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

REGIONAL BENCH – COURT NO. 03

CUSTOMS Appeal No. 10082 of 2021-DB

[Arising out of Order-in-Original/Appeal No AHM-CUSTM-000-COM-0015-19-20 dated 12.12.2019 passed by Commissioner of CUSTOMS-AHMEDABAD]

SHRADDHA IMPEX **...Appellant**

103 Chitrarath, Opp-Hotel President,

C.G. Road, Navrangpura
Ahmedabad
Gujarat-380009

VERSUS

C.C.-AHMEDABAD **...Respondent**

Custom House,
Near All India Radio Navrangpura,
Ahmedabad,
Gujarat

WITH

CUSTOMS Appeal No. 10294 of 2021-DB

[Arising out of Order-in-Original/Appeal No AHM-CUSTM-000-APP-772-2020-21 dated 12.02.2021 passed by Commissioner of CUSTOMS-AHMEDABAD]

SHRADDHA IMPEX **...Appellant**

103 Chitrarath Opp Hotel President C G Road Navrangpura
Ahmedabad
Ahmedabad
Gujarat-380009

VERSUS

C.C.-AHMEDABAD **...Respondent**

Custom House,
Near All India Radio Navrangpura,
Ahmedabad,
Gujarat

APPEARANCE:
Shri P P Jadeja, Consultant for the Appellant
Shri A R Kanani, Superintendent (Authorized Representative) for the Respondent

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

FINAL ORDER NO.A / 12576-12577 /2023

DATE OF HEARING:03.11.2023
DATE OF DECISION:08.11.2023

RAMESH NAIR

The issue involved in the present case is that whether the filing of refund application without having challenged the assessment order under Section 17(4) of Customs Act, 1962 is valid or otherwise in the peculiar facts of the present case the Bills of Entry were finally assessed without mention of demand/ payment of Anti Dumping Duty for which the refund is sought for by the appellant.

2. The brief facts of the case are that the appellant had imported goods namely "Polypropylene and Propylene Co-polymer (CTH 39021000 and 390023000) from Singapore, vide 37 bills of entry Anti Dumping Duty on the said goods was levied by the Notification No. 119/2010-Cus dated 19.11.2010 (Sl. No.19) (as amended). Notification provided that Anti Dumping Duty shall be levied for a period of 5 years (unless revoked superseded or amended earlier) from the date of imposition of provisional Anti Dumping Duty i.e form 30.07.2009, and shall be payable in Indian currency. Further, it was amended vide Notification No. 38/2014-Cus (ADD) dated 13.08.2014 to the effect that the said levy imposed on the said goods shall remain in force up to and inclusive on 29.07.2015, unless revoked earlier. No further extension of validity was granted. Government of India reviewed Anti Dumping Duty on the subject goods and vide Notification No. 07/2016-Cus (Add), dated 08.03.2016 (Sl. 3) provided for Anti Dumping Duty at nil rate for the subject goods of CTH 3902-10000 and 3902-30000 produced and exported by "Exxon Mobil Chemical Asia Pacific", thus, from 29.07.2015, there was no ADD. Thus

after 08.03.2016, it was completely settled that there was no Anti Dumping Duty for subject goods of CTH 39021000 and 390023000 produced in Singapore and exported by "Exxon Mobil Chemical Asia Pacific" from Singapore. In the mean while appellant being regular importer of the said goods had filed total 37 bills of entry between 31.07.2015 to 22.01.2016, and cleared the goods without any Anti Dumping Duty, however, the appellant voluntarily deposited total amount of Rs. 53,23,671/-, in anticipation of levy of Anti Dumping Duty. Since the notification was valid upto 29.07.2015 EDI system was not capturing Anti Dumping Duty, when importer had filed 37 bills of entry. Therefore, the assessment of bill of entry was escaped from mentioning levy of Anti Dumping Duty and payment thereof. Later on appellant filed refund claim in respect of the said Anti Dumping Duty on 04.04.2016. Further with reference to seeking clarification the custom respondent vide letter dated 29.06.2016 received on 21.07.2016 by appellant, wherein it was clarified that they were directed to make payment of Anti Dumping Duty manually by challan and to cooperate with customs appellant has deposited amount equal to Anti Dumping Duty voluntarily, though it was not applicable after 29.07.2015. The appellant also requested to re assess all these 37 bills of entry and to sanction the refund of Anti Dumping Duty paid after 29.07.2015. The Deputy Commissioner of Customs ICD Khodiyar Ahmedabad, vide his order-in-original dated 30.09.2016 sanctioned and paid refund of Anti Dumping Duty of total Rs. 53,23,671/- The said order-in-original was reviewed and on authorization given by principle Commissioner of Customs (Ahmedabad), the Assistant/deputy Commissioner of Customs ICD Khodiyar (District-Ahmedabad) filed appeal before the Commissioner of Customs (Appeals) Ahmedabad. At the same time a protective demand SCN dated 13.06.2017 was issued by the Commissioner of Customs Ahmedabad proposing to recover amount of Rs. 53,23,671/- as erroneous refund. In the department's appeal before the Commissioner (Appeals), the learned

Commissioner (Appeals) remanded the matter back to Assistant Commissioner/Deputy Commissioner, ICD vide order-in-Appeal dated 07.12.2017. The Assistant Commissioner ICD- Khodiyar in the de novo adjudication on the matter of refund rejected the refund claim vide order dated 06.12.2009. Against this order-in-original dated 06.12.2019 the appellant filed the appeal before the Commissioner (Appeals), which was rejected by the Commissioner (Appeals) vide order-in-Appeal dated 12.02.2021, being aggrieved with this order-in-Appeal, the appellant filed the present appeal bearing No. C/10294/2021-CU(DB), in the meanwhile the principle Commissioner in the matter of SCN dated 13.06.2017 passed order-in-original No. AHM-CUSTM-000-COM-0015-19-20 dated 13.12.2019, whereby a recovery of the erroneous refund was confirmed. Being aggrieved with the said order-in-original, the appellant preferred Appeal No. C/10082/2021-DB. This appeal is consequential to the order-in-appeal dated 12.02.2021.

3. Shri P P Jadeja, learned Consultant appearing on behalf of the appellant at the out set submits that the appellant's refund claim was rejected on the sole ground that the appellant have not challenged the assessment order of bill of entry. He submits that firstly at the time of assessment of bill of entry and clearance of goods no Anti Dumping Duty was leviable. It is on the behest of the department, the appellant have deposited the Anti Dumping Duty as per abundant precaution. Therefore, the payment of Anti Dumping Duty is not a part of final assessment of bill of entry. He invites our attention to the copy of bill of entry, wherein he has shown that the Anti Dumping Duty was neither part of the assessment of bill of entry nor the deposit was made in pursuance to the assessment of bill of entry. Therefore, the Anti Dumping Duty which was paid separately being not a part of assessment order there was no need to challenge the assessment as there was no assessment order in respect of the payment of Anti Dumping Duty. Therefore the entire basis of the

department for rejecting the refund claim is incorrect and illegal. He submitted that the department has heavily relied upon the Hon'ble Supreme Court Judgment in the case of ITC LTD-2019 (368) ELT 216 (SC). However the judgment is applicable only in a case where there is a final assessment order and the same is under challenge which is not the case here. Therefore, the rejection of the refund claim is not supported by any law. He also strongly submits that in the present case at the relevant time there was no levy of ADD which is not disputed by the department also. The payment of ADD is not duty but only a deposit and in such case there is no need of challenge the payment of deposit as the same is not a statutory levy. He also submits that admittedly the appellant was not issued reassessment order on ADD. Hence since there is no reassessment of Bills of Entry particularly when there is neither any endorsement on Bills of Entry to the effect of reassessment nor any reassessment order was given to the appellant by following statutory provision of Section 17 (4) & (5) of Customs Act, 1962. Hence there is no question to challenge anything by filing appeal. In support he placed reliance on the following judgments:

- 2015 (325) ELT 716 (Mad.)-Elpelabs Vs. CC (Seaport Import), Chennai-II
- 2019 (369) ELT 543 (Bom.)-Micromax Informatics Ltd Vs. UOI
- 2018 (361) ELT 727 (Bom.)-Titanium Ten Enterprise Pvt Ltd Vs UOI
- 2017 (351) ELT 241 (Del.)- Mount International Vs. Commr of Customs
- 2017 (358) ELT-125 (Mad.)-Ingram Micro India Pvt Ltd.Vs. Principal Commr. Of Customs
- 2017 (350) ELT 510 (Cal.) Sigma Power Products pvt Ltd Vs. Commr. Of Customs (Port)
- 2017 (347) ELT 403 (Ker)- John Jacob Vs. C.C (Imports), ICD
- 2016 (333) ELT 236 (Cal)- Gateway and Commodities Pvt Ltd Vs. Union of India

- 2011 (274) ELT 488 (Cal)- Kathari Metals Ltd. Vs. Union of India
- 2017 (351) ELT 65 (S.C)- UOI Vs. Kumho Petrochemicals Company Ltd
- 1986 (25) ELT 867 (SC)-Commr of Sales Tax, U.P Vs. Auriaya Chamber of Commerce, Allahabad
- 1988 (33) ELT 249 (SC)- Salona Tea Company Ltd Etc Vs Superintendent of Taxes Nowgong & Ors Etc
- 1989 (43) ELT 205 (SC)- Mahabir Kishore Vs. State of Madhya Pradesh
- 2001 (128) ELT 3 (SC)- U P Polluiton Control Board Vs. Kanoria Industrial Ltd
- 2001 (130) ELT 3 (SC)- Somaiya Organics Vs. State of Uttar Pradesh
- 2018 (36) ELT 577 (SC)- CC (Import), Mumbai Vs. Dilip Kumar & Company
- Perfect Importers And Distributors P Ltd Vs. UOI- 2023 (383) ELT 499 (Guj.)
- 2019 (368) ELT 216 (SC)-ICD Ltd Vs. CCE
- 2023 (384) ELT 227 (SC)-Royal Impex

4. Shri A R Kanani, learned Superintendent (Authorized Representative) appearing on behalf of revenue reiterates the findings of the impugned order. He placed reliance on the following judgments:

- Circular No. 24/2004-Cus dated 18.03.2004
- 2019 (368) ELT 216 (SC)-ITC Ltd Vs. CCE, Kolkata-IV
- Final Order No. 40498/2023 dated 28.06.2023-CC, Tuticorin Vs. Tamil Nadu Generation & Distribution Corporation Ltd

5. We have carefully considered the submissions made by both the sides and perused the records. We find that the sole ground for rejection on the refund claim of the appellant is that the appellant have not challenged the assessment order of bills of entry, therefore, the appellant is not entitled for

the refund of Anti Dumping Duty paid by them. From the record, we find that though there is a mention in the order of the authority's below about the endorsement on system about payment of Anti Dumping Duty. However, the finalization of bill of entry does not show any reference of payment of Anti Dumping Duty nor there is any order showing reassessment of Bills of Entry with regard to payment of ADD. For the ready reference the sample copy of the bill of entry is scanned below:

http://pcrsap01.cbec.gov.in:7777/impfiles/be2078151

Triplicate (Exchange Control Copy)
Indian Customs EDI System - Imports V1.5
ICD SABARMATI KALIGAM SABARMATI AHMEDABAD 382470

BILL OF ENTRY FOR HOME CONSUMPTION Provisional

[Custom Stn: INSBI6] CHA : AAEFP0054ECH002 [CAL INDIA SHIPPING AGENCY]
BE No/Dt./cc/Typ: 2078151/07/06/2010/N/H OOC No/Dt/Officer 2000079506/15-06-2010/10012320

Importer Details : 0605007717 PAN : ABKPD1673
SHRADDHA IMPEX
D 103, CHITRA RATH, OPP: HOTEL
PRESIDENT, C.G.ROAD, NAVRANGPURA,
AHMEDABAD 380006

LocalIGM No : 2022924/28/05/2010 28/05/2010 Port Of Loading :Singapore
Gateway IGM No: 24862 Date:26/05/2010 Port of Reporting INMSA1
Cntry Of Orgn. SINGAPORE Cntry Of Consgn
M. No MYRS3000692800 H/BL. No.
Date 18/05/2010 Date
Of Pkgs. 1800 BGS Gross Wt. 45225.000 KGS
Marks: NA
Nos

Inv No & Dt. : 34869744 18/05/2010
Inv Val : 65250.00 USD TOI: CIF
Freight : 0.00
Insurance : 0.00
SVB Load(Ass):
SVB Load(Dty):
Misc. Charges : 0.00

EXXONMOBIL CHEMICAL ASIA PACIFIC (A DIVISION OF EXXONMOBIL ASIA PACIFIC PTE LTD)1 HARBOURFRONT PLACE 06-00 HARBOURFRONTTOWER ONE

Cust. House: SINGAPORE
HSS Load Rate: 0.00% Amount: 0.00
0.00
Discount Rate: 0.00 Discount Amount: 0.00
Item Details
Exchange rate: 1.00 USD = 47.8800 INR

Slno / Qty / Unit	RITC	Description / Unit Price / Ass Val	CTH / CETH	C Notn C.NSNO / E Notn E.NSNO	RSP / Cus Dty Rt / Exc Dty Rt	Load PROV / BCD amt(Rs) / CVD amt(Rs)
1	39021000	EXXONMOBIL P.P 3155E3 5050715 (POLYPROPYLENE)				Y
45.00		1450.000000	39021000	021/2002 478	5.00 %	157671.70
MTS		3153434.63	39021000	002/2006 10	10.00 %	331110.60
		Educational Cess on CVD			2.00 %	6622.20
		Sec & Higher Edu. Cess on CVD			1.00 %	3311.10
		Customs Educational Cess			2.00 %	9974.30
		Customs Sec & Higher Edu. Cess			1.00 %	4987.20
		Addl Duty (Imports)		019/2006	4.00 %	146684.50

	Rs.	3153434.63	Page Total	Rs.	660361.60
	Rs.	3153434.63	BE Gross Total	Rs.	660361.60
BCD	Rs.	157671.70	NCD Duty	Rs.	0.00
ANTID	Rs.	0.00	SAFEGUARD Duty	Rs.	0.00
CVD	Rs.	331110.60	Sch 3 Spl Excise Duty	Rs.	0.00
CESS	Rs.	0.00	CSIA	Rs.	0.00
TTA	Rs.	0.00			
Edu. Cess CVD	Rs.	6622.20	Customs Edu. Cess	Rs.	9974.30
Health CVD	Rs.	0.00	Addl Duty (Imports)	Rs.	146684.50
SHE. Cess CVD	Rs.	3311.10	SH Cust Edu. Cess	Rs.	4987.20

Duty Payable: Rs. 660362
Rs. Six Lakh Sixty Thousand Three Hundred and Sixty Two only

Container Details

AhmD ENV 64/03

1 2022924 F WYKU2490014 2 2022924 F WYKU2636490 3 2022924 F WYKU2284932

BOND Details

BondCd	BondNo	BondAmt	BGRate	BGAmt	BondDebited	BGDebited
PD	2000008234	3153435	3	95675	3153435	95675

Declaration
1. I/We Certify that the above entries are correct
2. I/We further declare that wherever the RSP is applicable same has been

From the perusal of the above bill of entry which is a final assessment order there is no mention of Anti Dumping Duty for the obvious reason that the Anti Dumping Duty was not leviable at the relevant time. The department emphasized that the appellant should have challenged the final assessment order of the bills of entry in order to claim refund of Anti Dumping Duty. It is very surprising that when the finally assessed bills of entry do not bear any reference to the assessment/reassessment order in respect of payment of Anti Dumping Duty there is no purpose of challenging the bills of entry which was assessed finally.

5.1 As regard the payment of Anti Dumping Duty by the appellant it is nothing but only a deposit without having part of the final assessment of bills of entry. As per the Hon'ble Supreme Court judgment in the case of ITC Ltd importer can file a refund claim only if the duty which was assessed under final assessment of bills of entry is challenged by way of filing appeal. However, in the present case since the Anti Dumping Duty is not part and partial of final assessment of bills of entry there is no question of challenging the assessment of bills of entry for claiming the refund of Anti Dumping Duty. Since the Anti Dumping Duty was separately paid without having included in the final assessement of bill of entry, the appellant is entitled for refund without any challenge to the assessment order which was otherwise not required. As regard the department's claim that on system there was endorsement appearing regarding payment of Anti Duty, however, firstly the said endorsement was not brought to the notice of the appellant after the assessment of bill of entry as a part of final assessment order. Secondly, such endorsement is in isolation and no assessment order was passed in respect of such payment of Anti Dumping Duty, therefore even the said endorsement cannot be considered as part of final assessment order of the bills of entry. As regard the judgment relied upon by the revenue on going through the same, we observed that in both the decision one of ITC LTd of Apex Court and other is Tribunal decision in Tamil Nadu Generation & Distribution Corporation Ltd, it is clear that in both the cases, the issue was decided keeping in mind that any duty which is part and partial of the duty in regard to which the final assessment order was passed such final order needs to be challenged. However, in the fact of the present case as discussed in detail above with regard to the payment of Anti Dumping Duty, there is no final assessment order. Therefore, the judgments cited by the leaned AR have no application in the fact of the present case.

In the present case it is undisputed fact by the revenue also that the ADD paid by the appellant was not at all leviable at the relevant time. Therefore, duty which was not leviable and there is no is on that there can not be assessment/ reassessment of such not leviable duty. This fact also strengthen the case of the appellant. We also concur with the following views expressed by the sanctioning authority while sanction of refund claim:

> *"12. The claimant was asked to get the Bills of Entry re-assessed as it appeared that the refund claim is not maintainable when the claimant did not challenge the Bills of Entry assessed finally. The assessee in reply vide his letter received on 21.07.2016 submitted that the ADD is not assessed in any of the bills of entry under claims of refund. He further submitted that they have made payment of ADD manually by challan nos, and the same may be considered as deposits with the department. I find that the bills of entry are assessed finally having no ADD is assessed therein and the claimant paid the ADD manually to avoid any liability/consequences, that may arise at later stage. In view thereof, I find the Bills of Entry need not re-assessed and the ADD paid by the claimant is refundable to them."*

5.2 As per our above discussion and findings, we are of the considered view that in absence of any final assessment order in respect of payment of Anti Dumping Duty and particularly in the fact that the Anti Dumping Duty was not leviable at the relevant time. The appellant is legally entitled for the refund claim.

6. Accordingly the impugned order is set aside and Appeal No. C/10294/2021 is allowed. As regard Appeal No. C/10082/2021-DB, the same is on the issue of recovery of erroneous refund which was involved in the case under Appeal No. C/10294/2021. We, since held in Appeal No. C/10294/2021 that the appellant are entitled for refund of Anti Dumping Duty then consequently the recovery of the refund holding it erroneous refund will also not survive, hence the impugned order No. AHM-CUSTM-000-COM-0015-19-20 dated 13.12.2019, is set aside and Appeal No. C/10082/2021 is also allowed with consequential relief.

(Pronounced in the open Court on 08.11.2023)

RAMESH NAIR
MEMBER (JUDICIAL)

(RAJU)
MEMBER (TECHNICAL)

PALAK