

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
WEST ZONAL BENCH AT MUMBAI**

APPEAL NO.E/1275/2009

(Arising out of Order-in-Appeal No. YDB/35/M-III/2009 dated 17.07.2009
passed by the Commissioner of Central Excise (Appeals), Mumbai Zone II)

M/s. Kores India Ltd.

: Appellant

1st Pokhran Road,
Thane (W) 400 606

VS

Commissioner of Central Excise, Mumbai III

: Respondent

3rd & 4th Floor, Vardaan Centre,
MIDC, Wagle Industrial Estate,
Thane (W) Mumbai 400 604

Appearance

Shri Vipin Kumar Jain, Sr. Advocate for Appellant

Shri Sanjay Hasija, Supdt. (A.R.) for Respondent

CORAM:

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

Hon'ble Shri P Anjani Kumar, Member (Technical)

Date of hearing : 27.02.2019

Date of decision : 21.06.2019

ORDER NO. A/86156/2019

Per : P Anjani Kumar, Member (Technical)

The Appellants, M/s. Kores India Ltd, have filed a refund claim of Rs.63,90,541, on finalization of provisional assessment for the period 1992-1997, involving deduction of various post manufacturing expenses/ abatement from the wholesale sale price. Assistant Commissioner allowed its claim for refund but transferred the amount to the Consumer Welfare Fund holding that appellant has passed on

the incidence of duty to its customers. On an appeal, Commissioner (Appeals) modified the order and held that the refund which is relatable to the depot sales was not liable to be credited to the Consumer Welfare Fund and the same was to be granted to the Appellant. On further appeal filed by the Revenue, this Hon'ble Tribunal, vide order CII/1811-12/WZB/2003 dated 08.07.03 upheld the order passed by the Assistant Commissioner. On further challenge by the appellant, High Court of Bombay set-aside the order and remanded the matter back to the Assistant Commissioner for ascertaining whether the refunds arising on finalization of provisional assessments have already been recovered by the Appellant from the customers or not. The Hon'ble High Court held that it will be open to the Appellant to adduce additional evidence, if any, in support of its contention that the duty element has not been passed on to the customers in respect of the goods cleared on provisional assessment during the period from 1992 to 1997. In the remand proceedings the Assistant Commissioner and on appeal the confirmed the original order. Commissioner (Appeals) vide the impugned order, YDB/35/M-III/2009 dated 17.07.09 has upheld the order of Assistant Commissioner.

2. Learned counsel for the appellants, Shri Vipin Kumar Jain, submits that presumption that the incidence of duty has been passed on to the customers is a rebuttable. Hon'ble High Court held that it will be open to the Appellant to adduce additional evidence, if any, in support of its contention that the duty element has not been passed on to the customers. The Appellants placed on record Cost Accountant's certificates. However, both the lower authorities have failed to take cognizance of the certificates. The Assistant Commissioner has given a finding as under (para-21.3)

"From the 7 sample invoices submitted by the assessee with corresponding commercial invoices it is seen that they have recovered the central excise duty from their customers. The assessee, even after giving them a reasonable and fair opportunity have not been able to produce any evidence of having not recovered the said amounts or having issued credit notes to their customers."

Commissioner (Appeals) on page 25 of the order records that "*The said invoice does not indicate the amount of duty paid separately as required under Section 12A of the Act*".

The above conclusion is based on incorrect appreciation of facts; none of the invoices issued to the customers show any recovery of excise duty from the Customers; reference to the duty paid on the goods in question appears only in the excise invoice which is a document issued from the factory to the company's own depot; none of the excise invoices issued by the Appellant show that any amount of duty was to be recovered from the customer; Section 12 A declaration was not made by the Appellant for the simple reason that no part of excise duty was being charged to the customer apart from the price. Further, Commissioner (Appeals) has gone by an entirely different approach and concluded that the sale price has to be deemed to be including the duty by virtue of the presumption in Section 12B, no refund was admissible. The presumption under Section 12B is a rebuttable in the light of the specific directions of the Hon'ble Bombay High Court and authorities below were duty bound to examine the additional evidence produced by the Appellant by way of Cost Accountant's certificates.

2.1. Learned counsel further submits that the order of the Commissioner (Appeals) makes no effort to deal with the submissions made by the Appellant (paras 10 to 13 of written submissions dated 13.02.2008). Cost Accountants' certificate proves beyond doubt that the selling price charged by the Appellant was not dependent on the cost of production but was entirely market driven on the basis of demand and supply. Commissioner (Appeals) failed to follow Hon'ble Supreme Court's decision, in the case of State of Rajasthan v. Hindustan Copper reported in (1998) 9 SCC 708, that the selling price of the product being market driven prices, the presumption under Section 12B stood rebutted by the mere establishment of this circumstance. Section 12B of the Act, nowhere states that burden should be discharged by providing documentary evidence alone. Appellant do not sell any goods to the customers from

the factory gate; all clearances from the factory gate are to their depots. Though the price charged to the customers was all inclusive, no reimbursement towards excise duty was ever sought from the customer in the invoices. No part of the duty paid formed part of the price at which the goods were ultimately sold to the customer. Therefore, as the same was to be borne by them and not to be recovered, the Appellant did not indicate on any of its excise invoices issued at the time of clearance of goods any amount of duty which was to form part of the price at which the goods were to be sold. Thus, requirement of Section 12A stood satisfied. It cannot be concluded, on the basis that once the amount of duty is shown in the excise invoices, the same is deemed to have been passed on. The Appellant rebutted the presumption, under Section 12B, by placing on record the Cost Accountant's certificates.

2.2. Learned counsel submits that costing is not based on cost plus profit method; selling prices of the Appellant's products are market driven and are independent of the amount of duty charged; appellant does not recover anything from the customers towards duty; whatever be the duty liability, it is borne by the Appellant; even if a contrary view is taken, the price of goods can be regarded as inclusive of only such duty which is legally due and payable by law. Subsequent to the finalization of provisional assessment, if the amount of duty already paid by the Appellant is more than what was actually payable, the Appellant is entitled for refund of excess amount of duty paid; if the amount of duty paid provisionally is lesser than what is payable finally, the Appellant is required to pay the difference amount of duty. In the first case, the Appellant receives the amount which was part of its profit but foregone initially on account of excess payment whereas in the latter case, foregoes a part of its profit at a later stage since, initially the amount of duty that was lesser. In either case, the difference on account of excess payment of duty or short payment is borne by

the Appellant alone and no part of it is passed on to the customers.

2.3. Counsel for the appellant submits that under the doctrine of unjust enrichment, there is a bar in recovering the amount of duty from the customers as well as claiming the same as refund once again from the Government, resulting in unjustly enriching oneself. The bar therefore is on “**unjust**” enrichment and not applicable to all kinds of refund. In the present case, the duty that is paid excess by the Appellant is on its own account, which is subsequently claimed by as refund. The question of Appellant becoming unjustly enriched does not therefore, arise. Selling price is purely market driven and is not just cost plus profit as established from the Cost Accountant certificates. The said certificate clearly indicates that the pricing of the Appellant is market driven; selling price per unit has increased from Rs.65 to Rs.79 during 1992-1997; whereas, during the same period, the cost of production has decreased from Rs.34 to Rs.30.67; further, there has been a decrease in the rate of duty from 46% to 18%; the Appellant has been able to increase the selling price of goods consistently even though there has been fall in the cost of production and rate of duty; the Appellant over the period of time has been able to establish their brand and command higher price. As submitted, Apex Court in the case of State of Rajasthan Vs Hindustan copper (supra) held in unequivocal terms that where prices are market drive, incidence of duty cannot be said to have been passed on. The decision has been followed in a series of decisions by Courts /Tribunals.

- (i). *CCE, Bhubaneswar – II Vs Indian Aluminum Co Ltd 2002 (139) ELT 125 (T-Kolkata).*
- (ii). *Indian Oil Corporation Ltd vs. CCE reported in 2011 (263) ELT 698 (Tri-Ahmd)*
- (iii). *SPIC Ltd Vs CC (Imports), Chennai, 2009 (237) ELT 94 (Tri-Chennai)*
- (iv). *SAIL Vs CC (Port), Kolkata, 2008 (230) ELT 647 (Tri-Kolkata)*

3. Shri S.L. Hasija, Superintendent, Learned AR, reiterated the findings of original authority and submitted vide written submissions,

inter alia, that during the hearing, the advocate for appellants submitted some copies of price declarations, sale invoices, depot invoices and CA Certificate; the said documents only proves that the goods have been sold at depot on the price as declared in the price declarations; the documents do not show the element of excise duty separately; therefore, it is clear that price declared in the invoices has been recovered; the C.A. certificate dated 16.05.2007 does not show that the duty has not been passed on to the customers; it only shows that the price was constant; therefore, it does not establish that burden of duty was not passed on the customers; goods are sold at Maximum Retail Price, which includes all the duties and taxes. The said C.A. certificate was not before the adjudicating authority at the time of finalization of provisional assessment.

3.1. Learned AR submits that only submissions made by the appellants was that the prices were constant and therefore, unjust enrichment is not applicable. It cannot be said that the duty has not been passed on only because prices are constant; it only indicates that profit margin may go up or down; CA also confirms that there is variation in profit margin. Hon'ble Supreme Court, in the case of South India Alloy Industries vs. CCE (reported in 1997 (94) ELT 457 (SC), held that the onus was on the appellant to show that the price did not include the excise duty; in the absence of any such effort made by the appellant, it has to be assumed that the appellant has passed on the excise duty to the purchaser. Hon'ble Supreme Court dismissed the party's appeal in the case of Sanat Products Ltd Vs CCE (reported in 2015 (323) ELT 682 (All) which relied upon the decision of Supreme Court's decision in the case of CCE M-II Vs Allied Photographic India Ltd 2004 (166) E.L.T. 3 (S.C.), wherein it was held that

Before concluding, we may state that uniformity in price before and after the assessment does not lead to the inevitable conclusion that incidence of duty has not been passed on to the buyer as **such uniformity** may be due to various factors. Hence, even on merits, the respondents has failed to make out a case for refund".

Hon'ble Tribunal, Mumbai in the case of Philips Electronics India Ltd Vs CCE Pune-I (reported in 2010 (257) ELT 257 (Tri-Mumbai) and in the case of CCE, Mumbai-V Vs Milton Plastics Ltd (reported in 2008 (232) ELT 653 (Tri-Mumbai) followed the Apex Court's decision in Allied Photographic India Ltd (Supra).

3.2. As observed in the above case, in the present case also C.A. certificate shows that the profit margin has been changed in all the years though prices were constant. In view of the same, it is proved that the incidence of duty has already been passed on. He also relied upon the decision of Hon'ble Supreme Court in the case of Union of India Vs Solar Pesticide P Ltd (reported in 2000 (116) ELT 401 (SC). He further submits that in the present case the appellants have made a remark, Balance sheet for the year 1992-93 in Schedule X, that *there are some excise refund claims by the company but not accepted by the Central Excise Authorities; the company has preferred appeals with Central Excise Appellate Authorities/Bombay High Court/Supreme Court of India; in view of uncertainty of the claims, refunds will be accounted for on final decision by the authorities/courts.*

It is clear that they have booked the amount as expenditure and not carried forward the same claims as receivables in the subsequent years. Hon'ble Tribunal Mumbai, in the case of Hindustan Petroleum Corp Vs. CC (I) Mumbai (reported in 2015 (328) ELT 490 (Tri-Mumbai), held that

5.4. The next aspect to be considered is whether the refund claim is hit by the bar of unjust enrichment. The Revenue has referred to the case of HPCL (supra) holding that if the claimant himself has treated the refund amount due as expenditure and has not shown the same as receivable, the claimant cannot be said to have passed the test of unjust enrichment. In the present case, the appellant have not denied that the duty paid was shown as expenditure and form part of the Profit & Loss account. The appellant, however, have referred to the case of Flow Tech Power – 2006 (202) E.L.T. 404 (Mad.) and the case of Cummins India – 2008 (221) E.L.T. 525 (T) in support of their stand that even if duty paid is shown as expenditure,

the same is not a sufficient evident to show that the duty has been recovered from the customers. We have seen these case laws. The judgments, held that if the certificate from the C.A. states that incidence of duty has not been passed on to the customers, merely because the amount is shown as expenditure under the Profit and Loss account, it does not establish that it has been recovered as duty from the customers. We do not accept reliance on these because in each case, the C.A. certificate must elaborate on how it arrived at the conclusion that it did. It must be explained as to how the duty, incidence was not passed on to the buyers by showing cost structure, etc. Above all we do not see from the records whether any C.A. certificate was produced. The orders of lower authorities have also not discussed this aspect”.

4. Heard both sides and perused the records of the same. The brief issue to be decided in the instant case is as to whether the refund claim is hit by unjust enrichment and as to whether the appellants have shown enough evidence so as to satisfy that the incidence of duty has been borne by them and has not been passed on to the customers? We find that the appellants' main contention is that they have sold their products at a price driven by market forces, independent of the central excise duties paid. Regarding the obligation as per section 12B of the CEA 1944, it is submitted that as they were quite sure that in no case they were going to recover duties paid by them, they have not mentioned the same separately in the invoices issued to the custom house. The appellants also contended that they have placed on record cost accountant certificates which had successfully refuted the presumption that incident of duty has been passed by them to their customers. They submit that even after submitting the 7 sample invoices and cost accountant certificate, the lower authorities have either ignored the same or have misread the certificates or invoices.

4.1. On perusal of the said invoices we find that the same may not be of any help in advocating the cause of the appellants. Per contra we find that Ld. Commissioner (Appeals) has gone through the invoices and given a specific finding as follows:

‘... The appellants had submitted 7 (seven) Excise and commercial invoices before the Assistant Commissioner. Excise Invoice no. 248 dated 28.04.1995 shows the assessable value of variety ‘Sapphire 210x330’ as Rs.56.24

per unit, and total assessable value as Rs.89,984/- and duty paid @20% as Rs.17,997/-. The price declaration shows the selling price as Rs, 74/- per box; abatement @8.8029 as Rs.6.51; Excise duty @20% as Rs.11.25. The sale invoice dated 29.04.1995 from the Coimbatore Depot shows the sale price as Rs.74/- per box. The said invoice does not indicate the amount of duty paid separately as required under Section 12A of the Act. The presumption of law contained in Section 12B of the Act is that the entire duty of Rs.11.25 per box on the said variety has been passed on to the customer M/s ARS Stationers and Book Sellers. This is fully supported by the fact that the price charged was only Rs.74/- per box and appropriate assessable value had been worked out from the said price for payment of duty. On finalization of assessment, if it was found that the actual quantum of admissible abatement was for example Rs.8/- per box instead of Rs.6.51 quantified provisionally the revised assessable value would be Rs.55/- and the duty actually payable @ 20% would be Rs.11/- per box. This duty falls short of duty of Rs.11.25 per box already paid. The incidence of duty of Rs.11.25 per box had already been passed on to the buyer. The admitted position is that they had no occasion to revisit the price. When the price of Rs.74/-, which included an element of Excise duty of Rs. 11.25 as per own working remains undisturbed, the presumption of section 12B of the Act operated against them and refund would not be admissible to them.

Similarly in Excise invoice no. 2175 dated 29.03.97, the appellants had charged duty of Rs.2918.50 @ 25% on 'Plastocarb 1250 Film Carbon Black' on the assessable value of Rs.11,674/-. The Depot sale price of the product was Rs.160/- and the assessable value as per the price declaration dated 3.2.97 was worked out after deduction of Rs.1.08 of abatements and Rs.29.18 of Excise duty. The accompanying sales invoice shows that the product was sold from the Depot @ Rs. 160/- and the presumption of law is that the entire duty of Rs.29.18 had been recovered from the buyer as per their own working.'

Ongoing through the sample invoices, we find that the the conclusion drawn by the lower authorities are correct.

4.2. The appellants have relied upon the cost accountant certificate dated 16.05.2007 given by M/s. C. Sahoo & Co. We find that the cost accountant has certified that they have examined the records of M/s. Kores India Ltd. and certified the costing of the products as per books to be true and correct. We find that the cost accountant had evaluated the costing of seven products i.e. duplicating ink, carbon paper

black, film carbon blue, carbon paper 503 black, carbon paper sapphire blue, stencils F' CAP (in 2 QR) and stencils F' CAP (in 5 QR). Each of the certificate has analyzed the data of different products from 1992 to 1997, pre and post budget, containing details like selling price, rate of excise duty, rate of discount, discount value, rate of PME, amount PME, assessable value, duty amount, cost of production, cost with excise, margin and percentage of margin to sales price. Ongoing through the certificates *per se* reveals that the profit margin has been varying over the years irrespective of the fact that the duty has come down over the years for different products; in respect of some products the pre-budget and post-budget value was constant and for some it was changing depending on the rate of duty. We find that it cannot be inferred from the said certificates that the burden of incidence of duty has been borne by the appellants and has not been passed on to the customer.

4.3. Ld. Counsel for the appellants has relied upon various case laws. We find that the facts of the cases referred therein are not identical to the facts of the case before us. In most of the cases, the issue was relating to sale of goods as per London Metal Exchange prices or as per Administered Prices Mechanism, where the appellants had no control on the prices and as such, the proof of passing on the incidence of duty was irrelevant. Per contra we find that the case law cited by the Ld. AR for the department is more appropriate and on the point raised in the present appeal. We find that Hon'ble Supreme Court in the case of *Allied Photographic India Ltd.* (supra) have held that

'18. Before concluding, we may state that uniformity in price before and after the assessment does not lead to the inevitable conclusion that incidence of duty ahs not been passed on to the buyer as such uniformity may be due to various factors. Hence, even on merits, the respondent has failed to make out a case for refund. Since relevant factors stated above have not been examined by the authorities below, we do not find merit in the contention of the respondent that this Court should not interfere under Article 136 of the Constitution in view of the concurrent finding of fact.'

Also Hon'ble Supreme Court in the case *Sahakari Khand Udyog Ltd.* 2005 (181) ELT 328 (SC) have observed that

“48. From the above discussion, it is clear that the doctrine of ‘unjust enrichment’ is based on equity and has been accepted and applied in several cases. In our opinion, therefore, irrespective of applicability of Section 11B of the Act, the doctrine can be invoked to deny the benefit to which a person is not otherwise entitled. Section 11B of the Act or similar provision merely gives legislative recognition to the doctrine. That, however, does not mean that in absence of statutory provision, a person can claim or retain undue benefit. Before claiming a relief of refund, it is necessary for the petitioner/appellant to show that he has paid the amount for which relief is sought, he has not passed on the burden on consumers and if such relief is not granted, he would suffer loss.”

4.4. We also find that various judgments of the Hon'ble Supreme Court, High Courts and Tribunal have settled the issue of presumption under Section 12B of Central Excise Act, 1944. Such a presumption requires to be negated by sufficient evidence by the person who is claiming refund. IN the instant case, except for putting forth arguments theoretically, the appellants have not put forth any incontrovertible evidence to prove that the burden of duty has not been passed on to their customers. As discussed above, neither from the sample invoices nor from certificate by cost accountant, it cannot be inferred that the incidence of duty has not been passed on. We find that the lower authorities have shown due diligence in adhering to the orders of the Hon'ble High Court of Bombay in this regard, have verified the evidence made available to them by appellants and have come to the conclusion rightly that the appellants could not prove that the incidence of duty has not been passed on to the buyers and was borne by them. Therefore, we find that there is no reason to interfere with the impugned order.

5. In the result, we uphold the impugned order and dismiss the appeal.

(Order pronounced in open court on 21.06.2019)

(D.M. Misra)
Member (Judicial)

(P Anjani Kumar)
Member (Technical)

HM