

**IN THE CUSTOMS, EXCISE & SERVICE TAX
APPELLATE TRIBUNAL
WEST ZONAL BENCH AT MUMBAI
COURT No. I**

APPEAL No. E/1020/2009

(Arising out of Order-in-Appeal No. P-I/VSK/165/2009 dated 29.6.2009 passed by Commissioner of Central Excise (Appeals), Pune-I)

Mahindra Engg. & Chemical Products Ltd.

Appellant

Vs.

Commissioner of Central Excise, Pune-I

Respondent

Appearance:

Shri Mayur Shroff, Advocate, for appellant

Shri A.B. Kulgod, Assistant Commissioner (AR), for respondent

CORAM:

Hon'ble Dr. D.M. Misra, Member (Judicial)

Hon'ble Mr. Sanjiv Srivastava, Member (Technical)

Date of Hearing: 14.6.2018

Date of Decision: 13.7.2018

ORDER No. **A/86901/2018**

Per: Sanjiv Srivastava

The appeal is directed against the order in appeal dated 29.6.2009 of the Commissioner of Central Excise (Appeal) Pune – I upholding the order in original dated 17.03.2009. Vide the said order in original a Refund of Rs 11,03,924/- (Rupees Eleven Lakhs Three Thousand Nine Hundred and Twenty Four only) has been sanctioned under the provisions of Section 11B of

Central Excise Act, 1944 but ordered to be credited to Consumer Welfare Fund.

Appellant had claimed the refund pursuant to the order of Commissioner (Appeal) Pune – I. The issue involved here is one of suo motto adjustment of the excess payment against the short payment of Central Excise duty during the period from January 2002 to November 2006 which was allowed by the Commissioner (Appeal) Pune – I vide his order P-1/168/2008 dated 25.08.2008. At the time of examination of the refund claim Appellant were asked to submit the details of the accounting treatment of the said amount in their books of account. The appellant intimated that the said amount was treated as expenditure in their profit and loss account for the relevant period. After issuing a notice, the adjudicating authority has allowed the refund claim of the party but has credited the same to consumer welfare fund. In Appeal Commissioner (Appeal) has upheld the order of adjudicating authority,

3.0 Arguing for the Appellant, Shri Mayur Shroff (Advocate) submitted:

i. The refund claimed by them is not of the duty but of the amounts of deposited by them during the course of investigation. Hence when the matter has been

disposed of in their favour by the Commissioner (Appeal), the amounts deposited should be automatically refunded to them without treating them as a refund under section 11B of the Central Excise Act, 1944, in view of the decisions of various authorities, namely-

Commissioner Central Excise Pune Vs Rocket Engineering Corporation Ltd. [2014 (306) ELT 33 (BOM)]
Universal Heat Exchangers Ltd. Vs Commissioner of Central Excise Coimbatore [2015 (329) ELT 936 (T)]

Jayant Glass Industries (P) Ltd Vs Commissioner Central Excise Kolkata [2003 (155) ELT 188 (T-LB)]
appeal against this order has been disposed of by the Apex Court in Commissioner Central Excise Hyderabad Vs ITC Ltd [2005 (179) ELT 15 (SC)];

ii. It has been held by various authorities that doctrine of unjust enrichment would not apply to refund of pre-deposits. In Commissioner Customs (Imports) Raigad Vs Finacord Chemicals (P) Ltd [2015 (319) ELT 616 (SC)], the Apex Court has set aside the decision of Bombay High Court in case of United Spirits Vs Commissioner of Customs (Import) Mumbai [2009 (240) ELT 513 (BOM)] wherein it has been held relying on the decision of Apex Court in case of Shaakari Khand Udyog Mandal Vs Commissioner [2005 (181) ELT 228 (SC)] that bar of unjust enrichment would be applicable to deposits made on the basis of the directions.

iii. Bombay High Court has in case of Suvidhe Ltd, Vs Union Of India [1996 (82) ELT 177 (BOM)] held that doctrine of unjust enrichment can never be applied in case of the refund of amounts pre-deposited in terms of Section 35F of the Central Excise Act, 1944. The SLP filed by the department against this order has been dismissed by the Apex Court as reported in 1997 (94) ELT A 159 (SC)

iv. In respect of the deposits made during the investigation following authorities have settled the law-
Commissioner Central Excise Chennai II Vs UCAL Fuel System Ltd [2014 (306) ELT 26 (Mad)]

Commissioner Central Excise Coimbatore Vs Pricol Ltd [2015 (320) ELT 703 (Mad)]

Commissioner Central Excise Lucknow Vs Eveready Industries India Ltd [2017 (357) ELT 11 (All)]

Commissioner of Customs Vs Mahalaxmi Exports 2010 (258) ELT 217 (Guj)]

4.0 For the revenue Shri A B Kulgod, Authorized Representative, reiterated the order of Commissioner (Appeal) and submitted that:-

i. In the present case the refund claim made is under section 11B for the refund of the amounts deposited during investigation and not of the amounts pre-deposited under section 35F.

- ii. Bar of unjust enrichment is applicable in respect of all the refund made under Section 11B. In terms of Sub Section (3) to Section 11B it has been specifically provided that irrespective of any decision of a court or an appellate authority, no refund shall be granted contrary to the provisions of section 11B.
- iii. Appellant has not been able to negate the statutory presumption to effect of passing on the burden of the amount paid on to the consumer.
- iv. Since the amount claimed as refund has been shown on the expenditure side in Profit and Loss Account of the Appellant the same has been recovered from the customer and hence the refund claim though sanctioned has been rightly credited to the consumer welfare fund.

5.0 Have considered the submissions made by both the sides.

6.1 Main thrust of the arguments advanced by the Appellant, is to effect that the amounts deposited by them were only in nature of deposits and not duty and hence the refund of the said amount should be not be governed by the said section 11B and doctrine of unjust enrichment should not apply in their case. It is also an admitted fact that Appellant has claimed the deduction of the amount claimed as refund by them as expense in

his profit and loss account, i.e. as a deduction under section 43B of the Income Tax Act, 1961

6.2 Section 43B of the Income Tax Act, 196 is reproduced below:

Certain deductions to be only on actual payment.

43B. *Notwithstanding anything contained in any other provision of this Act, a deduction otherwise allowable under this Act in respect of—*

- (a) ***any sum payable by the assessee by way of tax, duty, cess or fee, by whatever name called, under any law for the time being in force, or***
- (b) *any sum payable by the assessee as an employer by way of contribution to any provident fund or superannuation fund or gratuity fund or any other fund for the welfare of employees, or*
- (c) *any sum referred to in clause (ii) of sub-section (1) of section 36, or*
- (d) *any sum payable by the assessee as interest on any loan or borrowing from any public financial institution or a State financial corporation or a State industrial investment corporation, in accordance with the terms and conditions of the agreement governing such loan or borrowing, or*
- (e) *any sum payable by the assessee as interest on any loan or advances from a scheduled bank ³¹[or a co-operative bank other than a primary agricultural credit society or a primary co-operative agricultural and rural development bank] in accordance with the terms and conditions of the agreement governing such loan or advances, or*
- (f) *any sum payable by the assessee as an employer in lieu of any leave at the credit of his employee, [or]*
- (g) *any sum payable by the assessee to the Indian Railways for the use of railway assets,*

shall be allowed (irrespective of the previous year in which the liability to pay such sum was incurred by the assessee according to the method of accounting regularly employed by him) only in computing the income referred to in section 28 of that previous year in which such sum is actually paid by him.

In terms of the said section amounts payable by way of tax, duty etc., can be claimed as deduction only when the said amounts are paid. Thus the essential character of the amounts deposited as Central Excise duty shall be that of the duty when the same is paid and claimed as deduction under the Section 43B of the Income Tax Act, 1961.

6.3 Hon'ble Apex Court has in the case of Commissioner Of Income Tax II vs M/S Modipon Ltd [AIR 2018 SC 182] was considering the nature of deposits made in PLA (Personal Ledger Account). After considering the submissions their Lordships concluded that the nature of deposits made in PLA too are also Central Excise duty for the purpose of Section 43B of the Income Tax Act, 1961. The relevant paras of the decision are reproduced below:

“3. The question involved in all the appeals is the same and may be formulated as hereunder:

“Whether the assessee is entitled to claim deduction under Section 43B of the Income Tax Act, 1961 in respect of

the excise duty paid in advance in the Personal Ledger Account ("PLA" for short)?"

12. The above discussions, coupled with the peculiar features of the case, noticed above i.e. consistent practice followed by the assessee and accepted by the Revenue; the decisions of the two High Courts in favour of the assessee which have attained finality in law; and no contrary view of any other High Court being brought to our notice, should lead us to the conclusion that the High Courts were justified in taking the view that the advance deposit of central excise duty constitutes actual payment of duty within the meaning of Section 43B of the Central Excise Act and, therefore, the assessee is entitled to the benefit of deduction of the said amount."

6.4 Scheme of Section 11B, also treats the deposits in PLA, as Central Excise Duty, and provides for the refund of any amounts from PLA (Account Current) only through the route of the said section. In terms of Section 11B(2) refunds claimed from the deposits in PLA are not susceptible to the doctrine of unjust enrichment. Subsection 11B(2) is reproduced below:

"(2) If, on receipt of any such application, the Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise is satisfied that the whole or any part of the duty of excise and interest, if any, paid on such duty paid by the applicant is refundable, he may make an order accordingly and the amount so determined shall be credited to the Fund :

Provided *that the amount of duty of excise and interest, if any, paid on such duty as determined by the Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise under the foregoing provisions of this sub-*

section shall, instead of being credited to the Fund, be paid to the applicant, if such amount is relatable to -

(a) rebate of duty of excise on excisable goods exported out of India or on excisable materials used in the manufacture of goods which are exported out of India;

(b) unspent advance deposits lying in balance in the applicant's account current maintained with the Principal Commissioner of Central Excise or Commissioner of Central Excise;

(c) refund of credit of duty paid on excisable goods used as inputs in accordance with the rules made, or any notification issued, under this Act;

(d) the duty of excise and interest, if any, paid on such duty paid by the manufacturer, if he had not passed on the incidence of such duty and interest, if any, paid on such duty to any other person;

(e) the duty of excise and interest, if any, paid on such duty borne by the buyer, if he had not passed on the incidence of such duty and interest, if any, paid on such duty to any other person;

(f) the duty of excise and interest, if any, paid on such duty borne by any other such class of applicants as the Central Government may, by notification in the Official Gazette, specify :

Provided further that no notification under clause (f) of the first proviso shall be issued unless in the opinion of the Central Government the incidence of duty and interest, if any, paid on such duty has not been passed on by the persons concerned to any other person.”

6.5 Accordingly all the amounts deposited other than those deposited as per the specific direction of the court or appellate authority in terms of Section 35 F are nothing but the payment towards the duty and all the

claims of the refund of such amount shall be governed by the provisions of Section 11B of the Central Excise Act, 1944. Hon'ble Supreme Court has in case of *Mafatlal Industries Ltd.* [1997 (89) ELT 247 (SC)] observed in the para 99 as under :-

“By virtue of sub-section (3) to Section 11B of the Central Excise and Salt Act as amended by the aforesaid Amendment Act, and by virtue of the provisions contained in sub-section (3) of Section 27 of the Customs Act, 1962 as amended by the said Amendment Act, all claims for refund (excepting those which arise as a result of declaration of unconstitutionality of a provision whereunder the levy was created) have to be preferred and adjudicated only under the provisions of the respective enactment. No suit for refund of duty is maintainable in that behalf. So far as the jurisdiction of the High Courts under Article 226 of the Constitution or of this Court under Article 32 is concerned, it remains unaffected by the provisions of the Act”.

6.6 Learned Counsel for Appellant tried to draw the parallel in respect of the amounts deposited by him during the course investigation with the amounts pre-deposited as per the orders of the Court/ Appellate Authority. He argued that various Courts and Appellate authorities have held that refund of pre-deposit should be made irrespective of doctrine of unjust enrichment. He also relied on the para 5.2 of the CBEC Circular No 984/08/2014-CX dated 16th September 2014, which reads as follows:

“5.2 Pre-deposit for filing appeal is not payment of duty. Hence, refund of pre-deposit need not be subjected to the process of refund of duty under Section 11B of the Central Excise Act, 1944 or Section 27 of the Customs Act, 1962. Therefore, in all cases where the appellate authority has decided the matter in favour of the appellant, refund with interest should be paid to the appellant within 15 days of the receipt of the letter of the appellant seeking refund, irrespective of whether order of the appellate authority is proposed to be challenged by the Department or not.”

6.7 The said argument of the Counsel, is not tenable in view of the clear distinction between the pre-deposit and payment of duty. The pre-deposit made as per the direction of the court or appellate authority is nothing but a statutory requirement for hearing the appeal and payment made towards the duty are for discharge of statutory liability in terms of section 35F of the Central Excise Act, 1944. The liability for the payment of pre-deposit is created under Section 35F of the Central Excise Act, 1944 and not under section 3 hence both have been treated differently. While an action lies for recovery of the duty that has not been paid by resorting to provisions of section 11A and 11 of the Act, no similar action lies for recovery of pre-deposit. In case the court or appellate authority finds that the amount required to be pre-deposited for hearing the appeal has not been paid, they can refuse to hear the appeal, but cannot proceed to recover the said amount of pre-

deposit. Further where a statutory interest has been provided for delay in payment of duty the same is not true for delay in deposit of pre-deposit. All the above distinctions clearly make the pre-deposit distinguishable from payment of duty. Para 5.2 of the CBEC Circular states that "*Pre-deposit for filing appeal is not payment of duty.*" In the present case when in terms of the Apex Court decision the deposits made were towards the payment of the duty the argument made by the Appellant to give similar treatment as the pre-deposit to it cannot be acceded to. Thus decisions relied upon by the counsel which are in relation to refund of pre-deposit are clearly distinguishable and not applicable to present case.

7.0 Learned counsel argued that in any case he has not passed on the burden of the amounts deposited by him on the customers and has borne the same. In their case the final product, cable jointing kit is exempt from payment of Central Excise duty. The duty is being paid by them on the dutiable intermediate products, after determining the value of same on cost construction basis using CAS-4. Since these intermediate products have been consumed captively, he could not have passed on the burden of duty. He stated that in this case the amounts claimed as refund were not charged

on the invoice and were deposited by him during the course of investigation. Since these amounts were not charged on the invoice and paid subsequently this amount cannot be said to be recovered from the consumer and hence refund should have been allowed in his favour. He also relied upon the certificate from Chartered Accountant in his support. Assistant Commissioner has dealt the said submissions in para 9.3 & 9.4 of his order (reproduced below)

“9.3 Above argument of the assessee indicate that in their view “duty” should passed on to the buyers directly/ explicitly, and since in their case duty paid components are captively consumed and final product is not excisable where “duty’ can not be charged on the buyers at all hence the duty paid on captively consumed components has to be borne by them only. But this line of argument is not acceptable because

- (i) *Section 11B & 12B uses phrase “incidence of duty” which means it is the burden of duty and not the “duty” as such – is required to be shown to have not passed on.*
- (ii) *At the same time it has also to be proved that the burden of duty has not been passed **directly or indirectly**. This position has been upheld in following case law-*
 - a. *Solar Pesticides [2000 (116) ELT 401 SC (Para 17)]*
 - b. *DCW Ltd [2006 (072) ELT 0130 (GUJ-HC)(Para 23 & 24)]*
- (iii) *It is already settled legal position that bar of unjust enrichment is also applicable to captive consumption-*
 - a. *Solar Pesticides [2000 (116) ELT 401 SC (Para 20)]*

- b. DCW Ltd [2006 (072) ELT 0130 (GUJ-HC)(Para 21]
- (iv) *The Act provides for – ‘**not passed on...**’ and it is different from ‘**not recovered..**’ It implies that you may not recover the duty explicitly from the buyers but while determining the price of final product (cable jointing kit which is not excisable) every prudent business man shall take into to account the duty suffered on components/ intermediate products in process of manufacturing which amounts to passing on the incidence of duty to others/ customers. In this regard I rely upon following case laws*
- a. Ballarpur Industries [2005 (184) ELT 67 (Tri-Del) (Para 6)]
- b. S Kumar Ltd Vs CCC Indore [2003 (153) ELT 217 (Tri LB)]
- (v) *Honourable High Court’s judgement in case of AC C EX vs Bata Shoe Co Pvt Ltd., [2004 (1690) ELT 3 (Cal)] is squarely applicable to the facts of the case where it has been held that where there is no direct collection from customers but duty paid under compulsion, must have reflected in ultimate cost of finished goods, clause of unjust enrichment applicable.*

9.4. C.A. Certificate alone is not sufficient evidence. It has been held in various judicial pronouncements. Some are mentioned below-

- a. Hanil Textile vs CCE Raigad [2008 (225) ELT 117 (Tri-Mum) Para 2)]
- b. Kirloskar Oil Engine Ltd Vs Commissioner Of Customs Mumbai [2004 (174) ELT 54 (Tri Mum) (Para 5 & ^)]
- c. CC Mumbai Vs Eltech [1999 (112) ELT 877 (Tri-Mum)]”

8.0 It has also been admitted by the Appellant vide his letter dated 26.12.2008 that these payments have been reflected as expenses during the relevant years in their books of account (Profit and Loss account). Tribunal has in case of Rajasthan Spinning & Weaving Mills Ltd vs Commissioner Central Excise Jaipur [2006 (194) ELT 254 (T)] held that-

“any amount paid by the appellants or any company, is in the form of expenses, and is generally accounted as an expenses in their Profit and Loss Account. Costing of the products of the company takes into consideration all the expenses charged to expense in their Profit and Loss Account and are appropriated as overhead. The appellants are also unable to produce any Chartered Accountants certificate to contrary Though their products were chargeable to specific rate of duty, that does not mean that the price of their products could not have included this amount. On the contrary, sales price could have been determined by them considering these expenses.

I feel that it is question of expenses, which is debited to Profit and Loss Account and appropriated to sales price of the product. They may not have collected this amount from the customer, but definitely would have loaded on the value of the without quoting specifically. Since the appellant were unable to produce any documentary evidence, in any form that these expenses were not recovered from any customer, I am unable to agree with the appellant, hence the appeal is rejected and adjudication order is upheld. ”

9.0 The refunds under Indirect taxes have to cross the bar of ‘Unjust Enrichment’. If the amount of Tax/Duty sought to be refunded has been recovered from the

buyers, then the claimant is not entitled to refund. Even if the such amount of tax, though not directly recovered from the client, but has been charged to expenses in the books of accounts, then also it is consistently held that the claimant has indirectly recovered the tax and hence failed to cross the bar of Unjust Enrichment. The only possible way to pass the bar of Unjust Enrichment is that the disputed tax /duty is not expensed off in the accounts, but booked as 'Receivables'. Tribunal has in case of Philips Electronics India Ltd Vs. Commissioner of Central Excise, Pune I [2010 (257) ELT 257(Tri-Mum)].

"13. The appellant produced a certificate dated 10.2.2004 of their Chartered Accountant in support of their claim for refund of duty of Rs 17,45,42,335/-. The C.A. certified that the assessee had paid the said amount of duty @10% (20 - 10%) by raising excise invoices for the period from 13.5.93 and that the amount had not been recovered from their customers. It was further certified that the amount had been shown as expenses in the Profit and Loss account for the aforesaid period whereas it is contended by the assessee that they collected cum-duty prices from their customers and that the prices at which the customers sold the goods were also cum-duty prices. The C.A.'s certificate of non-recovery of duty by the assessee from their customers loses its probative value (if any) in the face of the above contention of the assessee. The above refund claim was filed by the appellant as manufacturer of the goods. Therefore, if the amount was shown as expenses in their Profit and Loss account for the relevant period, as certified by the C.A., it must have been factored into the price of the goods manufactured by them

which situation would fit well in the contention that the goods were sold at cum-duty prices by the assessee and their customers and consequently the burden of duty would be deemed to have been passed on to the buyers of the goods. As already found, the appellant has failed to rebut this presumption."

10. Appeal filed is accordingly rejected.

(Pronounced in court on 13.7.2018)

(Dr. D.M. Misra)
Member (Judicial)

(Sanjiv Srivastava)
Member (Technical)

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