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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/4309/2004 - EX[DB]   Date 04/12/2009

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

To :
M/S BWL LTD.
P.B. NO-14, INDL. AREA BHILAI (C G)

M/S BWL LTD.   Appellant
Vs
C.C.E. RAIPUR   Respondent

I am directed to transmit herewith a certified copy of **Final order No. 1270/2009 EX[DB]** dated 14-10-09 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. RAIPUR
   DHAMTARI ROAD, TIKRAPARA, RAIPUR
2. Adv. / Consult MS.REENA KHAIR &SH.ABHISHEK JAJU,ADV., C/O MR.L.P ASTHANA
   R-163, SECOND FLOOR, GREATER KAILASH-1, NEW DELHI - 110 048.
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 Publictions 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
18. HON'BLE PRESIDENT.

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.4309/04

[Arising out of Order-in-Appeal No.142/RPR-II/2004 dt.24.5.04 passed by the Commissioner(Appeals),Raipur)

For approval and signature:

Hon'ble Mr. Justice R.M.S.Khandeparkar, President
Hon'ble Mr. Rakesh Kumar, 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?		Yes
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. BWL Ltd. Appellant

Versus

CCE, Raipur Respondent

Appearance

Ms. Reena Khair with Sh. Abhishek Jaju, Advs. for Appellant

Sh. R.K.Verma, Authorised Departmental Representative(DR) For Respondent

Date of decision: 14.10.09
FINAL Order No. 1270/09-EX

Per Justice R.M.S.Khandeparkar:

The appeal arises from order dated 24.5.04 passed by Commissioner(Appeals), Raipur. By the impugned order, the appeal filed by the appellants against the order-in-original by the Dy. Commissioner of Bhilai dt.22.3.2000 has been confirmed. By the said order, the Dy. Commissioner had confirmed the demand of Rs.8,73,013/- under Rule 57I of Central Excise Rules,1944 read with Section 11A of the Central Excise Act and imposed penalty of Rs.1,50,000/- under Rule 173Q and further had directed an amount of Rs.1,58,954/- should be credited to the Consumer Welfare Fund out of the amount of Rs.8,73,013/- in terms of Section 12C of the Central Excise Act,1944.

2. The impugned order is sought to be challenged on two grounds. Firstly that the classification list submitted by the appellants for the relevant period was not approved till Sept.'91 and therefore, pending the finalization of the classification list, the assessment was provisional and hence the provisions of Section 11B of the said Act, which relates to the principles of unjust enrichment were not attracted and this aspect was totally ignored by the authorities below while passing the impugned order. Secondly, it is a case of the appellants that the evidence produced in the form of the customer's affidavit and the certificate of the Chartered Accountant were not analysed in proper prospective and therefore, the rejection of the claim for refund was without taking into consideration the evidence on

record and hence the impugned order in that regard should not be sustained.

3. Few facts relevant for the decision are that the appellants were engaged in the manufacture of various products and in the process of manufacture thereof, the products like Lead Ash, Zinc Ash and Zinc Dross were emerging. During the period from April'88 to July'91, the appellants had filed three classification lists while claiming exemption benefit under Notification No.19/88-CE dt.1.3.88. Since 25.7.91 the said notification was amended whereby the benefit thereunder was made subject to condition that no credit could be taken on inputs used in the manufacture of the finished goods. Pending the approval of classification list, the Supdt. of Central Excise vide his letter dt.10.6.88 directed the appellants to pay the duty provisionally and the appellants paid the same under protest alongwith the letter dt.16.6.88. The classification list was approved on 12.9.91 alongwith the benefit of exemption under the said notification for the period prior to 25.7.91. The appellants filed their claim for refund on 3.12.91 relating to the period from April'88 to 24.7.91. Pursuant thereto a show cause notice came to be issued on 21.7.91 requiring the appellants to show cause as to why the claim for refund should not be rejected. The claim for refund was allowed by the Asstt. Commissioner by his order dt.14.9.92. The Department, being aggrieved, filed appeal before the Commissioner(Appeals) objecting to the order of refund on the ground that the duty incidence had already been passed on to the customers by the appellants. The said appeal was allowed by the

order dt.22.12.94 and matter was remanded to the Asstt. Commissioner to examine the issue relating to the unjust enrichment. The appellants produced evidence before the Asstt. Commissioner and sought to justify the claim for refund and non-applicability of the principles of unjust enrichment. However, the Asstt. Commissioner by order dt.28.8.95 rejected the claim of the appellants and ordered the amount to be credited to the Consumer Welfare Fund. Being aggrieved the appellants filed appeal before the Commissioner(Appeals) which was allowed by order dt.21.3.98. The matter was then carried before this Tribunal by the Department in appeal and the Tribunal by order dt.5.10.99 while setting aside the order of the Commissioner(Appeals) remanded the matter to the Asstt. Commissioner for fresh consideration of the matter and to ascertain whether the incidence of duty had been passed on to the buyers. After hearing the parties, the Dy. Commissioner by his order dt.22.3.2000 held that the claim of refund was not admissible and therefore, rejected the claim for refund as stated above. The said decision was challenged before the Commissioner(Appeals) without any success and consequently the impugned order can be passed.

4. The learned Advocate appearing for the appellants while fairly admitting that the appellants had not specifically raised the said point before the lower authority submitted that during the pendency of finalization of the classification list, the assessment could not be held to have been finalized and therefore, it was provisional and consequently, there was no occasion for applying

the principles of unjust enrichment contemplated under Section 11B. Drawing our attention to the fact that the classification list for the period prior to August,1991 was finalized only in September,1991, she submitted that it is apparent that the assessment could not be held to be final till the approval of the classification list and in that regard she placed reliance in the decisions in the matter of Rajeev Mardia vs CCE, Indore reported in 2001(129)ELT.334(Tri.-LB), Hindustan Metal Pressing Works vs CCE, Pune reported in 2003(153)ELT.11(SC) and Mafatlal Industries Ltd. vs UOI reported in 1997(89)ELT.247(SC). She further submitted that taking into consideration the law laid down by the Apex Court in Mafatlal Industries Ltd. case and Larger Bench of the Tribunal, the payment made provisionally during the finalization of the classification list could not be construed to be one in terms of the proceedings under Rule 9B and in the absence of the finalization of the classification list, the payment being provisional, it would amount to a situation in the nature of the deemed provisional assessment in relation to such payment and therefore, the provisions of Section 11A or Section 11B would not be attracted. Considering the same, it was necessary for the authorities below to appreciate that in the absence of applicability of those provisions, the question of applying the principles of unjust enrichment to deny the refund can not arise.

5. She further submitted that without prejudice to the above contention, even on merits, the evidence produced by the appellants in the form of certificate of Chartered Accountant as well as certificate of the buyers, it was clearly established by the

appellants that the incidence of duty had not been passed on to the customers and therefore, the refund ought to have been allowed. Taking us through the copies of the certificate by the Chartered Accountant and by the customer, she submitted that the same clearly confirms the case of the appellants regarding non-transfer of incidence of duty to the buyers. It was also sought to be argued that the burden was wrongly cast upon the appellants by taking resort to Section 12B inspite of the fact that the refund was in relation to the period prior to the enforcement of Section 12B.

6. The learned DR on the other hand submitted that there is nothing called deemed provisional assessment under the said Act or Rules made thereunder and in that regard reliance was sought to be placed in the decision in the matter of Mafatlal Industries Ltd., CCE, Calcutta vs Hindustan National Glass & Inds. Ltd. reported in 2005(182)ELT.12(SC) as well as in the matter of Metal Forgings vs UOI reported in 2002(146)ELT.241(SC). He further submitted that mere pendency of the finalization of classification list would not result in assessment being provisional. It was also sought to be contended that the evidence produced by the appellants was duly analysed and found not sufficient to establish the claim of non-transfer of incidence of duty to the customers and therefore, the refund was rightly rejected. Referring to Section 12B, it was submitted that the same is retrospective in nature and the law in that regard is well settled by the Hon'ble Supreme Court in Mafatlal Inds. Ltd. case.

6. It was also sought to be argued on behalf of the appellants that in case the evidence produced by the appellants in the form of certificates was either not sufficient or there was any doubt about genuineness thereof, the Department could have either summoned the concerned customers or could have directed the appellants to produce further evidence in that regard or could have itself investigated into the matter. Failure on the part of the Department in that regard could not be a justification to reject the claim of the appellants.

7. When the matter had come up before the Tribunal in the first round of litigation and the Tribunal on setting aside the order passed by the lower authorities had remanded the matter, while observing that

> "An affidavit for non-realization of duty from buyers, filed by the manufacturer, is not sufficient to hold that the burden in such a situation has been discharged by the respondents. The documentary evidence and gate passes were required to be examined by him before holding that the duty burden had not been passed on by the respondents to its buyers. Therefore, I am of the view that this is a fit case for remand of the matter to the Asstt. Commissioner for denovo adjudication. I order accordingly. The Asstt. Commissioner shall pass fresh order in accordance with law after considering all aspects and satisfying himself as to whether the respondents had or had not passed the duty burden at the relevant time to their buyers. He shall direct payment of the fund amount to the manufacturer only if he satisfies himself that they had not passed on the duty burden to their customers during the period covered by the refund claim".

Plain reading of the above order discloses that the remand to the authorities below was for specific purpose, i.e. to find now whether the manufacturer was able to satisfy the authority as to whether he has not passed on the incidence of duty to his customers. The scope of enquiry before the authorities below was, therefore, restricted to the said aspect of the matter. This was accepted by the appellants and thereupon the appellants appeared before the authorities below but could not establish their claim for refund by producing the necessary evidence to satisfy the authority that the duty burden had not been passed on to the customers of the appellants. There was no other issue left open for the adjudication by the lower authority while remanding the matter by the Tribunal. In other words, the effect of the order of the Tribunal was that the scope of the enquiry by the adjudicating authority was restricted to only one issue and secondly the appellants opted for the opportunity to lead evidence in support of their claim while submitting to the jurisdiction of the lower authority in relation to the said issue. In such circumstances, it is indeed difficult to permit the appellants to raise new points, even in relation to the point of law whether the proceedings were in the nature of provisional assessment or final assessment when the appellants themselves approached the lower authority on assumption that the same was in the nature of final assessment and therefore, opted for claim under Section 11B, it is too late in the day for the appellants to content that proceedings were in the nature of provisional assessments on account of non-finalization of the classification list and that, therefore, the provisions relating to principle of unjust enrichment are not attracted. In other words, we do not find substance in the contentions sought to be raised in that regard.

8. In Hindustan Metal Pressing Works case, the Apex Court had held that refund of the excise duty which was paid in excess was granted in 1989 and thereafter sub-Section (2) of Section 11B was incorporated in the said Act. Sub-section (2) of Section 11B which disentitled the refund on the ground of applicability of the principles of unjust enrichment came into force w.e.f. 20.9.91. In those circumstances, the Apex Court has observed that

> "there is basic error in approach by the authorities below as the assessee has not filed any application under Section 11B of the Act for refund of the excise duty paid by him. There is no question of application of principles of unjust enrichment as incorporated in Section 11B".

9. Obviously the ruling was on account of the fact that the refund order was passed in 1989 i.e. much prior to 20.9.91 and that therefore, there was no occasion for the party to make an application under Section 11B which came into force much after the order of refund. That is not the case in hand. Incidentally the refund claim was made in Dec'91, much after 20.9.91.

10. In the matter of Rajeev Mardia's case, the matter came up before six Member Bench pursuant to the doubt raised by the Regular Bench of the Tribunal regarding the statement made by the Larger Bench to the effect that the procedure laid down in Rule 9B should be followed for the purpose of showing that the assessments are provisional. The regular bench was of the opinion that the said statement in relation to the provisional nature of assessment required reconsideration in view of the decision of the Apex Court in the matter of Samrat International

(P) Ltd. vs CCE reported in 1992(58)ELT.561. In that regard, the Bench of six Members observed that

> "The only issue which requires to be considered by us in this matter is whether the decision of the Hon'ble Supreme Court in Samrat International (P) Ltd. vs CCE reported in 1992(58)ELT.561 envisages clearance of goods on provisional assessment dehors the provisions contained in Rule 9B of the Central Excise Rules,1944".

And after taking note of the provisions of Rule 9B as well as the decision in the Samrat International (P) Ltd.'s case it was held therein that

> "We are clear in mind that Samrat International(P) Ltd. envisages payment of duty on provisional basis pending decision of classification list or price list. For these payments to be treated as provisional, procedure contemplated by Rule 9B is not to be followed. Therefore, we are of the considered view that the observation made by the Larger Bench of five Members that there should be material on record to show that procedure laid down in Rule 9B was followed for the purpose of showing that the assessments are provisional, cannot hold good in the case of payments of duty effected pending finalization of classification list or price list".

11. The learned Advocate for the appellants however, drawing our attention to para 4 of the decision in Rajeev Mardia's case submitted that the same clearly rules that payment effected during the finalization of the classification list would amount to payment during in the course of provisional assessment. In fact what has been observed by the Tribunal in Rajeev Mardia in this regard

> "even if the procedure contemplated by Rule 9B is not complied with, it will be deemed that the payment of duty was provisional".

12. The ruling that in a given situation, the payment of duty would amount to be provisional one, cannot be construed to

mean that the same by itself would amount to saying that the proceedings were deemed provisional assessment. In fact the observation by the Tribunal in Rajeev Mardia's case was in the context of ruling of the Apex Court in Samrat International case. In Samrat International's case, the Apex Court had held that

> "9. This is the scheme for the payment of duty for clearance of goods by the manufacturers. This procedure is known as self-removal procedure. There will be no time bar for refund if the duty is paid under protest. The period of 6 months is prescribed in other cases. As we have already seen, Section 11B says that the period of 6 months "in a case where duty of excise is paid provisionally under this Act or the rules made therunder, the date of adjustment of duty after the final assessment thereof". In this case, the classification list filed by the appellant for the period 1.4.85 to 27.4.85 was not approved till 3.6.85. From the provisions of Rules 173B, 173C and 173CC, which we have set out earlier, it will be seen that clearances can be made only after the approval of the list by the particular officer. However, if there is likely to be delay in according the approval the officer can allow the assessee to avail himself of the procedure prescribed under Rule 9B for provisional assessment of the goods. In the present case between Ist April,1975 when the classification list was filed and 3rd June,1985 when the list was approved, the assessee was clearing the goods by determining the duty himself and debiting the amount of duty in his personal ledger account. The amount of duty paid by him was obviously provisional and subject to the result of the final approval by the officer concerned. This is the procedure prescribed under Rule 9B except for the circumstance that no bond as provided in Rule 9B is required in a case where the personal ledger account is maintained for the clearance of the goods, since there is always a balance in the account current sufficient to cover the duty that may be demanded on the goods intended to be removed at any time. In these circumstances, the clearance of goods made by the appellant between Ist April and 3rd of June,1985 were in accordance with the procedure for provisional assessment. In such a situation clause (e) of para (B) of the Explanation under Section 11B will be attracted. In this case the RT-12 return for the month of April,1985 was filed on 8.5.85 and the same was assessed on 29.10.85. It is, therefore, only from the date of this assessment that time bar in Section 11B will operate. In the present case the refund application had

been filed on the 30th of October,1985. It cannot, therefore, said to be time barred".

13. Having the decision of the Tribunal in Rajeev Mardia alongwith the decision of the Apex Court in the case of Samrat International Pvt. Ltd., therefore, it would be at once clear that the issue before the Apex Court in Samrat International Pvt. Ltd.'s case was in relation to the point pertaining to the bar of limitation prescribed for filing an application under Section 11B and not in relation to the point of unjust enrichment. The observations made by the Apex Court or by the Bench of the Tribunal in relation to particular point of law cannot be stretched to apply to a total different point of law. Therefore, the contention sought to be canvassed on the basis of the decision of the Tribunal in Rajeev Mardia's case cannot be accepted.

14. The Apex Court in Mafatlal Inds. Ltd.'s case with reference to Rule 9B held that

> "Rule 9B provides for provisional assessment in situations specified in Clauses (a), (b) and (c) of sub-rule (1). The goods provisionally assessed under sub-rule (1) may be cleared for home consumption or export in the same manner as the goods which are finally assessed. Sub-rule(5) provides that "when the duty leviable on the goods is assessed finally in accordance with the provisions of these Rules, the duty provisionally assessed shall be adjusted against the duty finally assessed, and if the duty provisionally assessed falls short of or is in excess of the duty finally assessed, the assessee shall pay the deficiency or be entitled to a refund, as the case may be". Any recoveries or refunds consequent upon the adjustment under sub-rule (5) of Rule 9B will not be governed by Section 11A or Section 11B, as the case may be. However, if the final orders passed under sub-rule (5) are appealed against - or questioned in a writ petition or suit, as the case may be, assuming that such a writ or suit is entertained and is allowed/decreed - then any refund claim arising as a consequence of the decision in such appeal or such other proceedings, as the case may be, would be governed by Section 11B. It is also

> made clear that if an independent refund claim is filed after the final decision under Rule 9B(5) re-agitating the issues already decided under Rule 9B – assuming that such a refund claim lies – and is allowed, it would obviously be governed by Section 11B. It follows logically that position would be the same in the converse situation".

Plain reading of the said ruling of the Apex Court would disclose that the provisions of Section 11A or 11B would apply in a case except when the refund is made as a consequence of adjustment under sub-rule (5) of Rule 9B. To read the said ruling in any other manner would virtually result in misconstruing the law laid down by the Apex Court.

15. In Hindustan National Class & Indus. Ltd.'s case, the Apex Court held that -

> "18. There is one other point which needs to be noted i.e. plea of the Revenue that the assessment orders were provisional in nature. This plea is equally untenable in view of what has been stated by this Court in Metal Forgings vs UOI (2002(146)ELT.241(SC). It was held that in order to establish that the clearances were on provisional basis an order under Rule 9B of the erstwhile Central Excise Rules,1944 (in short the Rules) and clearances/payment of duty on provisional basis are essential. Reliance was placed on an earlier decision of this Court in Coastal Gases and Chemicals Pvt. Ltd. vs Assistant Commissioner of Central Excise, Visakhapatnam(1997(92)ELT.460(SC)".

The above ruling needs no further elaboration. Even in Metal Forgings' case, the Apex Court after taking note of its rulings in Samrat International's case as well as in the matter of Coastal Gases and Chemicals Pvt. Ltd. vs Asstt. Commissioner of Central Excise, Visakhapatnam reported in 1997(92)ELT.460, held thus

> "12. From the above, it is clear that to establish that the clearances were made on a provisional basis, there should be first of all an order under Rule 9B of the Rules,

> and then material to show that the goods were cleared on the basis of said provisional basis, and payment of duty was also made on the basis of said provisional classification. These facts in the instant case are missing, therefore, in or opinion there is no material in the instant case to establish the fact that either there was a provisional classification or there was an order made under Rule 9B empowering the clearance on the basis of such provisional classification. In the absence of the same, we cannot accept the argument of the Revenue that in fact the order of the Assistant Collector dt.21.1.76 is a provisional order based on which clearance was made by the appellants or that they paid duty on that basis. On the contrary, as held by the Judicial Member the said order of classification was a final order, therefore, the Revenue cannot contend the limitation prescribed under Section 11A does not apply".

16. Being so, the contention that pendency the finalization of classification list would automatically result in the assessment being provisional and being so the principles of unjust enrichment would never be attracted while dealing with the claim for refund in such circumstances cannot be accepted.

17. The contention about the non-applicability of the provisions of section 11B on the ground that the refund claim relates to the period prior to 25.7.91 also cannot be accepted. In view of clear ruling in that regard by the Apex Court in Mafatlal Industries' case it was clearly held that

> "Reasonably construed and read together, the said provisions mean that in respect of pending applications, the requirement is only to produce such documentary and other evidence as is sufficient to establish that the incidence of duty, refund of which is claimed, has not been passed on by the applicant to any other person. The requirement of enclosing the documents referred to in Section 12A is obligatory only where the claim of refund pertains to the period subsequent to the commencement of the 1991(Amendment)Act".

It was further clarified that

> "88. There is yet another circumstance : Section 12B does not create a new presumption unknown till then; it

> merely gives statutory shape to an existing situation, as explained hereinbefore. At the most, it can be said that there were two views on the subject and Section 12B affirms one of them. Even without Section 12B, the true position is the same, as held by us in the earlier part of this judgment. The obligation to prove that duty has not been passed on to another person is always there as a pre-condition to claim of refund. It rights or substantive rights are being taken away. The deprivation, if at all, is not real. The manufacturer has already collected the duty from his purchaser and has thus reimbursed itself. By applying for refund yet, he is trying to reap a windfall; deprivation of that cannot be said to be real or substantial prejudice or loss. A manufacturer had no vested legal right to refund even when he had not Article 265, nor Section 11B. It was only on account of an incorrect view of law taken in Kanyaiyalal - and that cannot be treated as a vested legal right. Correction of judicial error does not amount to deprivation of vested/substantive rights, even though a person may be deprived of an unwarranted advantage he had under the over-ruled decision. In cases, where the burden is not passed on, there is no prejudice; he can always get the refund".

18. It was thus clear that the provisions comprises under Section 12B are indeed to be retrospective in nature and would apply to all the proceedings which are decided on or after 20.9.91.

19. Coming to the second ground of challenge which relates to the merits of the case, the records disclose that the affidavit which was filed by the manufacturer in support of the claim of non-realisation of the duty from the buyers was already discarded by the Tribunal under order dt.5.10.99 while remanding the matter. Other documents undoubtedly and mainly comprised of the so called certificate by the Chartered Accountant and a person alleged to be the buyer. In that regard, the original authority while analyzing the materials in this regard has held that as far as the certificate issued by the Chartered Accountant is concerned,

the same appears to be issued on the basis of invoices issued by the Branch Office of the assessee which did not disclose separately the amount of Central Excise Duty paid on the goods. Obviously the amount of Central Excise Duty paid on the goods had not been shown separately because it was included in the price of goods itself and hence there was no question of payment of Central Excise Duty by the buyer to the assessee/appellant over and above the price of goods but it was paid alongwith the price of goods itself as the price of the goods itself included the excise duty, in those circumstances, the certificate issued on the basis of such invoices cannot be relied upon. Indeed in the absence of duty element disclosed separately one fails to understand as to on what basis even the buyer could say that he had not paid the duty element to the appellants while purchasing the product.

20. Referring to the gate passes, the adjudicating authority has clearly observed that he found the goods to have been cleared on payment of duty, and however, the assessable value of the goods had not been shown in those documents.

21. In the background of such facts and circumstances which clearly discloses total failure on the part of assessee to establish non-transfer of incidence of duty to buyers one fails to understand as to what importance can be given to the so called certificate by the Chartered Accountant as well as the letter issued by the alleged buyer. It is not in dispute that there was no affidavit filed by any buyer on behalf of the appellants. It is difficult to give any credence to the letter which is essentially a

private document. There has to be confirmation of the contents of such letter by the author of the letter in the manner known to law by following the procedure contemplated under the law. In absence of the confirmation of the contents of such document, the same are to be affirmed by the author of such document and in case of copy of any public document or that of the public record of the private document, it could be under a certificate to be issued by the issuing authority competent to issue such certificate. In the absence thereof, any document without any proper confirmation of the contents of the document in the manner known to law cannot be relied upon.

22. It was, however, sought to be contended on behalf of the appellants that if the evidence produced by the appellants was not sufficient, nothing prevented the respondent from calling upon the appellants to produce further evidence or to call the buyer who has issued letter for their cross examination or to conduct the inquiry independently in that regard. We are afraid bearing in mind provisions of Section 12B, no credence could be given to these submission. The burden was squarely upon the appellants to prove that the incidence of duty had not been passed on to the consumers. In the facts and circumstances of the case, it cannot be said that the appellants had discharged this burden. Being so, no fault can be found out in the findings arrived at by the authorities below in relation to failure on the part of the appellants to discharge the said burden.

23. As regards the penalty, we find that there was no justification for imposition of penalty as such. The appellants are,

therefore, justified in contending the authorities could not have levied the penalty.

24. The appeal, therefore, partly succeeds as far as it relates to the imposition of penalty is concerned while it is dismissed in relation to all other contentions. The appeal is accordingly disposed of in the above terms.

(Justice R.M.S.Khandeparkar)
President

(Rakesh Kumar)
Member Technical

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