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

REGIONAL BENCH – COURT NO. 01

CUSTOMS Appeal No. 13860 of 2014-DB

[Arising out of OIA-KDL-CUSTM-000-APP-344-347-14-15 dated 10/06/2014 passed by Commissioner of CUSTOMS-KANDLA]

C.C.-Kandla **...Appellant**

Custom House,
Near Balaji Temple,
Kandla,
Gujarat

VERSUS

Welspun Steel Limited **...Respondent**

Welsun City, Survey No. 650/652,
Village : Varsamedi, Taluka : Anjar,
Kutch,
Gujarat

WITH

- **CUSTOMS Appeal No. 11474 of 2017 (Welspun Steel Ltd Vs.C.C-Kandla) With C/CO/10690/2017**
- **CUSTOMS Appeal No. 10709 of 2018 (C.C-Kandla Vs. Welspun Steel Ltd)**
- **CUSTOMS Appeal No. 10710 of 2018 (C.C-Kandla Vs. Welspun Steel Ltd)**
- **CUSTOMS Appeal No. 10711 of 2018 (C.C-Kandla Vs. Welspun Steel Ltd)**
- **CUSTOMS Appeal No. 10708 of 2018 (C.C-Kandla Vs. Welspun Steel Ltd)**

APPEARANCE:
Shri Himanshu P Shrimali, Superintendent (Authorized Representative) appeared for the Appellant
Shri Amit Laddha, Advocate for the Respondent

CORAM: HON'BLE MEMBER (TECHNICAL), MR. RAJU
HON'BLE MEMBER (JUDICIAL), MR. SOMESH ARORA

FINAL ORDER NO. A/ 11818-11823 /2023

DATE OF HEARING:24.08.2023
DATE OF DECISION:24.08.2023

RAJU

The following appeals are filed by the Revenue against the order of Commissioner (Appeals) allowing the appellants to use the DEPB scrips for the purpose of payment of Clean Energy Cess:

1. C/13860/2014
2. C/10709/2018
3. C/10710/2018
4. C/10711/2018
5. C/10708/2018

1.2 Ms. Welspun Steel Ltd has been filed Appeal No. C/11474/2017, seeking refund of the Clean Energy Cess paid by them in cash in addition to the debits made through DEPB scrips. Cross objection application No. 10690 of 2017, has been filed by revenue against the said appeal.

2. Learned Counsel for Welspun Steel Ltd., pointed out that the issue regarding eligibility of use of DEPB for the purpose of Clean Energy Cess has been decided by Tribunal vide Final Order No. A/10430/2023 dated 07.03.2023.

2.1 We find that the aforesaid order of Tribunal dated 07.03.2023, holds as follows:

> *"2. Learned AR relied on the appeal memorandum. It is seen from the facts of the case that the respondents had utilized DEPB Scripts for payment of "Clean Energy Cess" part of the CVD. Revenue has sought to disallow the utilization of DEPB script for the said purpose and the original Adjudicating Authority had confirmed the demand. The Commissioner*

(Appeals) has however set aside the said order. Aggrieved by the said order Revenue is in appeal before Trial Court.

3. Learned Counsel appearing on behalf of the Respondent relied on the impugned order. He pointed out that the provisions invoked in the appeal memorandum are not applicable to the instant case.

4. We have carefully considered the rival submissions, we find that in this appeal the dispute involved is if the respondent could have used the DEPB Scrips for payment of Clean Energy Cess part of contravaling duty under Section 3(1) of the Customs Tariff Act. It is seen that Commissioner (Appeals) passed detailed order giving the reasoning as follows:

> *"8. Levy of additional duty under section 3 (1) of the Customs Tariff Act is equivalent to the duty of excise, yet it remains duty of customs. Since cess is leviable as duty of excise, if it is meant for goods produced in India, to be paid as duty of excise, it was payable either in cash or possibly through utilization of CENVAT credit or both. In these situations, the Government has taken a decision that cess, when paid on goods produced in India, as duty of excise, must be paid in cast in the letter of TRU dated 24.06.2010, where it was mentioned that this amount is only payable through cash and not Cenvat credit and that amendment in Cenvat credit Rules were being made. it only and only referred to the restrictions on payment through Cenvat credit for goods produced in India and liable to duty of excise. However, the Customs duty is never payable through CENVAT credit. Cess is equivalent to duty of excise and not a duty of excise per se. It can be paid, as additional duty of customs levied under section 3(1) of the Customs Tariff Act. 1975, either in cash or debit in script like DEPB (which is also called payment through DEPB credit). It cannot be construed to mean that any restrictions were also imposed on payment through DEPB scrip. It that was the intention of the government in respect of clean energy cess levied as additional duty of customs levied under section 3(1) of the Customs Taritt Act. 1975, such restrictions would have been incorporated in the Notification governing DEPB scheme. Le, Notification No. 97/2009-Cus. Supra. However, there is no restriction under DEPB scheme or Notification No. 97/2009-Cus. Supra, to this effect. Without appreciating the correct position of law, I find that the impugned order is only referring to the Cenvat credit Rules which is completely whimsical and capricious where customs duty payment is d subject matter."*

It is also seen that the Commissioner (Appeals) has allowed the appeal on the ground of limitation as well. Revenue in its appeal has relied on the restriction appearing in the 3rd

> *proviso to Sub-rule (4) of Rule 3 of the CENVAT Credit Rules, 2004, which prohibits utilization of CENVAT Credit for the purpose of payment of "Clean Energy Cess". The said proviso reads as under:*
>
>> *"Provided also that the CENVAT Cerdit of any duty specified in sub-rule (1) shall not be utilized for payment of the Clean Energy Cess leviable under Section 83 of the Finance Act, 2010 (14 of 2010)"*
>
> *It is seen that the review order also relied on CBEC instruction issued vide F. No.354/72/2010-TRU dated 24.06.2010, which also essentially disallow the utilization of Cenvat Credit for the purpose of payment of "Clean Energy Cess" leviable under Section 83 of the finance Act, 2010. It is seen that the CENVAT Credit rules are irrelevant for the purpose of availing the benefit of DEPB Script in paying the contravening duty. The said provision of CCR can by no means prohibit utilization of DEPB Scripts. In this regard, we do not find any merit in the appeal filed by the revenue and the same is dismissed."*

2.2 In view of above, we find that the issue is squarely covered by the aforesaid decisions. The appeals filed by revenue Sr. no. 1, 5 above in para 1 are dismissed.

2.3 Learned Counsel for the Welspun, pointed out that they had paid the entire Clean Energy Cess in cash, in addition to that debited by DEPB scrips, as the said utilization of DEPB Scripts was resisted by revenue. He pointed out that they are entitled to refund of the said amount in cash. The Commissioner (Appeals) had remanded the matter back to the Adjudicating Authority for verification of facts.

2.4 It is noticed that revenue has field cross objections on the ground that the Commissioner (Appeals) has no power to remand.

3. We have considered rival submissions, we find that the Commissioner (Appeals) has not dealt with the issue on merits. While remanding the Commissioner (Appeals) as observed as follows:

> *"6. I find that the appellant imported steam coal by filing various Bills of Entry and paid duty leviable on coal including Clean Energy Cess. The appellant had paid the cess at the time of clearance by debit in the DEPB Scrip. Therefore, Less Charge Notice dated 30.08.2013 was issued to the appellant giving a reason that this duty had to be paid in cash. The same was adjudicated and confirmed vide Order in Original No. KDL/AC/AG/37/GR.VII/2014 dated 22.01.2014 and KDL/AC/AG/43/GR.VII/2014 dated 22.01.2014. Being aggrieved the said appellant preferred an appeal which was allowed by the appellate authority vide Order-in-Appeal No. KDL-CUSTM-000-APP-344-347-14-15 dated 10.06.2014. Department had already allowed re credit of clean energy cess paid earlier through DEPB licence on 07.05.2014. Appellant contended that there is no provision for further revalidation of DEPB Licence and DFPB re credit provided by the revenue is of no use. It is further submitted by the appellant that the respondent ought to have appreciated that DEPB licences were expired and there is no provision in Handbook of procedures 2009-14 for further revalidation of DEPB licence and DEPB re credit provided by the revenue is no benefit/use for the appellant. Appellant further submitted that the respondent erred in holding that the Appellant's application for revalidating of DEPB licence is lying before PRC. I find that the adjudicating authority had concluded that their application for revalidating the DEPB licence is lying alive before the PRC. I find the aforesaid facts and issues need proper verification and re examination by the original authority."*

3.1 It is seen that the Commissioner (Appeals) has not examined the issue on merits and therefore the said order cannot be sustained.

3.2 The second issue before us is the power of remand of Commissioner (Appeals) which has been raised by cross objection filed by the revenue.

3.3 We find that the matter is already settled by the M/s. Medico Labs reported in 2004 (173) ELT 117 (H.C), wherein following has been observed:

"10. *The appellant-Commissioner of Central Excise, Ahmedabad in both these appeals has annexed the order dated 12-5-2003 passed by the Tribunal in other cases. From the said judgment of Larger Bench of the Appellate Tribunal, it clearly appears that heavy reliance was placed by the Tribunal on the judgment of the Hon'ble Supreme Court in cases of (i) Shashikant Laxman Kale v. Union of India - AIR 1990 SC 2114 (ii) K.P Verghese v. ITO, Ernakulam - AIR 1981 SC 1922 for coming to the conclusion that in appeal Commissioner (Appeals) has no power to remand the case.*

11. *With utmost respect to the Larger Bench of the Appellate Tribunal, it had not considered the later judgment of the Hon'ble Supreme Court in case of Union of India v. Umesh Dhaimode - 1998 (98) E.L.T. 584 (S.C.). Relying on this decision of Umesh Dhaimode (supra) the learned Single Member of the Appellate Tribunal, in our considered opinion, rightly held that he was bound by the judgment of the Apex Court rather than the judgment of the Larger Bench of the Tribunal. He was bound to follow the judgment of the Hon'ble Supreme Court, which he did and rightly held that the Commissioner (Appeals) Continues to have the power of remand under post 2001 provisions of the Central Excise Act, 1944.*

12. *In view of the above, we are of the considered opinion that without properly understanding the judgment of the Appellate Tribunal the appellant has framed second question of law in both these appeals viz. "Whether a single member bench can overrule a decision of the Larger Bench decision on the same issue. There is no question of overruling the judgment of the Larger Bench. As stated earlier, the learned Single Member has held that the judgment of the Larger Bench of the appeal per incuriam in view of the judgment of the Hon'ble Supreme Court and he is bound by the Hon'ble Supreme Court judgment and not by the judgment of the Larger Bench of the Tribunal.*

14. *We must also state that even after amendment, which has come into force with effect from 11-5-2001, powers of remand by allowing the appeal of the Commissioner (Appeals) have not been taken away specifically. In that view of the matter, we are of the considered opinion that the appellate authority viz. Commissioner (Appeals) was vested with the power while deciding the appeal as he deemed fit by confirming, modifying or annulling the decision or order appealed against him. In our considered opinion, order of remand necessarily annuls the decision, which is under appeal* *before the appellate authority. Therefore, we entirely agree with the view taken by the learned Single Member of the Tribunal that even after amendment of Section 35A or the Central Excise Act, the appellate authority has the power to set aside the decision, which is under appeal before it and it has power to remand the matter to the authority below for its fresh consideration."*

3.4 We find that however, that issue becomes infructuous, as we hold that there was no need to remand the matter. The Commissioner (Appeals) to decide the issue on merit. We set aside the order and remit back to the Commissioner (Appeals) to decide the issue of the refund on merits.

4. In view of above, the appeals at Sl. No. 1-5 filed by the Revenue are dismissed.

5. Appeal filed by the M/s. Welspun Steel Ltd, is allowed by way of remand to Commissioner (Appeals) pass order on merits. Cross objection filed by revenue are disposed off. Since the matter is very old the Commissioner (Appeals) may decide the issue within a period of 3 months.

(Dictated & Pronounced in the open Court)

(RAJU)
MEMBER (TECHNICAL)

(SOMESH ARORA)
MEMBER (JUDICIAL)

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