GRAM : CEGCANAL
Site : www.cestat.gov.in

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

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL

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

EXCISE APPEAL BRANCH

Appeal No. E/524 /2005 - EX[DB]   Date 03/11/2010

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

To :
M/S GAIL INDIA LTD.
16,BHIKAJI CAMA PLACE,
R.K.PURAM,N.DELHI-66

M/S GAIL INDIA LTD.   Appellant

Vs

C.C.E.GWALIOR   Respondent

I am directed to transmit herewith a certified copy of **Final order No.** 770/ **2010 EX[DB]** dated 05-10-10 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.GWALIOR
   19/1265 CITY CENTRE OPP.TOUCHEL GWALIOR M.P.
   474011
2. Adv. / Consult
   MR.THOMAS VELLAPALLY
   C-465, SECOND FLOOR, DEFENCE COLONY, NEW DELHI-110024
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 & SERVICE TAX APPELLATE TRIBUNAL
West Block No. 2, R.K. Puram, New Delhi – 110 066.
Principal Bench, New Delhi

COURT NO. I

DATE OF HEARING : 05/10/2010.
DATE OF DECISION : 05/10/2010.

Excise Appeal No. 524 of 2005

[Arising out of the Order-in-Appeal No. GWL/231/2004 dated 28/10/2004 passed by The Commissioner (Appeals), Central Excise & Customs, Gwalior.]

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 would 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 Department Authorities?	: Yes

M/s GAIL India Ltd. Appellants

Versus

CCE, Gwalior Respondent

Appearance

S/Shri S.C. Kamra and G.K. Mahajan, Advocates - for the Appellants.

Ms. Monica Batra, Authorized Representative (SDR) – for the Respondent.

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

FINAL Order No. 770/10-EX Dated : ____________

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

Heard at length the learned advocate for the appellants and the DR for the respondent. The appeal arises from order dated 28th October 2004 passed by the Commissioner (Appeals), Gwalior. By the impugned order, the appeal filed by the appellants against the order of the Assistant Commissioner dated 27th May 2004 has been rejected. By the said order dated 27th May 2004, the Assistant Commissioner, Gwalior had held that the claim of the appellants for refund of Rs. 32,65,057/- (Rupees Thirty Two Lakh Sixty Five Thousand and Fifty Seven) was sanctioned but the amount was ordered to be credited to the consumer welfare fund by applying the principle of unjust enrichment to the matter.

2. The appellants are manufacturers of Liquefied Petroleum Gas classifiable under sub-heading 2711.19 of the First Schedule to the Central Excise Tariff Act, 1985. They were selling their final product LPG exclusively to oil marketing PSU i.e. IOCL, BPCL and HPCL and were paying duty of the price of LPG. The appellants filed a refund claim for Rs. 32,65,057/-. Consequently a show cause notice dated 18th December 2003 came to be issued proposing to reject the claim on the ground that the incidence of duty was passed on by them to their buyers. After hearing the parties, the Adjudicating Authority sanctioned the refund but

ordered the same to be credited to the consumer welfare fund. The appeal against the same was also rejected.

3. While assailing the impugned order, placing reliance in the decisions in the matter of **R.C.C. (Sales) Pvt. Ltd. vs. CCE, Hyderabad – IV** reported in **2008 (223) E.L.T. 53 (Tri. – Bang.), Polyglass Acrylic Mfg. Co. (P) Ltd. vs. CCE, New Delhi** reported in **2009 (235) E.L.T. 374 (Tri. – Del.), CCE, Coimbatore vs. Flow Tech Power** reported in **2006 (202) E.L.T. 404 (Mad.), Paper Products Ltd. vs. Commr. of Cus. (Import), Mumbai – I** reported in **2009 (233) E.L.T. 227 (Tri. – Mumbai), Laxmi Steel Industries vs. CCE, Kanpur** reported in **2009 (233) E.L.T. 257 (Tri. – Del.), Modern Syntex Ltd. vs. CCE, Jaipur** reported in **2001 (131) E.L.T. 96 (Tri. – Del.), Collector of C. Ex., Chandigarh vs. Oswal Cotton Spinning Mills** reported in **1999 (108) E.L.T. 841 (Tribunal), Union of India vs. A.K. Spintex Ltd.** reported in **2009 (234) E.L.T. 41 (Raj.)** and in appellant's own case in the matter of **GAIL vs. CCE, Gwalior** reported in **2006 (196) E.L.T. 68 (Tri. – Del.)**, the learned advocate for the appellants submitted that the authorities below failed to take into consideration the documentary evidence placed on record in proper prospective. Drawing our attention to the certificate stated to have been issued by the Chartered Accountant as well as the certificate stated to have been issued by the buyers it was sought to be contended that the same clearly disclose that the incidence of excise duty was not passed over to the buyers. The certificate

by the Chartered Accountant having been issued on the basis of the account books maintained by the appellants, the same read with the balance sheet of the appellants for the relevant period it would apparently disclose that the amount of excise duty was not recovered from the buyers and, therefore, it was refundable by the department. He fairly conceded that the certificates from the buyers were not placed before the original authority but the same were placed before the Commissioner (Appeals), who, however, did not take into consideration the same while deciding the matter. He, further submitted that the Adjudicating Authority erred in relying upon the decision of the Commissioner (Appeals) dated 12th December 2003 as the same was set aside by the Tribunal in the decision reported in **2006 (196) E.L.T. 68 (Tri. – Del.)**.

4. On the other hand, the departmental representative placing reliance in the decision in the matter of **Gomathi Engineering Service vs. Collector of C. Excise, Coimbatore** reported in **1995 (79) E.L.T. 154 (Tribunal)** and **Hanil Era Textiles Ltd. vs. CCE, Raigad** reported in **2008 (225) E.L.T. 117 (Tri. – Mumbai)** and taking us through the order passed by the Adjudicating Authority and the lower Appellate Authority submitted that the authorities below have duly considered the documents place on record and have disbelieved them on account of failure on the part of the appellants to prove the facts of non-transfer of the duty incident upon the buyers. She further submitted that the appellants at a time of verification of their

claim was repeatedly asked to submit the details of realisation of the duty against supply of LPG to the buyers during the relevant period for the purpose of comparison thereof invoice-wise, however, the appellants failed to produce any such details. The certificates of the buyers were produced only after the disposal of the matter by the Adjudicating Authority. She further drew our attention to section 12B of the Central Excise Act, 1944 while contending that heavy burden lies upon the assessee to establish the claim regarding non-transfer of duty incident upon the buyers. The appellants, according to the department, having failed to establish the same, no fault can be found with the impugned order.

5. It cannot be disputed that in case of refund claim, heavy burden lies upon the assessee to prove the fact that the duty incident has not been passed over to the buyers. In that regard the assessee is required to produce cogent evidence establishing the fact of either non-transfer of the duty incident to the buyers or having collected such duty element alongwith the price of the product, the same having been refunded to the buyers.

6. It is settled law that the primary document of establishing the transfer of the product to the buyer is the invoice issued by the manufacturer or the seller in relation to the sale of the product. All the relevant facts in relation to the consideration received by the manufacturer or the dealer on account of sale of the product has to be incorporated in the invoice. In other words, invoice should reflect the consideration which passes to the

manufacturer or dealer on sale of the product. Undisputedly in the case in hand, the invoices disclosed the duty element payable by the buyer in relation to the product sold. Considering the provision of law comprised under Section 12B of the said Act, therefore, it was necessary for the appellants to establish that the amount disclosed as an excise duty in the invoices was either not collected at a time of the receipt of the price of the product in terms of the invoices or that having so collected, the same was subsequently refunded to the buyer.

7. It is the case of the appellants themselves that the duty element disclosed in the invoices was not collected by the appellants at a time of receipt of the price in relation to the product sold. It is their own case that the liability in relation to the amount payable to the appellants arising under such invoices is settled at the end of every month by verification thereof by the parties. Being so, it was all the more required for the appellants to produce necessary documentary evidence in relation to such verification which could reveal that at the time of verification and clearance of the dues of the appellants arising under invoices, such clearance was restricted to the amount excluding the excise duty element as revealed from the invoices. Undoubtedly, the appellants have not produced any such evidence either before the Adjudicating Authority or before the lower Appellate Authority nor anything in that regard has been produced alongwith appeal filed in the Tribunal. Entire thrust has been on the certificate stated to have been issued by the Chartered Accountant and so called

certificates issued by the buyers to be read alongwith the balance sheet for the relevant year.

8. As regards the certificate of the Chartered Accountant the same reads thus :-

> "We have verified the relevant documents, records and books of accounts of M/s GAIL (India) Ltd., LPG Recovery Plant, Vijaipur, Distt. Guna and certify that they have short received excise duty of Rs. 4,11,40,056.00 from M/s IOCL, M/s BPCL & M/s HPCL towards sale of LPG for the period from Jan'99 to March'99 & Sept'99 to 28th Oct'99 as per statement annexed. After adjustment of short payment of excise duty for the period from April'99 to August'99, an amount of Rs. 32,65,057.00 is still recoverable and is outstanding in their books of accounts and has been included in separate account code 280320 – Claim Recoverable Others."

9. Plain reading of the said certificate discloses that it undoubtedly states that the Chartered Accountant had verified the relevant documents, records and books of accounts of the appellants. The certificate further states that based on such verification, the Chartered Accountant has certified that the appellants had short received excise duty of the amount disclosed in the certificate from IOCL, BPCL and HPCL during the period from January 1999 to March 1999 and September 1999 to 28th October 1999. It also further states that after adjustment of short payment of the duty for the period from April 1999 to August 1999, the balance amount is recoverable and is outstanding in the books of accounts of the appellants. The

certificate by itself nowhere speaks of the fact of non-collection of the duty from the buyers. Certifying that the books of accounts disclose certain amount to be outstanding and recoverable is different from certifying the fact of non-collection of duty from the buyers. The requirement of Section 12B of the said Act is not in relation to the account books of the parties but it is essentially in relation to the fact of non-collection of the duty element from the buyers. Undoubtedly, the Chartered Accountant's certificate would be a corroborative piece of evidence. But the corroborative piece of evidence cannot be itself a main piece of evidence regarding the fact which is required to be proved by the party. The fact which is required to be proved by the party in the case in hand is about the non-collection of excise duty from their buyers. The said fact does not stand proved by the statement of the Chartered Accountant that the books of account maintained by the appellants discloses short payment of excise duty or that certain amount is outstanding and/or recoverable. Unless the preliminary requirement of proof regarding non-collection of the duty is established by cogent evidence, mere recording of the amount being recoverable in the account books that itself cannot be a proof of fact of non-collection of duty.

10. It was sought to be contended that the expression used by the Chartered Accountant while describing the amount being recoverable, the same also appears in the balance sheet for the relevant year. Indeed the balance sheet for the year ending on 31st of March 2003 in Schedule 6th under the title "current assets"

refers to the entry called "claims recoverable : the amount disclosed is Rs. 32,65,057/-". It cannot be disputed that the amount disclosed as recoverable in the balance sheet tallies with the figure disclosed in the certificate of the Chartered Accountant has been shown as recoverable. But as already stated above that itself cannot be a proof of non-collection of the duty by the appellants from their buyers.

11. As regards the so called certificates issued by the buyers, we fail to understand as to how the same can be stated to be relevant in any manner. First of all, whether the duty element has been collected or not is a question of fact. Whenever a question of fact is to be proved, the same has to be established by following the process known to law. In order to issue a certificate there has necessarily to be an authority or power given in that regard under some statutory provision to a private individual or firm. Any certificate issued by private individual or a group cannot have legal sanctity, and certainly not in relation to any fact in dispute. When the authority wants to establish any such fact, it has to establish it either by examining the person having direct knowledge of the fact or by filing a affidavit of such person. When a fact in relation to collection or non-collection of duty is to be established on the basis of accounts maintained by any company, minimum that is expected in relation to the proof in that regard is that either the Chartered Accountant or the company secretary or the accountant dealing with the accounts of the company, on the basis of the accounts maintained by the

company, should file an affidavit making necessary disclosure. It is only then, such an evidence can be held to be reliable and can be admissible. No such efforts have been made by the appellants. No credence can be given to the so called certificates issued by the buyers of the appellants.

12. As regards the grievance of the appellants that the Adjudicating Authority could not have relied upon the decision of the Commissioner (Appeals), the same is totally devoid or substance. It is true that the said decision was set aside by the Tribunal. However, the Tribunal set aside the said decision only on 4th of January 2006. The Adjudicating Authority had passed the order on 27th May 2004. Certainly the Adjudicating Authority could not have visualised on 27th May 2004 that the Tribunal would set aside the order of the Commissioner (Appeals) after two years.

13. The decision of the Tribunal in R.C.C. (Sales) Pvt. Ltd. case was to the effect was that the Commissioner was not justified in directing refund of the amount to the credit of the consumer welfare fund when the issue stood covered by the order in **Toyota Kirloskar Motor Ltd. vs. CCE, Aurangabad** reported in **2005 (187) E.L.T. 499 (Tri. – Bang.)** and **Transformers & Electricals Kerala Ltd. vs. CC, Cochin** reported in **2005 (188) E.L.T. 60 (Tri. – Bang.)**. In Transformers & Electricals Kerala Ltd. case the Chartered Accountant had given certificate certifying that the element of duty had not been passed on to the

customers. Admittedly there is no such certificate issued by the Chartered Accountant in the appellants case.

14. In Polyglass Acrylic Mfg. Co. (P) Ltd. case, the Tribunal held that "the appellants had produced evidence to show that the amount in question was reflected in the books of accounts as recoverable from the customers for the relevant year and it continued to be so and further Chartered Accountant had certified to the effect that the amount had not been passed on to the buyers". The certificate issued by the Chartered Accountant in the case of the appellants nowhere discloses any such information. Clearly, therefore, the decision in Polyglass Acrylic Mfg. Co. (P) Ltd. is distinguishable.

15. In Flow Tech Power case, the Hon'ble Madras High Court held that "there was a factual finding by the authorities below that the duty had been paid under protest and the question of time bar would not arise". It was further observed that the Chartered Accountant's certificate confirmed that the duty paid on the goods was absorbed by the assessee and had not been passed on to the customer. As already observed above, the certificate of Chartered Accountant in the appellant's case does not certify this aspect.

16. In Paper Products Ltd. case, the Tribunal has observed that "the Commissioner (Appeals) has not disputed the Chartered Accountant's certificate but simple says that some more evidence was needed without specifying the nature of evidence which he

would like to have. He has not stated as to why the books of account, balance sheet and Chartered Accountant's certificate cannot be relied upon as already observed above, we have elaborately discussed and given reasons as to why the Chartered Accountant's certificate in the matter in hand cannot be relied upon". Admittedly the necessary account extracts alongwith the comparison with the invoices were made available to the Superintendent for necessary verification. Being so, this decision also is of no help to the appellants.

17. In Laxmi Steel Industries case, the same was decided purely on the basis of the decision in R.C.C. (Sales) Pvt. Ltd. case. As already stated above, in R.C.C. (Sales) Pvt. Ltd. case was decided on the basis of the decision in Transformers & Electricals Kerala Ltd. case. In Transformers & Electricals Kerala Ltd. case there was a certificate of the Chartered Accountant confirming that the element of duty had not passed over to the customers. There is no such certificate in the case in hand.

18. In Hanil Era Textiles Ltd. case, the Tribunal has already held that the certificate issued by the Chartered Accountant was not sufficient to discharge the burden cast upon the assessees.

19. In Gomathi Engineering Service case, the failure on the part of the assessee to produce evidence by way of accounts maintained by the customers and the assesses was held to be sufficient to hold that the assessee had failed to discharge the burden.

20. In Modern Syntex Ltd. case, it was held thus :-

"**4.** I have considered the submissions of both the sides. It has not been controverted by the Revenue that the Assistant Commissioner, Incharge of Modern Threads, has held that the credit amounting to Rs. 4,75,744/- was wrongly availed which was recoverable from them under Rule 57Q of the Central Excise Rules. The Revenue has also not disputed the fact that M/s. Modern Threads had paid the said amount by debiting the same in their PLA. It has been emphasised by the appellants that they issued the credit note for the said amount to M/s. Modern Threads India Ltd. who had never paid the entire amount of duty to them; that the payment was not made by cheque as the same subsequently cancelled; that this is evident from the certificate dated 3-7-1999 given by M/s. Agrawal S. Lal Company, Chartered Accountant, and the Affidavit dated 3-7-1999 of Shri S.N. Tapodia, Vice-President of M/s. Modern Threads Ltd. Shri Tapadia has clearly mentioned that out of excise duty amounting to Rs. 14,32,376/- they had paid only Rs. 7 lakhs to the appellants and only Rs. 2,56,632/- is outstanding against them as on 30-6-1999. I, therefore, observe from these facts that the Customer has never paid the entire amount of duty to the appellants and accordingly it cannot be claimed the entire incidence of duty was passed on to customer. It was held by the Tribunal in *Oswal Cotton Spg. Mills* case that once the Respondents has rebutted the presumption that every person who has paid duty of excise on any goods shall be deemed to have passed on the full incidence of such duty to the buyers of such goods, the principle of unjust enrichment will not apply as the Supreme Court in the case of *Mafatlal Industries* v. *U.O.I.* - 1997 (89) E.L.T. 247 (S.C.) has held that such presumption is a rebuttable presumption of law and not a conclusive presumption. In view of these facts that the appellants therein was held to have rebutted the presumption of passing of the incidence of the duty initially shown in the invoice to their customer. Accordingly, refund of the excise duty paid by them i.e. Rs. 4,75,744/- will be admissible to them. The appeal is thus allowed."

Plain reading of the above contents of the order would disclose that the decision was arrived at on the basis of non-controverted facts.

21. In Oswal Cotton Spinning Mills case, it was observed thus:-

"**3.** We have carefully considered the rival submissions and perused the invoices, debit notes and relevant extracts from the ledgers. We find that in the invoices raised by the respondents the excise duty component has been separately shown, the customers have raised debit notes on account of excise duty, indicating that the amount shown in the debit note was not paid by them and that the duty amount is shown as balance outstanding against the respective customers. The balance receivable from the customers is shown as Rs. 16,96,101/- which is the exact amount for which a refund claim has been filed. The respondents have, therefore, rebutted the presumption that every person who has paid 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. In the case of *Mafatlal Industries* v. *Union of India* cited supra, the Hon'ble Supreme Court, in para 91 of the judgment has held that such presumption is a rebuttable presumption of law, and not a conclusive presumption. We also note the respondents' submission that no other spinning mill in India was required to pay duty on soft cotton waste except the respondents herein and, therefore, their customers were purchasing waste on payment of the price of the waste only and without payment of the excise duty levied thereon, and paid by the respondents in whose factory the waste was being generated. This submission has not been found to be factually incorrect. The respondents have explained that their customers issued debit notes only after complete verification and this occasioned the delay between the receipt of the respondents' goods by the customers, and the issue of the debit notes. Further we find that the adjudicating authority has accepted the debit notes, but has held the non-issue of corresponding credit notes by the respondents as a factor that goes against them."

Plain reading of the above para discloses that the party had produced cogent and voluminous evidence in support of their claim and, therefore, it was accepted by the Tribunal.

22. In the result, therefore, we do not find any case for interference in the impugned order. Hence, appeal fails and is dismissed.

(Justice R.M.S. Khandeparkar)
President

(Rakesh Kumar)
Member (Technical)

PK