REGISTERED / AD

FAX : 011-26108426

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

Dated: **03/12/2012**

To

Appellant as per address in table below

Respondent as per address in table below

Final Order No. **A/1341-1344/2012-EX[DB]** dated **29/11/2012**

I am directed to transmit herewith a certified copy of order passed by the Tribunal under section **35-C(1) of the Central Excise and Salt Act, 1944.**

Asstt. Registrar(EXCISE Appeal Branch)

Name and Address of Respondent

1 E/998/2006 **I B P LTD.**
VILLAGE GOPALPUR, DISTT
KORBA, CHATTISGARH

E/999/2006

E/1000/2006

E/1001/2006

Name and Address of Appellant

2 **C.C.E. RAIPUR**
Central Excise Building, Dhamtari Road,
Tikrapara, Raipur 492001.

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Other Appellants and Respondents as per Annexure

Copy To
3Advocate(s) / Consultant(s): SH. UDIT JAIN, ADV.,
C/O. APPELLANT.

4 Bar Association, CESTAT, Delhi

5 Director Publications, Customs, Excise. I.P. Estate, Delhi

6 M/s Centax Publications Pvt. Ltd., 1512-B, Bhishm Pitamah Marg, 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, Satellite Road, Ahmedabad-15

10 LAWCRUX Advisors Pvt. Ltd., LAW House, 1-8, Sector-10, Faridabad 121003 (Haryana)

11 TaxIndiaOnline.com Pvt. Ltd., 2nd Floor, Vasant Arcade, Vasant Kunj, New Delhi - 110070

12 Mark Professional Services Pvt. Ltd., 108, Everest Block, Aditya Enclave, Hyderabad – 38

13 C.D.R. 14 Office Copy 15 Guard File

Asstt. Registrar(EXCISE Appeal Branch)

IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
COURT NO. 1

Date of Hearing: 12.11.12
Date of Decision: 29.11.12

Excise Appeals Nos. E/998 to 1001 of 2006

[(Arising out of the Order-in-Appeal No. 65-68/RPR-I/2005 Dated 29.07.2005 passed by the Commissioner (Appeals) of Central Excise, Raipur (C.G.)].

CCE, Raipur		Appellant
	Vs.	
M/s IBP Ltd.		Respondent

<u>Appearance</u>
Sh Udit Jain, Advocate - for the Appellant
Sh. R.K.Verma, A.R for the Respondent

Coram: Hon'ble 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) Rule, 1982?	:
2.	Whether it would be released under Rule 27 of the CESTAT (procedure) Rule, 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?	:

Final **Order No** A/1341-1344/2012-Ex(BR)

<u>Per Rakesh Kumar</u>

The fact leading to this appeal by the department are, in brief, as under:-

1.1 The respondents are engaged in the manufacture of explosives chargeable to Central Excise Duty. During the period of dispute they supplied explosive to Coal India Limited and its subsidiaries. The price of the explosives was on provisional base and accordingly the order for the provisional assessment has been issued by the Assistant Commissioner and the duty had been paid on the provisional price.

Subsequently when the Coal India Limited finalized the price, the assessments were finalized. Since, in some cases the final prices were lower then provisional price, the appellant become eligible for refund. Accordingly claim for refund of amount of Rs. 54,675/-, 1,63,177/-, 10,783/- & 57,214/- were filed for the periods from July 2002 to Dec.'02, July 2002 to Dec.'02, July'02 to March'03 and June'01 to March'02 respectively. The refund claims were allowed by jurisdictional Assistant Commissioner by four separate orders. However, these orders of the Assistant Commissioner were reviewed by the commissioner u/s 35E(2) of the Central Excise Act and the Assistant Commissioner was directed to file review appeals before the Commissioner (Appeals). The appeals were filed by the Revenue on the grounds that though initially the duty was paid on the higher price and its incidence had been passed on to the customers, and subsequently when the prices were reduced from back date, the respondent had issued credit notes to the buyers to neutralize the higher incidence of duty earlier passed on, the refund would still not available as once the incidence of the duty has been passed on, subsequent issue of credit note would not make any difference and in this regard the revenue relies upon the Larger Bench Judgments of the Tribunal in the case of **S. Kumar Limited Vs. Commissioner of Central Excise reported in 2003 (108) E.C.R. 82 and Grasim industries (Chemical Divn.) Vs. Commissioner of Central Excise, Bhopal reported in 2003 (153) E.L.T. 694 (Tri. – LB).**

1.2. The Commissioner (Appeals), however by a common order-in-appeal dtd. 29.04.05, dismissed these appeals of the Revenue relying upon the judgments of the Tribunal in the cases of **Commissioner of Central Excise, Jaipur Vs. Universal Cylinders Ltd., reported in 2004 (175) E.L.T. 202 (Tri. Del.)** and **Bharat Box Factory Ltd. reported in 2004 (178) E.L.T. 1058 (Tri. - Del.),** wherein the tribunal held that when initially the incidence of duty had been passed on, but subsequently credit notes had been issued to the customers to neutralize the incidence of higher duty earlier passed on, the Doctrine of unjust investment would not be applicable. The Commissioner (Appeals) observed that the civil appeal filed by the Department against the Tribunal's judgment in the case of **Universal Cylinder Limited has been dismissed by the Apex Court vide order reported in 2005 (179) E.L.T. A-41**. Against the above order of the Commissioner (Appeals), these four appeals have been filed.

2. Heard both the sides.

3. Sh. R. K. Verma, the learned departmental representative, assailed the impugned order by reiterating the grounds of appeal in the revenue's appeal and pleaded that the order of the Commissioner (Appeals) is contrary to judgment of the tribunal in the case of **Sangam Processors (Bhilwara) Ltd. Vs. Collector of Central Excise, Jaipur , reported in 1994 (71) E.L.T. 989 (Tri.)**, wherein it was held that when at the time of clearances of goods, the incidence of duty had been passed on to the customers, refund u/s 11B will not be admissible even if the assessee has subsequently issue credit notes to the customers to neutralize the incidence of the duty earlier passed on, that this judgment of the tribunal has been upheld by the Apex

Court as civil appeal filed against the same had been dismissed vide order reported in 1999 (112) E.L.T.- A 115(SC), that in view of the above judgment of the Tribunal, as affirmed by the Apex Court and judgment of Larger Bench of the Tribunal in the case of **Grasim Industries (Chemical Division) Vs. Commissioner of Central Excise, Bhopal reported in 2003(153) E.L.T. 694** giving the same ruling that once the incidence of duty paid has been passed on by an assessee to the customer, subsequent issue of credit notes to neutralize to such incidence of duty earlier passed on would not make any difference and the assessee would not eligible for refund, the legal position on this issue is well settled and hence, the Commissioner (Appeals)'s order is not correct.

4. Sh. Udit Jain, Advocate, the learned counsel for the Respondent, pleaded that in this case it is not disputed that though initially the incidence of higher duty paid had been passed on by the respondent to the customers, subsequently by issue a credit notes, the incidence of higher duty and higher price were neutralized and thus the incidence of higher duty earlier passed on stands neutralized, when the incidence of duty whose refund is claimed stands borne by the respondent and the same had not been passed on to the customers, its refund can not be denied, that the commissioner (Appeals), in this regard has rightly relied upon the judgments of the Tribunal in the cases of **Bharat Box Factory Limited Vs. Commissioner of Central Excise, Ludhiana (Supra) and CCE Jaipur Vs. Universal Cylinders Ltd.(Supra)** that while judgment of the Tribunal in the case of **Universal Cylinders Ltd**. stands affirmed by the Apex Court

by the way of dismissed of civil appeal vide order **reported in 2005 (179) E.L.T. (SC)**, the judgement of tribunal in the case of **Bharat Box Factory Limited, stands affirmed by Hon'ble Punjab & Haryana High Court Vide judgement reported in 2005 (218) E.L.T. (355 - PN),** that the same view has been taken by the Hon'ble Rajasthan High Court, in the case **Union of India Vs.** A.**K.Spentex Ltd., reported in 2009 (234) E.L.T. (41) and Hon'ble Madras High Court in the case of Addison & Co. Vs. CCE, Madras reported in 2001 (129) E.L.T. 44 (Mad.)** and also by **Hon'ble Karnataka High Court in the case of Sudhir Papers Limited Vs. CCE, Banglore-I, reported in 2012(276) E.L.T. 304 (Kar.)** and that in view of this, there is no infirmity on the order passed by Commissioner (Appeals).

5. We have considered the submissions from both the sides and peruse the records. The un-disputed facts are that in these cases the respondent had supplied explosives to Coal India Limited and its subsidiaries against the contracts at provisional prices and accordingly the duty has been paid on such provisional prices. There is no dispute that the assessment of duty was also on provisional basis. The refund claims have arisen subsequently, when the prices were finalized and in some cases the final prices were lower then the provisional price. However, there is no dispute at that stage, the respondent have issued credit notes the customers which, if acted upon, would have the effect of neutralizing the higher price along with higher duty charged earlier. The point of dispute is as to whether in view of subsequent issue of credit notes neutralising the higher price along with higher duty earlier

charged, the respondent would be eligible for refund. The Department pleads that in view of the judgment of the tribunal in the case of Sangam Processors (Bhilwara) Ltd., the civil appeal against which has been dismissed by the Apex Court, subsequent issue of credit notes would not make any difference and the respondent would still not be eligible for refund.

6. We find that on this issue Hon'ble Rajasthan High Court in the case of **Union of India Vs. A.K.Spintex Ltd (Supra) in para 5 to 17** of the judgment of appeal has held as under:-

> *5. "Arguing the appeal, learned counsel for the revenue relied upon the judgment of Hon'ble the Supreme Court in Mafatlal Industries Ltd. and Ors., v. Union of India and Ors., reported in 1997 (89) E.L.T. 247 (S.C.)= (1997) 5 SCC 536, and a judgment of the Tribunal in Sangam Processors (Bhilwara)Ltd. v. Collector of Central Excise, Jaipur reported in 1994 (71) E.L.T. 989, to contend, that once the incidence of excise duty has been passed on to the customers, it is the ultimate customer only, who can lay claim for refund, and, that, the system of issue of debit note and credit note, cannot be recognized, to lay the claim for refund.*
>
> *6. On the other hand, learned counsel for the assessee submitted, that the period relates to 11-6-2001, and on 31-7-2001 itself, the refund application has been filed. It was also submitted, that issuance of debit note and credit note, in the commercial transactions, is as good as cash passing, with the result, that burden of excise duty, which was passed on by the assessee, to its customers, was immediately reversed back, and came to be suffered by the assessee only, as a result of which, there was issuance of debit notes and credit notes, and therefore, no interference is required to be made in the order of the learned Tribunal.*

7. After going through the judgments, at the outset, we may observe, that the question is framed on basic misconception, rather on assumption, which is not borne out from the record, inasmuch as, the question apprehends error on the part of the Tribunal, in allowing refund, where incidence of duty has been passed on to the customers initially, and subsequently debit notes were issued by the suppliers of raw material but, no credit notes were credited in the account of the customers by the assessee. We may at once observe, that this is no where, that the authorities below were of the view, that the debit note were not credited in the account of the customers, by the assessee. Rather as is clear from the impugned order of the Tribunal, that it was not disputed on the side of the revenue, that customer had immediately issued the debit notes, and it was never contended, whether before the Assistant collector or the commissioner (Appeals), or the Tribunal, that the necessary credit was not given by the assessee. Obviously, if it is to be assumed, that though debit notes were issued by the customers, but, the assessee did not credited to them, then, obviously, the assessee would not be entitled to claim for any refund, while, herein positive case of the assessee is, that it also issued corresponding credit notes, which fact has also not been disputed any where, before the authorities below.

8. Therefore, the question required to be examined is, as to whether despite exchanges of debit notes and credit notes respectively, between the assessee and its immediate purchaser, the assessee is not entitled to claim refund, so as to find, that the Tribunal was wrong in allowing the refund.

9. On the face of the things itself, it is clear that once the goods are supplied, the property in the goods passes to the purchaser, and seller becomes entitled to the price, and once the debit note is issued by the purchaser, and corresponding credit note is issued by the seller, the price of the goods stand reduced to the extent of debit note and credit note, meaning thereby, that after issuance of debit note and credit *note, the price of goods charged by the seller, from the purchaser, is the price, initially billed, minus the amount of the debit note, and credit note, and therefore, when the debit notes and credit notes are issued and effected, which are not disputed, it cannot be assumed, that incidence of burden of excise duty has been passed on to the purchaser.*

10. 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 Sec. 12B, obviously is a rebuttable one, and the assessee may lead 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, where goods are sold on credit, and while making payment of price of the goods the purchaser may debit the amount, and thus, pay lesser amount to the seller, and if all those facts are shown and proved, the burden placed on the assessee, by Sec. 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 burden on the purchaser, and revenue fails to rebut that evidence, the presumption enacted by Sec. 12B, stands sufficiently rebutted, and cannot survive ad infinitum.

11. The preposition propounded by the Hon'ble Supreme Court in Mafatlal case being preposition No. 3, entitling only the ultimate person, bearing the burden, to be entitled to lay claim for the refund, is obviously, not open to any argument, and is duly respected.

12. The question, then arise is, the question of fact, as to who is an ultimate person, who has borne the burden. Obviously, if it is established by the assessee, that the burden has not been passed on, or has been appropriately reversed, *the ultimate person, who has suffered the burden, would be assessee himself.*

13. If is faced with this situation, that the submission made by the learned counsel for the revenue, was, that in the scheme of things, when the goods are sold or cleared for sale, it has to be assumed, that the burden has been passed on to the purchaser, and this process of issuance of debit note or credit note, cannot have the effect of reversal of passing of the burden, as it is only a paper transaction,to get undue benefit by the assessee.

14. In our view, the stand cannot be accepted. Passing on the burden of excise duty to the next purchaser, cannot be left in the realm of presumption. In cases, where the assessee is able to show, that the burden is not passed on, or it has been reversed, the claim of refund cannot be denied.

15. It is then, contended by the learned counsel for the revenue, that mechanism of issuance of debit note and credit note, if countenanced, it will open flood gates for pilferage of revenue. Firstly, we do not agree with the preposition, that it can open flood gates, inasmuch as, where false, fictitious or shame Debit note and credit note are issued for adjustment, the revenue can very well lead evidence, or can lead evidence in rebuttal. Simply because the revenue fails, and is not able to rebut evidence, it cannot be assumed, that it will open flood gates for pilferage of the revenue. Difficulties may be on either side, but then, that cannot be considered as a ground for interpreting Sec. 12B, in the manner the revenue wants us to interpret it.

16. Thus, in our view, on the facts of the case, it cannot be said, that Tribunal was in error, in allowing the claim of the refund.

17. Consequently, the question is answered, with above modification, against the revenue, and in favour of the assessee. There is no force in the appeal, the same is dismissed."

7. Thus what the Hon'ble Rajasthan High Court in the above judgment has held, is that while in terms of the provision of Section 12B of the Central Excise Act, 1944, once goods are cleared on payment of duty under invoice which mentions some amount as duty, it is presumed that the incidence of that duty has been passed on to the customer and the burden of proof that the incidence had not been passed on to the customer, is on the Assessee, this presumption is a rebuttable presumption and once the assessee produces the evidence in form of issue of credit notes to the customer or any other evidence, the burden shifts to the department and it is for the department to prove that the credit note are bogus and have not been acted upon and once it is proved that the credit notes have been acted upon and the incidence of duty earlier passed on, has been neutralized, the refund would be admissible. We find that the same view have been taken by the **Hon'ble Karnataka High Court in the case of Sudhir Papers Limited Vs. CCE Commissioner of Central Excise Bangalore-I, reported in 2012 (276) E.L.T. 304 (Kar.).** We also take note of the fact that tribunal in the case of **CCE, Jaipur Vs. Universal Cylinders Limited (Supra)** has taken the same view that when initially the goods have been supplied at a provisional price which subsequently had been reduced and when the higher price initially charged along with higher duty had been adjusted by the assessee from the subsequent supplies made, it can not be said that the incidence of duty has been passed on by the assessee to the customer. This judgment of the tribunal has been affirmed by the Apex

Court by dismissal of the Civil appeal filed against the same vide Order Reported in 2005 (179) E.L.T-841.

8. Thus from the above discussion, the legal position which emerges is that though Section 12B provides for the presumption that once the goods have been cleared on payment of duty under invoice which mentions some amount charged as duty, it shall be presumed that the incidence of duty has been fully passed on by the assessee to the customer, this is a rebuttable presumption and if the assessee produces evidence showing that by the issue of credit note to the customer subsequently or by charging lesser price in respect of subsequent clearances, the incidence of higher duty earlier charged have been neutralized, burden would then shifted to the Revenue to prove that the claim of the assessee is not correct and if the assessee's claim is found to be correct, the refund claim would be admissible. In the impugned order the Commissioner (Appeals), while relying upon the tribunal's judgments in the case of **Bharat Box Factory Limited (Supra) and Universal Cylinders Ltd.(Supra),** has not discussed the factual aspect as to whether the credit notes issued by the respondent were genuine and had been acted upon or not. If the credit notes are genuine and had been acted upon, resulting in neutralising the higher incidence of duty earlier passed on, the refund claim would no longer be hit by the principle of unjust enrichment. The impugned order is, therefore, set aside and the matter is remanded to the original adjudicating authority for de-novo

adjudication, keeping in view above mentioned observations and also keeping in view the judgments of **Hon'ble Rajasthan High Court in the case of Union of India A.K.Spintex Ltd.** The Revenue's Appeals stands disposed of, as above.

(Order pronounced in the open court on 29.11.12)

(Justic Ajit Bharihoke)
(President)

(Rakesh Kumar)
Member(Technical)

S.Kaur