

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,
WEST ZONAL BENCH : AHMEDABAD**

REGIONAL BENCH - COURT NO. 3

CUSTOMS Appeal No. 10536 of 2020-DB

[Arising out of Order-in-Original/Appeal No JMN-CUSTOM-000-APP-001-TO-004-20-21 dated 29.05.2020 passed by Commissioner of CUSTOMS-JAMNAGAR (PREV)]

Commissioner of Customs –JAMNAGAR (Prev.)

.... Appellant

Sharda House, Bedi Bandar Road,
Opp. Panchavati, Jamnagar, Gujarat

VERSUS

Reliance Industries Limited

.... Respondent

PO Reliance Greens Sub Po- Motikhavadi
Jamnagar, Gujarat-361142.

WITH

**(i) CUSTOMS Appeal No. 10537 of 2020 (Commissioner of Customs –
Jamnagar (Prev.)**

**(ii) CUSTOMS Appeal No. 10538 of 2020 (Commissioner of Customs
–Jamnagar (Prev.)**

**(iii) CUSTOMS Appeal No. 10539 of 2020 (Commissioner of Customs
–Jamnagar (Prev.)**

APPEARANCE :

Shri Anoop Kumar Mudvel, Superintendent (AR) s for the Appellant-Revenue
Shri JC Patel and Ms. Shilpa Balani, Advocate for the Respondent-assessee

**CORAM: HON'BLE MR. SOMESH ARORA, MEMBER (JUDICIAL)
HON'BLE MR. C.L. MAHAR, MEMBER (TECHNICAL)**

DATE OF HEARING : 18.09.2023

DATE OF DECISION: 27.09.2023

FINAL ORDER NO. 12155-12158/2023

C.L. MAHAR :

Brief facts of the matter are that the respondent-assessee namely M/s. Reliance Industries Limited having Special Economic Zone (SEZ) in Jamnagar was receiving iron and steel materials/ products from Domestic Tariff Area (DTA) unit. The Government of India vide Notification No. 66/2008 dated 10.05.2008 has imposed export duty on iron and steel products when exported out of India. It is worth mentioning here that Section 2(m) of SEZ Act, 2005 clearly stipulates that supply of goods from DTA unit to SEZ unit will amount to export. Thus, the respondent-assessee SEZ paid export duty on all supplies of iron and steel products as per the

rates prescribed in the Notification No. 66/2008 dated 10.05.2008 "under protest".

2. On the issue of payment of export duty on the iron and steel products supplied to SEZ in India, the Notification No. 66/2008 dated 10.05.2008 was challenged vide a civil application before Hon'ble Gujarat High Court. The Hon'ble High Court vide its order dated 04.11.2009 passed the order holding that levy of export duty on goods supplied from DTA to SEZ is not justified. The order of Hon'ble Gujarat High Court dated 04.11.2009 was challenged by the Revenue before the Hon'ble Supreme Court whereunder the Hon'ble Apex Court vide its order dated 12.07.2010 dismissed the Special Leave Petition filed by the department against the Hon'ble Gujarat High Court's order. Subsequent to dismissal of SLP by the Supreme Court, the respondent-assessee have filed four refund claims, which are a subject matter of this litigation, before the concerned Assistant Commissioner, CCP, Jamnagar. The Dy. Commissioner Customs rejected the refund claim of the respondent-assessee saying that claimant was neither the party in the case of proceedings before the Supreme Court nor the assessment order of the concerned bills of export was challenged. In the proceedings a show cause notice dated 19.04.2017 came to be issued asking the respondent-assessee as to why refund claim should not be rejected as they were not party before the Supreme Court or Hon'ble Gujarat High Court nor they have challenged assessment of bill of export. Accordingly, the jurisdictional Dy. Commissioner vide its order dated 26.09.2017 rejected the refund claims of the respondent-assessee.

3. The respondent-assessee being aggrieved of the order dated 26.09.2017 filed an appeal before the Commissioner (Appeals) Ahmedabad who vide its order No. JMN-CUSTM-000APP-28to31-18-19 dated 03.10.2018 has allowed the appeal of the respondent-assessee by setting aside the impugned order of Dy. Commissioner and remanded back the matter to the lower authority to process the refund claims on merits by following legal provisions and pronouncements of the High Court on the issue. In response to the above order of Commissioner (Appeals), the jurisdictional Dy. Commissioner vide order-in-original No. 56/DC/RD/18-19 dated 17.01.2019 has sanctioned the refund claims holding that the refund have been filed within proper time limit as prescribed in Section 27 of the Customs Act, 1962

and respondent-assessee has complied with the provisions of unjust-enrichment.

4. The department challenged the order of the Dy. Commissioner before the Commissioner of Customs (Appeals) Ahmedabad and the Commissioner (Appeals) vide order-in-appeal No. JMN-CUSTM-000-APP-001 to 004-20-21 dated 29.05.2020 rejected the department's appeal. The impugned grounds of department for reviewing order-in-appeal dated 19.05.2020 and filing these appeals is as under:-

"During the course of review of the subject impugned OIA, it has been observed that the refund in the subject case has arisen on account of the Order dated 04.11.2009 passed by the Hon'ble High Court of Gujarat in case of Essar Steel Ltd. v/s UOI. The Department had challenged the said Order dated 04.11.2009 before the Hon'ble Supreme Court vide SLP No.19498/2010 which was dismissed vide Supreme Court Order dated 12.07.2010 reported at [2010(255)ELT-A-115(SC)]. Since, there was an apparent mistake in the Order dated-12.07.2010, the Department filed a Review Petition no.1848 of 2010 in the case against the Apex court decision dated 12.07.2010. The ground on which the said Review Petition was filed is as follows:

(a) Aggrieved by the judgment of High Court, Gujarat dated 04.11.2009, a Special Leave Petition No. 5698/2010 was filed before the Hon'ble Supreme Court bench along with the office report dated 09.07.2010. The Hon'ble Supreme Court vide its order dated 12.07.2010 has dismissed the said petition. Now, the department is of the view that the Hon'ble Supreme Court might have dismissed the Special Leave Petition No. 5698/2010 based on the office report wherein the date was wrongly mentioned as 06.04.2010 instead of 06.04.2009. Factually, the date 06.04.2009 is the date of order passed by the Hon'ble Supreme Court in the SLP (Civil) CC No. 3881/2009. The department is of the view that there might be change in the decision of the Supreme Court if the correct facts were produced before the Apex Court. Accordingly, the department has filed a Review Petition once again wherein it is prayed to modify the order dated

12.07.2010 of the apex court and passed any other order as may deemed fit.

The Hon'ble Supreme Court vide order dated 10.02.2020 has allowed the departmental Review Petition No. 1848/2010 in SLP (C) No. 19498/2010 and the SLP has been re-stored to their original Numbers. Further, the Hon'ble Supreme Court vide Order dated 10.02.2020 has recalled their earlier Order dated 12.07.2010 as mentioned above.

(b) In view of the above, it is a fact that the original SLP No. 19408/2010 filed by the department against the order dated 04.11.2009 Passed by the Hon'ble High Court of Gujarat in case of Essar Steel Limited is pending for final decision. Accordingly, the subject OIA is not proper since the matter is under litigation and the matter is sub-judiced at present and thus, the OIA is not legally correct. Hence, the same may be set aside.

(c) In view of above, the subject Order in Appeal is erroneous to the extent that the Review Petition filed by the Department has been allowed by the Apex Court vide Order dated 10.02.2020 and the Original SLP No. 19498/2010 filed by the department has also been restored to it's original number. Thus, the finding of the Commissioner (Appeals) under Para No5 of the subject OIA that the Review Petition is pending is not correct and does not reveal the true position of the SLP & also does not the correct status of the Review Petition. Further, the facts of case reveals that the matter of review petition was already decided by the Hon'ble Apex Court vide said Order dated 10.02.2020 and, it is wrong to say that the review petition was pending. Factually, the review petition was decided by the Hon'ble Supreme Court vide Order dated 10.02.2020 whereby the original SLP No.19498/2010 filed by the department has been restored and pending for final decision.

5. Learned Consultant appearing on behalf of the respondent-assessee has argued that in the orders-in-original dated 26.09.2017, the Adjudicating Authority, Dy. Commissioner had categorically held that no export duty was payable and that such duty is liable to be rejected and this finding of the jurisdictional Dy. Commissioner has never been challenged by the

department and attained finality. It has further been mentioned that the Hon'ble Supreme Court might have restored the ordinal SLP No. 19498/2010 vide its order dated 10.02.2020 however, the Hon'ble Apex Court has not stayed the Hon'ble Gujarat High Court order dated 12.07.2010.

6. Having heard both the sides we are of the opinion that before proceeding further it will be relevant to have a look at the impugned order-in-appeal whereunder the Commissioner (Appeals) has rejected the department's appeal against the order of jurisdictional Dy. Commissioner:-

"5. I have carefully gone through the appeal memorandum as well as records of the case, submissions made by the appellant as well as the documents and evidences available on record.

(a) The appellant department has contended that it has been observed that a Review Petition in case of UOI vs. Essar Steel Limited has been filed by the department in Supreme Court of India against the Apex Court decision dated 12.07.2010 on which present refund claim filed by the claimant is based. The appellant department has contended that the impugned order is erroneous to the extent that the judgment of the Apex Court on which the instant refund is based, is itself under litigation since the department has filed a Review Petition and pending for decision. They have contended that as the matter at this juncture is sub-judiced, issuance of refund sanction order in favor of claimant by the Jurisdictional Deputy Commissioner is not legal, correct & proper and needs to be quashed and set aside.

(b) In this regard, I find that the Respondent has contended that the said entitlement of the Respondent to the refund stood decided in Respondent's favour by the earlier Order-In-Original dated 26.9.2017. The respondent submitted that in the said earlier order dated 26.9.2017, the Deputy Commissioner specifically held that the Respondent was entitled to refund of the export duty in view of the decision in the case of Essar Steel Limited. The said specific finding of the Respondent's entitlement was not questioned/challenged by the Department by filing any appeal and thus the issues attained finality. The respondent submitted that Department cannot by way of the present appeal question the sanctioning of refund to the respondent on the ground that the Department's review petition against the decision of the Supreme Court filed in the year 2010 is still pending.

I find that the respondents have further submitted that it is settled law as laid down in the following decisions that the mere pendency of a Review Petition against order/judgment of Supreme Court cannot be a ground for not following the same and the binding nature of the precedent's not lost merely because of filing of such review petition:

- (i) Dabur India Limited – 2016 (335) ELT 392(Pat)
- (ii) Aditya International Limited – 2016 (332) ELT95 (Cal)

I find that in the case of Dabur India Ltd.2016(335)ELT 392(Pat), the Hon'ble High Court, Patna has held that Precedent - Judgment of Apex Court - Review petition, pendency of -Apex Court in its judgment in 2015(318) EL.T.607 (S.C.) settling law relating to conditional rate of CVD on imported goods - Commissioner (Appeals) in his order not following impugne judgment on ground that Revenue's review petition against same still pending before Apex Court for a final decision - Said order of appellate authority, totally misconceived-Mere fact of filing review petition, not a ground for not following a binding precedent.

In the case of Aditya International Ltd. 2016(332)ELT95(Cal), the Hon'ble High Court Calcutta has held that Precedent - Binding precedent - Exemption from CVD Condition of non-availment of Cenvat credit-Mere filing of review petition by Revenue does not make said Judgment as non-binding - Said judgment having reached finality is binding until recalled and modified or varied in review - Revenue directed to assess the Bill of Entry either on basis of aforesaid judgment or give a decision with cogent reasons by distinguishing same - Article 226) of Constitution of India.

The appellant department in their appeal has contended that as the matter at this juncture is under litigation at the level of Apex court and sub-judice, therefore issuance of refund sanction order in favor of claimant by the Jurisdictional Deputy Commissioner is not legal, correct & proper and needs to be quashed and set aside. But in the case laws cited by the respondents. It is observed that the Hon'ble High Court at Patna and Hon'ble High Court at Calcutta have clearly held in their judgments that mere fact of filing review petition, not a ground for not following binding precedent. On the issue of payment of export duty on the Iron & Steel materials/produces received from DTA to SEZ unit, M/s Essar Steel Limited with others. filed Civil Application/Special Civil Application before the Hon'ble High Court of Gujarat. wherein an order dated 4th November, 2009 had been passed by the Hon'ble High Court that the levy of export duty on goods supplied from the Domestic Tariff Area to the Special Economic Zone is not justified. The above order of Hon'ble High Court of Gujarat was challenged by the

department before Hon'ble Supreme Court. The Appellant department has not contended that the said order passed by the jurisdictional Hon'ble High Court of Gujarat is stayed or set aside. The Appellant Department in their appeal has not discussed how the said order passed by jurisdictional Hon'ble High Court of Gujarat will not be applicable in this case."

7. It can be seen from the perusal of the above order that learned Commissioner (Appeals) has already considered all the submissions which have been made by the appellant-department in their appeals here. We are also of the opinion that only review petition being pending before the Hon'ble Apex Court cannot be the reason to set-aside the impugned order-in-appeal. In view of the fact that the jurisdictional High Court's order has neither been set-aside nor stayed by the Hon'ble Apex Court and since the Hon'ble Gujarat High Court's order as of today holds good. We are of the opinion that there is no illegality in the impugned order-in-appeal passed by the Commissioner (Appeals) and therefore, we find that appeals are without any merit and therefore we dismiss the same.

(Pronounced in the open court on 27.09.2023)

(Somesh Arora)
Member (Judicial)

(C L Mahar)
Member (Technical)