

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

Appeal No. E/6108/2004-6110/2004 - EX[DB]

Date 19/05/2009

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

To :
M/S NAHAR SPINNING MILLS LTD.
VILL.- SIMRAI, MANDIDEEP, DISTT. RAISEN (M.P.)
M/S NAHAR SPINNING MILLS LTD.

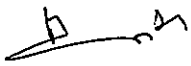
C.C.E. BHOPAL

Appellant

Vs
Respondent

EX[DB] dated 23-2-09

I am directed to transmit herewith a certified copy of Final order No.344-346/2009-
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. BHOPAL

48, ADMINISTRATIVE AREA, AREA HILLS, HOSHANGABAD ROAD, BHOPAL (M.P.)

2. Adv. / Consult SH. Z.U. ALVI, ADV.,
C/O. SH. S.K. BANSAI,
144, SECTOR-A, INDRAPURI,
BHOPAL (M.P.)

3 C.D.R

~~4 J.C.D.R.~~

5 Bar association, CESTAT, New Delhi

6 Director Publications, Customs, Excise. I.P. Estate, New Delhi

7 M/s Centax Publications Pvt Ltd., 1512-B, Bhishm Pitamah marg, Opp. ICICI Bank of Defence Colony, New Delhi - 3

8 Commercial Laws of India Pvt Ltd. Post Bag No. 1033, No.2(Old No. 36), Vaithyaram Street, T. Nagar, Chennai - 17

9 Raghuraman's 44-B, Regal Flat, Shipra Suncity, Indirapuram - 201010, Ghaziabad, DT, U.P.

10 M/s Manupatra Information Solutions Pvt Ltd. Excise & Customs Cases B-37, Sector - 1, Noida - 201301, Gautam Budh Nagar, (UP)

11 M/s. Deeparchie Publications, M-93, Marg. 46, Saket, New Delhi 110017

12 Taxindiaonline.com Pvt.Ltd, B-XI/8183, Vasant Kunj, New Delhi - 110070

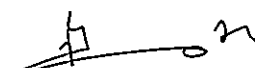
13 Taxmann Allied Service Pvt Ltd., 21/35, West Punjabi Bagh, New Delhi - 110026

14 Easy Service Tax Online Dot Com Pvt.Ltd.407A, Iscon Mall, Above Star India Bazar, Satellite Road, Ahmedabad-15

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

16 Office Copy

17 Guard file


Assistant Registrar
(Excise Appeal Branch)

**IN THE CUSTOMS, EXCISE & SERVICE
TAX APPELLATE TRIBUNAL,
WEST BLOCK NO. 2, R.K. PURAM,
NEW DELHI**

COURT – III

CENTRAL EXICSE APPEAL NO. 6108-6110 OF 2004

[Arising out of Order-in-Appeal No. 563-565/CE/BPL/2003/2851 dated 29.7.2004 passed by the Commissioner (Appeals), Bhopal]

For approval and signature:

Hon'ble Mr. M. Veeraiyan, Member (Technical)
Hon'ble Mr. P.K. Das, Member (Judicial)

1.	Whether Press Reporters may be allowed to see the order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982?	
2.	Whether it would be released under Rule 27 of the CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not?	m
3.	Whether their Lordships wish to see the fair copy of the order?	
4.	Whether order is to be circulated to the Departmental authorities?	Yh.

M/s. Nahar Spg. & Wvg. Mills Ltd.,

Appellant

Vs.

CCE, Bhopal

Respondent

Appearance:

Shri Z.U. Alvi, Advocate, for the appellant;
Shri S.N. Srivastava, D.R., for the Revenue,

Coram:

Hon'ble Mr. M. Veeraiyan, Member (Technical);
Hon'ble Mr. P.K. Das, Member (Judicial),

Date of hearing/decision: 23rd February, 2009

FINAL ORDER NO. 344-346/09 dated 28

Per P.K. Das:

The relevant fact of the case, in brief, are that the appellants are engaged in the manufacture of Cotton Yarn, Blended Yarn (Acrylic/Polyester) classifiable under Chapter 52 & 55 of the Schedule to the Central Excise Tariff Act, 1985. The appellants were selling their goods at factory gate and also through depot. They opted provisional assessment for payment of duty in respect of depot sales. The appellants filed refund claim consequent upon the finalization of provisional assessment. The original authority sanctioned the refund claim. The Revenue filed appeal before the Commissioner (Appeals) whereby the adjudication order was set aside and appeals of the Revenue were allowed. Hence, the appellant filed these appeals.

2. Learned Advocate on behalf of the appellants submits that the original authority sanctioned the refund claim holding that provisional assessment for the period in dispute was finalized on the basis of the price prevailing at depot on the day when the goods were cleared from the factory. He submits that in view of the amendment of Section 4 of Central Excise Act, 1944 in 1996 the depot price would be deemed to be the price for the purpose of assessment. Hence, the excess duty paid on price at the time of clearance from the factory and lower price charged on the same day at depot would be relevant to establish that incidence of

duty was not passed to other person. Accordingly, the appellants are eligible for refund of excess amount of duty paid at factory gate. He relied upon the decision of the Tribunal as under:-

(a) LML Ltd. vs. CCE, Kanpur – 2003 (155) ELT 532 (Tri.-Del.);

(b) CCE, Delhi vs. Jagsonpal Pharmaceuticals Ltd. – 2003 (152)
ELT 186 (Tri.-Del.);

(c) CCE, Chennai vs. Carborandum Universal Ltd. – 2008 (224)
ELT 290 (Tri.-Bang.);

(d) Castrol India Ltd. vs. CCE, New Delhi – 2000 (118) ELT 35
(Tribunal)

3. Learned D.R. reiterates the findings of the Commissioner (Appeals). He submits that in view of the decision of the Hon'ble Supreme Court in the case of Sahakari Khand Udyog Mandal Ltd. vs. CCE & Cus., reported in 2005 (181) ELT 328 (SC) the doctrine of unjust enrichment would be applicable in any refund of duty. He further submits that in the instant case, the appellants failed to co-relate the goods cleared from the factory and removal from the depot and, therefore, they failed to establish that the incidence of duty has not been passed to any further person. He relied upon the decision of the Tribunal in the case of United Spirit Ltd. vs. C.C. (Import), Nhava Sheva, reported in 2008 (228) ELT 360 (Tri.-Mumbai). He also submits that the Commissioner (Appeals) rightly observed that in order to fulfill the doctrine of unjust enrichment, the appellants have to justify that the same

goods cleared from the factory gate were sold from depot to the customer at a lower price.

4. After hearing both the sides and on perusal of the records we find that there is no dispute that the appellants opted provisional assessment for selling of the goods from depot. Rule 7 of Central Excise (Valuation) Rules, 2000 provides that where the excisable goods were not sold by the assessee at the time and place of removal but were transferred to depot, from where the excisable goods to be sold after their clearance from the factory, the value shall be the normal transaction value of such goods sold from such other place at or about the same time and, where such goods are not sold at or about the same time nearest time of removal of goods under assessment. Thus, if goods are cleared from factory today to a depot, the duty would be payable on the price prevailing at the depot today. The expression "such goods" in Rule 7 is significant. For the purpose of assessment, the clearance of goods from factory to depot would deemed to be "such goods" from depot. In view of that for the purpose of unjust enrichment, price of such goods prevailing at depot to be adopted.

5. On perusal of the Adjudication order we find that the original authority sanctioned the refund claim holding that "provisional assessment for the period in question was finalized on the basis of price prevailing at depot on the day the goods were cleared from the factory. The price prevailing at depot has been lower than the price at which duty

was paid by the appellant. The buyer at depot paid the duty on this lower price. Thus the excess duty paid by the appellants at the time of removal of the goods from the factory has not been recovered from the buyer. Hence, incidence of duty has not been borne by the appellants only." The Commissioner (Appeals) set aside the adjudication order, holding that the appellants failed to prove that the duty burden has not been passed on to other persons. It has been observed that the goods cleared from the factory and the goods sold from depot on a particular day are different. We are unable to accept the finding of the Commissioner (Appeals). We agree with the finding of original authority.

6. The original authority rightly held that depot price is relevant for the purpose of assessment. It is proved that the price at depot was lower than the factory gate price. So, there is no reason to look into as to what price goods were sold subsequently. In this connection we reproduce the relevant portion of the decision of the Tribunal in the case of Carborandum Universal Ltd. (supra):-

"5. On a very careful consideration of the issue, we find that when the goods are stock transferred from the factory, to the depot, duty is to be paid in terms of Section 4(b) read with Valuation Rules. The time of removal in respect of goods removed from the place of removal shall be deemed to be the time at which such goods are cleared from the factory. When the coated abrasives are removed from the factory to the depot,

duty liability has to be discharged and in terms of law value to be adopted is the price discount is given to the prevailing in the depot at the time of clearance from the factory. In terms of the declaration made by the respondents, it is seen that normally 17.5% discount is given to the dealers in respect of the goods purchased from the depot. Moreover at the time stock transfer from the factory to the depot, the appellants would not be knowing that a particular item would be sold to an industrial consumer. Further, the percentage of sales to industrial consumer from the depot is very meagre only 0.5%. However, as rightly observed by the Commissioner (Appeals) once the goods are cleared from the factory to the depot on payment of duty on the basis of a price prevailing at the depot, at the time of removal from the factory there is no need to chase the goods and to see at what price the same are actually sold. Therefore, he has rightly set aside the orders of the lower authority demanding duty. We do not find any reason to interfere with the orders of the Commissioner. Therefore, we dismiss Revenue's appeals and uphold the Orders-in-Appeal. The appeals and cross-objections are disposed of in the above terms."

7. The decisions cited by the learned D.R. for applicability of unjust enrichment are not relevant in this case, as the appellants fulfilled the conditions of unjust enrichment by showing that the depot price prevailing at the relevant time.

8. In view of the above discussion, we set aside the order of the Commissioner (Appeals). The orders of the original authority are restored. All the appeals are allowed.

(Dictated & pronounced in the Open Court.)

(M. VEERAIYAN)
MEMBER (TECHNICAL)

(P.K. DAS)
MEMBER (JUDICIAL)

RK