

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

Appeal No. C/385 /2007 - CU[DB]

Date 01/09/2011

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

To :
M/S J.K. INDS. LTD.
JAYKAYGRAM, KANKROLI,
DISTT. RAJSAMAND, RAJASTHAN
313342
M/S J.K. INDS. LTD.

Appellant
Vs
Respondent

C.C.E. JAIPUR II

I am directed to transmit herewith a certified copy of **Final order No.C/382/ 2011 CU[DB]** dated 26.08.2011
passed by the Tribunal under **Section 129, (B) of the Customs Act,1962 & Financial Act 1994 relating to Service Tax**


Assistant Registrar
(Customs Appeal Branch)

Copy to :

1. Respondent
C.C.E. JAIPUR II
N.C.R.BUILDING, STATUE CIRCLE,
"C" SCHEME, JAIPUR 302005.

2. Adv. / Consult
MR.V. LAXMIKUMARAN
B-6/10, SAFDARJUNG ENCLAVE,
NEW DELHI-110029

3. C.D.R
4. Bar association, CESTAT, New Delhi
5. Director Publications, Customs, Excise. I.P. Estate, New Delhi
6. M/s Centax Publications Pvt Ltd., 1512-B, Bhishm Pitamah marg, Opp. ICICI Bank of Defence Colony, New Delhi -
7. Company Law Institute of India Pvt Ltd.,No.2(Old No. 36), Vaithyaram Street, T. Nagar,Chennai -17
8. Taxmann Allied Service Pvt Ltd., 59/32, New Rohtak Road, New Delhi - 110005
9. Easy Service Tax Online Dot Com Pvt.Ltd.407A,Iscon Mall,Above Star India Bazar,Satellite Road, Ahmedabad-15
10. LAWCRUX Advisors Pvt Ltd, LAW House.1-8.Sector - 10, Faridabad 121003 (Harvana)
11. TaxIndiaOnline.com Pvt Ltd., Unit No.1, 2nd Floor,Vasant Arcade,Nelson Mandela Road, Vasant Kunj, New Delhi - 110070
12. Office Copy
13. Guard file


Assistant Registrar
(Customs Appeal Branch)

**CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI
Court No. III**

**Date of Hearing: 1.6.2011
Date of Pronouncement: 26-08-11**

Custom Appeal No. 385 of 2007

(Arising out of Order-in-Appeal No. 255(HKS)CE/JPR.II/07 dated 3.4.2007 passed by the Commissioner of Central Excise (Appeals), Jaipur-II)

For Approval and signature:

Hon'ble Ms. Archana Wadhwa, Judicial Member

Hon'ble Mr. Mathew John, Technical Member

1.	Whether Press Reporter 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 J.K. Industries Ltd

Appellant

Vs

CCE, Jaipur-II

Respondent

Appearance:

Appeared for the Appellant: Shri L.B. Naraian, Advocate

Shri R.K. Hasija, Advocate

Appeared for the Respondent: Shri Sheo Naraian Singh, Jt CDR

Coram: **Hon'ble Ms. Archana Wadhwa, Member (Judicial)**
Hon'ble Mr. Mathew John, Member (Technical)

Final Order No. C/382/11.....dated 26.8.11

Per **Mathew John:**

This is a case where the Appellant had filed four refund claims during 1998 in respect of nylon tyre cord fabrics imported

by them during 1997. These goods were used by the Appellant in their factory for manufacture of tyres.

2. The impugned claim for refund has been sanctioned but credited to Consumer Welfare Fund as per provisions of section 27(2) of the Customs Act. The Appellant is aggrieved by such order and claims that the amount should be paid to them.

3. This matter is in second round of litigation. The last time when the matter came before the Tribunal, the matter was disposed of by order dated 01-12-2004. The operative part of the order is given below:

"5. There is no dispute regarding the excess payment of the duty by the appellants. Their right to claim the refund of the excess paid duty had been accepted by the authorities below with a rider that they had passed on the incidence of duty to the consumers and as such are not entitled to get back, in view of the apex Court judgment in the case of Mafatlal Industries [1997 (89) ELT 247 (SC)]. The contention of the counsel that for proving of having not passed on the incidence of duty, the evidence placed before the Commissioner (Appeals) by the appellants could not be ignored, rather he should have examined the same even if it was produced for the first time, in the light of the law laid down by the Tribunal in case of CCE Vs Maruti Udyog Ltd (supra) and Jaipur Syntex Ltd (supra) in our view, deserves to be accepted. The perusal of the impugned order shows that the learned Commissioner (Appeals) has referred to only to the C.A. Certificate produced before him by the appellants. He has not made reference to the vouchers or copies of the balance sheets produced before him. He has refused even to take cognizance of that C.A. certificate also. But this, in our view, in the interest of justice, should not have been done. He should have gone into the authenticity, correctness and the evidentiary value of those documents. If he himself was unable to do so, he could call for, the report from authority below or sent back the case to

him for fresh decision, but he did not even adopt that course and this, in our view, has certainly resulted in mis-carriage of justice. It can hardly be denied that an assessee on the basis of the entries in the balance sheet, voucher or C.A certificate could prove the non-passing of the incidence of duty. The documents produced by the assessee required re-examination keeping in view the law laid down by the Tribunal in the above referred cases cited by the learned Counsel.

6. In the light of the discussion made above, the impugned order is set aside and the matter is sent back to the adjudicating authority for fresh decision of the matter after hearing the appellants and taking into consideration the evidence adduced by him. The appeal of the appellants accordingly stands disposed of in these terms. Every effort will be made by the authority to expedite the matter."

4. The Appellant produced the documents before the adjudicating authority. The Adjudicating authority still did not give refund to the Appellant. There after the Appellant filed Appeal before Commissioner of Customs (Appeal), who confirmed the order of the lower authority. Now the Appellants have filed appeal against the order of Commissioner (Appeal).

5. The evidences produced by the Appellant before the adjudicating authority were the following:

- (a) A certificate dated 28.1.2004 in respect of claim for Rs. 27,50,306/- and certificate dated 29.1.04 in respect of claim for Rs. 26,000/-;*
- (b) Copy of Journal Voucher No. 215 dt 31.3.9;*
- (c) Copies of Trial balance as on 31.3.99 and March 2005;*
- (d) Copies of price lists dated 20.11.97, 1.4.98 and 8.6.98;*
- (e) Copies of invoices from plant for the period April to August 1998 along with sales invoice from depot to dealers for October and November 1998;*
- (f) Copies of outstanding liabilities as on March 1999 and March 2005;*

- (g) *Material cost data per tyre for the month of April, July and Oct;*
- (h) *Statement showing the comparative prices (assessable value) for the period from 1997 to 1998.*

6. The reason given for not accepting the contention of the Appellant are given in para 5 of the impugned order. The same is reproduced below:

"As the goods in question are captively consumed for manufacture of tyre the unjust enrichment clause is applicable to their refund claim of excess custom duty paid on inputs in view of the Hon'ble Supreme Court's judgment in the case of Union of India Vs Solar Pesticides Pvt Ltd 132 (ELT) 401. In this context, I now examine the contention of the appellants as under:

- (a) *Chartered Accountant's certificate dated 28.1.04 and 29.1.04*

"It is to certify that M/s JK Industries Ltd Kankroli has deposited an excess amount of Rs. 27,50,306/- over prevailing rate of actual customs duty and special addl. Custom duty during June 1998. This mount has been included in Advance Account of the company as on 31.3.99 till date and has not been adjusted in P&L account"

&

"It is to certify that M/s JK Industries Ltd Kankroli has deposited an excess amount of Rs. 26,000/- over prevailing rate of actual custom duty and special addl custom duty during June, 1998. This amount has been included in advance account of the company as on 31.3.99, till date and has not been adjusted in P&L account."

I find that in these two certificates, the CA has not certified that the cost of inputs in question has been taken excluding the duty element (i.e. on which refund claimed) in computing the cost of final product tyre.

- (b) *Journal Voucher No. 215 dt 31.3.99 mentions as "amount recoverable towards custom duty and special addl customs duty paid during June, 198 vide challan 54/98, 55/98, 61/98, 64/98, 66/98, 67/98, 68/98, 74/98, 73/98, 71/98" an amount of Rs. 27,76,000/- shown debited as Collector of Custom (head of A/c code 2521326) and same amount shown as credited to O/S liability (head of*

A/c code 2711176). I find that initial refund claims were filed on 29.4.98 & 3.8.98, it is obvious that this voucher was prepared much later on.

- (c) Trial balance of factory-1 at Ac code 2711176 shown as 'outstanding liabilities works' R.109,931.196.62/- and of factory 3 shown as 'outstanding liabilities - works Rs.6,50,720.30/-. In their own statement of outstanding liabilities as on March, 1999, they gave break up of particulars and at S No.5 shown as 'Excise related liability Rs.27,76,000/-. I find that the term 'outstanding liabilities' used in the Trial Balance does not indicate that duty in question is recoverable from the department and moreover, appellants have stated that outstanding liabilities as on March, 1999 is related to excise liabilities, whereas the present refund claims are related to customs duty.

From the above statements of the appellants, it is inferred that Chartered Accountant's certificate by itself are not conclusive proof of not passing the burden of duty incidence to their ultimate customers. I find that many inputs are used for manufacture of tyre and it obvious that cost of every input contributes towards the cost of a tyre. Therefore, it is necessary to examine the cost sheet of the manufactured tyre of the relevant period to see the impact of inputs i.e 'Nylon Tyre Cord Fabric' on the tyre cost. On examination of the cost sheet submitted by the appellants, I find that the material cost of 'Nylon Tyre Cord fabric' as on 1st April, 1998 1st July, 98 and 1st Oct. 98 is on increasing trend in many cases. I also find that the material cost of rubber on which the appellants claimed to have paid excess 'cess' is also on increasing trend in many cases in that period. In view of such circumstantial evidence, CA's certificate dated 28.1.04 and 29.1.04 does not help the appellants in proving that burden of duties was not passed on to the buyers of the finished goods. Accordingly, the present case is distinguishable from the

relied upon decisions of the Hon'ble Tribunal in the case of Commissioner of Customs, New Delhi Vs. Maruti Udyog Ltd 2003 (155) ELT 523 and Jaipur Syntex Ltd Vs CCE Jaipur 2002 (143) ELT 605; and therefore, the appellants cannot take shelter of these two decisions."

7. During the hearing the Counsel for the Appellant submits that they had produced as much evidence as possible and they are at their wit's end as to what other evidence could be produced, to prove that the incidence of the impugned duty was not passed ~~to~~ ^{on} to the consumer. They submit that they are willing to produce any other evidence as may be specified by the Tribunal. In the Appeal Memo the following submissions are seen:

"2. The Refund Claim relates to duties of Customs paid in excess of that payable on the goods imported viz. synthetic rubber and Nylon Tyre Cord Fabric during the period April 1998 to June 1998. The appellants discharged Rs.26,106/- as Cess on imported synthetic rubber and Rs.27,50,306/- as Special Customs duty and Special Additional Customs duty on imported nylon tyre cord fabrics which were not payable. The Board vide CBEC Circular No. 65/97-Cus. dated 27.11.97 clarified that CESS on synthetic rubber is not payable. The levy of Special Customs duty and Special Additional Customs duty on Nylon Tyre Cord Fabrics was also abolished in the Budget of 1998.

3. The table showing the details of transactions relating to payment of excess customs duty is given below :-

Sl.No	Bond No. & Date	GBE No. & Date	Date of filing Refund claim	Amount	Remarks
1.	TA-8446/22.12.97 TA-8085/10.12.97	-	29.4.98	17600 8506	Excess payment of cess on synthetic rubber
2.	TA-1436/13.5.98	54/98 dt. 26.5.98	3.8.98	162304	Excess payment of SCD & SACD on Nylon Tyre Cord/Fabrics
3.	TA-1437/13.5.98	62/98 dt.3.6.98 64/98 dt.5.6.98 66/98 dt.8.6.98	3.8.98	1736249	-do-

		67/98 dt.8.6.98 67/98 dt.8.6.98 68/98 dt.8.6.98			
4.	TA-1498/13.5.98	71/98 dt.11.6.98 73/98 dt.15.6.98 74/98 dt.15.6.98	3.8.98	851753	-d0-
				2750306	

Copies of the Bills of Entry and other documents are enclosed as Annexure-2. Copies of refund claims are enclosed as Annexure-3.

4. The appellants booked the above amount of Rs.27,50,306/- under the head of account "Loans and Advances" and was duly reflected in the balance Sheet as at 31.3.99 (relevant pages enclosed as Annexure-4). Thus, the above amount was not treated as an expenditure item and was never included in the cost of production of tyres. Copy of Chartered Accountant Certificate for Rs.27,50,306/- and Rs.26,106/- to the effect that the amount is shown against advances in books of accounts is enclosed as Annexure-5"

8. The Ld. SDR on the other hand points out that the certificate of Chartered Accountant is silent on the fact whether the incidence of duty was passed on or not. The certificate only states that there are entries showing anticipated refund in the books of account of the Appellant. These certificates do not discharge the burden as specified in section 11B of the Customs Act.

9. The Counsel for the Appellant gave further written submissions on 20.6.2011 pointing out the following decisions to support his case :-

- (i) **CC Vs. Virundhunagar Textile Mills Ltd.** – 2008 (230) ELT 411 (Mad.).
- (ii) **MRF Vs. CC Kolkata** – 2008 (225) ELT 246 (Tri-Kol).

- (iii) **J.K. Industries Vs. CC, Kolkata** – 2007 (217) ELT 111 (Tri-Kol).
- (iv) **CCE Vs. Empee Sugar & Chemical Ltd.** – 2007 (211) ELT 292 (Tri-Bang).
- (v) **Zenith Ltd. Vs. CCE, Mumbai** – 2005 (187) ELT 23 (Tri-Mum).

The point the Id. Counsel wants to emphasize is that a certificate from a Chartered Accountant and entries in financial accounts showing anticipated refund are good enough to discharge the burden that incidence of tax has not been passed on to consumers.

10. Considered arguments on both sides and also the records.

11. Data Submitted as annexure -21 of the Appeal Memo gives information as under:-

COMPARATIVE CHART FOR VALUATION OF TYRES/TUBES AND FLAPS

S. No	Size/Description	CETH	COMPARATIVE PRICE (Ass. Value)			
			1.11.1997	1.4.98	8.6.98	24.11.98
	<u>TYRES</u>					
1.	1000.20/16 PR/JETTRACK	4011.9	6067.08	6006.18	5978.72	5978.72
2.	1000.20/16 PR/JETRIB	4011.9	5519.65	5501.32	5476.16	5476.16
3.	1000.20/16 PR/JETTRACK-39	4011.9	6889.31	6530.73	6500.87	6500.87
4.	145/70 SR 12 ULTIMA	4011.9	861.96	871.98	867.99	867.99
5.	825.20/14 PR/JETTRACK	4011.9	3938.95	3926.16	3908.21	3908.21
6.	700.15/10PR/JET RIB	4011.9	1953.49	1977.08	1968.04	1968.04
7.	900.20/14PR/MINEKI NG	4011.9	5054.05	4985.10	4962.50	4962.50
8.	600.16/8PR/SONA	4011.9	1074.49	1086.94	1081.97	1081.97

TUBES

9.	145/70 R 12 RDL TUBES	4013.9	102.93	104.46	103.98	103.98
10	825.20 TUBES	4013.9	300.46	299.74	298.37	298.37

11	600.16 TUBES	4013.9	86.86	85.53	85.14	85.14
12	900.20 TUBES	4013.9	395.72	394.36	392.55	392.55
13	1000.20 TUBES	4013.9	448.02	442.04	440.02	440.02

FLAPS

14.	825.20 FLAPS	40.12	109.75	98.4	97.95	97.95
15.	900.20/100.20 FLAPS	40.12	139.39	106.27	106.23	106.23

12. It is relevant that the budget for the year 1998 was presented on 01-06-98 and from 02-06-98 the SCD and SADC stood abolished. The refund claim is on account of these duties paid on raw materials used earlier. It is clear from the data given above that from 08-06-98, that is when prices were declared after taking into consideration the changes made in the 1998 budget the prices have come down. In the budget the impugned duties were withdrawn. This clearly implies that for the earlier period the Appellant was passing on the incidence of the said duties though they were expecting a refund of such duties and they made appropriate entries in their financial accounts. The entries in accounts like items at s.no. (a), (b), (c) and (f) of para 5 above can demonstrate only that the Appellant was expecting a refund and cannot prove that they were not passing on the incidence which they were bearing at least temporarily. The burden of proving that the incidence is not passed on is on the Appellant as per provisions in section 11B of the Customs Act. Whatever evidence they have produced proves to the contrary. In the decisions quoted by the Appellant there was no such direct evidence. So we do not want to blindly follow those decisions.

Hence we do not find it proper to interfere with the order of the Commissioner (Appeal).

13. Accordingly the Appeal filed is rejected.

(Pronounced on..26-08-11.....)

(Archanā Wadhwa)
Member (Judicial)

(Mathew John)
Member (Technical)

RM