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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/1946/2005 - EX[DB] Date 14/09/2010

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

To :
M/S WESTERN COALFIELDS LTD.
COAL ESTATE CIVIL LINES NAGPUR
440001

M/S WESTERN COALFIELDS LTD. Appellant
Vs
C.C.E.KOLKATA Respondent

I am directed to transmit herewith a certified copy of **Final order No. 638/2010 EX[DB]** dated 03-8-10 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.KOLKATA
   IV, COMMISSIONER KOLKATTA
   700001
2. Adv. / Consult
   MR.T. RAMESH
   59-D,FIRST LANE, FOURT AVENUE, INDRA NAGAR, CHENNAI-20
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. Company Law Institute of India Pvt Ltd.,No.2(Old No. 36), Vaithyaram Street, T. Nagar,Chennai -17
9. M/s. Deeparchie Publications, M-93, Marg, 46, Saket, New Delhi 110017
10. Taxmann Allied Service Pvt Ltd., 59/32, New Rohtak Road, New Delhi - 110005
11. Easy Service Tax Online Dot Com Pvt.Ltd.407A,Iscon Mall,Above Star India Bazar,Satellite Road,Ahmedabad-15
12. LAWCRUX Advisors Pvt Ltd. LAW House,1-8,Sector - 10, Faridabad 121003 (Haryana)
13. TaxIndiaOnline.com Pvt Ltd., Unit No.1, 2nd Floor,Vasant Arcade,Nelson Mandela Road, Vasant Kunj, New Delhi - 110070
14. Office Copy
15. Guard file
16. HON'BLE PRESIDENT

Assistant Registrar
(Excise Appeal Branch)

CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL,
West Block No.2, R. K. Puram, New Delhi.

Date of hearing/ decision: 03.08.2010

For approval and signature:

Hon'ble Shri Justice R.M.S. Khandeparkar, President
Hon'ble Shri 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 should 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 Departmental authorities?	Yes.

Excise Appeal No. 1946 of 2005

[Arising out of order-in-Appeal No. 28/Kol-IV/05 dated 28.02.2005 passed by the Commissioner of Central Excise, (Appeals-IV) Kolkata].

M/s Western Coalfields Ltd. Appellants

Vs.

CCE, Kolkata Respondent

Present for the Appellants : Sh. T. Ramesh, Advocate
Present for the Respondent : Sh. Anil Khanna, DR

Coram: Hon'ble Sh. Justice R.M.S. Khandeparkar, President
Hon'ble Sh. Rakesh Kumar, Member (Technical)

FINAL ~~O~~ral Order No. 638/10-EX.

Per: Shri Justice R.M.S. Khandeparkar:

Heard the learned Advocate for the appellants and learned DR for the respondent.

2. This appeal arises from order dated 28.02.2005 passed by the Commissioner (Appeals) Kolkata. By the impugned order, the appeal filed by the appellants against the order of the adjudicating authority was dismissed. The adjudicating authority namely, the Assistant Commissioner, Kolkata by his order dated 11.07.2001 had rejected the refund claim of the appellants to the tune of Rs. 60,05,316/-.

3. The appellants filed their refund claim in relation to sum of Rs.60,05,316/- on 15.04.1997 on the ground that the said amount was paid by them in excess of duty on PVC Conveyor Belt purchased by them from M/s Dunlop India Limited, Sahaganj during the period from 29.09.86 to 27.09.93, pursuant to the pronouncement of decision by the Apex Court on 28.03.1995 in the matter of Fenner India Limited classifying such goods under sub-heading No. 3922.90 for a certain period and thereafter under sub-heading 3926.92 of the Central Excise Tariff Act, 1985 attracting low rate of duty then what was actually paid by the appellants. Pursuant to the claim for refund, a show cause notice dated 16.03.1998 was issued requiring the appellants to satisfy against rejection of the refund on the ground of bar of limitation, failure to produce relevant documents as required under Rule 233B of the Central Excise Rules, 1944 in support of their claim about payment of duty under protest, and on the ground of unjust enrichment.

4. The notice was contested by the appellants. However, the adjudicating authority by the order dated 11.07.2001 rejected the claim for refund and appeal against the same was also dismissed by the Commissioner (Appeals) and hence the present appeal.

5. The impugned order is sought to be challenged on four grounds. Firstly, that the final product cleared by the appellants was non-excisable and, therefore, there was no question of passing of duty burden upon the consumers. Secondly, the price of the final product is fixed by the Government and, therefore, there was no occasion to include the duty element in such price and that is apparent from the notification issued fixing the price. Thirdly, the goods in question were capital goods and, therefore, were not consumable and hence there was no occasion to pass the duty burden upon the consumers of the final product. Fourthly, the appellants had been actually suffering loss and, therefore, there was also no justification to presume that the duty burden had been passed on to the consumers of the final product.

6. Learned Advocate for the appellants drawing our attention to the notification which was issued by the Ministry of Coal, Government of India on 08.01.1986 fixing the price of coal of different grades submitted that bare perusal of the said notification discloses different prices have been fixed for the coal of different grades and that itself discloses that gradation of the coal had been the basis for fixation of the price without considering duty element. Further, referring to the impugned order, learned Advocate submitted that as far as point of bar of limitation is concern, the Commissioner (Appeals) has answered the same in favour of the appellants and, there is no appeal filed by the department in relation to the said decision nor there is any cross

objection preferred by the department in that regard. He, therefore, submits that the said issue stands finally decided in favour of the appellants. As far as the point of unjust enrichment is concerned according to the learned Advocate since the final product manufactured by the appellants being non-excisable and the goods in question being capital goods, they are non-consumable and in those circumstances there was no occasion for the appellants to pass on the duty burden upon the consumers of the final product. The goods in question being Conveyer Belt, the same did not form part of ultimate product and hence there was no material to disclose that the duty burden in relation to such goods also was passed on to the consumers of the final product. According to learned Advocate, these aspects of the matter were not appreciated in proper perspective by the authorities below while rejecting the refund claim. He further submitted that once the authority below had held that the claim of the appellants was within the period of limitation, it would apparently disclose that the authority was convinced about the factual aspect of the matter in relation to the payment of duty by the appellants and bearing in mind the same and coupled with the fact that the goods in question were non-consumable and the final product non-excisable, the authorities below ought to have held that the appellants had established their case about non passing of burden of the duty on the consumers of the final product. In support of the contention that in case of capital goods, the doctrine of unjust enrichment would not be attracted inasmuch as that there would be no occasion for the assessee to pass on the burden of duty paid on the capital goods to the consumers of the final product in view of the fact that such goods are not consumed in the final product, the learned Advocate placed reliance in the decision of Madras High Court in the matter of **Collector of Custom, Madras** vs. **Indo-Swiss**

Synthetic Gem Mfg. Co. Ltd. reported in 2003 (162) ELT 121 (Mad.), of the order of the Tribunal in the matter of **Toyo Engineering India Ltd.** vs. **Commissioner of Customs, Mumbai** reported in 2004 (175) ELT 793 (Tri-Mumbai) and **Black Diamond Beverages** vs. **Commissioner of Customs, Calcutta** reported in 2002 (148) ELT 1016 (Tri. Kolkata). Attention was also drawn to the order of the Apex Court in the appeal which was filed by the Collector against the order of the Madras High Court in **Indo-Swiss Synthetic Gem Mfg. Co. Ltd.** whereby the SLP was dismissed on the ground of delay while contending that in view of the dismissal of the said SLP though the view expressed by the Madras High Court are not specifically confirmed, the same remains non interfered with by the Apex Court and, therefore, is binding upon the department. Reliance was also placed in the decision of the Tribunal in the matter of **Oswal Chemicals & Fertilizers** vs. **Commissioner of C. Ex. Guwahati** reported in 2004 (172) ELT 216 (Tri. Del.) and **Commissioner of C. Ex. Lucknow** vs. **Oswal Chem. & Fertilizers Ltd.** reported in 2009 (241) ELT 374 (Tri. Del.) in support of the contention that the price of the final product having been fixed by the Government, there is no presumption about inclusion of duty element therein. Reliance was also placed in the decision of the Apex Court in the matter of **HMM Ltd.** vs. **Administrator, Bangalore City Corporation** reported in 1997 (91) ELT 27 (S.C.), in support of the contention that duty paid on capital goods do not form part of the cost of the final product and, therefore, there is no occasion to pass on the duty burden paid on capital goods to the consumers of the final product.

7. On the other hand DR submitted that the duty paid on the capital goods is not excluded from the applicability of the principle of unjust enrichment and the same is clearly applicable even in relation to the refund claim pertaining to the duty paid on the capital goods. Reliance was sought to be placed in that regard in the decision of the Apex Court in **Union of India** vs. **Raj Industries** reported in 2000 (120) ELT 50 (S.C.) and of the Larger Bench of the Tribunal in the matter of **SRF Ltd.** vs. **Commissioner of Customs, Chennai** reported in 2006 (193) ELT 186 (Tri. LB). He further submitted that the authorities below have arrived at the finding that the appellants have failed to produce necessary documentary evidence in relation to the claim for refund and particularly to satisfy the requirement of the provisions of law comprised under Section 11B of the Central Excise Act, 1944. He further submitted that the records do not disclose the said findings to be perverse or de hors the record. Drawing our attention to the specific findings against the appellants by the original authority as well as by the lower appellate authority, the DR submitted that there is no case for interference in the impugned order.

8. The points which arise for consideration are:-

(i) Whether in case of duty paid on capital goods, the principles of unjust enrichment would not be attracted while deciding the refund claim in relation to such duty amount?

(ii) Whether the price fixation in relation to different grades of coal under Notification dated 08.01.1986 discloses non-inclusion of duty element in such prices?

(iii) Whether the capital goods being non-consumable in the final product, the duty element in relation to such capital goods cannot form part of the cost of the final product?

(iv) Whether the appellants had suffered loss and the same discloses non passing of burden of duty upon the consumers of the final product?

9. As regards the first point for consideration, undoubtedly, the refund claim can be made under Section 11B of the said Act. Sub-section (1) of Section 11B of the said Act read thus:-

> "(1) Any person claiming refund of any duty of excise may make an application for refund of such duty to the Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise before the expiry of one year from the relevant date in such form and manner as may be prescribed and the application shall be accompanied by such documentary or other evidence including the documents referred to in section 12A as the applicant may furnish to establish that the amount of duty of excise in relation to which such refund is claimed was collected from, or paid by, him and the incidence of such duty had not been passed on by him to any other person:
>
> Provided that where an application for refund has been made before the commencement of the Central Excises and Customs Laws (Amendment) Act, 1991, such application shall be deemed to have been made under this sub-section as amended by the said Act and the same shall be dealt with in accordance with the provisions of sub-section (2) substituted by that Act
>
> Provided further that the limitation of one year shall not apply where any duty has been paid under protest".

Undoubtedly, the period of one year in the second proviso was introduced w.e.f. 12.05.2000, prior to that the same was confined to six months.

10. Plain reading of the above provision would disclose that the same apparently does not make any difference between the duty paid on the final product or the inputs or the capital goods. The provision nowhere specifies that in case of duty paid on capital goods, the assessee claiming the refund

need not establish that he had not passed on the duty burden to a customer. The provision of law, therefore, apparently applies to all the cases of refund including the case of capital goods.

11. The contention on behalf of the appellants however, is that the capital goods, not being consumable, the same do not form part of the ultimate final product and therefore the duty element in relation thereto would not form part of the sale price of the final product.

12. Whether capital goods would form part of the final product or not can not be decisive factor for the purpose of deciding whether the duty paid on capital goods has been passed on to the buyers of the final product or not. Even in case of some of the inputs which may not ultimately be present in the final product when it is ready for clearance, yet the duty paid on such inputs, credit thereof can be availed and utilized by the manufacturer, as also in case it is found that duty on such inputs was wrongly paid, nothing prevents the assessee from claiming refund thereof. Being so, the presence of input or capital goods in the final product on its clearance is not the decisive factor to decide whether the duty wrongly paid on capital goods can be refunded ignoring the principle of unjust enrichment.

13. Besides, whether the duty element in relation to the capital goods form part of the sale price of the final product or not is essentially a question of fact which is to be decided on the basis of materials placed on record by the assessee in relation to the factors which the assessee considers while fixing the sale price of the final product. Undoubtedly, the burden in that regard would be on the assessee to establish that the duty paid on the capital goods did not form part of the final product and in case it forms part of the

sale price of final product, than to establish that the same had not been passed over to the ultimate consumer. In fact, that is the import of Section 11B(1) of the said Act. The provision of law in that regard clearly provides that the application for refund "shall be accompanied" by necessary material in the form of "such documentary or other evidence" and it further provides that the evidence to be produced shall be in relation to which the refund is claimed disclosing that the duty was "collected from or paid by him" and further that "the incidence of such duty and interest, if any, paid on such duty had not been passed on by him to any other person". In case of claim for refund, the two essential things which every assessee has to establish are that the duty was actually paid and that such duty burden was not passed over to any other person on clearance of the goods.

14. The provisions of law being abundantly clear, as regards the applicability of the principle of unjust enrichment even to the refund claim pertaining to the duty paid on capital goods, merely because the final product is non-excisable that would not in any manner lead to presumption that the duty paid on the inputs or capital goods were not included in the cost of the final product. As already observed above, the same being the question of fact, it is necessary for the assessee to establish the same by relevant evidence in that regard. There can be no presumption that merely because the final product is non-excisable that therefore, the duty paid on the inputs or the capital goods is not included in the sale price of the final product.

15. The materials on record nowhere disclose any evidence having been placed on record by the appellants to show that the duty element in relation to the capital goods in question did not form part of the sale price of the final product, apart from contending that the sale price of the final product was

fixed by the Government under the notification and it related to the gradation of the final product. The contention based on the price fixation is merely figment of imagination, without any substance.

16. Perusal of notification dated 08.01.1986 in relation to the price fixation of the coal of different grades nowhere discloses that the Government had either excluded the duty element in relation to the inputs or the capital goods nor it discloses inclusion thereof. The notification merely discloses various prices with reference to grade specification. Learned Advocate for the appellants, however, has also drawn our attention to the costing factors which were considered in relation to the Coal Study 1992. The said list relates to the information which was required to be collected by the nodal Officers from the headquarter and area offices of the appellants' company regarding various items. The said list also refers to the aspect of depreciation of the various machines which are used in the coal operation as well as in coal handling plant. Presumption, if at all, which could be drawn from the said document would be that the Government while fixing the price of the coal had taken into consideration various aspects including the depreciation of the machinery used in relation to the coal mining and coal handling operation. Undisputedly, the goods in question namely, conveyor belt is used for transportation of the coal to various places. The said list nowhere discloses the duty element had been ignored while fixing the sale price of the coal of different grades. In the background of these factors, it is difficult to accept the contention sought to be canvassed on behalf of the appellants that the price fixation by the Government did not include consideration of the duty element in relation to the capital goods used in the coal mining or coal handling operation.

17. As regards the ground that the appellants have suffered loss, and therefore there was no occasion for passing on the duty element to the consumer of the final product is concerned, learned Advocate has drawn our attention to the balance sheet of the appellants company since the year 1986-87 upto 1995-96. Perusal thereof, may disclose loss suffered by the appellants company, however, there is no presumption that every assessee who suffers loss do not pass on the duty burden to the consumers of that product. Merely because the manufacturer is Government or Government company, there can be no exception to the said rule. Besides, whether the duty element has been passed on to the consumer or not is a question of fact which is to be established by the assessee as has been clearly laid down by the Apex Court in the matter of **Mafatlal Industries** vs. **Union of India** reported in 1997 (89) ELT 247 (SC).

18. As regards the decision of the Madras High Court in the matter of **Indo-Swiss Synthetic Gem Mfg. Co. Ltd.** case is concerned, attention was sought to be drawn to para 30 of the judgement wherein it has been held thus:-

> "30. It is thus crystal clear that the imported silica crucibles are captively used for the manufacture of synthetic gem, and not consumed in the manufacture of synthetic gem, inasmucnh as it did not become a part and parcel whether separable or not, and it was captively used only as refractory goods, which could withstand high industrial temperature, which was necessary for such process of manufacture. What is further revealed is that the company had not directly passed on silica crucibles, as imported, to the customers or buyers. In such circumstances, we are of the view that the question of passing on the incidence of duty paid on silica crucibles did not at all arise".

19. It is to be noted that in the said case before the Madras High Court the assessee was the manufacturer of synthetic gem. It had imported silica crucibles which were assessed by the adjudicating authority as classifiable

under Customs Tariff Heading 70.21 and under item 23-A(4) of the Central Excise Tariff Act and consignments were cleared on payment of duty as was demanded. The assessee thereafter filed refund claim on the ground that the silica crucibles were liable to the duty under heading 69.03 of the Customs Tariff Act, 1975 and no additional duty was leviable under item 23 since heading 69.03 covered crucibles and goods were not glassware and hence were not liable to additional duty under item 23. The claim of the assessee was rejected and the matter was carried in writ jurisdiction. During the pendency of the writ jurisdiction, the provision of law underwent certain changes and taking into consideration the changes brought in, the department contended before the Madras High Court that in view of the changes brought in law, the assessee had to file application before the Assistant Collector of Customs for considering the question as to whether the claim was barred by limitation, whether the incidence of duties was passed on to anyone in the course of the trade or not and whether the disputed duty had been paid under protest or not. In response, the assessee clarified under an affidavit that the silica crucibles were used in manufacture of synthetic gems as refractory goods, which could withstand very high industrial temperature, which was necessary for such process of manufacture, that such crucibles were not sold or traded and that, therefore, there was no question of passing on the duty liability to the customers and hence the assessee was eligible for refund. The Division Bench of the Madras High Court who was dealing with the appeal against the order of the learned single Judge after noting the factual situation as was recorded by the learned single Judge in his judgement in the writ petition, and after taking note of provisions of law applicable to those facts held as quoted above of para 30 of the judgement. The findings recorded in the above quoted para of the judgement of the Madras High Court clearly reveal that in the said case the assessee had clearly established that the silica crucibles on which duty was paid and refund was claimed were neither cleared to the customers, nor the duty thereon was passed over to the customers, nor the same was in any manner forming part of the product cleared to the customers, nor it formed even part of manufacturing activity of the final product. Based on those findings, coupled with the finding that the duty element on those goods was not passed on to the consumers of the final product, the Madras High Court held that the assessee was entitled for refund. The decision, therefore, was in a totally different set of facts and circumstances.

20. Attention was also drawn to para 29 of the decision of the Madras High Court while contending that though the issue for consideration as was framed by the Madras High Court did not specifically refer to the point in the nature under consideration, the same was considered while dealing with the issue No. 2 by the High Court and that the same is apparent from the reading of para 29 and 30 of the decision. It is difficult to accept this contention. Mere passing reference to certain facts while arriving at the conclusion which has been arrived at, cannot be construed to mean that the Court has considered the point which had never arisen for consideration. Besides reading of para 29 refers to the details which were disclosed by the assessee regarding the function of silica crucibles in the process of manufacture of synthetic gem. It also discloses the fact that such crucibles were neither sold nor traded. There is a specific observation that from the details disclosed regarding the function of the crucibles, it was revealed that the crucibles were not consumed in the manufacture of synthetic gem.

Further, it is observed in para 29 that "To put it otherwise, the duty of customs paid on such imported crucibles does not become a part of the manufacture of the new item, viz synthetic gem, in which the imported item, that is to say, silica crucibles, is an ingredient". In other words, the conclusion that the duty paid on the silica crucibles did not form part of the final product has been arrived at on the basis that the silica crucibles were absent as an ingredient of the final product as well as did not form part of the manufacturing process and not because the duty formed part of the sale price of the final product or not. In fact, para 29 makes it more clear that the High Court was essentially dealing with the aspect as to whether silica crucibles formed part of final product in the sense it was an ingredient in the final product and not whether duty paid on the silica crucibles were forming part of the sale price of the final product or not.

21. In any case, the Larger bench of the Tribunal in **SRF Limited** case has clearly ruled that the doctrine of unjust enrichment is attracted in cases of claim for refund of duty paid on the capital goods. Besides, the decision of the Apex Court in **Raj Industries** is essentially with reference to Section 27 of the Customs Act, 1962 which is in *parimateria* with Section 11B of the Central Excise Act, 1944 and the decision reiterates the ruling in **Mafatlal Industries** case.

22. In view of decision of the Larger Bench which is binding on this Bench, the decision of the single Member in **Black Diamond Beverages** cannot be held to lay down a correct law. The Apex Court refused to interfere in the said decision solely on the ground that the amount involved in the matter was very small.

23. In **Oswal Chemicals & Fertilizers** (Guwahati) case, there was specific finding that while fixing the price, Ministry had taken into account only the concessional rate of duty on the naptha. As already observed above, there was no material placed before the authorities below or in the appeal which could disclose that the Ministry of Energy, Department of Coal had not taken into consideration the element of duty while fixing the coal price.

24. The decision in **Oswal Chem. & Fertilizers Ltd.** (Lucknow), the Bench merely reproduced the decision in **Oswal Chemicals & Fertilizers** (Guwahati) in relation to point of principle of unjust enrichment and has not laid down any law as such on this aspect.

25. The decision of the Division Bench in **Toyo Engineering India Ltd.** case also cannot be said to lay down correct proposition of law in view of Larger Bench decision and in any case, cannot be said to be binding.

26. For the reasons stated above, therefore, we do not find any justification for interference in the impugned order and hence the appeal fails and is hereby dismissed.

[Justice R.M.S. Khandeparkar]
President

[Rakesh Kumar]
Member [Technical]

/Pant/