

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on: 21.10.2016

Pronounced on :26.10.2016

Coram:

The Hon'ble Mr.Justice NOOTY. RAMAMOHANA RAO
AND
The Hon'ble Dr. Justice ANITA SUMANTH

CIVIL MISCELLANEOUS APPEAL No.3742 of 2011

M/s.TVS Electronics Ltd.
Rep. by Authorised Signatory
34, Developed Plots, South Phase,
Industrial Estate, Guindy,
Chennai-600 032. .. Appellant/ Appellant

Versus

- 1.The Assistant Commissioner of
Central Excise,
Guindy Division,
Chennai IV Commissionerate,
EVR Periyar Maligai,
Nandanam, Chennai 600 035.
 2. The Commissioner of
Central Excise (Appeals),
26/1, Mahatma Gandhi Road,
Chennai-600034.
 - 3.The Customs, Excise and Service
Tax Appellate Tribunal,
Shastri Bhavan Annexe,
Chennai-600 006.
- Respondents

Appeal under Section 35G of the Central Excise Act, 1944,
against Final Order No.350/2011 dated 23.02.2011 of the Customs,
Excise and Service Tax Appellate Tribunal, Chennai.

For Appellant .. Mr.Ragavan Ramabadhran
for Mr.Lakshmi Kumaran

For Respondents .. Mr.A.P.Srinivas for R1 & R2
R3 Tribunal

JUDGMENT

(Judgment of this Court was delivered by ANITA SUMANTH, J.)

1.This Civil Miscellaneous Appeal is filed at the instance of the Appellant challenging an order of the Customs, Excise and Service Tax Appellate Tribunal, dated 23.02.2011.

2.This appeal was admitted on the following substantial question of law:

"Whether the excise duty refund arising due to duty paid provisionally at the time of clearance of goods on stock transfer being higher than the excise duty finally assessed because of grant of various discounts through the issue of credit notes is subject to unjust enrichment?"

3.The Appellant is engaged in the manufacture of keyboards, printers and parts thereof. The Appellant follows a regular modus operandi whereunder clearances are effected from factory to branch office at a declared price. The pricing at the time of actual sale from the branch office however could vary from that of the factory price and a provisional assessment was made at the time of clearance from factory in view of the uncertain value of the goods at the relevant point of time. The price variations arise on account of two factors - firstly, a subsequent return on account of various market exigencies and secondly, distributors discount issued on the basis of performance. The discount is issued by way of credit note and the actual price of sale could thus be determined only at the time when the sales are effected from the branches to the distributors.

4.An order-in-original for the period 01.04.2006 to 31.03.2007, was passed by the Assistant Commissioner of Central Excise on 30.04.2008 finalising the provisional assessment made in respect of the clearances effected to the branch/regional office. The Assessing Authority notes as a finding of fact that the monthly/ quarterly/annual discount is passed on to the distributors (buyer) by virtue of a post-sale credit note issued by the Appellant. Thus, the clearances effected at factory value at a sum of Rs.10,43,86,149/- upon which excise duty on an account of Rs.1,70,68,445/-, their includes basic excise duty cess at 2% and cess at 1% was remitted. Taking into account the credit notes issued, the value of clearances effected from the Branch/Regional Office to dealers was valued at a sum of Rs.10,64,89,434/- upon which an amount of Rs.1,74,09,009/- being basic excise duty plus cess was at 2% and 1% was required to be paid. The difference in pricing arises after taking into account

the upward and downward price revision which would include the component of discount by way of credit notes.

5.The Assessing Authority computed the excess payment of excise duty by the Appellant at a figure of Rs.9,50,745/-. There is thus no dispute that the appellant has, in fact, remitted excess excise duty which has been duly quantified and determined to be refundable. The Assessing Authority finds, as a fact, that the details of credit note issued have been valued and found to be correct and without any discrepancy. However, the claim of refund was rejected on the ground of possible unjust enrichment. In conclusion, he orders that the refund be paid over to the Consumer Welfare Fund in so far as the Appellant according to him, was not entitled to the same.

6.The Assessment was confirmed in appeal by the Commissioner of Central Excise (Appeals) vide order dated 26.03.2010 and the matter was further carried in appeal to the Customs, Excise and Service Tax Appellate Tribunal (hereinafter referred to as 'CESTAT') which, vide order dated 23.02.2011 confirms the order of the Commissioner of Central Excise (Appeals) against which the present appeal has been filed.

7.We have heard Mr.Ragavan Ramabadhran on behalf of Mr.Lakshmi Kumaran, learned counsel appearing for the appellant and Mr.A.P.Srinivas, learned Standing Counsel appearing on behalf of the Central Excise Department.

8.The issue in the present appeal stands decided by a judgement of the three Judge Bench of the Supreme Court dated 29.08.2016 in the matter of Commissioner of Central Excise, Madras vs. Mr.Addison and Company Limited. The Bench has settled two propositions. Firstly, the entitlement of an assessee for filing a claim of refund on the basis of credit notes, has been accepted in the following terms:

"14. We have considered the submissions made by the counsel carefully and examined the material on record. The questions that arise for consideration in this case are whether the Assessee is entitled for a refund and whether there would be unjust enrichment if the said refund is allowed. It was held by the Special Bench of CEGAT, New Delhi by its judgment dated 17.03.1994 in Collector of Central Excise, Madras Vs. Addison & Co. Ltd. that the turnover discount is not an admissible abatement on the ground that the quantum of discount was not known prior to the removal of the goods. In an appeal filed by the respondent-assessee, this Court by its judgment dated 11.03.1997 in Addison and Co. Ltd. Vs. Collector of Central Excise, Madras (supra) held that the turnover discount is an admissible deduction. This Court approved the

normal practice under which discounts are given and held that the discount is known to the dealer at the time of purchase. The Additional Solicitor General submitted that any credit note that was raised post clearance will not be taken into account for the purpose of a refund by the department. We do not agree with the said submission as it was held by this Court in Union of India vs. Bombay Tyre International (supra) that trade discounts shall not be disallowed only because they are not payable at the time of each invoice or deducted from the invoice price. It is the submission of the assessee that the turnover discount is known to the dealer even at the time of clearance which has also been upheld by this Court. It is clear from the above that the assessee is entitled for filing a claim for refund on the basis of credit notes raised by him towards turnover discount."

9. With respect to the aspect of unjust enrichment, the Bench at para 19 of the judgment notes that the sine qua non for a claim of refund in terms of Section 11-B of the Central Excise Act is the establishment by the claimant that such duty in relation to which the refund is claimed was, in fact, paid by him and has not been passed on to any other person. The Bench thereafter, at para 21 of the judgement, extracted below, interprets the word 'buyer' in clause (e) to proviso to Section 11-B(2) of the Act to mean any buyer not restricted to the first buyer. In such an event, the burden is on the manufacturer to establish that the incidence of duty borne by him has not been passed on to at any stage in the transaction till the goods reach the hands of the end user.

"21. That a consumer can make an application for refund is clear from paras 98 & 99 of the judgment of this Court in Mafatlal Industries (supra). We are bound by the said findings of a Larger Bench of this Court. The word 'buyer' in Clause (e) to proviso to Section 11-B (2) of the Act cannot be restricted to the first buyer from the manufacturer. Another submission which remains to be considered is the requirement of verification to be done for the purpose of finding out who ultimately bore the burden of excise duty. It might be difficult to identify who had actually borne the burden but such verification definitely assist the Revenue in finding out whether the manufacturer or buyer who makes an application for refund are being unjustly enriched. If it is not possible to identify the person/persons who have borne the duty, the amount of excise duty collected in excess will remain in the fund which will be utilized for the benefit of the consumers as provided in Section 12-D."

10.This is thus, a mandatory exercise that is to be undertaken by a manufacturer in order to establish nil unjust enrichment. While this may be easier achieved in cases where the transaction is direct as between the manufacturer and end-user, the level of difficulty increases with the number of intermediaries involved.

11. The assessment, thus, stands remanded to the file of the Assessing Officer, who will determine the issue of refund after furnishing adequate opportunity to the Appellant for establishing nil undue enrichment in its hands. The exercise as set out by the Supreme Court is to be undertaken scrupulously in order to ensure that the incidence of duty has, in fact, not been passed on at any stage till the stage of ultimate end user. The substantial question of law is accordingly answered in the above terms and the appeal allowed by way of remand. No costs.

Sd/-
Asst.Registrar (CS III)

/true copy/

Sub Asst. Registrar

vga

To

1.The Assistant Commissioner of
Central Excise, Guindy Division,
Chennai IV Commissionerate,
EVR Periyar Maligai,
Nandanam, Chennai 600 035.

2. The Commissioner of
Central Excise (Appeals),
26/1, Mahatma Gandhi Road,
Chennai-600034.

3.The Customs, Excise and Service
Tax Appellate Tribunal,
Shastri Bhavan Annexe,
Chennai-600 006.

2 ccs to M/s.Lakshmi Kumaran, Advocate, Sr. 61474, 60021

C.M.A.No.3742 of 2011

CTK (CO)
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