# CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
# MUMBAI

WEST ZONAL BENCH, MUMBAI

## Service Tax Appeal No. 88473 of 2018

(Arising out of Order-in-Appeal No. PUN-CT-APPII-000-037-18-19 dated 10.05.2018 passed by the Commissioner of Central Tax (Appeals-II), Pune.)

**M/s Chowgule Industries Pvt. Ltd.** .....Appellant
**S. No. 53, Pune Satara Highway,**
**Katraj, Pune – 411 046**

*VERSUS*

**Commissioner of CGST &**
**Central Excise, Pune-I** .....Respondent
**41-A, ICE House, Sassoon Road,**
**Opp. Wadia College, Pune – 411 001**

**APPERANCE:**

Shri Jay Chheda, Advocate for the Appellant
Shri Prabhakar Sharma, Superintendent, Authorised Representative for the Respondent

CORAM:

**HON'BLE DR. SUVENDU KUMAR PATI, MEMBER (JUDICIAL)**

**FINAL ORDER NO. A/85559 / 2022**

Date of Hearing: 11.05.2022
Date of Decision: 16.06.2022

Rejection of refund claim against pre-deposit, in compliance to Section 35F (Pre 2014 amendment), consequent upon Order-in-Original confirming the duty demand, interest and penalty that has been subsequently set aside by the CESTAT in August 2015, is assailed in this appeal.

2. Factual backdrop, that has brought the dispute to this forum, can be summarised as follows:-

2.1 Appellant is engaged in the business of trading of cars and it is an authorised dealer for Maruti Udyog Ltd. Dealership agreement bounds the Appellant to provide first free servicing to the customers who purchased their Maruti Cars from the Appellant. Two show-cause notices issued to the Appellant in October, 2006 and November, 2006 demanding Service Tax on dealer margin, on the ground that first free service was a part of the Appellant's trading margin received from M/s Maruti, and also on handling charges, on which VAT was already paid by the Appellant. Through an adjudication process in the Order-in-Original such Service Tax demand to the tune of Rs.11,11,997/- alongwith interest under Section 75 and equal penalty under Section 78 of the Finance Act, 1994 was confirmed. Appellant made the payment in compliance to Section 35F and preferred appeal before the Commissioner (Appeals) but that yielded no fruitful result. Appellant knocked at the door of the CESTAT and got the desired relief vide this Tribunal's order dated 26.08.2015 after which it sought for refund of the amount paid in compliance to Order-in-Original as the then provision contained in Section 35F of the Central Excise Act, equally applicable to the Service Tax, grants the right of appeal to the Appellant only after such payment. Such refund request was indirectly denied again through an adjudication order that also had undergone an appeal procedure wherein Commissioner of Central Tax (Appeals-II), Pune vide his order dated 10.05.2018, confirmed the Order-in-Original

wherein the refund amount of Rs.21,26,143/- under Section 11B of the Central Excise Act was sanctioned but ordered that the same be transferred to the Consumer Welfare Fund established under Section 12C of the Central Excise Act 1944 read with Section 83 of the Finance Act on the ground that Appellant failed to establish that it was not unjustify enriched. Appellant is before this forum challenging the legality of such an order.

3. Learned Counsel for the Appellant Mr. Jay Chheda, in submitting copies of the CBEC Circular Nos. 1053/2/2017-CX, 984/8/2014-CX and 275/37/2k-CX.8A of 2002 and by placing reliance on the judgement of Hon'ble Bombay High Court in the case of *Suvidhe Ltd. Vs. Union of India* reported in *1996 (82) ELT 177 (Bom.)* had argued that Section 11B of the Central Excise Act would not be applicable for refund of pre-deposit made under provision of Section 35F for which doctrine of unjust enrichment would not be a bar for such refund. He further argued that such payment was made under protest with a clear noting in the covering letter of the Appellant sent to the Additional Commissioner of Service Tax Cell, Pune-III on dated 21.08.2009 informing about such Service Tax payment alongwith interest and penalty and showing its intention to file an appeal before the Commissioner of Central Excise & Customs (Appeals), Pune and such payment made under protest in compliance to the statutory requirement, so as to acquire right of appeal, can never be refused on the ground that the same is hit by the doctrine of unjust enrichment. Further, placing reliance on the judgement passed by the Hon'ble Bombay High Court in the case of

*Commissioner of Central Excise, Pune-I Vs. Sandvik Asia Ltd. [2015 (323) ELT 431 (Bom.)]*, he strongly contended that posting the amount deposited by the Appellant in its Profit & Loss Account as expenditure would be of no consequence since showing the same in the expense side cannot be presumed that the burden of duty has been passed to the consumer and Hon'ble High Court of Bombay also had highlighted the clarification made by the Hon'ble Supreme Court that Section 11B, which deals with claims of refund of duty, would have no application to the deposit made in compliance to the order of any Court, for which the order passed by the learned Commissioner (Appeals) is required to be set aside.

4. In response to such submissions, learned Authorised Representative for the Respondent-Department Mr. Prabhakar Sharma, while supporting the reasoning and rationality of the order passed by the learned Commissioner (Appeals), has drawn attention of this Bench to para 14 of the Order-in-Original dated 15.12.2017 wherein it was clearly stated that accounting statement requires to establish that unjust enrichment would not take place when dues paid is shown as recoverable in the books of account under the heading Current Assets and continue to pass on to the subsequent financial years till refund, as sought, in sanctioned and therefore, interference by this Tribunal in the order passed by the Commissioner (Appeals) is uncalled for.

5. I have gone through the case record and written notes alongwith connected documents filed by the parties. At the outset it

is required to have a look at Section 35F of the Central Excise Act, as applicable then during the relevant period, with reference to Appellant's letter dated 21.08.2009. First paragraph of Section 35F reads:

> *"Where in any appeal under this Chapter, the decision or order appealed against relates to any duty demanded in respect of goods which are not under the control of Central Excise authorities or any penalty levied under this Act, the person desirous of appealing against such decision or order shall, pending the appeal, deposit with the adjudicating authority the duty demanded or the penalty levied."*
>
> *(Underlined to emphasise)*

6. The above provision would clearly indicate that for the purpose of filing an appeal, confirmed duty demand in the order to be appealed against alongwith interest and penalty are to be deposited with the adjudicating authority. Accordingly, letter under reference i.e. Appellant's letter dated 21.08.2009 has been sent that borne testimony to the fact that such amount was deposited in confirmation of the order dated 27.07.2009 with its annexure issued on 12.08.2009 and it is a clear revolution of the fact that Appellant was to file an appeal against such order before the Commissioner of Central Excise & Customs (Appeals), Pune. There was a noting in it that such payment as full settlement of the amount demanded was without prejudice to the appeal to be filed. This being the facts and evidence on record, there is no second opinion that can emerge that such payment made by the Appellant towards discharge of duty confirmed alongwith interest and penalty was in the form of pre-deposit so as to acquire right of appeal and therefore the Circular of

the CBEC Board referred by the Appellant namely Circular Nos. 1053/2/2017-CX, 984/8/2014-CX, 275/37/2k-CX.8A would clearly apply wherein it was stipulated that a simple application would be sufficient for the purpose of processing the refund and Appellant would not be subjected to the process of refund of duty as contemplated under Section 11B of the Central Excise Act, 1944. Again this being the position prevalling all throughout, the judgment of the Hon'ble Bombay High Court passed in *Suvidhe Ltd. cited supra* with a clear finding that the doctrine of unjust enrichment will not be applicable in respect of such deposit, would apply to the present scenario.

7. The argument led on behalf of the Respondent-Department that when the amount is shown in the books of account as expenditure, if would be presumed to have been passed indirectly to another person is without any basis, since no such accounting procedure has confirmed such an erroneous logic. It is surprising that the Additional Commissioner in his Order-in-Original dated 15.12.2017 had put-forth two conditionalities as a requirement for establishment of no unjust enrichment (para 14 of this order) but the same is without any authoritative support and appears to have been designed in conformity to his erroneous understanding, despite the fact that Hon'ble Bombay High Court in *Commissioner of Central Excise, Pune-I Vs. Sandvik Asia Ltd., cited supra* had made the following category observation:

> *"4. ...The Tribunal was not concerned with the treatment given to the amount and as deposited in the Assessee's profit and loss account. It is immaterial and*

*irrelevant for the Tribunal and equally for us as to what the Assessee terms this amount in his Books of Account. Even if it is shown on the 'expense side' that does not mean that the presumption that the burden has been passed to the consumer can be raised.*

*5. Repeatedly the Hon'ble Supreme Court has clarified that Section 11B, which deals with the claims of refund of duty, will not apply to a case where the amount in question was deposited in compliance with the interim order. It the amount is directed to be deposited not towards duty liability but as a condition for grant of interim relief or interim stay, then this question of unjust enrichment would not arise at all."*

(In the instant case, it is for the purpose of making the Appellant eligible to appeal)

To put it differently, there is no such authority that would show that any amount being shown as expenditure would automatically get credited in the income side as if it is realised from a third party/person. Hence the order.

ORDER

8. The appeal is allowed and the order passed by the Commissioner of Central Tax (Appeals-II), Pune vide Order-in-Appeal No. PUN-CT-APPII-000-037-18-19 dated 10.05.2018 is hereby set aside. Appellant is entitled to get the entire deposited amount of Rs.21,26,143/- alongwith applicable interest and the Respondent-Department is directed to pay the same within 3 months of receipt of this order.

(Order pronounced in the open court on 16.06.2022)

**(Dr. Suvendu Kumar Pati)**
**Member (Judicial)**

*Prasad*