason order that shall bring the litigation to an end. In the manner stated above, we remand the matter to the learned Adjudicating Authority to dispose of this matter by end of **31st March 2009**.

(Dictated and pronounced in open court)

(D.N. Panda)
Judicial Member

(Rakesh Kumar)
Technical Member

PK

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CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
PRINCIPAL BENCH, WEST BLOCK No.2, R.K.PURAM, NEW DELHI - 110066
EXCISE APPEAL BRANCH

Appeal No. E/2962/2004 Date 12/11/2007

Assistant Registrar
C.E.S.T.A.T, New Delhi

To :
M/S BHILWARA PROCESSORS LTD.
P.O.NO-16,MANDPAM BHILWARA RAJASTHAN

M/S BHILWARA PROCESSORS LTD. Appellant
Vs
C.C.E.JAIPUR-II Respondent

I am directed to transmit herewith a certified copy of Final order No. 558/07-EX dated 03-10-07 passed by the Tribunal under Section 35-C(1)of Central Excises Act, 1944

Assistant Registrar
(Excise Appeal Branch)

Copy to :

1. Respondent
   C.C.E.JAIPUR-II
   N.C.R.B.STATUE CIRCLE C-SCHEME JAIPUR
2. Adv. / Consult SH. SANJAY KHATRI,
   204, SHALIMAR COMPLEX,
   OPP. CHWCHM. I. ROAD, JAIPUR-302001
3. S.D.R.
4. ~~J.C.D.R.~~
5. Bar association, CESTAT, New Delhi
6. M/s. Deeparchi Publications, M-93, marg. 43, saket, New
7. M/s Centax Publictions (P) Ltd., 1512-E, Bhishm Pitamah
8. Excise & Customs cases, B-37, Sector -1, NOIDA - 201301
9. R.Venkatraman Constt. 44-B, S.Suncity, Ghaziabad -
10. Nidheshak publications, I.P.Estate, new Delhi
11. Taxmann Allied Service Pvt Ltd., 21/35, West Punjabi Bagh,
12. Co, Law Institution
13. TAX INDIA, B-XI/8183,Vasant Kunj, New Delhi - 110070
14. Office Copy
15. Guard file

Assistant Registrar
(Excise Appeal Branch)

IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
West Block No.2, R.K.Puram, New Delhi-110066.
Principal Bench, New Delhi.

Excise Appeal No.2962 of 2004

(Arising out of Order-in-Appeal No.401(RM)CE/JPR-II/03 dt.24.10.03 passed by the Commissioner(Appeals), Jaipur)

For approval and signature:
Hon'ble Ms. Jyoti Balasundaram, Vice President
Hon'ble Mr. K.K.AGARWAL, MEMBER TECHNICAL

1.	Whether Press Reporters may be allowed to see the Order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982?	:	No
2.	Whether it would be released under Rule 27 of the CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not?	:	Yes
3.	Whether their Lordships wish to see the fair copy of the order?	:	seen
4.	Whether order is to be circulated to the Department Authorities:	:	Yes

M/s. Bhilwara Processors — Appellant

Versus

C.C.E., Jaipur — Respondent

Appearance

None or Appellant

Shri Sanjay Kumar,, Authorised Representative(DR) For Respondent

Coram: Hon'ble Ms. Jyoti Balasundaram, Vice President
Hon'ble Mr. K.K.Agarwal, Member Technical

Date of decision: 3.10.07
Final Order No. 558/2007 EX

Per Jyoti Balasundaram:

The authorities below have rejected the claim of the appellant herein for refund of Rs.1,38,70,221/- on the ground that the claim is hit by the bar of unjust enrichment enshrined in Section 11B of the Central Excise Act,1944.

2. None appears for the appellant inspite of notice, hence we heard Ld. DR and perused the records.

3. The claim for refund was initially rejected by the Asstt. Collector by his order dt.29.5.90 on the ground of time bar as well as on merits. This order was appealed against before Collector(Appeals) who vide order dt.25.10.91 upheld the rejection of the claim. The matter was carried further in appeal to the Tribunal which vide order No.223/99-A dt.4.3.99 set aside the rejection on the ground of time bar but remanded the issue for reconsideration with respect to unjust enrichment after ascertaining as to whether duty liability was passed on by the appellants to their buyers. On remand, fresh order was passed by the Asstt. Commissioner on 11.1.01 holding that the duty was recovered by the appellants from their customers. This order was upheld by the Commissioner(Appeals) vide impugned order dt.30.9.03, hence this appeal.

4. The first contention of the appellant is that the bar of unjust enrichment is not attracted in the present case for the reason that duty was paid by the appellants under protest. However, this contention required to

be rejected in the light of the judgment of the Apex Court in the case of CCE, Mumbai vs Allied Photographics India Ltd. reported in 2004(166)ELT.3(SC). In this case the earlier judgment of the Apex Court in Sinkhai Synthetics & Chemicals Pvt. Ltd. vs CCE, Aurangabad reported in 2002(143)ELT.17(SC) which held that refund of duty paid under 'Protest' is not hit by the bar of unjust enrichment has been considered and differed from, as seen from paragraph 14 which is reproduced herein below:

> "14. As stated above, para 104 of the judgment in the case Mafatlal Industries Ltd.(supra) states that if refund arises upon finalisation of provisional assessment, Section 11B will not apply. Para 104 of the said judgment does not deal with payment under protest. In the light of what is stated herein, we may now consider the judgment of this Court in the case Sinkhai Synthetics & Chemicals Pvt. Ltd.(supra). In that matter, the assessee was a manufacturer. The assessee claimed exemption which was denied by the Department. The assessee went in appeal to CEGAT. Pending appeal, assessee paid excise duty under protest. The assessee succeeded before the CEGAT and claimed refund on 17.1.91. Refund was denied by the Department. Therefore, it was a case of payment of duty under protest. However, in the said decision, this Court applied para 104 of the judgment of the Constitution Bench in the case of Mafatlal Industries Ltd.(supra), which with respect, had no application. As stated above, Para 104 of the judgment in the case of Mafatlal Industries Ltd.(supra) dealt with refund consequent upon finalisation of provisional assessment. Para 104 does not deal with refund of duty paid under protest. As stated above, there is a difference under the Act between payment of duty under protest on one hand and refund consequent upon finalisation of provisional assessment on the other hand. This distinction is missed out, ith respect, bythe judgment of this Court in the case of Mafatlal Industries Ltd.(supra). We may also point out that the judgment in the case of Sinkhai Synthetics & Chemicals Pvt. Ltd.(supra) is based on the concession made by the Counsel appearing on behalf of the Department. That judgment is, therefore, per incuriam. Learned Counsel for the respondent herein placed

reliance on the judgment of this Court in the case of TVS Suzuki Ltd.(supra). In that case, application for refund was filed. This was on completion of final assessment. On 9.7.96, the Department issued a show cause notice as to why the refund claim should not be rejected for non-compliance of Section 11B. By order dt.17.7.96, the refund claim was rejected on the ground that it was beyond limitation. On appeal, the Commissioner(Appeals) observed that the bar of unjust enrichment was not applicable as the assessee claimed refund consequent upon final assessment. He allowed the refund claim. CEGAT agreed with the view of Commissioner(Appeals). Before this Court, the Department conceded rightly that in view of para 104 of the judgment of this Court in Mafatlal Industries Ltd.(supra), bar of unjust enrichment was not applicable in cases of refund consequent upon adjustment under Rule 9B(5). The judgment of this Court in the case of TVS Suzuki Ltd.(supra), therefore, supports the view which we have taken herein above that refund consequent upon finalisation of provisional assessment did not attract the bar of unjust enrichment'.

5. In the light of the judgment in the case of Allied Photographics India Ltd.(supra) holding that the bar of unjust enrichment is attracted in cases where duty was paid under 'protest' and therefore, the question as to whether the appellants have passed on the duty burden to their customers will have to be examined in this case for the purpose of determining the eligibility to refund. The answer to this issue is to be found in the case of Sangam Processors(Bhilwara) Ltd. vs CCE, Jaipur reported in 1994(71)ELT.989 which has been upheld by the Apex Court as reported in 70 ELT.A.183(SC), in which the view of the Tribunal was that passing on credit notes to the supplies after initially passing on duty burden is not sufficient to hold that the duty burden has not been passed on, for the reason that only after passing on the duty burden initially the credit note had been

issued, and therefore,the appellants have unjustly enriched themselves. This order has been followed by the Larger Bench in S.Kumar's Ltd. vs CCE, Indore reported in 2003(153)ELT.217 and in the case of Meghdoot Gramodyog Sewa Sansthan vs CCE, Lucknow reported in 2003(153)ELT.695. In the light of the above decisions, we hold that the issue of credit notes to the suppliers subsequent to passing on the duty burden will not wipe out the initial passing on of duty burden and therefore, the claims for refund filed by the appellants is hit by the bar of unjust enrichment.

6. Lastly the plea of the appellant based on Section 72 of the Contract Act also requires to be rejected in the light of para 68 of the Mafatlal Industries Ltd. decision of the Apex Court (1997(89)ELT.247(SC) wherein the Apex Court has held that in the face of Section 11B of the Central Excise Act which expressly declares that all claims for refund of any duty shall be entertained in accordance with the said provisions, resort to Section 72 of the Contract Act to do precisely that which is expressly prohibited by the said provisions is not permissible. The relevant extracts of para 68 of the judgment is reproduced herein below:

> "In the face of the express provisions which expressly declares that no claim for refund of any duty shall be entertained except in acdordance with the said provision, it is not permissible to resort to Section 72 of the Contract Act to do precisely that which is expressly prohibited by the said provisions. In other words, it is not permissible to claim refund by invoking Section 72 as a separate and independent remedy when such a course is

expressly barred by the provisions in the Act, vis., Rule 11 and Section 11B. For this reason, a suit for refund would also not lie. Taking any other view would amount to nullifying the provisions in Rule 11/Section 11B, which, it needs no emphasis, cannot be done. It, therefore, follows that any and every claim for refund of excise duty can be made only under and in accordance with Rule 11 or Section 11B, as the case may be, in the forums provided by the Act. No suit can be filed for refund of duty invoking Section 72 of the Contract Act. So far as the jurisdiction of the High Court under Article 265 – or for that matter, the jurisdiction of this Court under Article 32 – is concerned, it is obvious that the provisions of the Act cannot bar and curtail these remedies. It is, however, equally obvious dthat while exercising the power under Article 226/Article 32, the Court would certainly take note of the legislative intent manifested in the provisions of the Act and would exercise their jurisdiction consistent with the provisions of the enactment".

6. In the light of the above discussions, we see no force in the submission of the appellants. Accordingly, we uphold the impugned order by which the dismissal of the refund claim has been upheld by the lower authorities and reject the appeal .

Order dictated in the open Court.

(Jyoti Balasundaram)
Vice President

(K.K.Agarwal)
Member Technical

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