

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

Date 03/05/2012

Appeal No. E/4981/2004 - EX[DB]

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

To :
M/S BHILWARA PROCESSORS LTD.
P.B. NO. 16, MANDPAM BHILWARA
M/S BHILWARA PROCESSORS LTD.

Appellant
Vs
Respondent

C.C.E. JAIPUR-II

2012 EX[DB] dated 02-5-12

I am directed to transmit herewith a certified copy of Final order No. A/494
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
NCRB, STATUE CIRCLE, C-
SCHEME, JAIPUR

2. Adv. / Consult

*SH. H.R. MADHAV RAO, ADV,
B6/10, S.J. ENCLAVE,
N. DELHI-29*

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-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)

**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 : 03/04/2012.
DATE OF DECISION : 04-5-2012.

Excise Appeal No. 4981 of 2004

[Arising out of the Order-in-Appeal No. 433-434 (RM) CE/JPR-II/2004 dated 14/07/2004 passed by The Commissioner (Appeals), Customs & Central Excise, Jaipur - II .]

For Approval and signature :

Hon'ble Shri Justice Ajit Bharihoke, 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? :

2. Whether it would 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 Department Authorities? :

M/s Bhilwara Processors Ltd.

Appellant

Versus

CCE, Jaipur

Respondent

Appearance

Shri A.R. Madhav Rao, Advocate - for the Appellant.

Shri S. Jain, Authorized Representative (DR) - for the Respondent.

CORAM : **Hon'ble Shri Justice Ajit Bharihoke, President**
Hon'ble Shri Rakesh Kumar, Member (Technical)

FINAL Oral Order No. A/494/2012-Ex (BR)

Per. Shri Rakesh Kumar :-

This appeal is directed against the order of the Commissioner (Appeals), dismissing the appeal against the order-in-original of the Adjudicating Authority declining to refund the sum of Rs. 62,20,506/- on account of excess excise duty paid, on the premise that the appellant was a job worker and vide the invoices issued he had passed on the duty incidence to the principal M/s BSL Limited. It is pertinent to note that this was done despite of the fact that the Adjudicating Authority had sanctioned the refund claim of Rs. 62,20,506/- and he took the view that refund to the appellant would amount to unjust enrichment.

2. Briefly stated undisputed facts of the case are that the appellant was doing job work i.e. manufacture of processed manmade fabrics falling under Chapter 54 and 55 of Central Excise Tariff Act, 1985 as an independent processor on behalf of the principal M/s BSL Limited. At the relevant time during the period from March 2001 to February 2002, on in-correct interpretation of the law, the department was of the view that appellant should pay excise duty in respect of the goods manufactured on job work basis under Rule 8 of Central Excise Valuation Rules, 2000 on 115% of cost of production. Though the appellant did not agree to this proposition, yet under the pressure of the department, he paid excise duty as per Rule 8 i.e.

on 115% of cost of production. The appellant raised invoices including the excise duty paid for the job work done to M/s BSL Limited showing the duty paid on the goods. M/s BSL Limited, however, declined to pay excise duty as per valuation done in accordance with Rule 8 and paid excise duty only in accordance with the valuation done as per the law laid down in judgment of Hon'ble Supreme Court in the matter of **Ujjagar Prints Ltd. - 1989 (39) E.L.T. 493 (S.C.)**.

3. In February 2002, a Board's Circular was issued wherein it was accepted that in case of goods manufactured on job work basis, the principles of valuation as laid down by the Hon'ble Supreme Court in **Ujjagar Prints Ltd.** (supra) should be followed. This resulted in the appellant submitting claim for refund of excess excise duty paid by him. The Adjudicating Authority on consideration of the refund claim of Rs. 1,17,19,359/- which included claim for other refunds, also allowed the refund of Rs. 62,20,506/- pertaining to the goods cleared by the appellant to M/s BSL Limited in respect of the excess excise duty payment, but declined to release that amount to the appellant holding that it is hit by unjust enrichment clause and ordered that refund amount be credited to the Consumer Welfare Fund. This was done by the Adjudicating Authority on the premise that the incidence of excess excise duty has been passed on to M/s BSL Limited by issuing the invoices for the amounts including the excess excise duty. Aggrieved with the order of Adjudicating Authority, the appellant preferred an appeal and the

Commissioner (Appeals) vide impugned order dismissed the appeal and affirmed the order of Adjudicating Authority.

4. Learned Shri Madhav Rao, Advocate, appearing for the appellant has assailed the impugned order as well as order of the Adjudicating Authority on the ground that those orders are based upon wrong reading of the order of the Tribunal in the matter of **Sangam Processors (Bhilwara) Ltd. vs. CCE - 1994 (71) E.L.T. 989 (Tribunal)**, which was affirmed by the Hon'ble Supreme Court by dismissing the civil appeal. Expanding on the argument, learned Shri Madhav Rao submits that in the matter of Sangam Processors, the excise duty paid by the appellant had been passed on to the purchaser in as much as that the payments including excise duty were received by him and subsequently to support his claim for refund, pursuant to 11C Notification, the appellant in that case, after a gap of two years submitted credit notes issued by him in favour of the buyers and claimed that there was no unjust enrichment. It is submitted that the facts of this case are entirely different for the reason that in this case, though invoices for the job work goods showing the excise duty incidence were issued to M/s BSL Limited, but M/s BSL Limited refused to pay the excess excise duty, which resulted because of the valuation done in accordance with Rule 8 of the Valuation Rules. In support of this contention, he has drawn our attention to a number of letters written month by month by M/s BSL Limited refusing to pay the excess excise duty to the appellant for which the refund is now being claimed and they only

paid the excise duty calculated as per the principle laid down in **M/s Ujjagar Prints Ltd.** (supra). It is submitted that since the excess excise duty was never paid by M/s BSL Limited to the appellant, it cannot be said that it was passed on to them by the appellant. Therefore, the decision of Adjudicating Authority and the Appellate Authority that refund of the amount to the appellant would amount to unjust enrichment is not tenable.

5. Shri Sanjay Jain, DR for the respondent, submits that M/s BSL Limited is sister concern of the appellant company. During adjudication process, the appellant was directed vide letter dated 6th March 2003 and 28th March 2003 to produce the accounts of M/s BSL Limited maintained by them as well as their own accounts for cross verification, but the assessee did not comply with the direction and did not produce the actual records and therefore, the Adjudicating Authority was not in a position to find out whether or not the full incidence of duty paid by the appellant had been passed on to M/s BSL and whether M/s BSL Limited have further transferred the duty incidence to their customers and without any such evidence it would amount to a case of unjust enrichment. He further submits that if the M/s BSL Limited have actually passed the duty incidence to their customers, then the judgment of **Sangam Processors (Bhilwara) Ltd. vs. CCE** (supra) would be squarely applicable to the facts of this case. Thus, learned DR prays for dismissal of the appeal or in the alternate it is proposed that the matter be remanded back to the

Adjudicating Authority directing him to look into the aforesaid aspect.

6. Shri Madhav Rao, Advocate, in rejoinder, submits that there is nothing on record to suggest that M/s BSL Limited is sister concern of the appellant. Learned Counsel further submits that the fact remains that month by month M/s BSL Limited had been writing letters to the appellant declining to pay the excess excise duty paid as per valuation under Rule 8 of the Valuation Rules and all the payments against the invoices have been made by cheques which fact is noted by the Adjudicating Authority to come to the conclusion that M/s BSL Limited has not paid excess excise duty to them. Learned Counsel relying upon the judgment of Hon'ble Madras High Court in the matter of **Addison & Co. vs. CCE, Madras** reported in **2001 (129) E.L.T. 44 (Mad.)**, states that in the cases of refund of excess excise duty paid, the only test is whether or not the assessee had passed on the excise duty paid by him to the buyer and what the buyer does subsequently is not relevant for deciding the question of unjust enrichment by the assessee.

7. We have carefully considered the rival submissions and perused the records. The undisputed facts are that -

(a) the appellant during the period of dispute in respect of the fabrics processed on job-work basis for their customers out of the grey fabrics supplied by them, had

paid duty on 115% of the cost of production, while they were required to pay duty on the value determined on the basis of Hon'ble Supreme Court's judgment in case of **Ujjagar Prints Ltd.** (supra) i.e. cost of grey fabrics in the hand of the job worker plus job charges including job-worker's profit ; and

(b) in the invoices issued by the appellant to their customers including M/s BSL, they had shown the duty actually paid i.e. duty paid on 115% of the cost of production.

The disputed refund claim is in respect of clearances to M/s BSL. The appellant's claim is that while in the invoice issued to M/s BSL, the excise duty actually paid i.e. duty on 115% of the cost of production had been mentioned, M/s BSL had not paid the full amount of duty to them but had reimbursed only the duty on the cost of production. The appellant, thus, claim that the incidence of duty whose refund is claimed by them, has been borne by them and, hence, the same is not hit by the bar of unjust enrichment in Section 11B of the Act. The Department, however, disputes this claim of the appellant pleading that M/s BSL is a sister concern of the appellant and no records have been produced to prove that the incidence of duty whose refund is claimed, had not been recovered from M/s BSL but had been borne by the appellant and that M/s BSL had not passed on the incidence of the excise duty, in question, to their customers.

8. In terms of clause (d) of proviso to Section 11B (2), refund of excess excise duty paid would be admissible to a manufacturer only if the incidence of duty whose refund is sought had not been passed on to any other person. Section 12A requires every person who is liable to pay duty on any goods to mention at the time of clearance on the invoice or like documents, the amount of duty which forms part of the price at which the goods are to be sold. According to Section 12B, **"every person who has paid the duty of excise on any goods, under this Act, unless, the contrary is proved by him, be deemed to have passed on the full incidence of such duty to the buyer of such goods."**

Thus Section 12B creates a presumption in respect of an assessee who has paid some excise duty on any goods cleared by him, that full incidence of the duty paid by him has been passed on by him to his customer. But from the language of this Section, it is also clear that this presumption is a rebuttable presumption and once he produces evidence showing that the incidence of duty had been borne by him, the burden of proving that he had passed on the incidence will shift to the Department. In the case of **Sangam Processors (Bhilwara) Ltd.** (supra), the Tribunal held that when initially, a manufacturer had passed on the incidence of full duty paid by him and subsequently credit notes are issued by him in respect of a part of duty to the customer, the bar of unjust enrichment would still apply and he would not be entitled to refund. Civil appeal filed against this judgment of Tribunal has been dismissed by the Hon'ble Supreme Court in the

case of **Rajasthan Spinning & Weaving Ltd. vs. Collector** vide judgment reported in **1999 (112) E.L.T. A115 (S.C.)**.

8.1 However, Hon'ble Rajasthan High Court in case of **Union of India vs. A.K. Spintex Ltd.** reported in **2009 TIOL - 12 - HC (RAJ - CX)** has held as under -

"So far as Section 12B is concerned, it only places burden of proof on the assessee by enacting the presumption against him, and does not do anything beyond it. The burden placed on the assessee, by Section 12B, obviously, is a rebuttable one and the assessee may lead the evidence in rebuttal by proving issuance of debit note and credit note. Likewise there may be cases, where purchaser may refund the amount to seller, in cash, or may issue some bank note, like cheque, or draft, for refund of the amount or there may be case, when goods are sold on credit, and while making payment of price of the goods, the purchaser may debit the amount and, thus, pay less amount to the seller, and if all those facts are known and proved, the burden placed on the assessee, by Section 12B, would shift on the revenue, then it is required for revenue to prove, either that the theory projected by the assessee is fake and false, or that the burden has actually been passed on. Once the assessee leads reliable evidence about his having not passed the burden on the purchaser, and the revenue fails to rebut that evidence, the presumption enacted by Section 12B stands sufficiently rebutted, and cannot survive *ad-infinitum*".

8.2 Hon'ble Madras High Court in case of **Addison & Co. vs. CCE, Madras** (supra) has held that the term "any other person" in Section 11B or the word "buyer" in Section 12B cannot be construed as referring to the ultimate consumer.

9. In this case, the appellant have produced evidence in form of letters from M/s BSL refusing to pay the 15% excess duty, accompanied by Chartered Accountant's certificate in support of their claim that the incidence of duty whose refund is claimed has been borne by them and that duty has not been recovered from their customer - M/s BSL. Para 7 of the appellant's memorandum of appeal mentions that the appellant vide their letter No. BPL/CEX/2002-03/4094 dated 3/2/03 have forwarded their balance sheet and other documents to show that they have not received excise duty on the additional amount by erroneously adding 15% of the cost of production. However, the department's plea is that the appellant have not produced any documents in support of their claim that the incidence of the excess duty paid, whose refund is claimed, had been borne by them. In our view, this matter has to be remanded for denovo examination of the question of unjust enrichment. If the records produced by the appellant - their books of accounts of the relevant period supported by the bank statements etc., show that in spite of the appellant paying 15% extra duty, they had not received the extra duty from their customer - M/s BSL, they would be considered as having borne the incidence of duty and would be eligible for refund. However, for the purpose of grant of refund to the

appellant, as held by Hon'ble Madras High Court in case of **Addison & Co. vs. CCE, Madras** (supra), whether or not the appellant's customer – M/s BSL had recovered full duty from their customer would not be relevant.

10. In view of the above discussion, the impugned order is set aside and the matter is remanded to the original adjudicating authority for denovo adjudication as per our directions in this order.

(Pronounced in the open court on 21/5/2012)

(Justice Ajit Bharihoke)
President

(Rakesh Kumar)
Member (Technical)

PK