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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/214 /2005 - EX[DB]

Date : 04/10/2010

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

To :
M/S SPBL LTD.
HAMIRGAR ROAD OUTSIDE OCTROI POST ATUN
BHILWARA RAJASTHAN

M/S SPBL LTD. Appellant

Vs

C.C.E.JAIPUR-II Respondent

I am directed to transmit herewith a certified copy of **Final order No.** 676/ **2010 EX[DB]** dated 04-8-10 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.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 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)

IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL, NEW DELHI PRINCIPAL BENCH, COURT NO. I

Excise Appeal No. 214 /2005-Ex(BR)

[Arising out of Order-in-Appeal No. 733(RM)CE/JPR-II/2004 dated 3.12.2004 passed by Commissioner (Appeals II) Customs & Central Excise, Jaipur]

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

M/s. SPBL Ltd. Appellants

Vs.

Commissioner of Central Excise
Jaipur II Respondent

Appearance:

Shri B.L. Narasimhan, Advocate for the Appellants
Shri B.K. Singh, Jt.CDR for the Respondent

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

Date of Hearing/decision : 04.08.2010

FINAL ORDER 676/10-EX

Per Shri Justice R.M.S. Khandeparkar (for the Bench):

1. Heard the learned Advocate for the appellants and Jt. CDR for the respondents. The present appeal arises from order dated 3.12.2004 whereby the appeal filed by the appellants against the order passed by the original authority was dismissed. The Assistant Commissioner, Bhilwara by its order dated 27.12.2002 had partly sanctioned the refund claim but applying the provisions regarding the principle of unjust enrichment, directed the amount to be credited to the Consumer Welfare Fund while rejecting the claim for refund to the tune of Rs.48,417/-.

2. The appellants were engaged in processing of man-made fabrics classifiable under Chapter 54 and 55 of the schedule to the Central Excise Tariff Act, 1985. During the period from July, 1999 to March 2000, the appellants were mainly processing the fabrics on job work basis. The appellants were working under compounded levy scheme formulated under section 3A of the Central Excise Act, 1944 and were paying duty in terms of annual capacity of production determined by the competent authority. The same was determined under orders dated 15.6.1999 and 3.11.1999. There was further order passed in that regard on 8.3.2000 taking into account the gallery attached to the stenter as one of the chambers. Though the duty was paid accordingly by the appellants for the relevant period, the said order dated 8.3.2000 was challenged before this Tribunal and by the order dated 4.1.2001 the Tribunal set aside the order dated 8.3.2000, while allowing the

appeal with consequential relief. Pursuant thereto the appellants filed an application for refund of duty, which the appellants had paid on account of order dated 8.3.2000. Such application was made on 20.2.2001 claiming refund of duty of Rs.14,22,313/-. Consequently, show cause notice dated 8.5.2002 came to be issued to the appellants for rejection of the said claim and for appropriate order applying principle of unjust enrichment. The same was contested by the appellants and ultimately the Commissioner's order dated 27.12.2002 disposed of the said application. Appeal against the same did not give any relief to the appellants and hence the present appeal.

3. Learned Advocate for the appellants while assailing the impugned order submitted that bare perusal of the impugned order discloses non-application of mind by the lower appellate authority inasmuch as that the rejection of the claim was sought to be confirmed by the said authority on the grounds which were totally extraneous to the matter and which were never raised by the department nor it was the case before the adjudicating authority. In that regard, attention is drawn to para 6 of the impugned order. He further submitted that the specific defence raised by the appellants was that the processing charges in relation to the goods returned to the supplier on completion of job work did not include the duty element and merely because the invoices disclose the statement to the effect that the duty liability has already been discharged, the authorities were not entitled to draw inference about inclusion of the duty element in the processing charges. He further submitted that the appellants were said to be working under

compounded levy scheme and therefore, the duty was paid in instalments as per the determination on the basis of annual production of capacity of the appellants unit, irrespective of actual production of goods. According to the learned advocate for the appellants the duty element had no bearing on the processing charges and this is apparent from the account books of the appellants which clearly disclose that the duty paid as 'recoverable'. This was further made good by the certificate issued by the Cost Accountant. It was also contended on behalf of the appellants that the processing charges and the goods remained static during the relevant period as well as the period preceding thereto and also for the period following the same. This would thus disclose that processing charges were not affected in any manner by the duty element. Reliance was sought to be placed in the decision of the Madras High Court and of the Tribunal in the matter of CCE Chennai vs. Saralee Household & Bodycare India (P) Ltd. reported in 2007 (216) ELT 685(Mad) and Dabur India Ltd. vs. CCE, Ghaziabad reported in 2008 (228) ELT 131(Tri-Del).

4. On the other hand, Jt. CDR submitted that very fact that the goods produced by the appellant were subject to duty liability, there was presumption about passing over of duty element to the consumers of the appellants and the burden was upon the appellants to establish that the duty element was not passed over to the consumer. The records placed before the authorities did not establish the same. No balance sheet was produced by the appellants and the so called accounts produced were not audited account books by the competent Chartered Accountant or auditors. The certificate is

of the Cost Accountant and not of Chartered Accountant. In short, there was no cogent material to establish the contention sought to be raised on behalf of the appellants that the duty element was not passed over to the customers. Merely because the processing charges remained static through out, that does not lead to presumption that it had ignored the duty element and in that regard reliance is placed in the decision of the Tribunal in the matter of Phillips Electronics vs. CCE, Pune I in Appeal No. E/713/06 delivered on 20.4.2010. Attention is also drawn to the decision of the Larger Bench of the Tribunal in the matter of Shivagrico Implements Ltd. vs. CCE, Jaipur reported in [2006 (199) ELT 44 (Tri-LB)].

5. Undoubtedly, the impugned order in para 6 refers to certain facts which apparently does not disclose to be relating to the matter in hand. However, in our considered opinion, merely by referring to para 6 of the impugned order, the matter cannot be decided. Para 4 of the impugned order discloses that the Commissioner (Appeals) was fully aware of the issues he was required to decide in the matter. In fact, the issues were clearly formulated and recorded in para 5 and they read thus:

(1) Whether the provisions of unjust enrichment are attracted when the duty is paid under protest?

(2) Whether the appellants have been able to rebut the presumption of unjust enrichment by way of documents putforth by them.

6. It is pertinent to note that only these two issues were actually canvassed by the appellants before the Commissioner (Appeals) and the same is apparent as rightly pointed by the learned Jt.-CDR from the

grounds of appeal in the memorandum of appeal filed before the Commissioner (Appeals). The grounds of appeal therein read thus:

> "(1) The learned Assistant Commissioner erred in fact and in law in ordering transfer of refund of Rs.14,22,313/- to the Consumer Welfare Fund, instead of holding that the same was payable to the appellants, in the facts and circumstances of the case.
>
> (2) The learned Assistant Commissioner should have held the amount as payable to the appellant in view of the fact that the deposits in the instant case were made under protest."

Even the arguments of the advocate who appeared before the Commissioner (Appeals) which have been summarised in the impugned order disclose that essentially these two grounds were raised before the Commissioner (Appeals). Undoubtedly, these two grounds were sought to be made good by referring to all other points which are canvassed before us. In the circumstances, therefore, merely because there is some reference to some facts which are unconnected with the matter in hand, that itself will not be sufficient, in the facts and circumstances of the case, to hold that the impugned order has been passed without application of mind.

7. Perusal of the entire order of the Commissioner (Appeals) does disclose the consideration of all the points which was raised before the lower appellate authroity. To what extent we can agree with those findings is a totally different issue.

8. As regards, the contention of the learned Advocate for the appellants that the processing charges did not include the duty element is concerned the first leg of argument in support of his contention is that the appellants

were covered by the compounded levy scheme. It cannot be disputed that on application of compounded levy scheme, the assessee pays the duty in instalments without reference to specific clearance of each consignment of the goods manufactured. Equally, it is true that the duty liability in such cases depends upon the determination of annual capacity of production by the competent authority and may not always have relation to actual quantity of production of the goods. However, the fact remains that once the annual capacity of production of a unit is fixed, undisputedly the presumption is that appellants would be able to manufacture the goods of the quantity which have been made the basis for determination of annual production of capacity of unit. In such cases, the assessee disputing the volume of total production in a year to justify any further claim based on such volume of production, will have to establish the same with cogent material as to what is the quantity of goods had been produced in a year, and being a question of fact will have to be established by the party who raises the dispute about the total volume of the goods produced from a unit during the particular period. There can be no presumption that the production is not in accordance with the determination of annual capacity. The presumption, if any, is just to the contrary. Being so, merely because the assessee is covered by the compounded levy scheme, there is no presumption that the payment of duty is not related to the actual production of their goods from the unit. This aspect in each case will have to be determined on the basis of facts established by the assessee. Undisputedly, no evidence in this regard has been placed by the assessee. As regards the second contention that the processing charges remained static during the relevant period as well as the period preceding the same and following the same, it is difficult to agree with the contention made in that regard on behalf of the assessee in the absence of any material being placed on record. As regards the processing charges which were the elements considered while fixing the same for the period prior to relevant period and what were the relevant elements considered while fixing the processing charges for the relevant period and similarly as regards the period subsequent to the relevant period nothing has been stated, nor any material in that regard has been placed on record. Merely because the processing charges remain static, there cannot be a presumption to' the effect that it never included the element of duty. Here again, whether the duty element is included in the processing charges being the question of fact, it is necessary for the assessee to produce the evidence as regards the elements which are considered while fixing the processing charges. Undisputedly, no such evidence has been produced by the assessee.

9. What is more important is that while claiming the refund, the appellants had produced the chart showing the duty which was actually collected, the duty which was legally payable and the difference between the two. There was no chart disclosing the total volume of production alongwith the details about the cost of each of the inputs/ heads consumed or utilised in such production during the relevant period as also the total processing charges collected during the relevant period. Undisputedly, mere production of these two elements would not by itself prove non-inclusion of

the duty element in the processing charges. The disclosure of the above details would have revealed as to whether the processing charges can be said to include the duty element or not.

10. As rightly pointed out by the Jt.CDR, one fails to understand the reason for suppressing the balance sheet from the authorities. Though the statement of accounts was produced to contend that duty element was shown as recoverable, the learned Advocate fairly conceded that the same was not reflected in the balance sheet. In the absence of such fact having not been reflected in the balance sheet, it is difficult to believe that the statement of accounts reflects true state of affairs. The so called certificate of Cost Accountant produced on record is also unbelievable. It merely states that the said certificate was issued "as per the information and explanation given to us". The Certificate nowhere discloses the Cost Accountant having personally verified the accounts either by himself or with the help of his associates or competent assistant.

11. The Tribunal in Phillips Electronics India Ltd. while dealing with the ground raised by an assessee, to get over the bar of unjust enrichment, that the price of the goods remained the same, had held, that the uniformity of price before and after assessment is by itself not a ground for holding that the duty burden has not been passed on by the claimant to any other person. The uniformity of price may be due to various factors as observed by the Supreme Court in Allied Photographic's case. Merely because the price at which the goods were sold by the assessee's customers at all material times were "all-inclusive" price or "cum-duty" price and that such price remained

the same, there is no warrant for the inference that the assessee was absorbing the duty burden. In such a scenario, it is inevitably to be inferred that the assessee was only altering their profit margin so as to maintain consistency of price inasmuch as every manufacturer would sell his goods at something above the cost-price + duty as observed by the Hon'ble Supreme Court in the case of Mafatlal Industries Ltd. vs. Union of India 1997 (89) ELT 247 (SC) and by the Tribunal in the case of JCT Ltd. vs. Commissioner 2004 (163) ELT 467 (Tri) and in the case of Interach Building Products (supra). Therefore, the appellant can not succeed on the ground of uniformity of prices.

12. The decision of the Madras High Court in Saralee Household & Bodycare India (P) Ltd. was in a case where the balance sheet and Chartered Accountant's certificate could establish that the burden of duty had not been passed on to the buyers. The High Court in para 4 had clearly observed that "it is clear that the Tribunal had given a factual finding that only 20% of duty alone was collected from the customer and the balance of 10% is not collected or not passed on to the customers. The above fact was also amply proved by the certificates of the Chartered Accountant as well as books of account for the period in dispute." It was in the background of those facts, the Madras High Court held that "the assessee produced books of account along with certificates issued by their Chartered Accountant. These documents clearly indicated that the Excise Duty (10%) paid by the assessee was kept as receivable from Government or current assets in the books of account". That is not the case in the matter in hand. Neither there

is certificate of Chartered Accountant nor balance sheet. Certificate of Cost Accountant is unbelievable for the reasons stated above.

13. The Tribunal in Dabur India Ltd. case has dealt with the matter wherein the balance sheet was clearly favouring the contention raised on behalf of the assessee. In para 5 of the order, Tribunal has held thus:

> "We find that the Tribunal in various decisions relied upon by the appellants has taken a view that in case balance sheet amount of refund was shown as recoverable, it has been taken as established that the appellants have not passed on extra duty burden but have borne the same themselves. In these circumstances, as the balance sheet which is as per record under the Companies Act showing the amount as recoverable from the revenue and in view of the earlier decisions on this issue impugned order is set aside."

Obviously in the balance sheet the amount claimed as refund was shown to be recoverable, and hence the issue was answered in favour of the assessee. In appellants case, as already observed above, no such balance sheet is produced and the fact that the duty element was included in the processing charges has been established. Being so, the decision sought to be relied upon on behalf of the appellants are of no help to the appellants.

14. In the case of Shivagrico Implements Ltd. vs. CCE, Jaipur cited supra, Larger Bench while answering the question as to whether bar of unjust enrichment will apply to the cases relating to refund claim arising out of clearances of goods from a unit working under Compounded Levy Scheme based on capacity of production, held that the Supreme Court has

held that bar of unjust enrichment is applicable in case of refund whether this is provided under the statute or not and in view thereof the point was answered in favour of the Revenue.

15. For the reasons stated above, we do not find any reason to interfere with the impugned order. Hence the appeal fails as dismissed.

(Justice R.M.S. Khandeparkar)
President

(Rakesh Kumar)
Member(Technical)

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