

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

Appeal No. E/1449/2009 - EX[DB]

Date 13/07/2011

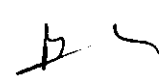
Assistant Registrar
C.E.S.T.A.T, New Delhi

To :
M/S ECE INDUSTRIES LTD. (T.D.),
DELHI ROAD, SONEPAT. (HARYANA)
M/S ECE INDUSTRIES LTD. (T.D.),

Appellant
Vs
Respondent

C.C.E. ROHTAK

I am directed to transmit herewith a certified copy of **Final order No.581/ 2011 EX[DB]** dated 08-7-11
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. ROHTAK
SCO NO,6 SECTOR 1, ROHTAK.

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
14. 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: 03.06.2011

Date of decision: 08.07.2011

For approval and signature:

Hon'ble Shri Justice R.M.S. Khandeparkar, President

Hon'ble Shri M. Veeraiyan, 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.	
2	Whether it should be released under Rule 27 of the CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not?	
3	Whether Their Lordships wish to see the fair copy of the Order?	
4	Whether Order is to be circulated to the Departmental authorities?	

Excise Appeal No. 1449 of 2009

[Arising out of Order-in-Appeal No. 61/ANS/RTK/2009 dated 27.02.2009 passed by the Commissioner of Customs and Central Excise (Appeals), Gurgaon].

M/s ECE Industries Limited

Appellants

Vs.

CCE, Rohtak

Respondent

Appearance:

Rep. by Sh. R.K. Hasija, ADvocate for the appellants

Rep. by Sh. S.R. Meena, DR for the respondent.

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

FINAL Oral Order No. 581/2011-EX

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

M/s ECE Industries (Transformer Division), Delhi Road, Sonapat the appellants herein have preferred the present appeal against Order-in-Appeal No. 61/ANS/RTK/2009 dt. 27.2.2009 passed by the Commissioner of Central Excise (Appeals), Delhi-III, Gurgaon. By the said order, the learned Commissioner (Appeals) has allowed the appeal filed by department against the order dated 16.11.2007 passed by the Assistant Commissioner, Rohtak.

2. The dispute in the present case relates to refund of the excise duty allegedly found to have been paid in excess on account of reduction in price which was disclosed in the invoices at the time of clearances of the goods.

3. The appellants are, interalia, engaged in the manufacture of electric transformers falling under chapter sub heading 8504 of the First Schedule to the Central Excise Tariff Act, 1985. The appellants are clearing their final products i.e. transformers on payment of appropriate duty of excise.

4. The appellants entered into a contract with Punjab State Electricity Board (PSEB) for supply of transformers and in terms of the contract, the PSEB placed purchase order No. 2012/SPEC-1793/DS-8209/S-II dt. 22.09.2006 on the appellants for supply of 16 transformers during the period from November 2006 to March 2007. The price of transformer was agreed at Rs. 1,47,00,000/- per transformer, subject to price variation clause.

5. The appellants in terms of their invoices supplied 16 transformers initially valued at Rs. 23,52,00,000/- involving basic excise duty of Rs.3,76,32,000/- plus Education Cess of Rs. 7,52,640/- and SHE Cess of

Rs. 94,080/-, (total central excise duty of Rs. 3,84,78,720/-). Thus, the appellants paid a total excise duty of Rs. 3,84,78,720/-. However, according to appellants, total price paid by PSEB was Rs. 22,63,97,210/- on account of reduction thereof in terms of price variation clause. The total excise duty on the said price received by the appellants could work out to be Rs.3,70,34,191/- (BED Rs. 3,62,23,552/- plus Education Cess of Rs. 7,24,471/- plus SHE Cess of Rs. 86,168/-), as against the duty actually paid to the tune of Rs. 3,84,78,720/-. Therefore, the difference thereby is Rs.14,44,529/-.

6. The appellants, therefore filed a refund claim of Rs. 14,44,527/- (BED : Rs. 1408448/- plus Education Cess : 28,169/- plus Rs. 7912/-) to the Deputy Commissioner of Central Excise, Sonapat vide their letter No. SPT/REFUND/NNK dated 6.7.2007. The Assistant Commissioner of Central Excise, Sonapat vide order-in-original No. R-185/AC/SNP/07 dated 16.11.2007 sanctioned the said refund claim. The Commissioner of Central Excise, Rohtak reviewed the order of the Assistant Commissioner dated 16.11.2007 under Section 35E(2) of the Central Excise Act, 1944 and directed the Assistant Commissioner, Central Excise, Sonapat vide his direction order No. 33/2007 dt. 8.2.2008 to file an appeal before the Commissioner (Appeals) Delhi-III, Gurgaon. The Assistant Commissioner, Sonapat in accordance with the direction order No. 33/07 dt. 8.2.2008 filed an appeal before the Commissioner (Appeals), Delhi-III, Gurgaon. Relying on the appeal filed before the Commissioner (Appeals) on the basis of review order dt. 8.2.2008, the Joint Commissioner of Central Excise, Rohtak

issued a protective show cause notice No. 12/CE/JC/SNP/HQ/08 dt. 10.04.2008 to recover the refund granted to them. The appellants filed a reply to the show cause notice dt. 10.4.2008 vide their letter No. SLV/ECE/2008 dated 5.5.2008. The appellants filed a Cross Objection to the appeal filed by the department against the Order-in-original No. 195/AC/SNP/07 dt. 16.11.2007. The learned Commissioner (Appeals) by the impugned order dated 27.02.2009 allowed the appeal of the department and rejected the refund claim.

7. It is case of the appellants that in terms of the Purchase Order dt. 22.09.2006, the appellants supplied 16 transformers declaring the value at Rs. 23,52,00,000/- and paid excise duty amounting to Rs. 3,84,78,720/-. The contract contained a Price Variation Clause. According to the Price Variation Clause, the prices of the goods can be increased or decreased subsequently based on the Price formula prescribed by India Electric and Electronics Manufacturers' Association (IEEMA). The relevant clause in the contract read thus:-

“4.1 The prices of transformers units mentioned under clause 1.1 are VARIABLE with base dated 01.06.2006 as per IEEMA price variation any positive/ negative ceiling. Price Variation shall be made on corresponding rates of variable elements prevailing on the first working day of one month before dispatch or date of contractual delivery, whichever is earlier”.

In accordance with the Price Variation Clause, the prices were reviewed and approved at Rs. 22,63,97,210/- and accordingly, excise duty amounting to Rs. 3,69,48,025/- (BED : Rs. 3,62,23,552/- plus Ed. Cess of Rs. 7,24,471/- plus SHE Cess of Rs. 86,168/-) was paid to the appellants. Thus, though the appellants actually paid to the department a central excise

duty of Rs. 3,84,78,720/-, the appellants recovered the excise duty only to the extent of Rs. 3,69,48,025/-. If SHE Cess of Rs. 86,168/- is included, it works out to Rs. 3,70,34,191/-. Thus, there is factually an excess payment of excise duty to the tune of Rs. 14,44,529/-. This is the amount which was claimed by the appellants before the Assistant Commissioner which was refunded to them. In view of the above, the appellants factually paid excess excise duty to the tune of Rs. 14,44,529/- and the same has not been passed over to the buyers or any other person. Therefore, the excess duty paid by the appellants is liable to be refunded to them.

8. It is further case of the appellants that the learned Commissioner (Appeals) erred in holding that the assessment is neither provisional nor was there any request for making any provisional assessment is not relevant to decide the dispute in question. The provisional assessment was not mandatory. The provisional assessment is required to be resorted to where the assessee is unable to determine the value of the excise goods or determine the rate of duty applicable thereto. The rule No. 7 of Central Excise Rules 2002 state that the provisional assessment is required only where the assessee is unable to determine the value of excisable goods or determine the rate of duty thereto. Further, the rule provides that the assessee may request the Assistant Commissioner or Deputy Commissioner for allowing payment of duty on provisional basis, thereby allowing a choice to the assessee. In the instant case, it cannot be said that the appellants were not able to determine the value of the goods cleared, and it is clear from the purchase order itself. The only possibility was that the price was to vary depending on the formula to be revised by the IEEMA. If there was no

revision of the formula by IEEMA, there would have been no variation in the price either upwards or downwards. Therefore, there was no requirement to adopt provisional assessment in the present case. Besides in a suitable case, it is open to the department to reject the request for provisional assessment by giving reasons. Further, the Purchase Order dt. 22.09.2006 and the supplies were to be completed 7.2.2007. Therefore, the appellants did not anticipate any revision in prices. Therefore, according to the appellants, there was no necessity for resorting to provisional assessments. Rule 7(1) of the Central Excise Rules, 2002 read thus:-

“Rule 7. Provisional assessment. – (1) where the assessee is unable to determine the value of excisable goods or determine the rate of duty applicable thereto, he may request the Assistant Commissioner of Central Excise or the Deputy Commissioner of Central Excise, as the case may be, in writing giving reasons for payment of duty on provisional basis and the Assistant Commissioner of Central Excise or the Deputy Commissioner of Central Excise, as the case may be, may order allowing payment of duty on provisional basis at such rate or on such value as may be specified by him”.

9. It is incorrect that the appellants reduced the price by issuing credit notes. The prices were reduced by the buyer unilaterally in terms of the price variation clause contained in the purchase order. Accordingly, the prices were reduced and the appellants were paid value to the lesser extent and the excise duty on the goods was also reimbursed to the less extent. In other words, the value was reduced to Rs. 22,63,97,210/- and the excise duty was reduced to Rs. 3,69,48,023/-. This in turn means that the excise duty paid by the appellants was not reimbursed to them by the buyers to the extent of Rs. 14,44,529/-. In other words, the excise duty of Rs. 14,44,529/- was borne by the appellants themselves and has not been passed on the

buyers. Therefore, the appellants are entitled for the refund of Rs. 14,44,529/- and the same is liable to be refunded.

10. The appellants submit that the Commissioner (Appeals) has failed to appreciate the evidences on record properly. The Commissioner (Appeals) ought to have appreciated that apart from the CA certificate, the appellants have also placed on record the certificate issued by the PSEB which clearly discloses the value of the transformers as also the duty paid to the appellants. The certificate issued by PSEB clearly shows that excise duty amounting to Rs. 3,69,48,023/- has been reimbursed to the appellants against the excise duty paid was Rs. 3,84,78,720/- resulting in an excess payment of Rs. 14,44,529/-. The said excess duty paid by the appellants is liable to be refunded to them. In view of the above, it is wrong on the party of the Commissioner (Appeals) to hold that the CA certificate produced by the appellants is insufficient. The impugned order-in-appeal is liable to be set aside for this reason itself.

11. The principles of unjust enrichment will not apply as the duty has not been passed on to the buyers or to any other person. The principles of unjust enrichment do not apply to the present case inasmuch as the appellants have not received the excess duty paid by them from their buyers or any other person. The appellants submit that the value (price) of the goods was in fact reduced by the PSEB and they reimbursed only excise duty applicable to the lower value paid by them. As against the excise duty payment of Rs.3,84,78,720/- by the appellants, the buyers only reimbursed excise duty amount of Rs.3,69,48,023/-. Therefore, there is no question of passing on any

duty to the buyers or any other person. It is not the case of the Department that the appellants have received any amount over and above the reduced value, freight and taxes. The appellants have produced the certificates issued by the PSEB to this effect. The certificate of Chartered Accountant has also been produced. Further, there is no allegation of any additional consideration having been received by the appellants. The appellants have been filing statutory documents like ER-1 returns and the factory of the appellants are audited by the Department regularly. There is no finding or allegation in any case about the receipt of the excess duty paid by the appellants. The appellants submit that it is established beyond doubt that the incidence of duty has not been passed on to the buyers and the excess duty paid by the appellants is liable to be refunded.

12. The issue involved in the matter is apparently that whether the appellants are entitled for refund of the duty amount equivalent to the difference in the amount of duty payable on the amount of transaction disclosed in the invoice and the amount actually received by the assessee as the price for the produce sold under such invoice. As already pointed out above, it is the case of the appellant that though ex-price was mentioned in the invoices at the time of clearance of the goods and accordingly the duty was paid factually the appellants received less amount consequent to the variation of the price on the strength of price variation clause in the agreement between the assessee and the supplier and, therefore, less duty was payable and hence the differential amount in the duty paid and payable is required to be refunded to the appellants.

13. The appellants have not pointed out any specific provision which would entitle the appellants to seek such refund except pointing out Section 11B of the said Act. Section 11B(1) provides that any person claiming refund of any duty of excise and interest, if any, paid on such duty may make an application for refund of such duty and interest, if any, paid on 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 and interest, if any, paid on such duty in relation to which such refund is claimed was collected from or paid by him and the incidence of such duty and interest, if any, paid on such duty had not been passed on by him to any other person. The first proviso thereto provides that where an application for refund has been made before the commencement of the Central Excises and Customs Law (Amendment) Act, 1991, such application shall be deemed to have been made under the amended provision of law and second proviso prescribed limitation of one year would not apply where the duty and interest if any paid on such duty has been paid under protest. Provision of law comprised under Section 11B, therefore, relates to the procedure for filing refund claim application. It does not speak of entitlement of refund as such. However, there is one important expression used in the said provision and that is relating to the period within which such application is made and that is very relevant for deciding the matter in hand. The provision under Section 11B

specifically provide that refund should be claimed within one year from the 'relevant date'. The expression 'relevant date' has been defined under clause (b) of sub-section 5 of Section 11B. Sub-clause (eb) of Section 'B' provides that the relevant date means, in case where the duty of excise is paid provisionally under the said Act or the rules made thereunder, the date of adjustment of duty after the final assessment thereof. In other words, in case where the duty is paid provisionally under the Act or rules made thereunder the claim for refund can be lodged within a period of one year from the date of adjustment of duty after the final assessment thereof. It would obviously disclose that question of refund of duty on the ground of excess payment can arise in relation to the specify matters under Section 11(5)(b) of the said Act and one of such occasion can be when the duty was provisionally paid and on account of financial assessment, it is revealed that there was excess payment of duty at the time of provisional payment of duty apart from the said provision none of the other provision disclose a situation which could cover the factual matrix of the case in hand. There is no provision under the Act where it is provided that in spite of payment of duty in terms of the price disclosed in the invoices at the time of clearance of the goods if subsequently lesser amount is received by the manufacturer in relation to such goods then the manufacturer would be entitled for reduction in the duty liability in relation to such goods and on that count for refund of the difference in the amount of duty. The fact that there is no such provision under the statute is not in dispute. The contention however is that the authority has no power to recover the amount in excess of duty legally payable. Since the price variation clause empowers the buyer to reduce the

price subsequent to the clearance of the goods and actually the price is reduced, therefore, the manufacturer is entitled for refund of the difference between the amount actually paid and amount becoming payable in terms of modified price. The contention is devoid of substance.

14. Section 4(1) of the said Act clearly provides that where under the said Act, the duty of excise is chargeable on any excisable goods with reference to their value, then, on each removal of the goods, such value shall be determined. In case where the goods are sold by the assessee for delivery at the time and place of removal the assessee and the buyer of the goods are not related and the price is the sole consideration for the sale then such value can be the transaction value and in any other case including the case where the goods are not sold, the value shall be the value determined in such manner as may be prescribed. In other words, for the purpose of determining the duty liability the value of the goods is to be determined either as transaction value or as is prescribed under the rules. It is not in dispute in the case in hand, such value has necessarily to be at the time of removal of the goods. The expression "time of removal" has been defined under clause (cc) of sub-section (3) of Section 4. It provides that the time of removal in respect of the excisable goods removed from the place of removal referred to in sub-clause (iii) of clause (c), shall be deemed to be the time at which such goods are cleared from the factory. Clause (c) (iii) defines the place of removal to mean a depot, premises of a consignment agent or any other place or premises from where the excisable goods are to be sold after their clearance from the factory. Taking into consideration all these aspects of the provisions of Section 4, it is apparent that the valuation is

directly related to the time of removal and place of removal. In the case in hand, we are not concerned with the place of removal as such. But the time of removal is very relevant. The duty element is to be determined on the basis of time of removal of the goods by the manufacturer. Undisputedly, the time of removal of the goods in the case in hand was issuance of invoices. The goods are cleared, and are required to be cleared, under invoices the valuation for the purpose of duty liability, therefore, was as disclosed in the invoices we haven't to record that this does not mean that even in case of under valuation the party can evade the correct duty liability. In case of undervaluation, there are specific provision for recovery of short levy.

15. It is also pertinent to note that it is unbelievable that a manufacturer would value their product that is over and above the value which ought to have been calculated for the purpose of payment of duty. In case of payment of duty or tax, there is no question of any voluntariness, it is always imposed upon the assessee. Being so, there is no presumption that the product can be overvalued.

16. Bearing in mind the above facts and the provisions of law, therefore, it is difficult to accept that on account of variation of price on the lower side by the buyer after the clearance of the product that could evade or in any way result in variation of the valuation of the product for the purpose of determining the duty liability at the time of clearance of the goods. Such a variation of price or lesser payment of price subsequent to the clearance of the goods either on account of some agreement between the manufacturer

and the buyer which has no sanction under the statute dealing with the duty liability can be of no help to the assessee to claim refund.

17. As regards the contention about non applicability of principles of unjust enrichment it is difficult to accept the same as in any case when the party prays for refund on the ground of excess payment of duty, it is necessary for the party to establish non passing of burden of excise duty upon the customer. Merely because the manufacturer receives an amount lesser than what has been disclosed in the invoice issued at the time of clearance of goods and payment of duty that itself cannot construe to mean that the manufacturer has not passed on the burden of excise duty on the customer. The receipt of lesser amount can also relate to the actual cost of the product and reduction may not relate to the excise duty. Such receipt of lesser amount could be for various reasons, being so, it cannot be said that the principles of unjust enrichment would not be applicable in relation to the cases of the type in the matter in hand.

18. For the reasons stated above, therefore, we do not find any fault with the impugned order and hence the appeal fails and is hereby dismissed.

(Justice R.M.S. Khandeparkar)
President

(M. Veeraiyan)
Member (Technical)

/Pant/