

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

REGIONAL BENCH : COURT NO. 3

CUSTOMS Appeal No. 221 of 2011-DB

[Arising out of Order-in-Original/Appeal No 22-COMMR-A--JMN-2011 dated 11.03.2011 passed by Commissioner of CUSTOMS-JAMNAGAR(PREV)]

Mosaic India Private Limited

...Appellant

Gurgaon, 11th Floor,
Building 8c, Dlf Cyber City, Phase-iii,
GURGAON,
MAHARASHTRA-122022

VERSUS

C.C.-Jamnagar(prev)

...Respondent

SHARDA HOUSE...BEDI BANDAR ROAD,
OPP. PANCHAVATI,
JAMNAGAR
GUJARAT

APPEARANCE:

Present For the Appellant : Shri T. Vishwanathan, Shri Manish Jain and
Ms. Shruti Agarwal, Advocates

Present For the Respondent : Shri S.N. Gohil, Superintendent (Authorised
Representative

CORAM:

HON'BLE MEMBER (JUDICIAL) ,RAMESH NAIR

HON'BLE MEMBER (TECHNICAL),RAJU

FINAL ORDER NO. A/12462 / 2021

DATE OF HEARING : 01/07/2021

DATE OF DECISION: 27/10/2021

RAMESH NAIR

The brief facts of the case are that the appellant entered into contract with M/s Mosaic Crop Nutrition, LLC, USA and imported Di-Ammonium Phosphate (DAP) in regular course of business. The appellants filed three bills of entry for clearance (DAP) and deposited 1% Revenue deposit for each bills of entry, totally amounting to Rs. 1,80,87,271/- in view of circular no. 11/2011-Cus dated 23.02.2001. The deposit is a security deposit furnished for provisional assessment of these bills of entry in terms of section 18 of the Customs Act, 1962. The matter was referred to Special Valuation Branch (SVB) vide order no. SVB/CUS/review/15/JPK/2009 dated

16.09.2009. It was held that declared valuation may be accepted with respect to usual check and scrutiny and comparison with prices in FMB international price guide. All the three bills of entry were finally assessed and the appellant filed the refund claim of Rs.1,45,98,975/- for the refund of Revenue deposit after adjusting duty and interest payable for one Bill of entry. Meanwhile, a show cause notice dated 13.05.2009 was issued to the appellant proposing to adopt US\$ 968 as the value of the goods imported by the appellant vide Bills of entry dated 03.04.2008 on the ground that US\$668.75 declared by the appellants was influenced by the relationship. The Customs department had invoked Rule 4. The said show cause notice was upheld by the Assistant Commissioner vide order dated 14.09.2009 and the Commissioner (Appeals) vide Order in Appeal dated 11.03.2011. However, on appeal to CESTAT, vide Order No. A/11113/2020 dated 11.06.2020 CESTAT set-aside the demand and accepted the declared US \$ 668.75 as fair price. The said order has attained finality. The Assistant Commissioner of Customs vide the OIO No. 02/AC/RD/2010-11 dated 29.04.2010 held that the refund claim pertaining to refund of Rs. 1,45,98,975/- pertaining to revenue deposit is maintainable and also held that doctrine of unjust enrichment is not applicable as it is related to refund of revenue deposit. However, the refund was appropriated against demand of Rs. 1,19,69,617/- and part interest, in terms of the provisions of Section 142. On appeal by department against sanctioning the refund, Ld. Commissioner of Customs (Appeals) vide Order in Appeal No. 22/Commr(A)/LMN/2011 dated 11.03.2011 allowed the appeal of the department. Therefore, the present appeal by the appellant.

2. Shri T. Vishwanathan with Shri Manish Jain and Ms. Shruti Agarwal, Advocates, appearing on behalf of the appellant submits that the Revenue

deposit furnished at the time of provisional assessment should be automatically refunded to the assessee after the final assessment. In his support he placed reliance on the following judgments:

- a. CC Vs Hindalco Industries Ltd - 2008 (231) ELT 36 (Guj.) –
[upheld by the SC in the case of C Vs R.L. Kalthia Ship Breaking Pvt Ltd - 2016 (338) ELT A76 (SC)]
- b. CC Vs. India Oil Corporation - 2012 (282) ELT 368 (Del.)
- c. Contemporary Packaging Technologies Pvt. Ltd Vs UOI - 2014 (299) ELT 439 (Guj.) -
[upheld by SC in the case of UOI Vs Contemporary Packaging Technologies Pvt. Ltd - 2017 (354) ELT A58 (SC)]

2.1 He further submits that the principal of unjust enrichment is not applicable in case of revenue deposit refund as the same is in the nature of security deposit with the Department. In support of this submission, reliance is place upon the following decisions :

- i. Commissioner of Cus. (Export), Chennai vs. Sayonara Exports Pvt. Ltd. 2015 (321) ELT 583 (Mad.)
- ii. C.C., Chennai vs. Mirvera Trade Links (P) Ltd. 2009 (233) E.L.T. 399 (Tri Chennai)
- iii. SKF Technologies v. CC Bangalore 2017 (352) ELT 355 (Tri. Bang)]
- iv. C.C., Chennai vs. Madras Fertilizers Ltd. 2014 (299) E.L.T. 465 (Tri Chennai)
- v. V.R. Equipment Ltd. vs. C.C. (I), Mumbai 2007 (217) E.L.T. 277 (Tri-Mum.)
- vi. C.C., Bangalore v. Ecomaster (India) Pet. Ltd. 2007 (213) ELT. 281 (Tri-Bang.)

The Ld. Assistant Commissioner vide O1O dated 29.04.2010 had appropriated the disputed amount against another proceeding for which Appellants have now received a favorable order. Thus, considering the disputed amount as a pre-deposit for an appeal which has been settled in favour of the Appellants vide Order No. A/11113/2020 dated 11.06.2020, the Appellants are eligible for consequential refund along with applicable interest. It is submitted that CESTAT in the said proceeding vide Stay Order No. S/1305/WZB/AHD/2011 dated 05.10.2011 treated the disputed amount as a pre-deposit and the stay application was treated as infructuous. Now, the said matter has been settled in favor of Appellants as the Order No. A/11113/2020 dated 11.06.2020 has been accepted by the department and the same is not being contested before the higher authority. Therefore, the Appellant is entitled for refund of pre-deposit along with interest without filing any application.

2.2 He referred to section 129E and 129EE of the Customs Act, 1962. As per the said section it is evident that the Appellants are eligible for consequential refund of the disputed amount in lieu of Order No. A/11113/2020 dated 11.06.2020. Further, they are also eligible for the refund on the said amount. They are also eligible for the interest on the said amount from 11.09.2020 till the day the said amount is refunded. He also submits that in case of refund of pre-deposit under Section 129EE no separate refund application needs to be filed by the assessee and the principal of unjust enrichment is also not applicable in such cases. He placed reliance upon the judgment of Hon'ble Supreme Court in the case of Mahavir Aluminium Ltd. vs. Collector-1999 (114) E.L.T. 371 (SC). He also placed reliance upon the judgment of Hon'ble Supreme Court in the matter of CC Hyderabad vs. ITC-2005 (179) E.L.T. IS (SC).

2.3 He further submits that based on the aforesaid judgment of Hon'ble Supreme Court the department had issued a clarification vide Circular No. F.No. 275/37/2K CX 8A. dated 02.01.2002 and had clarified that for the refund of pre-deposit amount on receipt of favorable order refund applications under Section 27(1) of the Customs Act, 1962 is not necessary and the same shall be processed on receipt of a simple letter from the person who has made such deposit, requesting the return of the amount, along with an attested Xerox copy of the appellate authority order and an attested Xerox copy of the Challan in Form TR6.

2.4 Without prejudice to his above submission, he further submits that the appellants have not passed on the burden of duty to their customers or to any other person. These deposits are shown as receivable in their balance sheets from the order in which the deposit was furnished from the department till date. He also place reliance on the CA Certificate wherein the CA has referred upon the balance sheet of FY 2009-10 to FY 2019-20 and certified that the burden has not been passed on. It is further that the balance sheet clearly shows this amount as recoverable from the Customs authority in the schedule pertaining to Loans and Advances, thus principal of unjust enrichment is satisfied. He placed reliance on following judgments -

- a. Commissioner v. Prism Cement Ltd. 2008 (9) S.T.R. 12 (All.)
- b. Gujarat State Fertilizers & Chemicals Ltd. v. Commissioner - 2014 (309) E.L.T. 94 (Tribunal)
- c. Riddhi Siddhi Processors v. CC-2019 (370) E.L.T. 1298 (Tribunal)
- d. Afcons Infrastructure Ltd. v. CC-2015 (329) E.L.T. 0390 (Tribunal)

2.5 Without prejudice to his submissions made hereinabove, he further submits that the subsidy was being granted to compensate the losses faced

by the company due to fixation of selling price of DAP fertilizers. The same was not sufficient to cover the burden of tax duties or deposits. He submits that in the case of subsidy for price ceiling, the principal of unjust enrichment is not applicable. He placed reliance on the following judgments:

- i. Karnataka Antibiotics & Pharmaceuticals Ltd. v. Collector-1996 (83) E.L.T. 114
- ii. Indian Oil Corporation Ltd. v. Commissioner -2011 (263) E.L.T. 698 (Tribunal)
- iii. Gobind Sugar mills Ltd. v. CC-2018 (363) E.L.T. 204 (Tribunal)

In view of his above submission, he prayed that the impugned order may be set aside and that the refund be granted with interest.

3. On the other hand, Shri S.N. Gohil, learned Superintendent (Authorised Representative) appearing on behalf of Revenue reiterates the finding of the impugned order. He filed written submission dated 25.03.2021 and post hearing dated 02.07.2021 whereby he relied on the following judgments:

- i. 1987 (31) ELT 30 (Cal)-D Sengupta Vs. CC
- ii. 1996 (81) ELT 669 (Tri) - Jaswant B Shah Vs. CC, Bombay
- iii. 2015 (322) ELT 267 (Guj) - CCE, Vs. Dutron Plastics
- iv. 2009 (238) ELT 680 (Tri-Mum) - Shree Baidyanath Ayurved Bhavan Ltd Vs. CCE, Nagpur
- v. 2013 (288) ELT 203 (Bom) - Western Coalfields Ltd Vs. CESTAT, New Delhi
- vi. 2018 (363) ELT 844 (Tri-Chennai) - Chemplast Sanmar Ltd Vs. CCE, Tiruchirappalli
- vii. 2011 (264) ELT 393 (Tri-Del) - Gail India Ltd Vs. CCE, Gwalior

- viii. 2010 (262) ELT 500 (Tri-Mum) - Krohne Marshall Ltd Vs. CC, Airport, Mumbai
- ix. 2017 (352) ELT 308 (Guj) - GSFCL Vs. CCE
- x. 2018 (8) GSTL 47 (Mad) - Shoppers Stop Ltd Vs. CC (Exports), Chennai
- xi. 2010 (259) ELT 526 (Mad) - CC (Exports), Chennai Vs. BPL Ltd
- xii. 1997 (89) ELT 247 (SC) - Mafatlal Industries Ltd Vs. Union of India
- xiii. A/10958-10959/19 dated. 08.02.2019-Nokia India Sales P Ltd Vs. CC, Ahmedabad

4. We have heard both sides and perused the records. The issue arising out of the impugned order to be decided is whether the refund filed by the CHA can be entertained and whether the principle of unjust enrichment is applicable to the refund of Revenue deposit. As regard the issue that the refund claim filed by the CHA is proper or otherwise, we find that it is not the case that whether CHA is claiming the refund. Those are applications of refund filed by the CHA but ultimately the refund has to be given to the appellant only. Therefore, only on the ground that the application for refund was filed by CHA, refund cannot be denied which is otherwise due to the appellant. As regard the unjust enrichment, we find that though appellant have paid the Revenue deposit but the same was appropriated against the duty demand. Therefore, the Revenue deposit has been converted into duty. Moreover, Hon'ble Supreme Court in the case of Mafatlal Industries Ltd. (supra) has categorically held that all the refund has to pass through test of unjust enrichment. Therefore, in the present case also unjust enrichment is very much applicable for granting the refund of duty. There is a subsequent development that after appropriation of the refund against their demand, the same was settled in favour of the appellant vide CESTAT's Order no.

A/11113/2020 dated 11.06.2020. Therefore, the amount appropriated needs to be refunded subject to passing of the test of unjust enrichment. We find that the appellant have made a categorical submission that amount of refund is reflected as receivable under the head of 'loan' and advances' in the balance sheet of the appellant and to that effect Chartered Accountant has also issued a certificate. If this submission on the basis of the documents as referred therein is found to be correct, then this is sufficient to establish that the incidence of duty for which refund was sought for was not passed on to any other person.

5. With our above observation, the matter needs to be remanded to the Adjudicating Authority for passing a fresh order. Accordingly, appeal is allowed by way of remand to the Adjudicating Authority for passing a fresh order within a period of 3 months. Needless to say, that the appellant shall be given sufficient opportunity of hearing as well as for filing submissions and documents, if required. Appeal is allowed by way of remand.

(Pronounced in the court on 27/10/2021)

(RAMESH NAIR)
MEMBER (JUDICIAL)

(RAJU)
MEMBER (TECHNICAL)

Diksha