

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

Appeal No. E/1327/2006 - EX[DB]

Date 22/09/2010

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

To :
M/S STYLE DYERS
B-17, SECTOR-1, NOIDA.
M/S STYLE DYERS

C.C.E. NOIDA

I am directed to transmit herewith a certified copy of Final order No. 647/
passed by the Tribunal under Section 35-C(1) of Central Excises Act, 1944

Appellant
Vs
Respondent

2010 EX[DB] dated 17-9-10


Assistant Registrar
(Excise Appeal Branch)

Copy to :

1. Respondent

C.C.E. NOIDA

C-56/42, SECTOR-62, NOIDA-201307

2. Adv. / Consult

MS. DIVYAWASAN & SH. ASHOK DHINGRA, ADV.,

J. SAGAR ASSOCIATES

SANSTONE CRST, OPP. PARK PLAZA HOTEL

SUSHANT LOK, PH -I, GURGAON-122009

3 C.D.R.

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

5 Bar association, CESTAT, New Delhi

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

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

8 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

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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: 15.06.2010

Date of decision: 17.09.2010

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?	See
4	Whether Order is to be circulated to the Departmental authorities?	Yes

Excise Appeal No. 1327 of 2006

[Arising out of Order-in-Appeal No. 153/CE/APPL/NOIDA/2006 dated 19.01.2006 passed by the Commissioner of Central Excise (Appeals), Noida].

M/s Style Dyers

Appellants

Vs.

CCE, Noida

Respondent

Appearance: Ms. Divya Wasan & Sh. Ashok Dhingra, Advocates
for the appellants.
Rep. by Sh. V. Choudhary, DR for the respondent.

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

FINAL Oral Order No. 647 / 10 - EX.

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

Heard the learned Advocate for the appellants and the representative for the Department. Perused the records.

2. This appeal arises from order dated 19.01.2006 passed by the Commissioner (Appeals), Meerut-II. By the impugned order, the appeal filed by the appellants against the order passed by the adjudicating authority has been dismissed.

3. The Assistant Commissioner, Noida by his order dated 31.03.2005 had rejected the appellant's refund claim for Rs. 2,51,714/-.

4. The appellants are independent Textile Processor engaged in processing of Cotton fabrics, Man-made fabrics and Embroidered fabrics classifiable under chapter heading 7207.00, 5407.00 and 5845.00 of the Central Excise Tariff Act, 1985.

5. Pursuant to the declaration filed by the appellants opting for the benefit of compounded levy scheme in terms of Notifications No. 43/98-CE (NT) dated 10.12.1998, further amended under Notification No. 11/2000-CE (NT) dated 1.3.2000, the Deputy Commissioner of Central Excise by his provisional order dated 4.1.2001 determined the duty liability of the appellants @ Rs.1,93,500/- p.m. for the period from April 1999 to February 2000 and @ Rs. 2,04,000/- for the month of March 2000. The appellants accordingly paid the duty till the finalization of the assessment. The Commissioner by his order dated 3.12.2003, made the final assessment and determined the duty finally as Rs. 1,50,000/- for the month from April 1999 to February 2000 and sum of Rs. 2,00,000/- for the month of March 2000.

6. Subsequent to finalization of the assessment and final determination of duty liability, the appellants filed a refund claim for Rs.2,51,714/- on 19.01.2004. Consequently, a show cause notice dated 31.05.2004 came to be issued proposing to deny the refund of excess duty which was paid by the appellants during the period from the date of provisional assessment till the final assessment. The notice was contested by the appellants on three grounds. Firstly, Rule 96ZQ of the Excise Rules is a complete code in itself providing for levy of duty, quantum thereof, demand, recovery, etc and therefore it provides for complete procedure relating to the applicability of the compounded levy scheme including the refund of duty and, therefore, the provisions of Section 11B are not attracted in such cases. Secondly, the provisions of Section 11B of the said Act and 9B of the Central Excise Rules, 1944 operate in different spheres and, therefore, the provisions of Section 11B of the said Act including the principle of unjust enrichment is not applicable to such cases in terms of the decision of the Supreme Court in the matter of **Commissioner of C. Ex., Mumbai-II vs. Allied Photographics India Ltd.** reported in 2004 (166) ELT 3 (S.C.). Thirdly, the incidence of higher duty was not passed on to its customer as the appellants had informed the buyers about the duty changes in advance and that after introduction of the scheme and company's decision to operate under the scheme, the customers had stopped paying excise duty to the appellants and it was apparent from the invoices issued during the relevant period.

7. The adjudicating authority after hearing the parties rejected the contentions sought to be raised on behalf of the appellants, while holding that the appellants had in fact passed on the incidence of excise duty to the

buyers inasmuch as that the duty element was inbuilt in the processing charges of the goods and that therefore, the appellants had apportioned the duty, and accordingly rejected the claim for refund. The Commissioner (Appeals) confirmed the said findings arrived at by the adjudicating authority and dismissed the appeal. Hence, the present appeal.

8. Learned Advocate appearing for the appellants drawing our attention to the Circular No. 677/68/2002-CX.3 dated 03.12.2002, the decision of the Tribunal in the matter of **CCE, Mumbai-V vs. Shree Ram Textile & Processing Mills (I) P. Ltd.**, reported in 2006 (193) ELT 485 (Tri. Mumbai), **Shri Rajendra Rolling Mills vs. Commissioner of C. Ex. Ahmedabad** reported in 2004 (167) ELT 533 (Tri. Mumbai) and **Mohinder Steels Ltd. vs. Commissioner of C. Ex. Chandigarh** reported in 2002 (145) ELT 290 (Tri. LB) submitted that the authorities failed to take the note of the difference between the mandate of Section 11B and that of Rule 9 of the said Rules. Learned Advocate further submitted that both the provisions operate in two different spheres and it is settled law that in case the assessee is found to have paid any amount in excess of the duty liability as determined at the final assessment, the same becomes immediately repayable to the assessee and in such cases the principle of unjust enrichment enshrined under Section 11B is not attracted. He further submitted that the invoices issued during the relevant period clearly disclose that the duty element was not passed on to the ultimate consumers.

9. On the other hand, learned DR referring to the decision of the Apex Court in the matter of **Commissioner of C. Ex., Mumbai-II vs. Allied Photographics India Ltd.** reported in 2004 (166) ELT 3 (S.C.), submitted that the Apex Court has clearly distinguished between the amount

refundable at the time of finalization of assessment and the amount claimed by way of refund thereafter by the assessee. In the case in hand, the same falls in the second category and, therefore, the provisions of Section 11B are clearly attracted.

10. The undisputed facts on record are that the provisional assessment pursuant to the declaration filed by the appellants opting for compounded levy scheme was made under order dated 04.01.2001. The final assessment was made under order dated 03.12.2003. On account of difference in relation to the duty liability between provisional order and the final order, an amount of Rs. 2,51,714/- became refundable to the appellants. However, there was no order passed in that regard at the time of finalization of the assessment. The appellants filed the refund claim on 19.01.2004 for the said amount.

11. Undisputedly the record, therefore, discloses that the authority at the time of finalization of the assessment did not order any refund of any amount found to have been paid pursuant to the provisional assessment and in excess of the final assessment.

12. It is also an undisputed fact as is evident from the records and the concurrent findings arrived at by the authorities below on assessment of the materials on record that the appellants after opting to operate under the compounded levy scheme, informed the same to the buyers and the buyers accordingly stopped paying excise duty separately as the amount of duty was included by the appellants in the processing charges. In other words, the duty element was part of the processing charges of the goods cleared by the appellants. The fact that the element of excise duty was part of the processing charges of the goods of the appellants is not only an undisputed

fact but there is admission to that effect in the memo of the appeal itself, besides that, there is no challenge to the said concurrent finding. Ground 'F' of the memo of appeal clearly states that after the introduction of the scheme and the company's decision to operate under the said scheme, the customers had stopped paying excise duty to the appellants and amount of excise duty was absorbed by the company as part of the processing charges and hence no amount of excise duty as such had been collected from the buyers.

13. In the background of above facts, if one peruses the provisions of law comprised under Section 11B, Rule 96ZQ and Rule 9B of the said Rules alongwith decision of the Apex Court in **Allied Photographics India** case, it would be at once clear that the refund consequent upon finalization of provisional assessment does not attract bar of unjust enrichment. At the same time, it is to be noted that neither Rule 9B nor the decision of the Apex Court relates to a situation where factually the duty element in terms of the provisional assessment already stands transferred to the buyer. It is true that in terms of Rule 9B read with the said decision of the Apex Court, there is no obligation cast upon the authority to consider the applicability of the principle of unjust enrichment at the time of finalization of assessment. At the time of finalization of assessment, if the authority finds the assessee having paid any amount in excess of the amount payable under the final assessment, then certainly the authority is expected to order refund of such excess amount.

14. In the case in hand, as already stated above, there is however, admission on the part of the appellants themselves about passing over of incidence of duty element to the buyer. There is a clear statement by the

appellants themselves that after opting for the benefit of compounded levy scheme, the amount of excise duty determined under provisional assessment order was included in the processing charges. Obviously, therefore, the same was not disclosed independently in the invoices. Being so, absence of specific indication thereof in the invoices, in the fact situation, cannot lead to conclusion that the duty incidence had not been passed on to the customer. Rather the admission about the duty element was inbuilt in the processing charges reveals that the duty element got passed on to the customers in the process of clearing the goods to them.

15. In general, therefore, though in terms of the order of the Apex Court, it is not permissible to dispute that the principles of unjust enrichment does not apply at the time of finalization of assessment for ordering refund of excess amount, if any, found to have been paid, however, in cases where pursuant to the finalization of assessment and subsequent to such order of assessment, if the party approaches the Department with an application for refund, the provisions of Section 11B would obviously be attracted. Non applicability of Section 11B as ruled by the Apex Court is in cases of making of order of refund by the proper officer under Rule 9B and not in cases of claim for refund by the assessee. The Apex Court in para 7 of the decision in **Allied Photographics India** case has clearly ruled that “under Section 11B(1), such a person had to claim refund by making an application within six months from the relevant date except in cases where duty was paid under protest in terms of the proviso. However, even in such cases, the person claiming refund had to pay the duty under protest in terms of prescribed rules. A bare reading of Section 11B(1), therefore shows that it refers to claim for refund as against making of refund by the proper officer under Rule 9B”. In the case in hand, undisputedly, the authorities

were dealing with the matter which related to "claim for refund" by the assessee and not at the stage of "making of refund under Rule 9B".

16. The ruling in **Allied Photographics India** case rather than lending any support to the contentions canvassed on behalf of the appellants, the same supports the case of the Revenue. It has been held therein thus:-

"12. In the present case, reliance was placed by the respondent M/s APIL on the above para in support of its contention that payment of duty under protest and payment of duty under provisional assessment are both "on account" payments under the Act. We do not find any merit in this argument. As discussed, there is a basic difference between duty paid under protest and duty paid under Rule 9B. The duty paid under protest falls under Section 11B whereas duty paid under provisional assessment falls under Rule 9B. That Section 11B deals with claim for refund whereas Rule 9B deals with making of refund, in which case the assessee has not to comply with Section 11B. Therefore, Section 11B and Rule 9B operate in different spheres and, consequently, in Para 104 of the said judgement, it has been held that in cases where duty is paid under Rule 9B and refund arises on adjustment under Rule 9B(5), then such refund will not be governed by Section 11B. In the said para, it has been clarified that if an independent refund claim is made after adjustment on final assessment under Rule 9B(5), agitating the same issues, then such claim would attract Section 11B. This is because when the assessee makes an independent refund claim after final orders under Rule 9B(5), such application represents a claim for refund and, it would not come in the category of making of refund and therefore, the bar of unjust enrichment would apply. Hence, there is no merit in the contention of the respondent M/s APIL that although in this case duty was paid under protest, there was no difference between such payment and duty paid under provisional assessment under the said Act. This argument was obviously advanced because unless the two payments are equated as contended, the respondent M/s APIL was required to comply with Section 11B. In this matter, duty has been paid under protest. It is the case of the respondent M/s APIL that since such payment was similar to payment under Rule 96, the respondent M/s APIL was not required to comply with Section 11B. In the light of the discussion hereinabove, we hold that the respondent was bound to comply with Section 11B. Lastly, in any event, the application dated 11.2.1997 fell in the category of refund claim being made after finalization of assessment of NIIL and, therefore, Section 11B had to be complied with in terms of Para 104 of the above judgement in the case of Mafatlal Industries Ltd. (supra). For above stated reasons, since there was failure to comply with Section 11B, the respondent was not entitled to refund".

17. Even otherwise invocation of unjust enrichment principle does not depend only on the applicability of Section 11B only. The said principle gets attracted even otherwise, whenever the facts situation would disclose that the claimant is not entitled for refund of the amount. As rightly pointed out by the learned DR the three Judges Bench of the Apex Court in **Sahkari Khand Udyog Mandal Ltd. vs. CCE&C** reported in 2005 (181) ELT 328 (S.C.) had clearly ruled that:

“It is clear that the doctrine of ‘unjust enrichment’ is based on equity and has been accepted and applied in several cases. In our opinion, therefore, irrespective of applicability of Section 11B of the Act, the doctrine can be invoked to deny the benefit of which a person is not otherwise entitled. Before claiming a relief of refund, it is necessary for the petitioner/ applicant to show that he has paid the amount for which relief is sought, he has not passed on the burden on the consumers and even such relief is not granted, he would suffer loss”.

18. Undisputedly, the appellants in the case in hand have not established any of the above mentioned requirements to justify the claim of refund.

19. The Apex Court in **State of Maharashtra & Others vs. Swanstone Multiplex Cinema Private Limited** reported in (2009) 8 SCC 235 has clearly ruled that “the doctrine of unjust enrichment can be invoked irrespective of any statutory provision against any person who unjustly enrich himself”

20. The orders passed by the learned Single Member of the Tribunal in **Shri Rajendra Rolling Mills vs. Commissioner of C. Ex. Ahmedabad** reported in 2004 (167) ELT 533 (Tri. Mumbai) and **CCE, Mumbai-V vs. Shree Ram Textile and Processing Mills (I) P. Ltd.** reported in 2006 (193) ELT 485 (Tri. Mumbai) do not lay down the correct proposition of law. The said decisions are contrary to the law laid down by the Apex Court as stated

above. Being contrary to the decision of the Apex Court on the point in issue, they do not lay down binding precedent.

21. For the reasons stated above, therefore, in the facts and circumstances, it is difficult to accept the contention of the appellants that the amount was refundable to the appellants or that the authorities erred in rejecting the same.

22. In view of the law on the point being well settled by the decision of the Apex Court, question of relying upon the decision of the Tribunal including that of the Larger Bench does not arise. In the result, therefore, the appeal fails and is hereby dismissed.

[Justice R.M.S. Khandeparkar]
President

[Rakesh Kumar]
Member [Technical]

/Pant/