2012 (2) ECS (63 ) (Tri-Ban)

CUSTOMS, EXCISE & SERVICE TAX APPELATE TRIBUNAL
SOUTH ZONAL BENCH AT BANGLORE

Date of hearing: 13.06.2012
Date of decision:13.06.2012

Appeal No. E/1112/2006

**M/s Indian Explosive Ltd.**
**Vs**
**The Commissioner of Central Excise, Hyderabad**

(Arising out of order-in-appeal No. 46/2006(H-III) CE dated 22/08/2006 passed by the Commissioner of Central Excise (Appeals), Hyderabad)

For approval and signature:

**Hon'ble Mr. P.G. Chacko, Member (Judicial)**
**Hon'ble Mr. M. Veeraiyan, Member (Technical)**

M/s Indian Explosive Ltd. …Appellant
Vs
The Commissioner of Central Excise, Hyderabad …Respondent

Present for the Appellant : Ms. Kamana Srikanth, Adv
Present for the Respondent : Mr. Ganesh Haavnur, A.R.

**CORAM:**
**Hon'ble Mr. P.G. Chacko, Member (Judicial)**
**Hon'ble Mr. M. Veeraiyan, Member (Technical)**

FINAL ORDER NO. 396/2012

**"The ruling of the apex court is clear to the effect that, when an assessee claims refund of duty on the basis of price variation under the price variation clause of the relevant contract subsequent to clearance of the goods, the claim, for whatever reason, cannot be allowed. Such fluctuation in price subsequent to clearance of the goods cannot affect the manufacturer's liability to pay excise duty. This ruling of the apex court, in our view, is applicable to the facts of the present case." [Para 4]**

**"In this scenario, we have to follow the ruling MRF case and hold that the refund claim filed by the appellant cannot be allowed on any ground whatsoever. It is settled law that provisional assessment of excisable goods can be resorted to by a manufacturer only with prior permission of the proper officer of Central Excise only. In such case, the finalization of the provisional assessment is also done by the proper officer, whereupon the short paid duty would be paid by the assessee or the excess duty could be claimed as refund in accordance with the provisions of Section 11 B. In no other circumstance can an assessment be claimed to be provisional." [Para 4]**

**Order per P.G. Chacko**

1. This appeal filed by the assessee is against rejection of refund claim. The appellant was engaged in the manufacture of explosives during the period from 1/7/2003 to 29/2/2004. They cleared their product to M/s Singareni Collieries Company Ltd. on payment of duty based on the price initially agreed between the two. The contract between the appellant and the said company contained a price variation clause, which it appears, was invoked by the appellant and the buyer entertained their request for downward revision of prices. It appears, the negotiations did not culminate in any reduction of price of the goods for the said period, for quite some time. Pending final decision by the buyer, the appellant filed a refund claim on 22/6/2004 claiming refund of duty of Rs. 5,83,135/- which, apparently, was worked out by the claimant themselves. The revised price was determined as late as on 1/2/2005. Subsequently, the appellant filed the relevant document to the department in support of the refund claim. Subsequently, the department issued show-cause notice dated 5/10/2005 proposing to reject the refund claim on the ground of limitation. This proposal was contested by the party. In adjudication of the dispute, the Assistant Commissioner rejected the refund claim as time-barred, after also observing that the refund claim was not hit by unjust enrichment. In an appeal filed by the assessee against the Assistant Commissioner's order, the Commissioner (Appeals) passed the impugned order whereby, the order-in-original came to be confirmed. Hence the present appeal.

2. The learned counsel for the appellant narrates the circumstances of the case and submits that the refund claim was filed within the statutory period and its rejection on the aforesaid ground may not be sustainable in law. In this connection, she has relied mainly on the Tribunal's decision in the case of Telephone Cables Ltd. Vs. Commissioner of Central Exicse [2003 (154) ELT 237 (Tri. Del)] wherein, on a more or less similar set of facts, it was held that the refund claims filed by the assessee was not to be rejected on the ground that they had not sought provisional assessment of the goods cleared under an agreement incorporating therein a price variation clause. It is pointed out that the civil appeal filed by the department against the Tribunal's decision in Telephone Cables case was dismissed as withdrawn and therefore the Tribunal's decision is liable to be followed in the present case. The learned counsel has also referred to the Tribunal's decision in Commissioner of Central Excise Chennai Vs. Sua

Explosives & Accessories Ltd. [2009 (240) E.L.T. 577 (Tri-Che)] wherein the decision in Telephone Cables case was followed and the department's appeal against grant of refund based on downward revision of price of the goods was dismissed. The learned counsel has also argued that the time bar provisions are prospective in nature and should not be allowed to stand in the way of grant of a substantive benefit like refund. In this connection, reliance is placed on Collector of Central Excise Vs. I.T.C Ltd. [1193 (67) E.L.T 529 (Tri)]. The learned counsel therefore prays for setting aside the impugned order.

3. The learned Superintendent (A.R.), per contra, submits that the refund claim in question is not liable to be granted as it would be contrary to the Hon'ble Supreme Court's ruling in the case of MRF Ltd. Vs. Collector of Central Excise, Madras [1997 (92) E.L.T 309 (S.C.)]. He has also referred to certain decisions of this Tribunal which followed the said ruling of the apex court, for instance, Punjab Digital Indus. Systems Ltd. Vs Commissioner of Central Excise, Chandigarh [2008 (232) E.L.T. 811 (Tri-Del)]. In her rejoiner, the learned counsel has made and endeavour to distinguish the cases cited by the learned superintendent. According to her, the ruling of the apex court may not be applicable to the facts of the present case wherein the refund claim, though not supported by all the requisite documents, was filed within the statutory period.

4. We have given careful consideration to the submissions. Although we are impressed with the way the learned counsel argued the appellant's case, we are not in a position to accept her submission that the ruling of the apex court in MRF case is not applicable to the facts of the present case. The full text of the Hon'ble Supreme Court's decision in MRF case is reproduced below:-

> "This appeal by the assessee is directed against the judgment and order of the Customs, Excise and Gold (Control) Appellate, tribunal, South Regional Bench at Madras dated 24.9.1986 whereby the assessee's claim for refund of excise duty on the differential between the price on the date of removal and the reduced price at which the tyres were on sold the direction of the Government. The assessee contends that their price list was approved on 14.5.1983 but subsequent there to on account of consumer resistance, the Ministry of Commerce, Government of India, directed them, pursuant to the decision taken at the meeting with tyre manufacturers, to roll back the prices to pre 14.5.1983 level and it is on account of this roll back of prices that there came about a differential in the price on the basis of which the assessee claimed refund of excise duty to that extent. The Tribunal came to the conclusion that under Rule 9A and Rule 173C (2) (vi) of Central Excise Rules, the duty was chargeable on the excisable goods at the rate and on the price prevailing on the date of actual removal as shown by the assessee and the subsequent reduction in the price even at the behest of the Government could not create a right in four of the assessee [to] refund of excise duty on the differential in the price. The Tribunal also came to the conclusion that the subsequent reduction in

the price for whatever reason was totally irrelevant so far as the liability to pay excise duty was concerned and, therefore, the claim could not be entertained. On this broad premise, the claim of the assessee for refund came to be rejected and hence the assessee is before us by way of an appeal.

2. We have heard the learned counsel for the assessee. Once the assessee has cleared the goods on the classification and price indicated by him at the time of the removal of the goods from the factory gate, the assessee become liable to payment of duty on the date and time and subsequent reduction in prices for whatever reason cannot be a matter of concern to the Central Excise Department insofar as the liability to payment of excise duty was concerned. This is the view which was taken by the Tribunal in the case of Indo Hacks Ltd. vs. Collector of Central Excise, Hyderabad – 1986 (25) E.L.T. 69 (Tribunal) and it seems to us that the Tribunal's view that the duty is chargeable at the rate and price when the commodity is cleared at the factory gate and not on the price reduced at a subsequent date is unexceptionable. Besides as rightly observed by the Tribunal the subsequent fluctuation in the prices of the commodity can have no relevance whatsoever so far as the liability to pay excise duty is concerned. That being so, even if we assume that the roll back in the price of tyres manufactured by the appellant-company was occasioned on account of the directive issued by the Central Government, that by itself, without anything more, would not entitle the appellant to claim a refund on the price differential unless it is shown that there was some agreement in this behalf with the Government and the latter had agreed to refund the excise duty to the extent of the reduce price. That being so, we see no merit in this appeal brought by the assessee and dismiss the same with no order as to costs."

The ruling of the apex court is clear to the effect that, when an assessee claims refund of duty on the basis of price variation under the price variation clause of the relevant contract subsequent to clearance of the goods, the claim, for whatever reason, cannot be allowed. Such fluctuation in price subsequent to clearance of the goods cannot affect the manufacturer's liability to pay excise duty. This ruling of the apex court, in our view, is applicable to the facts of the present case. This ruling was not considered by the Tribunal in the case of Telephone Cables Ltd supra. On the other hand, as rightly pointed out by the Superintendent (A.R.), the apex court's ruling in MRF case was followed by the Tribunal consistently in numerous cases such as the case of Punjab Digital Indus. System Ltd. (supra). In this scenario, we have to follow the ruling MRF case and hold that the refund claim filed by the appellant cannot be allowed on any ground whatsoever. We are not able to accept the submissions made with reference to the nature of assessement of the goods. It has been argued by the learned counsel that, in view of the price variation clause contained in the relevant contract, the self assessment made by the appellant can be considered to be provisional in nature and,

consequently, the subject refund claim can be allowed without time bar. This submission is not supported by any statutory provision. It is settled law that provisional assessment of excisable goods can be resorted to by a manufacturer only with prior permission of the proper officer of Central Excise only. In such case, the finalization of the provisional assessment is also done by the proper officer, whereupon the short paid duty would be paid by the assessee or the excess duty could be claimed as refund in accordance with the provisions of Section 11 B. In no other circumstance can an assessment be claimed to be provisional. Now that the refund claim itself has been held to be inadmissible in view of the Hon'ble Supreme Court's ruling, the plea made by the learned counsel with reference to unjust enrichment is inconsequential.

5. In the result, the appeal gets dismissed.

(Pronounced and dictated in open Court)