

Customs, Excise and Gold Tribunal - Delhi

Mr. Technological Institute Of ... vs Commissioner Of Central Excise on 4 December, 2006

Equivalent citations: 2007 (116) ECC 356, 2007 ECR 356 Tri Delhi

Bench: R Abichandani

ORDER R.K. Abichandani, J. (President)

1. The appellant challenges the order of the Commissioner (Appeals), by which he upheld the order of the Assistant Commissioner directing the amount of refund of Rs. 3,37,749/- to be credited in the consumer welfare fund.

2. The short contention raised by the learned authorised representative of the appellant was that presumption under Section 12B was not attracted in cases where the duty was paid after clearances were effected. Reliance was placed on the decision of the Tribunal in Plas Pack Industries and Ors. v. CC & CE, Ahmedabad reported in 2004 (63) RLT 207 (CESTAT-Mum.), in which it was held that the presumption, under Section 12B of the Central Excise Act, 1944, that incidence of duty has been passed on to the buyers will not be attracted when the payment of duty was made subsequent to the clearance of goods. The learned authorised representative pointed out from the record that the appellant had paid the differential amount of duty of Rs. 2,36,7887- on 23.11.98, while the goods were cleared much earlier in the year 1996-97.

3. It appears from the record that the contention that, the provisions of Section 12B were not attracted in the appellants case because the duty was paid after the goods were cleared, was not raised before the authorities below. The case of the appellant was that they had paid the excess amount of Rs. 3,37,749/- as duty because of wrong calculation of the difference of cash discount claim in their calculations. According to appellant, they claimed deductions of the amount actually passed on to their buyers whereas as per the law settled, they were entitled to claim deduction of the entire amount of cash discount.

4. The learned authorised representative for the department, on the other hand, supported the reasoning and findings of the authorities below and submitted that the appellant had admitted the fact that the amount of cash discount was actually passed on, and that, they had worked out the value after deducting the amount of cash discount actually passed on as against the amount of cash discount claimed for deduction in the price declaration, from the gross sale price, irrespective of the fact that each and every buyer did not avail of the facility of cash discount. The authorities below have found that incidence of duty on such goods was passed on to the buyers, and, therefore, the refund amount was required to be credited in the fund. The adjudicating authority had found on scrutiny of the records that the differential duty paid and the value worked out by the appellant was a part of gross sale price charged from their buyers who had not availed of the cash discount facility. It was held that incidence of duty appeared to have been passed on to such buyers, and their refund claim should be transferred to the consumer welfare fund.

5. Under Section 12B of the Act, it has been provided that every person who had paid the duty of excise on any goods 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. The provision does not make any distinction on

the basis of time when the duty is paid namely, whether it is paid at the time of clearance or thereafter. However, reliance has been placed on Division Bench decision of the Tribunal in Gujarat State Fertilizers & Chemicals Ltd. v. CCE, Vadodara reported in 2005 (67) RLT 714 (CESTAT-Mum), in which the Tribunal relied upon the earlier decision in Gwalior Oil Mills v. CCE, Bhopal reported in 2002 (52) RLT 648 (CEGAT-Del), wherein it was held that the presumption under Section 12B, that incidence of duty has been passed on to the buyers, will not be attracted when the payment of duty is paid subsequent to clearance of goods. The same Bench of the Tribunal had again taken the same view in Plas Pack Industries and Ors. v. CC & CE, Ahmedabad reported in 2004 (63) RLT 207 (CESTAT-Mum) relying on the decision of Gwalior Oil Mills v. CCE, Bhopal (supra). In Gwalior Oil Mills (supra), the Tribunal, in the context of debit entry made by the assessee after the relevant period during which the sales were made, held that the appellant was justified in contending that the presumption under Section 12-B was not applicable. The Tribunal referred to the earlier decision in Easter Industries v. Commissioner reported in 1999 (35) RLT 696, in which it was held that where the duty is paid by making debit entries in PLA subsequent to date of clearance of goods, presumption under Section 12-B of Central Excise Act, that incidence of duty has been passed on to the buyer will not be attracted.

6. Apart from the question of presumption of Section 12B, under the provision of Section 11B, requires that for entitlement of refund claim, it should be established that the incidence of duty had not been passed on to any other person. In other words, the question whether refund should be given or not would depend on the requirement of the provision of Section 11B being satisfied. Under that provision, any person claiming refund of any duty of excise is required to produce documentary or other evidence to establish that the amount of duty of excise in relation to which such refund is claimed was collected from, or paid by him, and the incidence of such duty has not been passed on by him to any other person. This requirement of Section 11B is independent of any presumption that may arise under Section 12B. Therefore, even in cases, where presumption, under Section 12B of the Act does not arise, the need to establish that the incidence of such duty has not been passed on by the assessee to any other person, would still remain, albeit, without such presumption.

7. In view of the decisions of the Tribunal in Easter Industries v. CCE (supra), and other cases following the decisions of Tribunal, including Gwalior Oil Mills, on which reliance has been placed, the impugned order of the Commissioner (Appeals) applying the presumption under Section 12B against the assessee is required to be set-aside. However, the matter is required to be examined afresh without the aid of such presumption, under the provisions of Section 11B of the Act, in the light of the above. The adjudicating authority should, therefore, examine whether the requirement of Section 11B that, "...the incidence of such duty had not been passed on by him to any other person", is satisfied or not without the aid of any presumption under Section 12B of the Central Excise Act. The impugned order is, therefore, set aside and the matter is remanded to the adjudicating authority for a fresh decision in accordance with the law and in the light of the observations made in this judgment.

The appeal is accordingly allowed by way of remand.

(Pronounced and dictated in the open Court)