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

REGIONAL BENCH : COURT NO – 3

Excise Appeal No. 12786 of 2018-SM

(Arising out of OIA No.- VAD-EXCUS-001-APP-240-2018-19 dated 17.08.2018 passed by Commissioner (Appeals) Commissioner of Central Excise, Customs and Service Tax-VADODARA-I)

Jayant Agro Organics Ltd. Appellant

Unit-I, Plot No. 601-602, Behind Gacl, Po-Petrochemicals,
Vadodara
Gujarat, 391346.

-VERSUS-

C.C.E. & S.T., Vadodara-i Respondent

1st Floor...Central Excise Building,
Race Course Circle,
Vadodara,
Gujarat, 390007

Present For the Appellant : None

Present For the Respondent : Shri S.N. Gohil, Supdt.(AR)

CORAM:

HON'BLE MEMBER (JUDICIAL) , MR. RAMESH NAIR

FINAL ORDER NO. A/11395/ 2019

Date of Hearing: 23/07/2019
Date of Decision: 23/07/2019

RAMESH NAIR

The brief facts of the case are that the appellant initially availed the CENVAT Credit in respect of outward GTA used for export as well as for domestic clearances. Department raised objection that availment of CENVAT Credit on outward GTA is not correct and legal. In response the appellant reversed the credit under protest. On the issue of availment of credit on GTA, a Show cause notice was also issued by the department which was adjudicated in favour of the appellant. Accordingly, the CENVAT Credit was allowed. On the basis of the adjudication order, the appellant filed the refund claim which was sanctioned by the Adjudicating Authority. The said order was challenged by the department before the Commissioner (Appeal) only on the ground of time bar which was allowed by the Commissioner (Appeal). Therefore, the present appeal.

2. Shri Shailesh Vyas, Ld. Counsel appearing on behalf of the appellant submits that they had reversed the credit under protest and thereafter have claimed the refund claim after adjudication of the Show Cause Notice within one year. Therefore, the refund claim was filed well within the time of one year from the date

of adjudication order. Therefore, it is not time barred. He placed reliance on the following decisions:

1. Deepak Fertilisers & Petrochem. Corpn. Ltd. v/s Commissioner of C. Ex. Raigad 2018 (361) E.L.T. 1068 (Tri-Mumbai)
2. ITEL Industries Ltd. v/s Commr. of Central Excise, Calicut 2014 (301) E.L.T. 288 (Ker.)

3. Shri L. Patra, Ld. Asst. Commissioner (AR) appearing on behalf of the Revenue reiterates the findings of the impugned order. He further submits that unjust enrichment has not been verified by the Adjudicating Authority while sanctioning the refund. Therefore, even if refund is payable to the appellant, it can only be given after test of unjust enrichment.

4. I have heard both sides and perused the records. I find that the Commissioner (Appeals) allowed the Revenue's appeal holding that appellant's refund claim is time barred. I find that firstly, the appellants have reversed the CENVAT Credit under protest. In case of payment under protest no time bar is applicable as provided in second proviso to section 11B of Central Excise Act, 1944 read with para 3 of Chapter 13 in CBEC excise manual. Both provisions read as under:

> ***"SECTION [11B. duty]. Claim for refund of Section 11B***
>
> ***Provided*** *that where …*
>
> ***Provided*** *further that the limitation of one year shall not apply where any duty and interest, if any, paid on such duty has been paid under protest."*
>
> ***Para3. Of Chapter 13 in CBEC Excise Manual***
> *3. Duty paid under protest*
>
> *3.1 At present, there is no explicit provision either in the Central Excise Act or Rules for payment of duty under protest.*
>
> *However, Section 11B proviso provides that the limitation of one year period prescribed for making application for refund of duty from the relevant date shall not apply where any duty has been paid under protest.*

As per the above provisions, if the payment is made under protest, no time bar will apply.

4.1 On the issue of admissibility of Cenvat Credit on outward GTA, a Show Cause notice was issued. For this reason also, the appellant was prevented from filing any refund. The refund was filed within one year from the dated of Adjudication Order which were accepted by the Revenue. Relevant section 11B (5)(B) clause (ec) reads as under:

> *"in case where the duty becomes refundable as a consequence of judgment, decree, order or direction of appellate authority, Appellate Tribunal or any court, the date of such judgment, decree, order or direction."*

As per the above unambiguous provision, the refund has arisen in the present case only after adjudication order is passed. Therefore, as the above clause (ec), the one year period will be reckoned from the date of the adjudication order and not from the date of original payment of duty. As per my above discussion, the refund is absolutely within the stipulated time period. Therefore, the Ld. Commissioner (Appeal) holding that it is time barred is absolutely illegal and incorrect.

4.2 As regard the submission made by Ld. AR that the aspect of unjust enrichment needs to be verified, I find that the refund claim was carefully scrutinized and after the jurisdictional range office verification, it was sanctioned. The Revenue has not filed any appeal challenging the issue of unjust enrichment before the Commissioner (Appeals). The Commissioner (Appeals) also consequently not commented on the aspect of unjust enrichment. In this position, since the issue of unjust enrichment also stands concluded in the adjudication order and now in the Revenue's appeal, Revenue cannot raise this point. Therefore, I need not address the issue of unjust enrichment. As per my above discussion, the impugned order is set aside. Appeal is allowed.

(Dictated and pronounced in the open court)

(Ramesh Nair)
Member (Judicial)

Diksha