

2013 (2) ECS (117) (Tri - Mum)

**IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
WEST REGIONAL BENCH AT MUMBAI**

COURT NO. II

Bharat Electronics Ltd.

Versus

Commissioner of Customs (Import), Mumbai

APPEAL No. C/933/03

(Arising out of order – in – Appeal No. 330/2003 - MCH dated 09.09.2003 passed by the
Commissioner of Customs, (Appeals), Mumbai

Date of Hearing: 09.01.2013

Date of Decision: 09.01.2013

Bharat Electronics Ltd.,

Appellant

Versus

Commissioner of Customs (Import),
Mumbai

Respondent

Appearance:

Shri D H. Nadkarni, Advocate for Appellant

Shri V K Agarwal, Addl.Comm.(AR) for Respondent

CORAM

HON'BLE SHRI P.R. CHANDRASEKHARAN, MEMBER (TECHNICAL)
HON'BLE SHRI ANIL COUDHARY, MEMBER (JUDICIAL)

ORDER NO. A/381/13/CSTB/C-I

“As regards the reliance placed on the Chartered Accountant’s certificate, this Tribunal in the case of CC (Export), Nhava Sheva Vs. SNS Overseas Pvt. Ltd., reported in 2012 (275) ELT 621 (Tri - Mumbai) held that Chartered Accountant’s certificate cannot be a conclusive proof of the fact that duty incidence has not been passed on even though it could be one of the evidence with respect to such a claim.” [Para 5.4]

Per: Shri P.R. Chandrasekharan, Member (Technical)

1. The appeal is directed against order – in – appeal No. 330/2003 – MCH dated 09.09.2003 passed by the Commissioner of Customs (Appeals), Mumbai – I.
2. The appellant, M/s Bharat Electronics Ltd. filed a refund claim towards excess duty paid on import of a consignment of refractory bricks. The refund claim was rejected by the assessing officer and the appellant preferred an appeal which was allowed vide an order – in – appeal dated 24.07.1998. The said order – in – appeal was accepted by the Revenue. In pursuance to the said order – in – appeal, the refund claim of the appellant was once again considered by the adjudicating authority after following due process of law. The adjudicating authority allowed the refund amounting to Rs. 81,28,725/- but credited the same to the Consumer Welfare Fund in terms of Section 27 (2) of the Customs Act, 1962 on the ground that the appellant did not lead any satisfactory evidence to show that they have not passed on the incidence of duty burden to anybody else. The appellant preferred an appeal before the lower appellate authority who dismissed their appeal and hence, the appellant is before us.
3. The Ld. Counsel for the appellant submits that in this case, the refractory bricks have been consumed in the furnace for manufacturing TV glass shells, which was in turn used in the manufacturing of various goods of the appellants. In other words, the refractory bricks have been captively consumed and the refractory bricks has not been sold as such. As per the provisions of Section 28 D, only in

respect of goods which have been sold as such, the question of unjust enrichment would arise and in the present case inasmuch as the goods have not been sold but captively consumed, the appellant is rightly eligible for the refund. He relies on the decision of the Tribunal in the following cases:

- a) Pharmacia India (P) Ltd., 2010 (256) ELT 685 (Kar - HC)
 - b) Indo – Swiss Synthetic Gem Mfg. Co. Ltd., - 2003 (162) ELT 121 (Mad)
 - c) Jindal Vijaynagar Steel Ltd., - 2006 (206) ELT 528 (T)
 - d) Elightread (India) Ltd. - 2006 (199) ELT 486 (T)
4. The Ld. Commissioner (A.R.) on the other hand submits that the concept of unjust enrichment would apply even in respect of goods captively consumed, whether or not they are capital goods, and relies on the decision of the Hon'ble apex Court in the case of UOI vs. Solar Pesticide Pvt. Ltd., reported in 2000 (116) ELT 401 (SC), Western Coalfields Ltd., vs. CCE, Kolkata, reported in 2011 (273) ELT 153 (Tri - Del) and Larger Bench decision in the case of SRF Ltd., Vs. CC, Chennai, reported in 2006 (193) ELT 186 (Tri - LB) in support of his contention.
5. We have carefully considered the rival submissions.
- 5.1. From the records of the case it is seen that the appellant did not lead any evidence before the adjudication and lower appellate authority showing that the incidence of duty burden has not been passed on to any other person. They produced only a Chartered Accountant's certificate stating that the appellant, M/s Bharat Electronics Ltd. are the actual users of the bricks and the incidence of duty claimed as refund was not included as cost in the price of the manufactured goods.
- 5.2. The Hon'ble apex Court in the case of Solar Pesticide Pvt. Ltd., considered the question of unjust enrichment in the case of captive consumption and held as follows :-
- “To claim refund of duty it is immaterial whether the goods imported are used by the importer himself and the duty thereon passed on to the purchaser of the finished product or that the imported goods are sold as such with the incidence of tax being passed on to the buyer. In either case

the principle of unjust enrichment will apply and the person responsible for paying the import duty would not be entitled to get the refund because of the plain language of Section 27. Having passed on the burden of tax to another person, directly or indirectly, it would clearly be a case of unjust enrichment. If the importer / seller is then able to get refund of the duty paid from the Government notwithstanding the incidence of tax having already passed on to the purchaser. Difficulty in proving that the incidence of duty borne by the importer has not been passed on to the purchaser of the finished product can be no ground for interpreting Section 27 differently. Therefore, the principle of unjust enrichment incorporated in Section 27 would be applicable in respect of imported raw material and captively consumed in the manufacture of a final product”.

- 5.3. The same decision was followed by the Hon'ble apex Court in the case of CC, Chennai Vs. Borax India Ltd., reported in 2001 (134) ELT 11 (SC). The larger Bench decision of this Tribunal in the case of SRF Ltd. (supra) held that the principles of unjust enrichment would apply in respect of imported capital goods captively consumed in the manufacture of excisable goods. The same decision was followed by this Tribunal in the case of Western Coalfields Ltd. wherein also this Tribunal held as follows, in the context of Section 11 B of the Central Excise Act.

“Plain reading of the above provision would disclose that the same apparently does not make any difference between the duty paid on the final product or the inputs or the capital goods, the provision nowhere specifies that in case of duty paid on capital goods, the assessee claiming the refund need not establish that he had not passed on the duty burden of a customer, the provision of law, therefore, apparently applies to all the cases of refund including the case of capital goods”.

- 5.4. As regards the reliance placed on the Chartered Accountant's certificate, this Tribunal in the case of CC (Export), Nhava Sheva Vs. SNS Overseas Pvt. Ltd., reported in 2012 (275) ELT 621 (Tri - Mumbai) held that Chartered Accountant's certificate cannot be a conclusive proof of the fact that duty incidence has not been passed on even though it could be one of the evidence with respect to such a claim. The invoices issued by the importer to their buyers have to be necessarily seen to conclude whether the incidence of duty has been passed on or not. In the present case apart from the Chartered Accountant's certificate the appellant has not produced any evidence before the lower authorities, in support of their claim that they have not passed on the incidence of Customs duty to the

buyers. Respectfully following the decision of the Hon'ble apex court in the case of Solar Pesticide Pvt. Ltd. and Borax India Ltd. cited supra and the decision of the Larger Bench in the case of SRF Ltd., we hold that the principles of unjust enrichment would apply in the case of refractory bricks which are consumables and which are captively consumed and inasmuch as the appellant has not led any sufficient and satisfactory evidence to prove that the burden of duty incidence has not been passé on, they are not eligible for the refund.

6. Thus the appeal is dismissed as devoid of merits.

(Pronounced in Court)