

CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL
1st Floor, WTC Building, FKCCI Complex, K. G. Road,
BANGLORE-560009

COURT-2

Customs Appeal No. 1481 of 2012

*[Arising out of the Order-in-Appeal No.34/2012 dated
09.03.2012 passed by the Commissioner of Customs
(Appeals), Cochin.]*

M/s. Cochin Shipyard Ltd

PO Bag No.1653,
Perumanoor P.O
Cochin – 682 015.

....Appellant

Vs.

Commissioner of Customs

Customs House
Willingdon Island
Cochin – 682 009.

....Respondent

Appearance:

Mr. Kuryan Thomas, Advocate

Mr. K. A. Jathin, AR

....For Appellant

.... For Respondent

CORAM:

HON'BLE MR. P. A. AUGUSTIAN, MEMBER (JUDICIAL)
HON'BLE MRS R. BHAGYA DEVI, MEMBER (TECHNICAL)

Date of Hearing: 21/09/2023

Date of Decision: 24/01/2024

FINAL ORDER No. 20055 of 2024

Per R. BHAGYA DEVI:

The appellant, M/s. Cochin Shipyard Ltd., filed five ex-bond bill of entry No.515 dated 14.05.2004 for clearance of dredger manufactured under bond in the warehouse in terms of Section 65 of the Customs Act, 1962 by availing the benefit of Notification

No.21/2002 dated 01.03.2002 by which the raw materials and components imported for manufacture of vessel falling under CTH 8905 are exempted from customs duty. The dredger was to be sold to Chennai Port Trust as per the sale agreement. The goods were assessed as per the value declared in the sale agreement and duty was remitted by the appellant. Later, the appellant preferred an appeal before the Commissioner (Appeals) and the Commissioner (A) vide Order-in-Appeal No. 141/04 dated 19.08.2004 allowed the appeal observing that the benefit of Notification was also available to the imported raw materials and parts that were utilised in the manufacture of dredgers. Based on this, a refund application was filed for refund of duty amount of Rs.2,61,21,513/-. Meanwhile, the said order was appealed by the Revenue before this Tribunal and the Tribunal vide its Final Order No.1733/06 dated 13.10.2006 dismissed the appeal for want of COD clearance and the CBEC had directed the authorities to decide the refund claim on merits. The Commissioner (A) rejected the refund claim on the ground that the documents filed along with the refund claim clearly establish that the incidence of duty was passed on to the buyer i.e., Chennai Port Trust who had informed the reimbursement of duty to the appellant. Accordingly, the amount rejected was credited to the consumer welfare fund and the claim was hit by the doctrine of unjust enrichment. The present appeal is against this impugned order rejecting the refund claim.

2. The learned counsel on behalf of the appellant submitted that they had entered into an agreement dated 24.04.2002 with Chennai Port trust for design, construction and supply of Trailing Suction Hopper Dredger. While clearing the dredger, the appellant had claimed benefit of the Notification No.21/2002 dated 01.03.2002 which granted exemption from basic duty of customs and additional duty in respect of raw materials and parts used in the manufacture of dredger. The appellant remitted the duty on 14.05.2004 challenged the assessment. On appeal, the Commissioner (Appeals) had extended the benefit of the Notification and accordingly, they filed a refund claim. It is submitted that when Revenue demanded duty on the clearance of the dredger, the Chennai Port Trust advanced the said duty amount to the appellant. At the time of payment of duty, the Account Head "Other Direct Expenses" having Account No. E-DE-SB-2160-00 was debited on 14.05,2004. After the Commissioner (Appeals) extending the benefit of the Notification on 13.10.2004 under Account Head "Other Direct Expenses" Account was credited and corresponding debit was given to "Customs Cochin - Advance Account" bearing Account No. A-LA-CP-4507-00 by the amount of duty of Rs.2,61,21,513/-. It is further submitted that the amount equivalent to customs duty advanced by Chennai Port Trust was debited from the customer ledger of Chennai Port Trust and credited to the account "Credit Balance of Sundry Debtors" bearing Account No. L-CL-OL-3525-00. In the financial statements, amount of the customs duty is shown as deposits with Customs Department under the heading "Other Non-current

Assets". It is also stated that it has been declared as payable to Chennai Port Trust under the heading "Other Financial Liabilities Non-current". Therefore, it is claimed that when the amount equivalent to duty which was advanced by Chennai Port Trust to enable the appellant to pay the duty and clear the dredger and it is stated as payable to Chennai Port Trust in the books of account; hence, the authorities cannot hold that the appellant had passed on the duty liability to Chennai Port Trust. As long as the appellant shows the amount as payable to Chennai Port Trust and as a deposit with the Customs Department, it cannot be treated as passed on to Chennai Port Trust. In support, he relied upon the following decisions:

- Jindal Drugs Ltd vs. CC: 2017 (357) ELT 259
- CC vs. Jinal Drugs Ltd.: 2018 (360) ELT 988 (Bom.)
- Cadbury India Ltd. vs. UOI: 2015 (315) ELT 488 (Ker.)
- CCE vs. Addison & Co. Ltd.: 2016 (339) ELT 177 (SC)
- Pfizer Ltd vs CCE: 2022 (66) GSTL 122 (Tri.-Mum.)
- PMP Components Ltd vs. CCE: 2001 (135) ELT 914 (Tri.-Mum.)

3. The Authorised Representative on behalf of the Revenue submits that from the records, it is very clear that the duty burden was borne by the buyer i.e., Chennai Port Trust and this fact is not under dispute. The only reasoning placed by the appellant is that it was an advance and the documents in the financial statements of the appellant shows as payable to Chennai Port Trust. The provisions of unjust enrichment are very clear and very categorical that unless and until the appellant produces evidences

to show that it is not passed on to the buyer, refund cannot be sanctioned. In this case, the duty has been borne by the buyer is not under dispute and therefore, any amount of clarifications on records placed before the authorities will not entitled the appellant refund amount.

Section 27. Claim for refund of duty. –

(1) Any person claiming refund of any duty or interest,-
 (a) paid by him; or
 (b) borne by him,
 may make an application in such form and manner as may be prescribed for such refund to the Assistant Commissioner of Customs or Deputy Commissioner of Customs, before the expiry of one year, from the date of payment of such duty or interest:

Provided that where an application for refund has been made before the date on which the Finance Bill, 2011 receives the assent of the President, such application shall be deemed to have been made under sub-section (1), as it stood before the date on which the Finance Bill, 2011 receives the assent of the President and the same shall be dealt with in accordance with the provisions of sub-section (2)

Provided further that the limitation of one year shall not apply where any duty or interest has been paid under protest.

Provided also that where the amount of refund claimed is less than rupees one hundred, the same shall not be refunded.

Explanation. - For the purposes of this sub-section, "the date of payment of duty or interest" in relation to a person, other than the importer, shall be construed as "the date of purchase of goods" by such person.
 (1A) The application under sub-section (1) shall be accompanied by such documentary or other evidence (including the documents referred to in section 28C) as the applicant may furnish to establish that the amount of duty or interest, in relation to which such refund is claimed was collected from, or paid by him and the incidence of such duty or interest, has not been passed on by him to any other person.

(2) If, on receipt of any such application, the 4 [Assistant Commissioner of Customs or Deputy Commissioner of Customs] is satisfied that the whole or any part of the 5 [duty and interest, if any, paid on such duty] paid by the applicant is refundable, he may

make an order accordingly and the amount so determined shall be credited to the Fund:

Provided that the amount of 5 [(duty and interest, if any, paid on such duty] as determined by the 4 [Assistant Commissioner of Customs or Deputy Commissioner of Customs] under the foregoing provisions of this sub-section shall, instead of being credited to the Fund, be paid to the applicant, if such amount is relatable to –

(a) the 5 [duty and interest, if any, paid on such duty paid] by the importer, 6 [or the exporter, as the case may be] if he had not passed on the incidence of such 7 [duty and interest, if any, paid on such duty] to any other person;

(b) the 5 [duty and interest, if any, paid on such duty] on imports made by an individual for his personal use;

(c) the 5 [duty and interest, if any, paid on such duty] borne by the buyer, if he had not passed on the incidence of such 5 [duty and interest, if any, paid on such duty] to any other person;

4. The appellant is eligible for the refund claim is not in dispute. The limited issue to be decided is whether the appellant as per the above Refund provisions has passed on the duty burden to his buyer and therefore, the Commissioner (A) was right in rejecting the refund claim on the question of unjust enrichment. The appellant himself admits to the fact that the Chennai Port Trust, their buyer had advanced the customs duty amount of Rs.2,61,21,513/- to the appellant for discharging their duties on the dredger imported by them. The Chartered Accountant has also certified that customs duty was paid by Chennai Port Trust. The Chief Engineer of M/s. Chennai Port Trust vide his letter dated 19.12.2007 to the Assistant Commissioner (Refunds) informed that the sum of Rs.2,61,21,513/- has been reimbursed by the Chennai Port Trust to M/s. Cochin Shipyard (appellant) towards

customs duty on construction and supply of 1 no. Trailing Suction Hopper Dredger Cauvery by M/s. Cochin Shipyard to Chennai Port Trust. This letter and the contents of the letter is not disputed. Their only claim is that the amount received from the buyer is an advance which will be paid to them after the receipt of the refund claim from the authorities. As per Section 27 (2) (a) the appellant will be eligible for **duty and interest, if any, paid by the importer, if he had not passed on the incidence of such duty and interest, to any other person;** and in the present case it is obvious and admitted fact that duty burden was passed on to the buyer. All the decisions relied upon by the appellant are those wherein the appellants in those cases had produced sufficient evidence to prove that duties paid by them were not passed on to their buyers. As the law, on unjust enrichment, it is a settled that unless and until the importer proves that incidence of duty has not been passed on to the buyer, the question of refund does not arise. The Hon'ble Supreme Court in the case of **Union of India Versus Pesticide Pvt. Ltd. 2000 (116) E.L.T. 401 (S.C.)** dated 4-2-2000 observed that:

“17. The use of the words “incidence of such duty.....” is significant. The words “incidence of such duty” mean the burden of duty. Section 27(1) of the Act talks of the incidence of duty being passed on and not the duty as such being passed on to another person. To put it differently the expression “incidence of such duty” in relation to its being passed on to another person would take it within its ambit not only the passing of the duty directly to another person but also cases where it is passed on indirectly. This would be a case where the duty paid on raw material is added to the price of the finished goods which are sold in which case the burden or the incidence of the duty on the raw material would stand passed on to the purchaser of the finished product. It would follow from the above that when the whole or part of the duty which is

incurred on the import of the raw material is passed on to another person then an application for refund of such duty would not be allowed under Section 27(1) of the Act.

18. Section 27(2) of the Act, as already noticed, deals with the cases where application for refund had been made prior to the amendment of the Act in 1991. Sub-section (a) of the proviso is similar to the provisions contained in Section 27(1) of the Act i.e. refund of duty paid by the importer will be allowed if he had not passed on the incidence of such duty to any other person. Section 28C of the Act would have reference to those goods which are cleared and would undoubtedly have no application to the cases of the captive consumption. It is in respect of those goods, which are cleared that Section 28C requires a person clearing the goods to indicate the amount of duty paid thereon which will form part of the price at which such goods are to be sold. It is not possible to accept the contention that because Section 28C of the Act cannot be applied in the cases of goods imported for captive consumption, therefore, the principle of unjust enrichment would not be applicable in such cases. As we have already indicated, Section 27 of the Act has been re-cast with the amendments made in 1991 and the said section does not necessarily have to be read in conjunction with Sections 27C and D of the Act. If the incidence of duty paid on the imported raw material has not been passed on to any other person, then by virtue of proviso to Section 27 (2) of the Act in the case where application for refund had been made prior to 1991, refund due on the duty paid would be given to the applicant.

5. In view of the above, we do not find any reason to interfere with the impugned order and accordingly, the appeal is dismissed.

(Order pronounced in open court on 24.01.2024.)

(P. A. AUGUSTIAN)
MEMBER (JUDICIAL)

(R. BHAGYA DEVI)
MEMBER (TECHNICAL)