

(2010) 08 AP CK 0132

In the Andhra Pradesh High Court

Case No : Central Excise Appeal No's. 95,
97-98,105,107-111,119,132,134,135,137-140
144-146,152,156,164-180,182-183,185-192 and 194-196 of 2010

C.C.E.

APPELLANT

Vs

Andhra Pradesh Paper Mills Ltd.

RESPONDENT

Date of Decision : 20-08-2010

Acts Referred:

Central Excise Rules, 1944 — Rule 7
Central Excises and Salt Act, 1944 — Section 35G
Customs Tariff Act, 1975 — Section 11B, 11B(2), 12B, 12C, 4(4)

Citation : (2010) 259 ELT 513

Hon'ble Judges : V.V.S. Rao, J;B.N. Rao Nalla, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

V.V.S. Rao, J.—This judgment shall dispose of all the appeals heard together, as similar dispute is involved in these cases. M/s. A.P. Paper Mills, Rajahmundry (APPL), filed refund claims. All of them were allowed by the Assistant Commissioner of Central Excise, Rajahmundry. Some of the appeals by the department were dismissed and some were partly allowed. Aggrieved, the department then moved Customs, Excise and Service Tax Appellate Tribunal, Bengaluru (CESTAT). By final order No. 151-255 of 2006 dated 31-1-2006 in Appeal Nos. E/1109-1151, the learned Tribunal rejected the appeals. Being aggrieved by the orders of CESTAT, the department has filed these appeals u/s 35G of the Central Excise Act, 1944 (the Act).

2. APPL is manufacturers of paper and paper boards falling under Chapter 48 of First Schedule to the Customs Tariff Act, 1975. They clear their goods at factory gate (duty duly paid) and transfer them to their depots at Chennai, Delhi, Kolkata, Mumbai, Hyderabad etc., on stock transfer basis (STB). They conduct sale through these depots. At the time of sale, they allow various discounts like cash discount, quantity surplus, freight rebate etc., to their customers. For the

period from May 1996 to November 1999, APPL filed refund claims on the ground that the goods manufactured by them were sold at lower prices through their depots than the assessment value per metric ton at which price duty was paid at the time of clearing the goods on STB from the factory to the respective depots in different cities. There is no dispute that the price of the goods in the transfer invoice at the time of clearing the goods at the factory gate is higher than the invoice sale price at the time of sale at the depot. There is also no dispute that the duty was paid by APPL at the factory gate on transfer invoice on the assessment value and the value of the goods at depot includes 16% excise duty and 1.8% cess thereon. Be it also noted that APPL vide their letter dated 28-5-1996 informed the department about the system of allowing cash discount to the buyers at their depots and about the transferred goods being sold from the depots to customers/dealers allowing discounts. Their case was that instead of revising ex-mill prices downward as adopted by the other mills, they introduced system of cash discount to the dealers.

3. After receiving the refund claims, the original authority adjudicated and came to the conclusion that the time barred claims cannot be accepted and that the claim becomes ineligible in the cases where the depot invoices do not tally with corresponding factory invoices. Therefore, a show cause notice was issued as to why refund claim should not be limited excluding ineligible items. A personal hearing was granted on 13-8-1999. The order in original (OIO) was passed for refund of eligible amount and the ineligible part was disallowed. Various orders, were passed for different period.

4. The Assessee as well as the department filed appeals before Commissioner. The appeals by the former were allowed directing entire refund of claimed amount and department appeals were dismissed. The department then filed appeals before CESTAT. By final orders dated 11-2-2003 and 11-6-2003, appeals were allowed and were remanded to the appellate Commissioner. After rehearing the matters, the Commissioner partly allowed the department appeals on 21-7-2004 rejecting the claim for refund for a minor amount. Otherwise the claim for refund by APPL was accepted. As noticed supra, the department again filed appeals before CESTAT, which were rejected by the final order dated 30-1-2006 [2006 (198) E.L.T. 237 (Tri. - Bang.)].

5. Senior Central Government standing counsel submits that APPL are required to show element of duty on the depot sale invoice but they have shown all inclusive price without bifurcation of excise duty elements. He would urge that as per the ratio in Mafatlal Industries Ltd. and Others Vs. Union of India (UOI) and Others, a presumption has to be drawn that the manufacturer has passed incidence of duty to the customer. In such a case, if the refund is allowed u/s 11B of the Act, the same would be in contravention of the proviso to Section 11B(2) and Section 12B of the Act. He has also criticised the approach of the appellate authority, CESTAT in not appreciating the work sheets enclosing refund claims and the invoices produced by APPL. He has also produced one such invoice before us to,

show absence of the bifurcation of excise duty elements. According to him, it has to be presumed that the incidence of duty has been passed on to the buyer. Next, he contends that in view of the amendment of Section 4(4)(b)(iii) of the Act with effect from 28-9-1996 (subsequently again amended with effect from 1-7-2000) and the Central Valuation Rules, 2000 as well as Rule 7 of Central Excise (Determination of Price of Excisable Goods) Rules, 2000, even if depot sale is at a lesser price than the factory invoice, the transaction value shall be the invoice price when the goods are cleared for the purpose of stock transfer to depot. He placed strong reliance on 2003 (85) ECC 48

6. The counsel for APPL submits that the Appellant cannot be permitted to take a new ground in an appeal u/s 35G, which was not raised before the Assistant Commissioner or Commissioner of CESTAT. According to him, the matter was remanded by CESTAT once. Even at that stage, no such ground was raised and therefore, based on Section 4(4)(b)(iii), it cannot be allowed to be raised. It is nextly contended that APPL has not passed on the incidence of duty to the buyer and the same was proved before the Assistant Commissioner as well as Commissioner by producing evidence. He would urge that the invoices would show that goods were sold at lesser price than the price at which goods were cleared at the factory paying the duty thereon, but when they were sold at the depot, the invoice price was less. Assistant Commissioner has considered all the invoices and arrived at refund amount based on invoices. According to him, even if the depot sale invoice does not separately indicate, excise duty elements, presumption u/s 12B cannot be pressed into service. Lastly, he would urge that the fact that the Assistant Commissioner did not allow all the refund claims, and rejected those of the clients where the factory invoices and depot invoice were not tallying would itself show that APPL is not beneficiary of unlawful enrichment.

7. At the outset, we may point out that the refund claims are for the period from May 1996 to November, 1999. The sale depot of a manufacturer was also included as "place of removal" with effect from 28-9-1996. Though "the place of removal" includes a sale depot, Rule 52A as introduced by notification No. 4/94-C.E. (N.T.), dated 1-3-1994 remained unchanged. As per Rule 52A, no excisable goods shall be delivered from a factory or warehouse except under an invoice consigned by the owner or authorised agent. Therefore, the transaction value of the goods is the invoice price at the time of delivery of goods to the buyer. When the goods are cleared from the factory on payment of excise duty and transferred to the depot from where they are delivered to the buyer, assessable value of the goods for the purpose of duty shall have to be necessarily the transaction value of the goods at the time of delivery from the depot. Therefore, there cannot be any dispute that APPL is entitled to claim/refund of excess duty paid u/s 11B on the admitted fact that the price declared at the time of clearance of the factory, is higher than the price at which the goods are sold at the depot, by reason of giving various discounts as per the market policy. To that extent, the senior standing counsel does not dispute. But he contends that the refundable amount is to be credited to Consumer Welfare Fund (CWF)

established u/s 12C of the Act, as APPL has not proved that they had not passed on the incidence of duty to the buyer. He draws support and sustenance for such argument u/s 12B of the Act. We are afraid we cannot accept the submission for reasons more than one. The Assistant Commissioner, Rajahmundry - as found by CESTAT - scrutinised all the invoices and recorded a finding of fact that APPL itself borne the burden of duty paid on clearance effected at factory at cash discounts, which are refundable and that relevant invoice numbers were noted in the depot invoices. Indeed, wherever APPL failed to produce evidence for exact correlation between depot invoice and factory invoice, claims were disallowed. The appellate authority in the first round of appellate consideration in various orders, dated 3-4-2000, 1-11-2000 and 9-11-2001 again considered the matter and allowed the refund claims. After remand by CESTAT, the appellate Commissioner again scrutinised invoices at random covering the disputed period, and recorded a finding of fact that APPL had not been paid any consideration over and above the amount invoiced at the depot in all the cases. It is a finding of fact by the adjudicating authority as well as appellate authority which has been accepted by CESTAT and in such an event, ordinarily no interference is called for in appeal u/s 35G of the Act.

8. There is no dispute that paper and paper products are cleared from APPL from factory on payment of duty to depots on stock transfer basis. At the time of sale, cash discounts are given and therefore, the depot price would always be lower than the factory price. When APPL paid the duty on the price at which the goods are cleared from the factory, they would certainly be entitled to claim refund if the incidence of excise duty is not passed on to the buyer. When the claim for refund is legitimate and sustainable, the next question would be whether the amount should be paid to the APPL or to be credited to the CWF. Hence, we may quote Section 11B(2) of the Act.

11B. Claim for refund of duty and interest, if any, paid on such duty. - (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 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.

Under Clause (d) of the proviso to Sub-section (2) of Section 11B of the Act, an Assessee can claim payment of refundable amount to him only when he proves that the incidence of duty was not passed on to any other person. In the absence of any such proof, presumption that the incidence of duty has been passed on to the buyer as adumbrated in Section 12B of the Act is attracted. In this case, the adjudicating authority, appellate authority and the learned Tribunal have consistently found that APPL has proved that the incidence of duty was not passed on to the buyers at the time of sale at discount price from the depots. The senior standing counsel has placed before us the transfer invoice No. 11663, dated 11-11-1999 under which 108 reams of MS cover NS paper weighing 1000.40 kg was transferred to New Delhi Depot. The invoice price of Rs. 28,374.30 ps., is inclusive of excise duty. The assessable value and basic excise duty and cess thereon have been separately shown and typed in the invoice. He has also placed invoice No. 2558, dated 30-11-1999 from Delhi depot for 55.80 kg of MS cover NS paper. Even in this, the excise duty of 16% and cess of 1.8% are mentioned separately, although the exact determined amount of excise elements is not mentioned. This itself, in our opinion, cannot disentitle APPL. The adjudicating authority as well as appellate authority have considered these invoices and have determined that the incidence of excise duty was not passed on to the buyer. We are not able to accept the submission of the senior standing counsel that it is an inclusive invoice and that we should draw presumption against APPL. The case decided by Delhi Bench of the Tribunal was altogether different where the element of excise duty was not separately shown or mentioned. Indeed, as held by Constitution Bench in *Mafatlal Industries*, "just because the duty is not separately shown in the invoice price, it does not follow that the manufacturer is not passing the duty nor does it follow therefrom that

the manufacturer is absorbing the duty himself. The manner of preparing the invoice is not conclusive.

9. Therefore, by inviting the attention of this Court to just one invoice where the element of excise duty is not separately mentioned though there are sufficient columns thereof, the Appellant cannot succeed in this appeal u/s 35G of the Act. As rightly held by learned Tribunal, the Assistant Commissioner, the adjudicating authority scrutinised the invoices and was satisfied that there was no unjust enrichment.

10. In the result, for the above reasons, the appeals are dismissed as they do not involve any substantial question of law u/s 35G of the Central Excise Act. No costs.