

# **THE GODS MUST BE CRAZY – PART IV**

(S. Jaikumar, Advocate, Swamy Associates)

## **THE MIRAGE**

*"Tax refunds are receding mirages in the expanding desert of impossibilities"*

### **- Indian Tax Testament**

To get the divine Prasad of "refund" from the Tax Lord, one has to pass the two legal dwarabalakas, namely, "Time bar" and "Unjust enrichment"! 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" in 1991. This is based on the equitable principle that, when the incidence of duty had been passed on to the buyers/customers, then the refund of any such duty shall not be given to the assessee who has paid it to the Government, but in turn, shall be given to the person who had really borne the incidence of such duty or shall be credited to the Consumer Welfare Fund, as the case maybe.

Section 12 B of the CE Act creates a legal fiction that the manufacturer, upon raising an invoice, is deemed to have passed the full incidence of duty to the buyer, unless the

contrary is proved. Now the moot question is who is the "buyer" under the above provisions? Is it the first buyer of the goods from the assessee or the subsequent buyer or the ultimate buyer, who is the actual consumer? If the term "buyer" either under Section 11B or 12B of CEA is understood to mean the "ultimate buyer", it would only result in a neverending wild goose chase and this leaves one aghast with a question that as to whether there could be any "refund" at all or it is only a mirage?

In this connection, 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 worth a case study! In the said case, the Hon'ble High Court of Madras, has held that,

*"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 11B or 12 B of CEA is not the ultimate buyer but the first buyer from the manufacturer.

Now the other 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, netizen’s kind reference is drawn to the decision of the Tribunal in the case of M/s Sangam Processors (Bhilwara) Limited vs CCE, Jaipur **(2002-TIOL-59-CESTAT-DEL-SB)**, wherein it has been held that it is not possible to interpret and to say that even when duty has been passed on to the customers at the time of clearance the assessee can still claim refund by issuing credit notes.

Then came the Larger Bench of the Hon’ble Tribunal in the case of **S. KUMAR’S LIMITED Vs CCE, INDORE {2003 – TIOL – 01 – CESTAT – DEL - LB}** had affirmed the aforesaid decision of Sangam Processor and 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. When the ratio laid down by the Hon’ble High Court of madras in the Addison case (*supra*) 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.

In the latest judgement in the case of M/s Grasim Industries Limited vs CCE, Bhopal **(2011-TIOL-82-SC-CX)**, the Hon'ble Supreme Court has affirmed the ratio spelt in the case of Sangam Processors and S. Kumar's *supra*. While doing so, the Apex Court has held as under:

*" So far as the issuance of the credit note is concerned, the same was issued only on 07.08.1991 although the duty was paid on 19.07.1989 and, therefore, the credit note was issued after two years of the payment of the duty and the clearance of the goods. In this connection, Section 12 of the Central Excise Act becomes relevant which indicates that the party who is liable to pay excise duty on any goods, has to file the sales invoice and other documents relating to assessment at the time of clearance of the goods itself. Therefore, when at the time of clearance no such document was filed and what is sought to be relied upon is a document issued after two years, the same raises a doubt and cannot be accepted as a reliable document."*

From the above, can it be inferred that, if the credit note is issued immediately and not after a lapse of two years and if it can be demonstrated that such credit note is a reliable document, then will the same would be accepted and the refund be granted?

***"When Lord closes one door, he always opens another"***

### **Before Parting ...**

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 (PVC) in the agreement. If that is the only condition to beat the vice of "unjust enrichment", we suggest every manufacturer to incorporate PVC in all their transactions !!!