CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL REGIONAL BENCH AT HYDERABAD

Single Member Bench

Court – I

Customs Appeal No. 30010 of 2023

(Arising out of Order-in-Appeal No. HYD-CUS-000-APP-039-22-23 (APP-I) dt.30.09.2022 passed by Pr. Commissioner, Hyderabad)

Pr. Commissioner of Customs
Central Tax, Hyderabad **.....Appellant**
Kendriya Shulk Bhavan, LB Stadium,
Basheerbagh, Hyderabad – 500 004

VERSUS

Sachdev Overseas Fitness Pvt Ltd
Plot No.17, Thyagaraya Colony,
West Maredpally, Hyderabad – 500 015 **.....Respondent**

and

Customs Appeal No. 30011 of 2023

(Arising out of Order-in-Appeal No. HYD-CUS-000-APP-040-22-23 (APP-I) dt.30.09.2022 passed by Pr. Commissioner, Hyderabad)

Pr. Commissioner of Customs
Central Tax, Hyderabad **.....Appellant**
Kendriya Shulk Bhavan, LB Stadium,
Basheerbagh, Hyderabad – 500 004

VERSUS

Nityasach Fitness Pvt Ltd
Plot No.17, Thyagaraya Colony,
West Maredpally, Hyderabad – 500 015 **.....Respondent**

Appearance
Shri V.R. Pavan Kumar, DR for the Appellant.
Shri M.V.S. Prasad, Advocate for the Respondent.

Coram:
HON'BLE MR. A.K. JYOTISHI, MEMBER (TECHNICAL)

FINAL ORDER No. A/30122-30123/2023

Date of Hearing: 26.05.2023
Date of Decision: 01.06.2023

[Order per: A.K. JYOTISHI]

Learned DR brings to the notice that the facts in these two appeals are identical and the same can be taken up together. Learned Advocate has also no objection as he is representing the Respondents in both the Appeals.

Accordingly, both the Appeals filed by the Department are taken up together for decision.

2. The Appeals are filed by the Department with respect to OIA No.HYD-CUS-000-APP-039-22-23 (APP-I) & OIA No.HYD-CUS-000-APP-040-22-23 (APP-I) both dated 30.09.2022, passed by Commissioner (Appeals-I), whereby the Commissioner (Appeals-I) has set aside the OIOs dated 21.09.2021 and allowed the Appeals filed by the defendants. Aggrieved by the said OIAs, the Department has filed the present Appeals, seeking, inter alia, determination of the following points arising out of the said Orders.

(i) Whether, the refund claim filed by Respondents for refund of Customs Duty paid in excess is hit by the bar of unjust enrichment and the refund amount is liable to be granted to the Appellants instead of crediting the same to the Consumer Welfare Fund as held by the Commissioner (Appeals), is legal and proper;

(ii) Whether, by an order passed under Section 129B of the Customs Act, 1962, the Hon'ble Tribunal should set aside the orders passed on the issue raised in the present review order and or pass such other orders as the Hon'ble Tribunal deems fit.

3. The learned DR submits that the issue whether the doctrine of unjust enrichment is involved and applicable in the instant case or not is settled issue. He takes the Bench through the facts of the case and grounds on which Original Authority has invoked the applicability of bar of unjust enrichment, which was later on set aside by the Commissioner (Appeals). The Department is in appeal before this Bench against the said Order of Commissioner (Appeals) setting aside the Order allowing the refund claim, but proposing to credit the same to the Consumer Welfare Fund.

4. The Department, in their Appeal, mainly contests that the Commissioner's decision that the amount would not be shown as receivable in the Balance Sheet of the Respondents for the same year cannot be accepted as importer knew it very well while they were requesting for re-classification of their goods and claiming refund of excess duty paid by them, vide their letters dated 21.02.2018 & 18.04.2018. Further, unless the amount is shown as receivables, it has to be presumed that the incidence of duty was passed on to their customers, and since they have claimed the same as "expenditure" in their Profit & Loss account and failed to recognize the refund as duty receivables for

the said period in their Books of Account, the refund claim cannot be presumed to have passed the test of unjust enrichment.

5. The Department has also relied on CBEC Circular where vide Para 2 of Circular No. 07/2008 dated 28.05.2008, it has been clarified that the concerned authority should go through the details of audited Balance Sheet and other related financial records, certificate of CA etc., which are relied upon, to arrive at the conclusion, whether the burden of duty and interest as the case may be, has been passed on or not. The Department also did not agree with the contentions of the Appellants vide their letter dated 13.09.2021 as regards not showing the amount as receivable in the said period shown in subsequent period on the grounds that time period has already lapsed and there was no possibility for them to revise the accounts by including the amount receivable (refund) as current assets of the previous financial year and, therefore, their submission that they will reflect the refund amount as receivable was considered as untenable.

6. They also relied on the judgment in the case of HPCL [2015 (317) ELT 3798 (CESTAT-Mumbai)], wherein it is held that if the refund amount due was not reflected in the books of account as claims receivable, that would imply that the duty paid was shown as current expenditure and, therefore, formed part of the profit and loss account of the assessee and therefore, cannot claim to have passed the test of unjust enrichment.

7. Learned DR also submits that as far as the statutory provisions are concerned, all the refund claims are required to be decided in accordance with the provisions of Section 27 of the Customs Act, 1962. The provisions under Section 27(1A), inter alia, requires that the refund application has to be accompanied by such documentary or other evidence (including 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. He also invites the attention to Section 28C, which, inter alia, provides for indication of amount of duty paid in all the documents relating to assessment, sales invoice, and other like documents, the amount of such duty which will form part of the price at which such goods are to be sold. He also invites attention to Section 28D which provides for presumption about incidence of duty having been passed on to buyer unless the contrary is proved by the claimant. Therefore, it will be

deemed to have been passed unless evidence to the contrary is produced by the person claiming refund.

8. The Department has also submitted plethora of case laws in support of their claim that principle of unjust enrichment has been rightly invoked by the Original Authority and the Commissioner (Appeals) has not correctly appreciated the same and rejected the appeal of the Department. Learned DR invites the attention to the following case laws:

(i) M/s Ispat Industries Ltd vs Commissioner of Customs (Mumbai) – [2015-TIOL-614-CESTAT-MUM]
(ii) Commissioner of Customs, Chennai vs BPL Ltd – [2010 (259) ELT 526 (Mad.)]
(iii) Shoppers Stop Ltd vs Commissioner of Customs, Chennai – [2018 (8) GSTL 47 (Mad.)]
(iv) CCE, Mumbai – II vs Allied Photographics India Ltd – [2004 (166) ELT 3 (SC)]

9. In a nutshell, the argument of Department is that the Respondent have not passed the test of unjust enrichment in as much as they had not produced sufficient documents in support of their claim that incidence of duty has not been passed on to their customer. On the contrary, the statutory provisions would entail that the presumption, as to it's passing on would be squarely on them. Therefore, he submits that the Department's case is no longer res integra, in view of the Larger Bench judgment in the case of Ispat Industries Ltd and also subsequent judgments cited in their support that mere CA's certificate would not suffice to prove that incidence has not been passed, unless, other tangible and substantial evidence are also adduced before the competent authority granting the refund.

10. The learned Advocate for the Respondent, on the other hand, relies on the submissions made before the Original Authority as well as before the Commissioner (Appeals). He opposes the grounds of appeal and submitted as follows:

(i) The ground that unless the amount claimed as refund is shown as receivable, it would be presumed that the incidence of duty was passed on to the customers, is not proper and correct. Respondent submitted evidence that they have not charged the customers the refund amount claimed. In view of the actual evidence as well as the certificate issued by CA, the presumption cannot prevail over the factual evidence.

(ii) The excess amount paid by the Respondent becomes receivable only after re-assessment and sanction of refund pending payment. In this case re-assessment was done in April 2021 and refund was ordered in September 2022. Hence it could not be treated as receivable in earlier financial years.

(iii) The CBEC Circular relied upon by the Department is not applicable in the present case based on facts. Since the Annual Accounts were audited and approved by 30.09.2022, the refund could be shown in the remaining period of the financial year as receivable till it is received by the claimant. In this case, the refund was given only after the impugned OIA dated 30.09.2022. The refund was granted vide OIO No.03/2023-ICD dated 25.01.2023. Hence the refund cannot be shown as receivable till the impugned OIA was issued. After the issue of refund order consequent to the impugned OIA, the refund will be shown as receipt (not receivable) during the FY 2022-2023.

(iv) The Department cannot suggest something which is not possible as per the established Code of Accounting based on facts.

(v) The Appellant insists on performance of an impossible thing and hence is not sustainable as per the accepted 'doctrine of impossibility'.

(vi) The case of HPCL vs CCE, Mumbai relied upon, relates to Central Excise and is distinguishable on facts as well as law. The issue involved in HPCL's case were limitation, procedure of payment and protest and unjust enrichment. It was urged that the payment was under protest but they have not followed the procedure prescribed under Rule 233B of CER. Therefore, the claim that the excise duty was paid under protest was not accepted. Basically the case is related to limitation under Central Excise Act. As regards to unjust enrichment, the finding of the Tribunal was with reference to Section 11B of Central Excise Act, 1964. Hence the ratio of this case cannot be invoked in respect of the present case.

11. He further submits that the reason why the refund amount was not shown as receivable during 2022-2023, was because at that point of time, the refund was not sanctioned. On the other hand, learned DR submits that while it was shown as expenditure and not as receivable, even when they knew that they will go for re-assessment and consequential relief during the material time. Learned Counsel for the Respondent further states that since there was no provisional assessment in the case and duty was paid originally as demanded and therefore it was shown as expenditure in the books of account.

12. The issue to be decided is whether, in the facts of the case, the doctrine of unjust enrichment was correctly applied or otherwise. The Department has mainly relied upon statutory provisions whereby certain presumptions are made with regard to passing of incidence of duty unless there is evidence to the contrary. Admittedly, in this case, on reassessment the rate of duty was reduced and as consequence respondents filed refund claims. The Respondents, at that point of time, were aware of the quantum of refund even though they had to go through the procedural requirement of filing refund claim. In fact they have clearly specified the amount of refund which they were eligible as consequence to reassessment also. At this point also they have not shown this amount as receivable in any of their books of account nor any such evidence was produced before the competent authority sanctioning refund to the effect that they had not passed on total amount of applicable Customs Duty to their customers except for the CA's Certificate.

13. The statutory provisions concerning grant of refund and application of unjust enrichment are very clear. The Respondents were required to give clear evidence to the sanctioning authority that they had not collected the duty or had only partially collected the duty instead of full duty by way of any relevant document. They have clearly failed to do so. In fact, the statutory provisions clearly provided for the documents which would show the element of duty in the price and if such documents were produced it would have clearly shown the exact amount of duty included in the price or otherwise. They have not produced any such documents. Therefore, in the absence of any such evidence, merely producing CA certificate would not suffice to shift the burden of presumption for the purpose of Section 27 read with Section 28C of the Customs Act.

14. On the other hand, the learned DR has invited the attention to plethora of cases and especially to the settled position in the case of Ispat Industries Ltd vs Commissioner of Customs (Preventive), Mumbai [2015-TIOL-614-CESTAT-Mum] wherein, inter alia, it was held that if the duty incidence was not passed on then the same should have been recorded in their receivable account. The other judgments relied upon in support of argument that merely producing a CA certificate would not suffice to prove that the incidence has not been passed on, are as follows:

(i) Commr. of Customs (Exports), Chennai vs BPL Ltd [2010 (259) ELT 526 (Mad.)]

(ii) Shoppers Stop Ltd vs Commr. of Customs (Exports), Chennai [2018 (8) GSTL 47 (Mad.)]

(iii) Hindustan Petroleum Corporation Ltd vs CCE, Mumbai-II [2015 (317) ELT 379 (Tri-Mumbai)]

(iv) Adarsh Kumar Goel and Rajesh Bindal, JJJCT Ltd vs CCE [2006 (202) ELT 773 (P&H)]

(v) Philips Electronics India Ltd vs CCE, Pune-I [2010 (257) ELT 257 (Tri-Mumbai)]

These judgments essentially indicate that the onus is on claimant of refund to produce sufficient and tangible evidence, including CA's certificate, if they so wish, but merely CA's certificate to the effect that the incidence of duty element, in respect of which refund is being claimed, cannot be the basis for conclusive evidence to the same. This is because of the statutory provisions regarding presumption, the Department has to consider that the duty incidence has been passed on and therefore, doctrine of unjust enrichment, as provided for in the statutory provisions would be applicable.

15. In the present case, barring CA certificate, no other evidence has been produced by the Respondents before the Adjudicating Authority. As against this, the Department has clearly brought out certain evidence like the Respondents having not shown this amount as "receivables" in their books of account during the relevant time or not having produced any documents etc., as envisaged under Section 28C of the Customs Act. All these evidence leading to the conclusion that they have treated the duty as an element of expenditure and therefore, forming part of the Profit & Loss account and not as receivables. It is also noted that they were aware that reassessment would lead to refund and they were also aware about the exact amount of refund which would be admissible to them on merits, and despite that they had not shown this amount as receivables in any of their books of account. Therefore, in the facts of the case, they have clearly not been able to clear the bar of unjust enrichment by not having produced sufficient evidence before the original authority.

16. The learned Advocate for the Respondents has relied on the judgment of JK Prints [2020 (373) ELT 110] in support of his argument. However, the facts of the case are not same in as much as duty in that case was paid "under protest", whereas, it was not the case in the present Appeals. The reliance placed by the learned DR on the Ispat Industries Ltd case is squarely applicable in the present case. Thus, in the absence of any verifiable and positive evidence

from the Respondents, the Original Authority has rightly granted the refund on merits but ordered for crediting it to Consumer Welfare Fund and therefore, there is not infirmity in the Order of the Original Authority which was, however, set aside by the Commissioner (Appeals) as discussed in foregoing paras, therefore, the Order of the Commissioner (Appeals) is not correct and is liable to be set aside and the Order of the Original Authority is liable to be restored.

17. In view of the foregoing, the Impugned Orders of the Commissioner (Appeals) setting aside the Orders of the Original Authority, are set aside, allowing the Appeals filed by the Revenue. As a consequence, the Orders of the Original Authority are restored.

(Pronounced in the Open Court on 01.06.2023)

(A.K. JYOTISHI)
MEMBER (TECHNICAL)

Veda