CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL,

West Block No.2, R.K.Puram, New Delhi

COURT-IV

Date of hearing: 25.08.2017

Appeal No. E/1575/2010-EX[SM]

[Arising out of the Order-in-Original No. 314/BPL/2009 dated 13.08.2009, passed by the Commissioner of Central Excise, Bhopal]

M/s. Birla Corporation Ltd. … Appellant

Vs.

C.C.E. Bhopal ... Respondent

Appearance:
Present Ms. Rinki Arora, Advocate for the appellant
Present Shri Ubhav Sengraj, DR for the respondent

Coram: Hon'ble Mr. Ashok Jindal, Judicial Member

FINAL ORDER No. 56347/2017

Per Ashok Jindal:

This appeal is filed by the appellant against the impugned order wherein refund claim has been rejected on the ground that the appellant has failed to pass the bar of unjust enrichment.

2. The brief facts of the case are that the appellant is a manufacture of cement and clearing the same on payment of duty at the rate of 12 % vide notification no. 4/2006 dated 01.03.2006. The rate of duty was reduced to 8% but appellant continued to pay the duty at the rate of 12%. On realization, the appellant has paid the excess duty they filed the refund

claim. The refund claim was rejected and it was held that the appellant has failed to pass the bar of unjust enrichment. Therefore, refund claim was rejected. Aggrieved from the said order the appellant is in appeal.

3. The Ld. Counsel for the appellant submits that the appellant has produced the certificate issued by Chartered Accountant stating that duty incidence has not been passed on to the buyer and they are entitled for the refund claim as they pass the bar of unjust enrichment.

4. It is also the contention of the ld. Counsel for the appellant that as they are selling their goods on MRP therefore if duty is 8% or 12% the MRP will not change. Therefore, they have not collected any amount from the buyer towards duty. To support this contention she relied on the case of ***Girish Foods and Beverages (P) Ltd. Vs. CCE Pune2007 211 ELT 388.***

5. On the other hand, the Ld. DR drew my attention to the invoices issued by the appellant wherein it was clearly mentioned that duty has been paid by the appellant at the rate of 12%. Therefore, he prayed that as it is evident from the invoices itself that they have recovered duty at the rate of 12% from the buyer and have not produced any evidence that the said incidence of duty has not been passed on the buyer. Therefore, refund claim is rightly rejected.

6. Heard the parties. Considered the submissions.

7. It is admitted fact that after notification no. 4/2006 dated 01.03.2006, wherein rate of duty was reduced from 12 to 8%,

the appellant kept paying duty at the rate of 12% which is evident from the invoice itself. It is the contention of the appellant that from selling goods at MRP and all duties are inclusive. I have gone through the invoice which is reproduced here:

TRIPLICATE FOR ASSESSEE

BIRLA CORPORATION LIMITED
MP BIRLA GROUP

Birla Corporation Limited
(Cement Division) Satna
Factory:- SATNA CEMENT WORKS
P.O. BIRLA VIKAS, SATNA - 485 005 (M.P.)
Tel.: (07672) 257844-847, Fax : (07672) 257456, 257576 Gram "CEMENT"
(Regd. Office : Birla Building, 9/1, R.N. Mukherjee Road, Kolkata 700 001)

BIRLA CEMENT KHAJURAHO

DELIVERY CHALLAN - CUM - EXCISE INVOICE

Our Sales Tax TIN No.
MPVAT No.: 23757000140 w.e.f. 15.11.79
CST No. : 23757000140 w.e.f. 15.11.79

EXPORTER'S CODE No.:
IEC No. : 0288003926
BIN NO.: AABCB2075JFT001

(Invoice for removal of Excisable goods from factory on payment of duty) (Rule : 11 of CER, 2002) CEMENT HOME CONSUMPTION

Challan No. H.CS18365 Date : 07/12/2008
SL. No. : CMT/BCL : 0018365 Date: 07/12/2008

DI No. 906534 Date : 06/12/2008
Order Entry No. 5 Date : 27/09/2008
Order No. : NIL Date : 26/09/2008

Excise Range : R-I, Satna, C.R. Building, Rajendra Nagar, Satna (M.P.)
Excise Division : Satna, C.R. Building, Rajendra Nagar, Satna (M.P.)
Excise Commissionerate : 48, Administrative Area, Arera Hill, Hoshangabad Road, Bhopal

Code, Name & Address of Consignee : P0233
PIYUSH TRADER
KRISHI UPAJ MANDI
JABALPUR/MP
Jabalpur

- Name of excisable commodity: Portland Pozzalona Cement
- Tariff Heading / Sub Heading No.: 2523/2523 29 30
- No. & Date of Notification Under concessional rates of duty is claimed
- ECC No. - AABCB2075JXM010

Document Preparation Date 07/12/2008 Time 00: 17: 31
Removal of Goods Date 07/12/2008 Time
Time in Words Zero ... 0107

Description of Goods Despatched
Variety: BIRLA CEMENT SAMRAT
IS No.: PPC-BS
Quantity: 1489 - 1991
Packed in: 10.0000 M.T.
(Average Contents per bag - 50 kgs) 200 Bags
Bag Type: HDPE
Mode of Transport: ROAD
Booking Station: BCSW, SATNA
Destination: JABALPUR
VIA / JABALPUR
Distance K.M.
FORM 31 NO
"note:- Local goods for Satna (MP) Entry Tax of MP not paid"
Total Approx. Value : Rs. /M.T.
(Inclusive of packing charges & excise duty) 17085.00/- @1708.50/-
Transporter : AMAR JAIN TRANSPORT AGEN
Bilty / R.R. No. : 1837
Bilty / R.R. Date: 06/12/2008
Wagon Type
Weight Chargesd Qtl.
Rate Per Qtl.
Rail Freight (Rs)
Surcharge per Qtl.
Chl. No. H.CS18365 00:02
ISO No.
ISSUE No. : 3 JAN' 97
XXXXX 02-13Aug-08
HANDLE WITH CARE. ANY CEMENT COMING OUT WOULD POLLUTE ENVIRONMENT.
THIS IS HARMFUL FOR YOU AND OTHERS.

- Total Price of Goods: Based on RSP(MRP)Rs.190 declared on bag
- Deductions under Section 4 of the Act: for ED Calculation
- Assessable value per M.T./ Rs 3800/00
- Total assessable Value Rs. 38000.00

Rate of Excise Duty (Basic) Rs./M.T. 350 +02% EdC 7 +1% SHEC 3.5
Total Duty Payable (Rs.) 3500 EdC 70 SHEC 35
(In words) Rupees THREE THOUSAND FIVE HUNDRED ONLY+ SEVENTY ONLY+ THIRTY-FIVE ONLY

Truck/ wagon No.	CC of Wagon	Tare of Wagon	Quantity M.T.	Quantity Bags
MP19A /7791			10.0000	200

Certified that the particulars given above are true and correct and the amount indicated represents the price actually charged and that there is no flow of additional consideration directly or indirectly from the buyer.

Received Delivery Challan & Goods as above

(Name & Signature)

Authenticated
Pre Authentication is exempted by the Commissioner of Custom & Central Excise, Raipur vide his letter No. IV (18) 30-101/2001/CX/TECH/763/Dated 7-1-2002

(Prepared By)

Terms & Conditions of delivery:
1. Our responsibility ceases after delivery of Goods to carriers for any shortage/damages.
2. All the disputes are subject to Satna Jurisdiction
3. Sales Tax and other taxes shall be charged as applicable.

For BIS Certification details see website www.bis.org.in

For Birla Corporation Limited
(Cement Division) Satna
RAJESH KR CHOUDHARY
SR.MGR (EXCISE&SALES TAX)
(Signature of the Licencee or his Authorised Agent)

R. K. CHOUDHARY
Senior Manager (Excise & Sales Tax)

8. The invoice clearly shows that appellant has paid duty at the rate of 12%. Although the appellant is selling goods on MRP basis but duty payable has been shown by the appellant at the rate of 12%. The contention of the ld. Counsel that they are selling goods at MRP and all duties and taxes are inclusive but from the invoice it is clear that duty collected from the buyer has been shown separately. In that circumstances, duty incidence has been passed on the buyer.

9. Moreover, the Ld. Counsel relied on the decision in the case of ***Girish Foods and Beverages (P) Ltd. (Supra)***. The fact of the said case are that the assessee was availing SSI exemption and on persuasion of the department they paid duty in protest and claim refund of duty paid in protest on the ground that they are selling goods on MRP. The facts of the said case are not applicable to this case as in this case duty has been paid by the appellant voluntarily on the understanding that they are required to pay duty at the rate of 12%. Further, appellant has failed to produce any evidence on record that buyers have not availed Cenvat Credit on duty shown in the invoice. In that circumstances appellant has failed to pass the bar of unjust enrichment.

10. Therefore, I do not find any infirmity in the impugned order. Same is upheld. Appeal filed by the appellant is dismissed.

[Dictated and Pronounced in the open court]

(Ashok Jindal)
Judicial Member

Bhanu