

**Ongc Vs. Cce**

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**Court :** Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

**Decided On :** Oct-13-2003

**Reported in :** (2004)(91)ECC82

**Judge :** S Kang, a T V.K.

**Appellant :** Ongc

**Respondent :** Cce

**Judgement :**

1. Appellants filed this appeal against the Order-in-Appeal passed by the Commissioner (Appeals), whereby the refund claim, filed by the appellants, was rejected on the ground that the appellants failed to prove that the burden of duty has not been passed on to their buyers.

2. Brief facts of the case are that the appellants, M/s. ONGC, filed a refund claim of Rs. 18,91,310 with the Assistant Commissioner of Central Excise on the ground that the appellants had paid excess duty on the value, which included the Central Excise duty also, for the clearance of LPG for the period from 23.3.2000 to 31.8.2000. Show cause notice was issued to the appellants to provide evidence to the revenue regarding not passing the burden of duty on to their customers. The adjudicating authority rejected the claim. Appellants filed the appeal and the same was dismissed.

4. The contention of the appellants is that due to mistake by the appellants, the assessable value was calculated after adding the excise duty of 8 per cent. Though, initially, M/s. IOC paid the duty as calculated by M/s. ONGC, but subsequently, M/s. IOC adjusted the excess amount of duty paid by them in subsequent bills. The contention of the appellants is also that price of LPG is fixed, so there is no possibility of passing on the duty burden to the ultimate buyers.

Appellants also contended that the Commissioner (Appeals) wrongly relied upon the decision of the Tribunal in the case of CCE v. Addison & Co., 1997 (93) ELT 420 (T), which was subsequently, reversed by the Hon'ble Madras High Court in the case of Addison & Co. v. CCE, 2001 (129) ELT 44 (Mad.). Appellants produced Chartered Account (sic, Accountant's) Certificate, which shows that excess duty paid by the appellants was recovered by M/s. IOC in subsequent monthly bills of 1.8.2000 to 15.8.2000.

5. The contention of the revenue is that as the appellants had recovered the duty from their customers, the subsequent adjustment, in no way, is helpful to the appellants. As per the provisions of Section 11B of the Central Excise Act, the onus is on the appellants to prove that the burden of duty had not been passed on to their customers. As the appellants had recovered the duty from their customers, they are not entitled for refund.

6. We find that in this case, initially, the appellants paid higher duty due to mistake as they calculated the assessable value after adding the excise duty of 8 per cent. M/s. IOC, who are the buyers of LPG, made payment to M/s. ONGC, the appellants. On realising the mistake, M/s. IOC recovered the excess amount paid in respect of duty from subsequent monthly bills of 1.8.2000 to 15.8.2000. These facts are not disputed by the revenue.

7. The Commissioner (Appeals) relied upon the decision of the Tribunal in the case of CCE v. Addison & Co. (supra), which was set aside by the Hon'ble Madras High Court in the case of Addison & Co. v. CCE (supra).

The Commissioner (Appeals) also relied upon the decision of the Tribunal in the case of CCE v. Adarsh Guar Gum Udyog, 2000 (120) ELT 138 (T). We find that in

the case of M/s. Adarsh Guar Gum Udyog (supra), the Tribunal held that the manufacturer initially recovered the duty from their customers at the time of clearance of the goods and subsequently, issued the credit notes, in such a situation, the Tribunal held that when the manufacturer was recovered the duty from their customers, subsequent instance of credit notes shall not alter the position that incidence of duty has not been passed on to their customers. The facts of the present case are not parallel to the facts in M/s. Adarsh Guar Gum Udyog (supra). In the present case, the customer of M/s. IOC pointed out the mistake committed by M/s. ONGC and immediately adjusted the excess duty paid in subsequent monthly bills. *Mafatlal Industries Ltd. v. Union of India*, 2002 (83) ECC 85 (SC) : 1997 (89) ELT 247 (SC) held that Section 12B of the Central Excise Act provides that it is presumed that incidence of duty shall be deemed to have been passed on to the buyer unless the contrary is proved. The Hon'ble Supreme Court held that such presumption is rebuttable presumption of law and not conclusive presumption. In the present case, though the appellants, initially, paid higher duty and their customers also paid the same to the appellants, but immediately on realising the mistake, the customers recovered the higher duty paid by them. Therefore, M/s.

ONGC, the appellants, have proved that they had not passed on the burden of duty on to their customers, therefore, the impugned order is set aside and the appeal is allowed.

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