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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/2689/2005-2691/2005 - EX[DB] Date **29/05/2012**

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

To :
C.C.E.GHAZIABAD

C.G.O.COMPLEX HAPUR CHUNGI GHAZIZBAD U.P

C.C.E.GHAZIABAD Appellant

Vs

M/S MAHAVEER CYLINDER LTD. Respondent

I am directed to transmit herewith a certified copy of **Final order No.628-630** **2012 EX[DB]** dated 22-5-2012 passed by the Tribunal under **Section 35-C(1)of Central Excises Act, 1944**

Assistant Registrar
(Excise Appeal Branch)

Copy to :

1. Respondent
M/S MAHAVEER CYLINDER LTD.
32-B,SITE-IV.INDUSTRIAL AREA
GHAZIABAD U.P

2. Adv. / Consult SH. RAJESH CHHIBBER ADV.
FA-2, KAVI NAGAR
GHAZIABAD 201002

3. C.D.R
4. Bar association. CESTAT. New Delhi
5. Director Publications, Customs, Excise. I.P. Estate, New Delhi
6. M/s Centax Publictions Pvt Ltd.,1512-B, Bhishm Pitamah marg,Opp. ICICI Bank of Defence Colony, New Delhi-3
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 (Haryana)
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
(Excise Appeal Branch)

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

E/Appeal No.2689-2691/2005

(Arising out of order in appeal No.64-65/CE/GZB/05 dated 16.5.05 passed by the Commissioner of Customs & Central Excise(Appeals), Ghaziabad)

Date of Hearing: 29.2.2012
Date of Pronouncement:

For Approval and signature:

Hon'ble Mrs. Archana Wadhwa, Member Judicial
Hon'ble Mr.Mathew John, Technical Member

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

CCE, Ghaziabad — Appellants

Vs

M/s Mahavir Cylinders — Respondent

Appeared for the Appellant: Shri N. Pathak, DR
Appeared for the Respondent: Shri Rajesh Chibber, Advocate

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

FINAL ORDER No. A/628-630/2012-EX(BR)

Per Mathew John:

The Respondents are engaged in the manufacture of LPG Cylinders. They were supplying such cylinders to Oil Companies namely IOC Ltd and HPC Ltd under purchase order which had price variation clause. The assessments were not done on provisional basis. They paid excise duty on price that was agreed to between the parties as on the date of clearing of goods. But subsequently the prices were reduced downwards with retrospective effect and the oil companies adjusted excess payments made to the respondents prior to the date on which revised lower price was communicated to the respondents. These are three appeals being considered in this proceedings relating to three refund claims filed by the appellants in such circumstances as detailed below:

A No.	Name of Oil company	Period of clearance	Refund claimed	Date of filing of refund claims
E/2689/05	HPCL	1.7.09 to 31.10.2000	Rs.6,53,087.44 Time bar not explained	15.12.2000
E/2690/05	IOCL	1.7.09 to 31.10.2000	Rs.11,33,913.60 Time bar not explained	14.12.2000
E/2691/05	BPCL	1.7.09 to 31.10.2000	Rs.6,52,169.65 (Rs.1,88,648.50 time barred)	15.12.2000

Appeal No. E/2689/2005 and Appeal No. E/2690/2005

The Assistant Commissioner rejected the claims of refund on the ground that reduction in price subsequent to clearance of goods from the factory cannot result in a reduction of excise duty to be paid. The Adjudicating Authority relied on the decision of MRF Ltd Vs CCE 1997 (92) ELT 309 (SC) and also the decision of the Tribunal in Hindustan Wires Ltd 2003 (151) ELT 679 (Trib). Further, it was held that the claim was barred by limitation of time. It was also held that refund will result in unjust enrichment. However, prima facie only part of the claims are hit by unjust enrichment. The reason why the full amount was held to be time barred is not explained in the order in original.

3. Aggrieved by the order, the respondent filed an appeal with the Commissioner (Appeals). The Commissioner (Appeals) held the refund claims to be admissible for the period one year prior to the relevant date and it should be granted to them as per provision of Section 11B.

The Commissioner (Appeals) has relied on the decision of the Tribunal in the case of Universal Cylinders Ltd Vs CCE Jaipur-I reported in 2004 (65) RLT 39 (Tri-Del) and M/s Telephone Cables Ltd Vs CCE Chandigarh reported in 2003 (154) ELT 237.

4. Aggrieved by the order of the Commissioner (Appeals), the Revenue has filed this appeal. Revenue is relying on the decision of the Apex Court in the case of MRF Ltd (supra) and also decision of the Tribunal in the case of Premier Plastic Pipes reported in 2005 TOIL 648 CESTAT(Del).

Appeal No. E/2691/05

5. In this case, the claim was for Rs. 6,52,169.65. Out of this, the adjudicating authority sanctioned an amount of Rs. 4,52,478.10 and rejected the balance amount. Aggrieved by the order, Revenue filed appeal with the Commissioner (Appeals) citing the decisions in the case of MRF Ltd (supra) and Hindustan Wires (supra). Commissioner (Appeals) rejected the appeal of Revenue. Aggrieved by the order of Commissioner (Appeals), Revenue has come up in second appeal before the Tribunal.

6. There are two issues to be decided in these appeals. These are,-

(i) Whether any refund can be granted to an assessee in a situation where assessments were not made provisionally but the price of excisable goods are revised downwards after clearance of goods as per price variation clause which was in existence in the contract under which goods were being cleared and the buyer adjusted the amount from the sale price to be paid on goods subsequently sold

(ii) Whether there is unjust enrichment is involved in granting such refunds.

7. Issue-I

7.1 On this issue, Revenue relies on the following decisions:

(i) MRF Ltd Vs. CCE -1997 (92) ELT 309 SC

(ii) Hindustan Wires Ltd Vs. CCE -2003 (151) ELT 679 (Tri-Del);

(iii) Premier Plastics Pipe Industries Vs. CCE-2005-TIOL-648 CESTAT-DEL.

7.2 The Respondents rely on the following decisions:

(i) CCE Vs. Universal Cylinders Ltd-2004 (175) ELT 202;

(ii) GKN Drive Shafts India Ltd Vs. CCE -2204 (169) ELT (Tri-Del)

7.3 In the case of MRF Ltd. the goods were not cleared under any agreement with the buyer incorporating price variation clause. Further the goods were of a type which were sold to individual consumers whereas in this case the products are sold to an industrial consumer under an agreement having price variation clause. The decision of Tribunal in the case of Hindustan Wires relates to gas cylinders. Though in that case the claim was time barred Tribunal had examined the claim on merits and rejected by relying on the decision in the case of MRF (Ltd) (supra) without examining whether the clearences covered under an agreement with price variation can be considered on same footing as in the case of goods in the case of MRF Ltd. But later decisions of the Tribunal in similar matters is to the effect that refund can be granted in such cases as may be seen from the decision in the case of Universal Cylinders (supra) which was affirmed by the Apex Court as reported at 2005 (179) ELT A 41-SC. So this issue is already decided in favur of the appellant to the extent it relates to claim which is not time barred.

8. Issue-II

8.1 On this issue Revenue relies on the following decisions:

(i) Sangam Processors (Bhilwara) Ltd. v. Collector — 1994 (71) E.L.T. 989 (Tribunal) affirmed by Supreme Court in-1994 (70) ELT A 182.

(ii) Grasim Industries (Chemical Division) Vs. CCE-2003 (153) ELT 694 (Tri-LB) affirmed by Apex Court in 2011 271 ELT 164 SC;

8.2 The Respondents rely on the following decisions:

(i) Universal Cylinders Ltd. Vs. CCE-2004 (178) ELT 898 (Tri)-affirmed by Apex Court in 2005 (179) ELT A208-2003-SC;

(ii) Rajasthan Cylinders and Containers Vs. CCE 2004 (166) ELT 474;

(iii) Rajasthan Electronics & Instrumentation Ltd. Vs. CCE-2006 (200) ELT 324.

(iv) Metal ForgingsVs. UOI-2002 (146) ELT 474 (Tri);

(v) ONGC Vs. CCE-2003 (158) ELT 829.

(vi) Telephone Cables Ltd. Vs. CCE-2003 (154) ELT 237.

8.3 Unjust enrichment involves different aspects. The most direct aspect is whether the assesse has collected money representing it to be excise duty from the buyer paid to the government initially but trying to get it back for himself by claiming refund of such duty paid. The second aspect is that whether the buyer of the goods has taken credit of duty paid by the assesee and utilized it for payment of the buyers' final product and whether the assesse is trying to get refund of the amount for which buyer has already taken Modvat credit thus involving refund of the same amount twice because Modvat credit also is a type of refund though paid to the buyer. The third aspect is whether the person paying duty passed on the incidence of duty to the buyer of the product as cost of the material sold and is trying to get refund of the tax paid by him. This is the issue involved in decision of the Apex Court in UOI Vs. Solar Pesticide Ltd. Vs. 2000 (116) E.L.T. 401 (S.C.).

8.4 In the case at hand the first and aspects are relevant and the third aspect is not relevant.

8.5 On the first aspect Revenue is relying on the decision of the Apex Court in the case of Sangam Processors (Bhilwara) Ltd. (Supra). This was not a case of goods cleared under a price variation clause but was in the context of a Notification issued under section 11C of Central Excise Act. The decision in the case Grasim Industries relies on the decision in the case of Sangam Processors (Bhilwara) Ltd. Since the matter in relation to contracts involving price variation clause and where the buyer adjusted the excess price paid on certain clearances in the price of later clearance has been specifically examined in the case of Universal Cylinders and held in favour of assesse and affirmed by Supreme Court this decision has to be adopted in this case.

8.6 In the matter of second aspect, that is, whether the buyer had taken Cenvat credit on the initial excise duty paid, the matter has not been examined by the adjudicating authority at all. In the third case the adjudicating authority has already granted part refund also. This ground is not taken in the appeals either. So we presume that this aspect has been looked into by the Revenue and there was no scope for raising this argument.

9. In view of the discussions above the appeals filed by the Revenue are rejected.

(Order pronounced on .)

(MATHEW JOHN)
Member (Technical)
MPS*

(ARCHANA WADHWA)
Member (Judicial)