

Commissioner of Central Excise Vs. Addison and Co.

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Tamil Nadu

Decided On : Dec-07-1996

Reported in : (1997)(93)ELT429Tri(Chennai)

Appellant : Commissioner of Central Excise

Respondent : Addison and Co.

Judgement :

1. The issue in the appeal relates to respondents' eligibility to refund in terms of Section 11B of the CEA, 1944. The respondents had claimed refund in respect of excess duty paid by them by including certain element including turn over tax and additional sales tax which have been held to be abatable for arriving at the assessable value.

Refund claim was allowed by the original authority consequent on the order-in-appeal passed by the CCE (Appeals) that abatements are allowable. The original authority examined the issue with reference to Section 11B relating to unjust enrichment and the said authority held as under : In this case, the percentage of turnover deduction that the buyer would be receiving from the assessee after the former crossed the slab limitation target fixed by the assessee was known, since the assessee had either given it in the invoice itself or passed it on, by way of credit notes to the buyers and adjusted the sale against subsequent supplies.

(b) Section 11 B(2) says that if the duty becomes refundable then the amount goes to the Consumer Welfare Fund. But if the assessee has paid the Excise duty and

has not passed the incidence of such duty to any other person [Section 11B(2)(d)] then the refund goes to the assessee himself and as per Section 12B, the proof of not having passed on the incidence should be provided by the assessee.

Verification of credit notes has established that unjust enrichment will not occur if refund as claimed is granted to the assessee, since it is actually suo motu refund.

(c) The contention of the Assistant Director (Cost) that the benefit of the discount claimed has not reached the ultimate consumer is beyond the purview of the Central Excise Laws & Rules because, what is sought to be established when a discount is claimed by an assessee is whether the same has been passed on to his buyers (in this case the dealers) and hence whether the duty burden is borne solely by the assessee. This has been fully proved by the verification of the documents produced by the assessee to substantiate their claim.

(d) A bank guarantee has been obtained for 25% of the refund amount i.e., Rs. 11,42,000/- by way of abundant caution in view of the point made in Para 3(h).

(e) The party has also given an undertaking wherein they agree to pay the full duty of refund of Rs. 45,82,626/- to the Central Excise Department within 15 days of receipt of the CEGAT Order, if the CEGAT decision as specified in para 3(h) goes against their favour.

It is seen that the matter regarding abatement was being agitated before the Tribunal when based on order of the Collector (Appeals), refund due has been paid. This order of the original authority was reviewed by the Commissioner and in the appeal which was filed before the CCE (Appeals) against this order under Section 356E(2) of the CEA, 1944. The grounds taken in this application before the CCE (Appeals) are as under: While post auditing the above refund claims sanctioned by the Assistant Collector of Central Excise, Madras V Division, I find that the refund claim should have been rejected under the provisions of Sections 11B and 11D inasmuch as the duty incidence has not been borne by the manufacturer. Even if Tribunal orders are involved, the provisions of Section 11D are clear and statutorily binding on the Department and refund should have been rejected.

The Assistant Collector has stated in her Order-in-Original that unjust enrichment will not occur if refund as claimed is granted to the assessee since it is actually suo motu refund. The above argument of the Assistant Collector cannot be accepted in view of the provisions of Section 11D. The argument of the Assistant Collector against the views expressed by Assistant Director (Cost) is also not in alignment with provisions of Section 11B. Moreover the incidence of duty has not been borne by the manufacturer.

The learned CCE (Appeals) in his order has held that inasmuch as this application itself was filed after 6 months of refund granted, the same could be only recovered in terms of Section 11B as the recovery of the refund was barred by limitation as contemplated under Section 11A of the CEA, 1944. He has also held that in terms of Section 11 B(2) refund could not be recovered as the benefit of the refund of the discount has been passed on to the dealers by credit notes and the incidence of duty had not been passed on to the customers i.e. their dealers and he has held as under in this regard.

It is observed from the impugned order that in respect of the above point, the Assistant Collector has given a finding in para 6(b) which is as follows : "6(b): Section 11B(2) says that if the duty becomes refundable then the amount goes to the Consumer Welfare Fund. But if the assessee has paid the Excise duty and has not passed the incidence of such duty to any other person [Section 11B(2)(d)] then the refund goes to the assessee himself and as per Section 12B, the proof of not having passed on the incidence should be provided by the assessee.

Verification of credit notes has established that unjust enrichment will not occur if refund as claimed is granted to the assessee, since it is actually suo moto refund." Therefore, the contention of the respondent to the effect that it is not their concern to find out as to whether the benefit has in turn been passed on by the dealer to the ultimate buyer, in my considered view, has considerable force.

Against this order, the Revenue filed appeal and urged the following grounds.

In this case, the assesseees were periodically passing on the turnover discount to their dealers by way of credit notes issued to them and it is evident that the

assessee had also passed on the duty element on the discounts to such dealers. However it is not established that the dealers in turn have passed on the benefit of refund to the ultimate consumers. Thus, in the absence of concrete proof to show that the refund of duty passed on to dealers has in turn, reached the ultimate consumers, who had borne the burden of the duty liability, the unjust enrichment will accrue in view of Section 11B(2)(d) read with Section 12B according to which, every person who has paid the duty of excise on any goods under this Act shall, 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.

In the circumstances Collector (Appeals) has erred in holding that, it is not necessary to find out as to whether the benefit has in turn been passed on by the dealer to the ultimate buyer, which is contrary to provisions of Section 11 B(2)(d) read with Section 12B. (2) Section 35E(2) of Central Excises & Salt Act, 1944 empowers Collector of Central Excise to examine the legality and propriety of any order or decision passed by an adjudicating authority, subordinate to him, and for directing the adjudicating authority to apply to Collector (Appeals) for determining such points as may be specified by Collector. It is clear that Section 35E does not exclude from its purview decisions taken in the matter of refund.

Section 11A and Section 35E are two distinct and different provisions, having no restrictions on each other. Collector of Central Excise, Madras v. Raman Boards Ltd. has held that Section 11A cannot be telescoped or super imposed over Section 35E with an over riding effect.

(3) Refunds made under a valid order of a competent authority cannot be treated as erroneous refund; Section 11A will have no application in such cases. Only where the refund is made on account of mistaken calculation, technical or clerical error, the same will be recoverable by issue of notice under Section 11A by the same authority.

(4) The Central Excise Law does not enable an officer to review his own order. If the refunds made under valid orders are to be recovered by issue of notice under Section 11 A, then it would amount to reviewing of his own order by the same officer which is against provisions of Central Excises and Salt Act 1944. Collector

(Appeals) has therefore erred in holding that action initiated under Section 35E(4) is not sustainable in law.

(5) The CEGAT order in the case of Collector of Central Excise v. Universal Radiators Ltd. - 1988 (37) E.L.T. 222 (Tribunal) has not been accepted by Government of India and an appeal against the same has been filed before the Supreme Court.

2. Before us, the learned Counsel Shri Krishna Srinivas has pleaded on behalf of the respondents that so far as the time bar aspect is concerned, he is not contesting the plea of the Revenue in view of the judgment of the Madras High Court in the case reported in 53 ECR 146.

The issue therefore that falls for consideration is whether the respondents would be entitled to refund in terms of Section 11B of the CEA, 1944. We observe that this amended Section 11B reads as under: (2) If, on receipt of any such application, the Assistant Commissioner of Central Excise is satisfied that the whole or any part of the duty of excise 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 as determined by the Assistant 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 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) duty of excise paid by the manufacturer, if he had not passed on the incidence of such duty to any other person ; (e) the duty of excise borne by the buyer, if he had not passed on the incidence of such duty to any other person; (f) the duty of excise borne by any other such class of applicants as the Central Government may, by notification in the Official Gazette, specify: We observe that in terms of the scheme of this Section, the assessee would be entitled to grant of refund only if he is able to

show that he had not passed on the duty burden which is claimed as refund, to the customers. In case the duty burden has been passed on to the buyers then, it would be buyer in turn will be entitled to claim the refund in question. He too will be entitled to the refund in case he has not passed on the incidence of duty to any other person. Provisions of Section 11B(2) are also applicable in case of refund which arise out of the judgment decree, order or direction of the Appellate Tribunal or any court or any provisions of the Act or Rules or any other law for the time being in force in terms of Section 11B(3) as above. The order relating to refund as determined by the CCE (Appeals) had to be therefore, considered in the light of the above provisions. The lower appellate authority, it is seen, has merely agreed with the observation of the AC that it is not the concern of the respondents to find out as to whether the benefit had in turn been passed on by the dealer or purchaser of the goods to whom the discount the allowed to the ultimate buyer. We observe that the provisions of Section 11B clearly enunciate that once incidence of duty has been passed on to the buyer of the goods refund cannot be given to the assessee and it will be the buyer who will be eligible to the refund and by amendment to Section 11B in terms of the explanation, limitation of 6 months for claiming refund for the buyer has also been fixed with reference to the date of purchase of the goods by him. We observe that event under the Central Excise law which gives rise to cause of action for refund is payment of duty made in respect of the goods cleared from the factory. The claim of the assessee has to be related to this event of clearance of the goods on payment of duty. Once the assessee has passed on the duty burden at the time of clearance of the goods thereafter, notwithstanding the fact that he has issued credit notes to the buyer, he cannot come forward to claim the refund in terms of Section 11B and the person who becomes entitled to the benefit of refund is the buyer of the goods. Post clearance transaction by issue of credit note is not the concern of the Central Excise authorities and there is no requirement in law nor any stipulation that in the event of credit given subsequent to the clearance of the goods, the assessee will continue to remain eligible to the refund if available in terms of Section 11B. As mentioned above, the event of payment of excise duty is the one which gives rise to the cause for refund. The claim for refund is to be with reference to the date of payment of duty in respect of certain clearances and after that date if any other

payment adjustments are made by the assessee with the customers, the same cannot be taken cognisance of for the purpose of Section 11B of the CEA, 1944. The scheme of Section 11B is so devised that if the duty burden has been passed on by the assessee then the buyer of the goods becomes eligible to the claim of refund. He (customer) has also to establish that duty burden has not been passed to any other person. This provision in law has been made to ensure that the refund is allowed only to the person who ultimately absorbs the duty burden. In this context it is relevant to note that duty burden is normally passed down line by the dealer as urged by the Revenue. In the above view of the matter, we therefore, hold that the appellants could not have been allowed the refund. We, therefore, allow the appeal of the Revenue and the Revenue can take necessary follow up action.

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