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

REGIONAL BENCH – COURT NO. 03

Customs Appeal No. 11524 of 2015

[Arising out of OIA-MUN-CUSTM-000-APP-121-15-16 passed by Commissioner of Central Excise, Customs and Service Tax-MUNDRA]

M/s. Balkrishna Industries Ltd. **........Appellant**
Bkt House, C/15, Trade World, Kamala Mill Compound,
S B Marg, Lower Parel,
Mumbai, Maharashtra-400013.

VERSUS

C.C. Mundra **........Respondent**
Office of the Principle Commissionerate of Customs,
Port User Buld., Custom House Mundra,
Mundra, Kutch, Gujarat-370421

WITH

Customs Appeal No. 11238 of 2016

[Arising out of OIO-MCH-PRCOMMR-PVR-35-2015-16 passed by Commissioner of Customs -MUNDRA]

M/s. Balkrishna Industries Ltd. **........Appellant**
Bkt House, C/15, Trade World, Kamala Mill Compound,
S B Marg, Lower Parel,
Mumbai, Maharashtra-400013.

VERSUS

C.C. Mundra **........Respondent**
Office of the Principle Commissionerate of Customs,
Port User Buld., Custom House Mundra,
Mundra, Kutch, Gujarat-370421

APPEARANCE:
Shri Rahul Gajera, Advocate for the Appellant
Shri Sameer Chitkara, Additional Commissioner (AR) for the Respondent

CORAM: HON'BLE MEMBER (JUDICIAL), MR. RAMESH NAIR
HON'BLE MEMBER (TECHNICAL), MR. RAJU

FINAL ORDER NO.A/ 12153-12154 /2019

DATE OF HEARING: 19.07.2019
DATE OF DECISION: 07.11.2019

RAMESH NAIR

The two appeals bearing Numbers C/11524/2015 – DB and C/11238/2016 being arisen out of same issue are being taken up together for disposal. The Appeal No. C/11524/2015 has been filed against Order-in-Appeal No. mun-custm-000-APP-121-15-16 dt. 05.08.2015 passed by Commissioner (Appeals), Ahmedabad whereas the Appeal No. 11238/2016 – CUS has been filed against order dt.

29.02.2016 passed by the Principal Commissioner of Customs, Customs House, AP & SEZ, Mundra. The brief facts of the case are that Appellant is engaged in manufacture of Tyres falling under chapter 40 of the CETA, 1985. During the period 01.04.2014 to 06.06.2014 they had imported 121 consignments of Natural Rubber at Mudra Port under Advance licence and claimed exemption under Notification No. 96/2009 – Cus Dt. 11.09.2009. The Bill of Entry were thus assessed to "Zero" However they were not permitted to clear the goods without depositing the "rubber cess" in cash. The same was paid by the Appellant "Under Protest". The Appellant subsequently on the basis of order of Commissioner (Appeals) dt. 20.05.2014 in their own case that cess is not payable filed an appeal before the Commissioner (Appeals) filed refund application for imports involving instant period under section 27 of the Customs Act for cess paid by them " Under Protest". They also filed certificate from the C.A and other records to show that there has been no unjust enrichment. The adjudicating authority sanctioned the refund claim vide order dt. 17.12.2014. On an appeal by the revenue the Commissioner (Appeals) vide impugned Order-in-appeal dt. 05.08.2015 allowed the appeal filed by the revenue and ordered for recovery of refund on the ground that the Bill of Entry were neither reassessed nor assessment was modified in appeal proceedings and hence the refund was not maintainable. That by exclusive placing reliance upon the C.A Certificate for the purpose of unjust enrichment refund cannot be granted as the same has no validity unless supported by facts available in books of accounts. The Appellant filed appeal No. C/11524/2015 – DB against the said order which is before us. The Principal Commissioner meanwhile on the basis of order passed by Commissioner (Appeals) issued show cause notice dt. 05.10.2015 towards recovery of sanctioned refund under section 28 (1) alongwith interest under section 28AA (1) of the Customs Act, 1962. Vide impugned Order dt. 07.12.2015 he ordered for recovery of refund amount alongwith interest. Aggrieved the Appellant has filed appeal No. 11238/2016 which is also being taken up for disposal.

2. Shri Rahul Gajera, Learned Counsel appearing for the Appellant submits that Commissioner (Appeals) has erred in holding that the refund was wrongly sanctioned. That each of the Bill of Entry was assessed by the proper officer and no duty was payable by them. No

duty was assessed as payable or paid by the Appellant in pursuance of the assessment orders passed by the proper officer. Copies of Bill of Entries were produced before him to show that no duty was assessed as payable or paid by the Appellant in pursuance of the assessment orders passed by the proper officer. The entire duty (including rubber cess assuming to be payable by the Appellant was held to be exempted from payment of duty as per the assessment made on each bills of entry and entire amount of duty was debited in bond. The Commissioner (Appeals) has recorded the Appellant's submission that assessed duty was zero and the rubber cess was not paid in pursuance of assessments by the proper officer yet erroneously held that refund of cess was not admissible as was paid in pursuance of the assessments made by the proper officer. That the assessment was of zero duty and no appeal could have been filed against the zero duty assessment as the same was futile exercise. The case of the Appellant was covered under Section 27 (ii) of the Act and the rubber cess was not paid in pursuance of assessment orders. He relies upon the judgments in case of Aman Medical Products Ltd. 2010 (250) ELT 30 (DEL), Sesa Goa Ltd. 2014 ELT 221 (TRI) as upheld vide Hon'ble Apex Court Sesa Goa Ltd. 2015 (321) ELT A66 (SC), Whirlpool India Ltd. 2007 (211) ELT 223. He submits that the reliance placed upon the Commissioner (Appeals) in case of Flock (India) Pvt. Ltd. 2000 (120) ELT 285 (SC), Priya Blue Ind. Ltd. 2004 (172) ELT 145 (SC). He also submits that the case of Appellant is covered under Section 27 (1) of the Act and as per Tribunal order in case of Suryalakshmi Cotton Mills 2015 (327) ELT 718, the judgment in case of Priya Blue (supra) is not applicable in their case. As regard unjust enrichment, he submits that the cess paid "Under Protest" is appearing as "receivable from Government" in Balance Sheet under the head "Short term Loans & Advance"in "Current Assets" and it is clear that there is no unjust enrichment. He also submits that since there was no change of price, hence it is absolutely clear that the burden of cess was not passed on to the customers. He also submits that pending the appeal against the order of Commissioner (Appeals), the Principal Commissioner should not have ordered for recovery of said cess refund amount.

3. Shri Sameer Chitkara, Learned Additional Commissioner (AR) appearing for the revenue supports the findings of both the impugned orders.

4. We have heard both the sides and perused the case records. We find that the Bills of Entry were assessed at "zero" rate of duty and the amount was debited in Bond. The issue involved is only of rubber cess. As per Appellant if there is no duty charged on Bill of Entry, in that case there was no question of challenging the assessment. We find that the Appellate Authority has held that since the assessment order has not been challenged the refund claim is not maintainable. He has relied upon the Apex Court judgment in case of Flock (India) P. Ltd and Priya Blue Industries (supra). Further he has also held that no documentary evidence has been provided. However we find that the contentions raised by the Appellant in their appeal before us and the judgments cited by them viz. Aman Medical Products Ltd. 2010 (250) ELT 30 (DEL), Sesa Goa Ltd. 2014 ELT 221 (TRI) as upheld vide Hon'ble Apex Court Sesa Goa Ltd. 2015 (321) ELT A66 (SC), Whirlpool India Ltd. 2007 (211) ELT 223, Suryalakshmi Cotton Mills 2015 (327) ELT 718 and any other judgments or facts as contended by the Appellant are required to be taken into consideration while resolving the present controversy. Also the question of unjust enrichment has to be considered carefully since as per the Appellant the amount of such refund amount was also shown as receivables in Balance Sheet apart from certificate by the Chartered Accountant. Thus without expressing any views on merits of the case, we consider it necessary to send back both the appeals to the adjudicating authority for reconsidering the case afresh. The Appellant are at liberty to appear and file their submissions which they may consider necessary in support of their contentions. Both the appeals are remanded for de-novo consideration in above terms and are disposed accordingly.

(Pronounced in the open court on 07.11.2019)

(RAMESH NAIR)
MEMBER (JUDICIAL)

(RAJU)
MEMBER (TECHNICAL)

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