

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

Appeal No. E/1154/2005 - EX[DB]

Date 31/03/2010

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

To :
M/S SPBL LTD.

HAMIRGARH ROAD OUTSIDE OCTROI POST ATUN
BHILWARA RAJASTHAN
M/S SPBL LTD.

Appellant

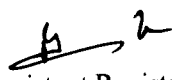
Vs

Respondent

C.C.E.JAIPUR-II

2010 EX[DB] dated 24-2-10

I am directed to transmit herewith a certified copy of Final order No. 112/
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

MR.V. LAXMIKUMARAN

B-6/10, SAFDARJUNG ENCLAVE, NEW DELHI-110029

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

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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 Kuni, New Delhi - 110070

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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 (Harvana)

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18, HON'BLE PRESIDENT


Assistant Registrar
(Excise Appeal Branch)

**CUSTOMS, EXCISE & SERVICE TAX
APPELLATE TRIBUNAL,
West Block No. 2, R.K. Puram,
NEW DELHI**

COURT No: I

CENRAL EXCISE APPEAL NO. 1154 OF 2005

[Arising out of Order-in-Appeal No. 5(RM)CE/JPR-II/2005 dated 11.1.2005 passed by the Commissioner (Appeals-II), Customs & Central Excise, Jaipur]

Dated of hearing/decision: 24th February, 2010

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?	<i>Yes</i>
2.	Whether it would be released under Rule 27 of the CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not?	<i>Yes</i>
3.	Whether their Lordships wish to see the fair copy of the order?	<i>See</i>
4.	Whether order is to be circulated to the Departmental authorities?	<i>Yes</i>

M/s. SPBL Limited

Appellants

Vs.

CCE, Jaipur-II

Respondent

Appearance:

Shri B.L. Narasimhan, Advocate for the appellants;
Shri Sunil Kumar, Authorised Representative (DR) for the Revenue

Coram:

Hon'ble Justice R.M.S. Khandeparkar, President;
Hon'ble Mr. Rakesh Kumar, Member (Technical)

FINAL **ORAL ORDER NO. 112/10-EX** dated _____

Per JUSTICE R.M.S. KHANDEPARKAR:

Heard.

2. This appeal arises from order dated 11.1.2005 passed by the Commissioner (Appeals-II), Customs & Central Excise, Jaipur. By the impugned order the appeal filed by the appellants against order of the adjudicating authority has been dismissed. The adjudicating authority by its order dated 31st July, 2002 while sanctioning the refund to the tune of Rs. 31,83,519/- and Rs. 67,19,061/- and rejecting the claim of Rs. 8,378/- directed that the said amount should be credited to the Consumer Welfare Fund in terms in terms of Section 11B(2) of the Central Excise Act, 1944 on the ground of failure on the part of the appellant to discharge their burden regarding non-passing of duty liability to the consumer.

3. The facts, in brief, relevant for the decision are that the appellants were engaged in the manufacture of Processed Manmade Fabrics classifiable under Chapter 54 and 55 of the Schedule to the Central excise Tariff Act, 1985. They used to receive Grey Fabrics from various Grey Fabric suppliers and used to return the Processed Fabrics to the dealers on payment of duty on the basis of job work done and processed on such fabric procured by them. In terms of Trade Notice No. 18/CEX/2001/M-III dated 20.3.2001 issued by Bombay Commissionerate the appellants

were paying duty on the assessable value arrived at on the basis of 115% of the cost of production, though subsequently pursuant to the issuance of the Board's Circular No. 610/10/2002-CX dated 19.2.2002 it was settled that the duty liability on the processed fabrics payable would be on the basis of principles laid down by the Hon'ble Supreme Court in the case of Ujjagar Prints Ltd., reported in 1989 (39) ELT 493 i.e. on the assessable value taking into account the landed cost of raw material plus job charges including actual profit margin. So, the appellants filed the refund claim. The adjudicating authority found that the claim to be admissible on merit and accordingly sanctioned the refund under the order. However, at the same time on the ground of bar of unjust enrichment, the adjudicating authority directed that the said amount should be credited to the Consumer Welfare Fund. As the appeal against the said order failed the appellants have approached this Tribunal.

4. Drawing our attention to the impugned order, the learned Advocate for the appellants submitted that the authorities below erred in directing the refunded amount to be credited to the Consumer Welfare Fund on the assumption that the appellants had, in fact, passed on the burden in relation to the said amount to the customers of the product ignoring the fact that the appellants pursuant to the processing of the fabrics had supplied the same to their dealers and not directly to the ultimate consumer and in the process they either had not collected the part of the amount which was claimed as refund from the department or that

subsequent to the passing of such burden upon the dealer, the same was refunded by the dealers to the appellants by issuing necessary credit note and corresponding debit note by the appellants to the dealers. He further submitted that the law does not require the appellants to establish that the burden of duty was passed on to the ultimate consumer, and it is sufficient for them that they have not passed on the burden to the dealers. In that regard attention was drawn to the various letters written by M/s. Sangam Suitings Ltd. from time to time confirming the fact that the payment made by them related to the amount excluding the amount of duty payable on the basis of addition of 15% of the profit margin. As regards the other dealers, it was pointed out that the documentary evidence in the form of credit note and debit note besides balance sheet which apparently discloses that the amount which was sought to be refunded was always shown as advance to the Central Excise department and not towards expenses in the said balance sheet. Reliance is sought to be placed in the matter of Addison & Co. vs. CCE, Madras, reported in 2001 (129) ELT 44 (Mad.), Jaipur Syntex Ltd. vs. CCE, Jaipur, reported in 2002 (143) ELT 605, and UOI vs. A.K. Spintex Ltd., reported in 2009 (234) ELT 41 (Raj.).

5. On the other hand, learned D.R. drawing our attention to the order passed by the original authority and the Commissioner (Appeals) submitted that the decision by the lower authorities is in consonance with the decision in the matter of Mafatlal Industries Ltd. vs. UOI, reported in

1997 (89) ELT 247. He further submitted that the provision of law comprised under Section 11B(2) clearly requires that the amount refundable is required to be credited to the Consumer Welfare Fund unless the claimant clearly establishes that the duty burden in that regard has not been passed on to the ultimate consumer. Drawing our attention to the decision in the case of Sangam Processors (Bhilwara) Ltd. vs. CCE, Jaipur, reported in 1994 (71) ELT 989 (Tribunal) he submitted that in the said case the Tribunal had held that issuance of credit note can not establish the discharge of burden cast upon the claimant in terms of Section 12B of the Central Excise Act, 1944. He further submitted that the findings arrived at by the authorities below are based on proper analysis of the material on record. As far as letters of M/s. Sangam Suitings Ltd. are concerned, he submitted that the same is sister concern of the appellants, and if those letters could be procured by the appellants it is not understood why similar letters were not procured from other dealers. The decision sought to be relied upon on behalf of the appellants are in different state of facts, and therefore, are not attracted in case in hand.

6. The refund claim is in two parts, one relating to the amount of Rs. 31,83,519/- which pertains to the goods cleared to M/s. Sangam Suitings Ltd., sister concern of the appellants. The second part relates to the amount of Rs. 67,19,061/- which pertains to the clearances effected to the other parties. As regards the clearances to the sister concern are

concerned, it is the case of the appellants that though the appellants had issued invoices disclosing the duty calculated by taking the value of 115% of the cost of production, the actual payment made by the sister concern to the appellants was excluding the value of 15% of the cost of production and that too by way of cheques. As regards the clearances to the other parties are concerned, though initially the duty amount was collected from such dealers, the part thereof which related to the duty element taking into consideration addition of 15% cost of production was refunded to the supplier by issuing the credit note to them and accordingly the debit note by the supplier.

7. It is undisputed fact that the above contention on the part of the appellants were sought to be made good by producing documentary evidence in the form of letters by M/s. Sangam Suitings Ltd. and copies of debit notes and credit notes as also balance sheet of the appellants. To what extent those documents could assist the appellants in discharging the burden is to be ascertained. Perusal of the impugned order reveals that as far as letters issued by M/s. Sangam Suitings Ltd. are concerned, those letters clearly disclose payment by cheques with reference to the invoices issued by the appellants in relation to the goods supplied to them after deducting the duty element calculated on the amount of value of goods deducting 15% of the cost of production. It is not the case of the department that this evidence produced regarding absence of collection of duty at the time of supply of goods to Sangam Suitings Ltd. was sought

to be rebutted by any evidence on record. In the case in hand, as it was the contention of the appellants that the duty element was not passed on to the dealers and that was sought to be established by the above documents, neither of the contents were disputed nor any counter evidence in this regard was produced by the department. As rightly pointed out by the learned Advocate this relevant aspect of the matter was not considered either by the adjudicating authority or Commissioner (Appeals) while deciding the matter.

8. Once it was established by the appellants that the burden in relation to the amount which was sought to be claimed was not passed on to the dealer to whom goods were supplied, the burden cast upon them in terms of Section 12B was clearly discharged and the onus had shifted upon to the department. Since there is no evidence produced by the department to counter the said material on record, we have no hesitation in holding that as far as amount of Rs. 31,83,519/- is concerned, there is no proof of passing on the burden upon their dealers.

9. It is further sought to be contended by the learned D.R. that it is not sufficient for the claimant to establish that the burden had not been passed on to the dealer but it has to be established that the burden has not been passed on to the ultimate consumer. There can be no doubt about this proposition which has been reiterated in the case of Mafatlal Industries Ltd., but once it is disclosed and clearly established that the manufacturer had not passed on the burden in relation to the particular

amount of duty on its dealer unless specifically shown that the dealer on his part has collected the money and passed on to the original manufacturer, it is difficult to accept the contention that the Tribunal will have to presume that the burden has been passed on to the ultimate consumer. The very fact that the burden has not been passed on to the dealer leads to presumption that the burden has not been passed on the consumer which consequently leads to discharge of burden in terms of Section 12B of the said Act. In case it is presumed that the burden has not been passed on to the dealer and the dealer collect the duty amount, the bar of unjust enrichment will apply to dealer and not to the claimant. In any case, in the facts and circumstances of the case in hand, it cannot be said that the claimant had not discharged the burden cast upon them in terms of Section 12B of the said Act.

10. As regards the claim relating to Rs. 67,19,061/- is concerned, undisputedly the appellants have passed on the burden in this regard upon the dealer. It is the contention of the appellants that only after passing of burden the same was refunded to the dealer, and therefore, they are entitled for refund of the amount from the department. In this regard attention was drawn to the decision of the Hon'ble Rajasthan High Court in the case of UOI vs. A.K. Spintex Ltd. The Hon'ble Rajasthan High Court while deciding the issue as to "whether in the facts and circumstances of the case, the Tribunal is right in law in allowing the refund where the incidence of duty had been passed on to the customers

initially, and subsequently the debit notes were issued by the suppliers of raw material but not credited in the accounts of customers by the assessee” taking into consideration the facts of the case had observed as under:-

“After going through the judgments, at the outset, we may observe, that the question is framed on basic misconception, rather on assumption, which is not borne out from the record, inasmuch as, the question apprehends error on the part of the Tribunal, in allowing refund, where incidence of duty has been passed on to the customers initially, and subsequently debit notes were issued by the suppliers of raw material but, no credit notes were credited in the account of the customers by the assessee. We may at once observe, that this is no where, that the authorities below were of the view, that the debit note were not credited in the account of the customers, by the assessee. Rather as is clear from the impugned order of the Tribunal, that it was not disputed on the side of the revenue, that customer had immediately issued the debit notes, and it was never contended, whether before the Assistant collector or the Commissioner (Appeals), or the Tribunal, that the necessary credit was not given by the assessee. Obviously, if it is to be assumed, that though debit notes were issued by the customers, but, the assessee did not credited to them, then, obviously, the assessee would not be entitled to claim for any refund, while, herein positive case of the assessee is, that it also issued corresponding credit notes, which fact has also not been disputed any where, before the authorities below.”

Therefore, the question required to be examined is, as to whether despite exchanges of debit notes and credit notes respectively, between the assessee and its immediate purchaser,

the assessee is not entitled to claim refund, so as to find, that the Tribunal was wrong in allowing the refund.”

11. Having reframed the question for consideration the Hon'ble Rajasthan High Court analysed the facts of the case and held as under:-

“On the face of the things itself, it is clear that once the goods are supplied, the property in the goods passes to the purchaser, and seller becomes entitled to the price, and once the debit note is issued by the purchaser, and corresponding credit note is issued by the seller, the price of the goods stand reduced to the extent of debit note and credit note, meaning thereby, that after issuance of debit note and credit note, the price of goods charged by the seller, from the purchaser, is the price, initially billed, minus the amount of the debit note, and credit note, and therefore, when the debit notes and credit notes are issued and effected, which are not disputed, it cannot be assumed, that incidence of burden of excise duty has been passed on to the purchaser.”

12. While referring to the provision of law comprised under Section 12B, the Rajasthan High Court observed thus:-

“So far as Section 12B is concerned, it only places burden of proof on the assessee, by enacting the presumption, against him, and does not do anything beyond it. The burden placed on the assessee, by Sec. 12B, obviously, is a rebuttable one, and the assessee may lead evidence in rebuttal, by proving issuance of debit note and credit note, likewise there may be cases, where purchaser may refund the amount to seller, in cash, or may issue some bank note, like Cheque, or Draft, for refund of the amount, or there may be case, where goods are sold on credit, and while

making payment of price of the goods the purchaser may debit the amount, and thus, pay lesser amount to the seller, and if all those facts are shown and proved, the burden placed on the assessee, by Sec. 12B, would shift on the revenue, then, it is required for revenue, to prove, either that the theory projected by the assessee, is fake and false, or that the burden has actually been passed on. Once the assessee leads reliable evidence, about his having not passed burden on the purchaser, and revenue fails to rebut that evidence, the presumption enacted by Sec. 12B, stands sufficiently rebutted, and cannot survive ad infinitum.

The preposition propounded by the Hon'ble Supreme Court in Mafatlal case being preposition No. 3, entitling only the ultimate person, bearing the burden, to be entitled to lay claim for the refund, is obviously, not open to any argument, and is duly respected.

The question, then arise is, the question of fact, as to who is an ultimate person, who has borne the burden. Obviously, if it is established by the assessee, that the burden has not been passed on, or has been appropriately reversed, the ultimate person, who has suffered the burden, would be assessee himself."

13. Ultimately the Rajasthan High Court held thus:-

"It is faced with this situation, that the submission made by the learned counsel for the revenue, was, that in the scheme of things, when the goods are sold or cleared for sale, it has to be assumed, that the burden has been passed on to the purchaser, and this process of issuance of debit note or credit note, cannot have the effect of reversal of passing of the burden, as it is only a paper transaction, to get undue benefit by the assessee.

In our view, the stand cannot be accepted. Passing on the burden of excise duty to the next purchaser, cannot be left in the realm of presumption. In cases, where the assessee is able to show, that the burden is not passed on, or it has been reversed, the claim of refund cannot be denied.”

14. The Hon’ble Rajasthan High Court rejected the contention that mechanism of issuance of debit note and credit note, if countenanced, it will open flood gates for pilferage of revenue. It was held that “we do not agree with the preposition, that it can open flood gates, inasmuch as, where false, fictitious or shame Debit note and credit note are issued for adjustment, the revenue can very well lead evidence, or can lead evidence in rebuttal. Simply because the revenue fails, and is not able to rebut evidence, it cannot be assumed, that it will open flood gates for pilferage of the revenue. Difficulties may be on either side, but then, that cannot be considered as a ground for interpreting Sec. 12B, in the manner the revenue wants us to interpret it.”

15. Section 12B of the Act provides that every person who has paid the duty of excise on any goods under this Act shall, unless the contrary is proved by him, be deemed to have passed on the full incidence of such duty to the buyers of such goods.

16. While dealing with the said provision of law, the Apex Court in the case of Mafatlal Industries Ltd. had observed thus:-

“Ordinarily, no manufacturer will sell his products at less than the cost-price plus duty. No

manufacturer can say with any reasonableness that he cannot survive in business unless he collects the duty from both ends. The requirements complained of (prescribed by Section 11B) is thus beyond reproach - and so are Sections 12A and 12B. All that Section 12A requires is that every person who is liable to pay duty of excise on any goods, shall, at the time of clearance of the goods, prominently indicate in all the relevant documents the amount of such duty which will form part of the price at which the goods are to be sold, while Section 12B raises a presumption of law that until the contrary is proved, every person who has paid the duty of excise on any goods shall be deemed to have passed on the full incidence of such duty to the buyer of such goods. Since the presumption created by Section 12B is a rebuttable presumption of law - and not a conclusive presumption - there is no basis for impugning its validity on the ground of procedural unreasonableness or otherwise. This presumption is consistent with the general pattern of commercial life.

.....Ordinarily speaking, no manufacturer would take the risk of not passing on the burden of duty. It would not be an exaggeration to say that whenever a manufacturer entertains a doubt, he would pass on the duty rather than not passing it on. It must be remembered that manufacturer as a class are knowledgeable persons and more often than not have the

benefit of legal advice.”

17. Above ruling of the Apex Court in relation to Section 12A and 12B of the said Act clearly discloses that in case of contention of the manufacturer about non-passing of duty burden in relation to the goods cleared by him, he has to establish the claim in that regard by producing cogent evidence in support of such claim. Until burden in this regard is discharged by producing the cogent evidence, the requirement of Section 12B does not stand satisfied, and therefore, presumption would not stand rebutted till then.

18. In A.K. Spintex Ltd. case, the assessment of the facts as revealed from para 9 quoted hereinabove clearly discloses that the claim regarding issuance of debit note and credit note was not disputed and was clearly established and in those circumstances, it was clearly proved that the price did not include duty element which was sought to be claimed as refund.

19. Reverting to the facts of the case in hand, it is not in dispute that the appellants claimed that there had issued debit notes by them in favour of the dealers and corresponding credit notes were issued by the dealers. It is also their contention that in relation to the amounts so claimed as refundable to the appellants, the same was shown in their account as the amount advanced to the Excise department, and it was not shown in the expenses column. However, the learned D.R. in this regard has drawn our attention to the decision in the case of the appellants themselves

reported in 1994 (71) ELT 989 (Tribunal) wherein similar contention was sought to be raised but the same was rejected by the Tribunal. It is also stated that the said decision was sought to be challenged before the Apex Court. Apparently, the issue as to whether the burden which is required to be discharged to claim refund can be discharged by producing the evidence in the form of credit and debit notes and whether such evidence would disclose non-passing of duty burden stands concluded as far as the appellants are concerned. Bearing the same in mind, it cannot be presumed for the appellants to re-open the said issue in this appeal. Hence, the decision of the Rajasthan High Court can be of no help to the appellants as far as claim in relation to amount of duty of Rs. 67,19,061/- is concerned.

20. The decision of the Tribunal in the case of Jaipur Syntex Ltd. and the decision of Madras High Court in the case of Addison & Co. can also lend no support to the contention of the appellants in relation to the claim relating to Rs. 67,19,061/-.

21. In the result, therefore, the appeal partly succeeds and the impugned order as far as refund claim of Rs. 31,83,519/- is concerned the same cannot be sustained and liable to be set aside and the said amount required to be refunded to the appellants along with interest thereon. The authorities in this regard will have to calculate the same while refunding the amount.

22.. As far as claim for Rs. 67,19,061/- is concerned we find no fault

with the order passed by the authorities below directing the amount to be credited to the Consumer Welfare Fund. The appeal in that regard is dismissed.

23. The appeal stands disposed of in above terms.

(JUSTICE R.M.S. KHANDEPARKAR)
PRESIDENT

(RAKESH KUMAR)
MEMBER (TECHNICAL)

RK