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UNJUST IMPOVERISHMENT

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Refunds in Central Excise are like a mystic game of Snakes and Ladders, wherein, one has to cross two mighty King Cobras, namely, "Time bar" and "Unjust enrichment" to reach the destiny! While the "time bar" is based on a well founded legal principle called "limitation", the "unjust enrichment" is based on the principles of equity!

Section 11B of the Central Excise Act, 1944 inherited the concept of "unjust enrichment" during 1991. This is based on the equitable principle that, when the incidence of duty had been originally passed on to the buyers/customers (by way of representing and collecting the duty through the invoices), then in the event of refund of any such duty, it shall not be given to the assessee who has paid it to the Government, but in turn, shall be given to the person who has really borne the incidence of such duty. But this concept of "unjust enrichment" has been caught in a legal labyrinth and seems to have thoroughly lost its direction, purpose and object.

Section 12 B of the CE Act creates a legal fiction that the manufacturer, has deemed to have passed on the full incidence of duty to the buyer, unless the contrary is proved. In other words, the buyer of the goods is deemed to have borne the incidence of the duty paid by the manufacturer. This legal fiction creates two crucial bottlenecks in many cases, namely, who is the 'buyer" under Section 12 B of the Act and what would be the status of the "refunds" in case of "Post-clearance adjustments!"

As said earlier, being an indirect tax and as it has to be paid at the time of removal, it becomes mandatory for the manufacturer to represent and pay the duty through the invoice on which the goods are originally cleared. Now, as per the legal fiction under Section 12B, the incidence of duty is deemed to have passed on to the buyer. Secondly, in most of the cases, the first buyer of the goods may subsequently either sell such goods bought from a manufacturer or use such goods for his manufacture as a raw material! We will not discuss the category wherein the goods are not sold as such but are used in subsequent manufacture, as with the CENVAT scheme in place, there is not much of an impact, on such categories. Coming to the instances where the goods are traded further it is a common sense that, the first buyer would pass on the incidence of the duty, originally paid by the manufacturer, to the subsequent buyers. This passing-on would continue to relay till the ultimate consumer. If the term "buyer" under Section 12B is understood to mean the "ultimate buyer", it would only result in a never ending wild goose chase! To counter this situation, Section 11B of the Act, has a recourse asylum, whereby, all such refund claims will have their destination called "Consumer Welfare Fund".

This leaves one aghast with a question that as to whether there could be any "refund" at all or it is only a mirage? As always, Courts are the Knights of wisdom! The decision of the Hon'ble High Court of Madras in the case of **M/s Addison & Co vs CCE, Madras {2001(129) ELT 44 (Mad)}**, is a landmark decision and is worth a case study! In the said case, the Hon'ble High Court of Madras, has held as, *"Section 11B is intended to prevent a person who has paid duty or borne it initially from receiving the refund of a part or whole of the duty if he has already passed on that burden of the duty paid by him to another as that would result in unjust enrichment. It is that amount which is required to be credited to the Consumer Welfare Fund. The fact that the Consumer Welfare Fund has been constituted does not on that score require the authorities dealing with refund claims to start an enquiry as to the price at which the goods had been sold to the ultimate consumer after the dealer who purchases the goods from the manufacturer, sells to its sub-dealer who in turn may sell to a retailer who in turn ultimately may sell the same to the actual consumer. The enrichment of the person, who has paid the duty and seeks refund, would be unjust if he even while not suffering the burden of duty after having passed on the same to another obtains refund and retains such refund with him. There would be nothing unjust where the person who has paid duty and has not passed on that burden to another receives refund thereby reducing the burden which he was not required to bear but had bore.*

> *The language employed in Section 11B therefore is not capable of being construed as having reference to the ultimate consumer of the product. What has to be demonstrated by the claimant is that the burden of the duty paid had not been passed on by him to any other person. The passing on will occur only if the person who claims refund of duty as*

shifted the burden to another. There can be no passing on of the incidence of the duty if he merely reduces his burden by receiving the refund. The possibility that the dealer who has obtained goods from the manufacturer may charge to his buyer the full amount of the duty ignoring the refund received by the manufacturer cannot be a ground for denying refund to the manufacturer.

The word 'buyer' used in Section 12B also cannot be construed as referring to the ultimate consumer. The buyer referred to therein in the normal circumstances is the buyer who buys the goods from the person who has paid duty.

The primary object of the provision which is intended to deter or prevent unjust enrichment is to prevent enrichment of the person who has paid duty and who seeks refund of the same. It is not directed at the buyer who has entered into arms length transactions with manufacturer and has sold the goods to sub-dealers, retailers or consumers."

Thus the Hon'ble high Court has held that the "buyer" under Section 12 B is not the ultimate buyer but the first buyer from the manufacturer. Now the second bottleneck is as to how to overcome the presumption under Section 12B that the incidence of duty is deemed to have been passed on to the buyer. Apparently, there are only two options left to the hapless manufacturers. Either not to collect the duty from the buyer but retain the incidence with him or subsequently return the duty portion to the buyers, once it is held to be "not-payable". The first option is commercially not prudent, as even Mr. Nostradamus cannot predict the fate of a Central Excise refund claim! As on date, retaining the duty incidence and also fighting against such levy with the department could well be the most foolish decision on this planet! So the only possible and viable option left to the manufacturer is to pay back the duty portion to the buyers, once it is held to be "not-payable/ refundable". This return of the duty subsequent to the original receipt from the buyers can be either by way of raising a credit note, issuing a cheque or by way of adjusting the running account to the extent of the duty. By doing so, the manufacturer is reclaiming the duty incidence back from the buyer and thus appears to qualify for the refund, negating the doctrine of "unjust enrichment". These sort of financial adjustments can be termed as "Post-clearance adjustments".

In this connection, readers' kind reference is drawn to the decision of the Larger Bench of the Hon'ble Tribunal in the case of **S. KUMAR'S LIMITED Vs CCE, INDORE {2003 (153) E.L.T. 217}.** The facts of the said case, as enumerated in Para 3 of the decision, are as under:

"The appellants were job workers for M/s. Dhvani Terrifabs Export Pvt. Ltd. (for short M/s. DTE). They received raw material (grey fabrics of cotton) from M/s. DTE and after processing the same, supplied the processed fabrics (falling under Chapter 60 of the Schedule to the Central Excise Tariff Act, 1985) to M/s. DTE. During the period 5-3-97 to 30-8-97, the appellant cleared processed fabrics to M/s. DTE on payment of Additional Excise Duty (AED) in lieu of sales tax @ 8% ad valorem under the Additional Duties of Excise (Goods of Special Importance) Act, 1957. The total duty so paid was Rs. 8,43,041/-. Later on realizing that under Notification No. 9/96-C.E., dt. 23-7-96, the goods were exempt from such duty, the appellant sent to M/s. DTE a cheque dt. 3-9-97 for Rs. 7,08,520/- which is equivalent to the amount of duty, the appellants had collected from M/s. DTE at the time of clearance of the goods. It is to be noted that the appellant had not collected the differential amount of Rs. 1,34,521/- from M/s. DTE at the time of clearance of the goods."

After considering catena of judgments, the Hon'ble Tribunal has held as under:

"In the result, the claim for refund made by the appellant to the extent of Rs. 7,08,520/- is declined. As far as the claim for refund of Rs. 1,34,521/- is concerned since there is no dispute of the fact that this amount of duty had not been collected by the appellant, it is not hit by the principles of unjust enrichment. Subject to the above clarification, the appeal stands dismissed."

Thus the Hon'ble Tribunal has held that the "Post-clearance adjustments" like issuance of credit notes or cheque by the assessee to buyer of the goods, taking back the burden of duty on the goods would **not** help the assessee to get over the bar of unjust enrichment under Section 11B of the Central Excise Act. But the decision of the Hon'ble High court of Madras in the above said Addison's case was on the contrary. In the said case, the Hon'ble High Court has recognized the postclearance adjustments, such as, issuance of credit notes in favour of the buyers, as satisfying the requirements under both Section 11B and 12 B of the Act, to claim "refunds", under the Act. When the said ratio was cited before the Hon'ble Tribunal in the S. Kumar's case (supra), it was observed that an appeal against the said decision of the High Court is pending in the Supreme Court. Thus, as on date, the 'postclearance adjustments" are not recognized as having the effect of satisfying the doctrine of "unjust enrichment" bar under Section 11B, across the nation.

In an interesting decision in the case of **M/s UNIVERSAL CYLINDERS LTD vs CCE, JAIPUR {2004 (178) E.L.T. 898}**, the Hon'ble Tribunal observed as under:

> *"Coming to the question of applicability of bar of unjust enrichment, we observe that undisputed fact is that the contract entered into between the assessee and their customers contain the price variation clause. When the customers refused the price of the cylinder with effect from July, 1999,* ***they had deducted the difference amount from payment already made by them to the assessee****. In view of these facts, it cannot be claimed by the Revenue that the incidence of duty has been borne by the assessee. As their customers had not made the entire payment to them on account of revision of the price downward with effect from July 1999, the decisions relied upon by the learned Senior Departmental Representative are not applicable as in those cases, the credit notes were issued subsequently by the assessee to their customers. We, therefore, find no reason to interfere with the finding of Commissioner (Appeals) on this aspect also and accordingly reject the Appeal filed by the Revenue." (Emphasis supplied)*

In the above case, the Hon'ble Tribunal has allowed another mode of "post-clearance adjustment" (Highlighted). The above decision has also distinguished the Larger Bench decision of S.Kumar's (supra). The above decision has been affirmed by the Hon'ble Supreme Court **{2005 (179) E.L.T. A41 (S.C.)}.**

Thus from the above, it could be seen that, "post-clearance adjustments" in the nature of deduction from the payment already made is allowed and accepted to have satisfied the condition of "unjust enrichment' if there is a price variation clause in the agreement. Price variation clause is just another safety clause in a commercial transaction, whereby, both the seller and buyer are at liberty to amend the price, depending upon various exigencies, which may arise at a future date. If that is the only condition to beat the vice of "unjust enrichment", we suggest every manufacturer to incorporate it in all their transactions! And coming to the mode of "post- clearance adjustments", if the deduction by the buyer from the payment already made would suffice the requirement, we feel there is no rhyme or reason, not to recognize issuance of credit notes and issuance of cheque, etc, as they are nothing but other modes of "post-clearance adjustments". In other words, issuance of credit notes or cheques to the buyer would have the same effect as that of deducting the difference from the payment already made. Any discrimination between them would only defeat the principles of equity and giving rise to victims of *unjust impoverishment!*