TELEGRAM : CEGCANAL
Website : www.cestat.gov.in

REGISTERED / AD
Email : delhi@cestat.gov.in

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL

PRINCIPAL BENCH, WEST BLOCK No.2, R.K.PURAM, NEW DELHI - 110066

SINGLE MEMBER APPEAL BRANCH

Appeal No. **E/1351/2009 – SM [BR]** Date **23/12/2011**

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

To :
M/S LIBERTY SHOES LTD.
LIBERTY PURAM , G.T. ROAD, KUTAIL, KARNAL

M/S LIBERTY SHOES LTD. Appellant
Vs
C.C.E. PANCHKULA Respondent

I am directed to transmit herewith a certified copy of **Final order No. 931 /2011-SM[BR]** dated 19.12.2011 passed by the Tribunal under **Section 35-C(1)of Central Excises Act, 1944**

Assistant Registrar
(SM Appeal Branch)

Copy to :

1. Respondent
C.C.E. PANCHKULA
SCO NO. 407 AND 408, SECTOR 8,
PANCHKULA (HARYANA) 134119.

2. Adv. / Consult
MR.VERMA KANT & ASSOCIATES
704,NILGIRI APARTMENT,9,BARAKHAMBA ROAD,N.DELHI

3. C.D.R
4. Bar association. CESTAT. New Delhi
5. Director Publications. Customs. Excise. I.P. Estate. New
6. M/s Centax Publictions Pvt Ltd., 1512-B, Bhishm Pitamah marg, Opp. ICICI Bank of Defence Colony, New Delhi -
7. Company Law Institute of India Pvt Ltd.,No.2(Old No. 36), Vaithyaram Street, T. Nagar,Chennai -17
8. Taxmann Allied Service Pvt Ltd., 59/32. New Rohtak Road. New Delhi -
9. Easy Service Tax Online Dot Com Pvt.Ltd.407A,Iscon Mall,Above Star India Bazar,Satellite Road, Ahmedabad-15
10. LAWCRUX Advisors Pvt Ltd. LAW House.1-8.Sector - 10. Faridabad 121003 (Haryana)
11. TaxIndiaOnline.com Pvt Ltd., Unit No.1, 2nd Floor,Vasant Arcade,Nelson Mandela Road, Vasant Kunj, New Delhi - 110070
12. Office Copy
13. Guard file

Assistant Registrar
(SM Appeal Branch)

CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI
Court No.IV

E/Appeal No.1351/2009-SM

(Arising out of order in appeal No. 46-49/Ans/Pck/09 dated 17.2.09 passed by the Commissioner of Customs & Central Excise, (Appeals), Gurgaon)

Date of Hearing: 11.11.2011
Pronounced on: 19-12-2011

For Approval and signature:

Hon'ble Mr.Mathew John, Technical Member

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?
3. Whether their lordships wish to see the fair copy of the order?
4. Whether order is to be circulated to the Department Authorities?

M/s Liberty Shoes Ltd — Appellants

Vs

CCE, Panchkula — Respondent

Appeared for the Appellant: Shri Verma Kant, Advocate
Appeared for the Respondent: Shri S.K. Bhaskar, DR

Coram: **Hon'ble Shri Mathew John, Member (Technical)**

Final ORDER - 931/2011 SM (Br)

Per Mathew John:

The Appellants are manufacturers of footwear which is subject to duty on the basis of M.R.P.. In Budget of 2004 a new Cess by name Education Cess was levied with effect from 09-07-

2004 on such products to be paid at 2% of the basic duty to be paid. A question arose whether the appellants had to pay the new Cess on goods which were already manufactured prior to 09-07-2004 but were not cleared. Appellants paid Education Cess on such goods under protest. Later the issue was clarified by the Department of Revenue vide letter F. No. 345/2/2004-TRU dated 10-08-2004 that the new Cess need not be paid on goods which were manufactured before 09-07-2004. The Appellants filed refund claims for such Cess paid on goods which were manufactured before 09-07-2004 but cleared alter. The Assistant Commissioner verified their claim and granted such refund. The revenue filed an appeal to the Commissioner (Appeal) on the ground that the issue whether the incidence of Cess was passed on to the consumer and whether unjust enrichment was being gained by the appellants by such refund was not examined in the order sanctioning refund as was required under the provisions of section 11B of the Central Excise Act. The Commissioner (Appeal) held that the appellants have not proved that there is no unjust enrichment was involved in the refund and allowed the appeal of the Revenue following the decision of the Supreme Court in the case of CCE Vs. Allied Photographic India Ltd. 2004 (166) ELT 3 SC. Aggrieved by the order of the Commissioner (Appeal) the Appellants filed an appeal with the Tribunal. The Tribunal held that the Appellants have not been given an opportunity to prove that they have not passed on the incidence to the customers and for that reason set aside the order of the Commissioner (Appeal) and remanded the matter to the Commissioner (Appeal). In remand proceedings, Commissioner (Appeal) considered the evidences produced and passed an order to the effect that the appellants have not produced proof to show that incidence of duty has not been passed on and therefore the Appellants are not eligible for the refund. Aggrieved by the order, the Appellants have filed this appeal.

2. The arguments on behalf of the appellants are the following:

(i) The M. R. P. on the goods remained the same before budget and after budget. Rebate prescribed for arriving at assessable value also remained the same. So when extra duty was paid it was from their profit margin only and they have not passed on the additional duty burden;

(ii) They had paid the Cess under protest because they had expected that the Cess will be refunded to them and there was no need to pass on the duty incidence;

(iii) Their invoices do not show that education Cess was being collected from the buyer because invoices are issued on cum-duty price;

(iv) The decision in the case of Allied Photographic India (Supra) is not applicable to the facts of this case because in that case the manufacturer had admitted passing on the burden to the dealers and refund claim was by the dealer. The dealer had not paid the duty under protest. Duty involved was paid during the period 1974 to 1984. After the refund claim of Allied Photographic was rejected the dealer filed a Writ Petition in 1993 claiming that the dealer had not passed on the burden to the consumers and hence they were eligible for refund. It was this claim that was rejected by the Apex Court. The facts in the present case are very different from facts in that case.

(v) They have produced a chartered Accountant's certificate to the effect that their net realization after payment of duties was lower after payment of education Cess.

(vi) The Appellants rely on the following decisions to support that they are eligible for the refund:

(a) Asian Paints (I) Ltd. Vs. CCE-2006 (199) ELT 873 (Tri-Mum)

(b) CCE Vs. Audithiya Minerals Ltd-2006 (199) ELT 868 (Tri-Bang)

(c) CCE Vs. Vikram Cement, 2008 (85) RLT 187

(d) CCE Vs. Softtouch Hygine Products Pvt. Ltd-2009 (90) RLT 373 (CESTAT-Ahmd)

3. After conclusion of the arguments when the order was reserved Appellants have given further written submission dated 22-11-2011. The main thrust in the written submission is that after granting the refund to the appellants the Revenue has not issued any Show Cause Notice for recovery of the same. Only appeals have been filed against the order sanctioning refund. The Appellants point out the following decisions to contest that Revenue cannot recover the refund granted without issue of Show Cause Notice:

(a) CCE Vs. Tulsipur Sugar Co. Ltd-1999 (114) ELT 784-SC

(b) CCE Vs. Inter Trade Electronics P Ltd-2000(124) ELT 675

4. The Ld DR on the other hand argues that the fact that MRP did not change after imposition of Education Cess or that the Cess has been paid under protest cannot be proof enough to demonstrate that the incidence has not been passed on. He points out that in the case of Vikram Cement (Supra), Cess was paid on 05-08-2004 for goods cleared on 09-07-2004 to 12-07-2004. In the present case Cess was cleared at the time of clearance of the goods itself. So there is a presumption that incidence has been passed on. Further in the case of CCE Vs. BPL Ltd -2010 (259) ELT 526 (Mad) it was decided by the Madras High Court that a Chartered Accountant's certificate is not good enough to prove that incidence has not been passed on. In the case of CCE Vs. Softtouch Hygine Products (P) Ltd (Supra) relied upon by the appellants there was a letter addressed by the assesse to the department that the assesse was paying duty from their resources and not passing on the incidence. There is no such letter in this case. He argues that the burden of proving the fact that incidence has not been passed on is on the Appellant and they have not discharged this burden. So their appeal should be rejected.

5. I have no doubt that the facts of the case of Allied Photographic (Supra) are very different where the manufacturer had indeed passed on the increased incidence to the dealer. The

fact that the manufacturer had paid the duty under protest would not have helped in proving that the dealer did not pass on the credit to the next level of buyers. Such a claim was prima facie unlikely to be correct. Commissioner (Appeal) has quoted this case to argue that payment under protest does not help in proving that incidence has not been passed on.

6. I have considered the documents submitted by the Appellants. The documents show the following aspects:

(i) The matter relates to a short period and specified quantity of goods which were manufactured before the imposition of levy and cleared after the levy and the legal position was that the new cess was not required to be paid on such stock

(ii) The Appellant had paid the duty under protest showing an expectation that he was eligible for refund

(iii) The Bills raised by the appellant to the dealers also continued to show the same transaction prices and same rates of duty was applied on the transaction price to arrive at the total price to be paid by the dealer, though this rate is shown as 10% towards taxes when the excise duty itself was 16% plus 2% of 16% as Education Cess. So it is clear that the appellant hadnot passed on the incidence to the dealer;

(iv) The RSP of the goods was not changed to pass on the incidence to the retail customer.

(v) The Chartered accountant's certificate shows that the realization to the appellant had reduced on account of the levy of education cess and no change in prices to the dealers.

7. When I consider all these facts together, I am convinced that the appellant had not passed on the incidence of the new levy to any other person and refund if paid would not cause any unjust enrichment to the appellant.

8. Another matter that has been raised is whether refund granted can be recovered without issue of demand under section 11A, in a situation where appeal is filed against the order granting refund. The decision quoted by the appellant in the case of Tulsipur Sugar Co. Ltd is not relevant to the context. The decision in the case of Inter Trade Electronics P Ltd relates to a period when the time limit for issuing demand under section 11A was six months but the time period for filing appeal under section 35B was two years. Now the position has changed. Period for issuing demand is one year and time limit for filing appeal is 3 months. So the assesse is put to notice about the erroneous refund through appeal proceeding within the time time limit that is applicable under section 11A. However an issue can arise whether the notice given through appeal proceedings is a good enough notice. Since this issue is not critical in deciding the case at hand, I am not making any observation on this issue.

9. The appeal succeeds and I allow the appeal.
(Order pronounced on 19/12/2011)

(Mathew John)
Member(Technical)

MPS*