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**Cce Vs. Optel Telecommunication Ltd.**

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

**Decided On :** Sep-12-2006

**Reported in** : (2006)(113)ECC148

**Judge** : M Ravindran

**Appellant** : Cce

**Respondent** : Optel Telecommunication Ltd.

**Judgement** :
1. These appeals are filed against order in appeal dated 21/06/04 which set aside the order in original rejecting the refund claims.

2. The relevant fact that arise for consideration are the respondent is a regular supplier of optical fiber cables to DoT and Bharti Telenet under specific contracts. In the contract with their buyers, there is price variation clause whereby the final prices of the excisable goods supplied by the respondent are finalized after specific period of term depending upon the factors of rise or fall of the price of base metals.

Hence by virtue of the price variation clause, the appellant is either paying a differential duty or claiming the refund from the revenue for the excess duty paid by him. In these cases, the respondent filed refund claims to the proper officer based on the reduction in the final price of products which was rejected by the adjudicating authority. On an appeal, the Commissioner (Appeal) set aside the

order in original and allowed the refund claim of the respondent. Hence this appeal by the revenue.

3. The learned DR submits that the Commissioner (Appeal) has proceeded on the footing that due to price variation clause, the assessment of the products cleared by the respondent were provisional. It is his submission that if the assessments were provisional, then there should have been the recourse of provision of Rule 9B of the Central Excise Rules.

In the absence of any such recourse, the assessment cannot be considered as provisional. It is his submission that once the respondent has raised an invoice and discharged the duty liability, subsequent reduction of the price, may be due to the reason of price variation clause in the contract, would not entitle him for any refund.

He relies upon the decision of the Tribunal in the case of Commissioner of Central Excise, Nagpur v. Maharashtra Cylinder Ltd. as reported at .

4. On the other hand, the learned advocate appearing for the respondent submits that it is not in dispute that they have paid excess duty due to price variation clause. This part of the order in appeal is unchallenged by the revenue. It is his submission, that the issue is covered by the decision of the Tribunal in the case of Commissioner of Central Excise, Jaipur v. Universal Cylinders Ltd. as reported at 2004 (175) E.L.T. 202 (Tri. -Del.) and which is upheld by the Hon'ble Supreme Court as reported at .

5. Considered the submissions made at length by both sides and perused records. I find that in this case, it is not disputed that there was a contract between the respondent and purchaser. The said contract also had a price variation clause vide which the respondent was required to make adjustment in the books of accounts for increase or decrease in prices of final products. From the records, I also find that the purchasers of the respondents had a running account with the respondent. That is to say, that they were making the payments after the periodical review of the prices depending upon price escalation clause. It is also undisputed that the price which was charged by the respondent to their customers were inclusive of all

duties, freight, sales tax etc. Hence, whenever there is a price variation i.e.

reduction in the price in raw material, the customers of the respondent used to make the payment as per the reduced re-calculated price of the final product in turn were paying the less amount to the respondent which also included the recalculated duty payable.

6. I find that the identical issue is decided by the Division Bench in the case of GAIL v. Commissioner of Central Excise as reported at 2006 (196) E.L.T. 68 (Tri. - Del.).

3. We have perused the record and heard both sides. The mere issue of an invoice does not amount to passing on of the duty liability.

Passing on takes place only upon payment of duty as shown in the sale document by the recipient of the goods. In the present case, parties are having continuous transaction and payments are settled subsequent to the supply of the goods mentioned in the invoice.

Certificates from the buyer companies clearly show that payments were made by the buyers including in regard to central excise duty, at the lower prices only. Thus, the fact that the higher duty amount was not passed on, remains established. Provision relating to unjust enrichment cannot apply to the appellant's case.

7. Further, I find that the Tribunal in the ease of Universal Cylinders Ltd. (Supra) had held as under: 2. I have heard both the sides and gone through the record. The facts as made out from the record are that the respondents are engaged in the manufacture of LPG cylinders. In the months of April and May, 2001, they supplied 24650 number of cylinders to Hindustan Petroleum Corporation at the provisional price mentioned in the purchase order and paid duty @ 16%. But the said provisional price initially fixed at Rs. 637.17 per cylinder was reduced to Rs. 476.62 by the HPC vide their letter dated 10/8/2001. They had even adjusted the excess price including the duty from the subsequent supplies made by the respondents. That being so, it cannot be said that the incidence of duty had been

passed on by the respondents to M/s MPC. Rather it can be safely concluded that duty had been borne by the respondents, after the reduction in the price and adjustment of entire the excess amount, by the buyers, from the account of the respondents. Under these circumstances, the Commissioner (Appeals) has rightly held that the principle of unjust enrichment is not attracted to the case. I do not find any illegality in the impugned order passed by the Commissioner (Appeals) and the same is upheld. The appeal of the Revenue is dismissed.

8. The above said decision of the Tribunal was taken up by the revenue to the Hon'ble Supreme Court, wherein the Hon'ble Supreme Court passed the following orders: On facts of this case, we see no reason to interfere. The Civil Appeal is dismissed.

9. As against this, the learned DR reliance upon the decision of the Tribunal in the case of Maharashtra Cylinder Ltd. would be of no much help to him for the simple reason that in that case the respondent had not produced any evidence regarding the price escalation clause which was enforced. The facts are different than the current case before me.

Hence the ratio of the decision of the Tribunal may not be applicable in the current case before me.

10. Accordingly, I do not find any reason to interfere in the impugned order passed by the Commissioner (Appeals). The appeals filed by the revenue are dismissed.

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