

**CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL,**

**West Zonal Bench, Ahmedabad**

Appeal No. E/1148/2010-DB

(Arising out of OIA No. KS/56/SRT-II/2010 dated 16/04/2010 passed by Commissioner of Central Excise, Customs and Service Tax-SURAT-II)

**C.C.E. & S.T.-Vadodara**

**- Appellant**

Vs.

**Gujarat Borosil Ltd.**

**- Respondent**

**Represented by:**

For the appellant : Shri T.G. Rathore, Jt. Commr. (AR)  
For the respondent : Shri Anand Nainawati, (Advocate)

**CORAM:**

**Hon'ble Mr. Ramesh Nair, Member (Judicial)**

**Hon'ble Mr. Raju, Member (Technical)**

Date of Hearing: 16/11/2018

Date of Decision:06/12/2018

Order No. **A/12715 / 2018**

*Per: Ramesh Nair*

The brief facts of the case are that the respondents cleared the glass manufactured by them on payment of Excise Duty on the price by claiming deduction there from in respect of cost of secondary packing, i.e., Wooden crates for the period April- November 1994. Three Show Cause Notices were issued proposing to disallow said deduction and demand differential excise duty which was adjudicated by OIO no. 03/Demand/96 dated 29.02.1996 passed by the Asst. Commissioner of Central Excise, Ankleshwar confirming the proposal of the Show Cause Notices to disallow the deduction claimed on account of secondary packing and demanding differential Excise Duty. Against the said order in original, an appeal was filed before the Commissioner (Appeals). After receipt of the said order, the respondent started paying Excise Duty under protest on value on secondary packing. The invoices clearly indicated the fact of duty being paid under protest for the period of March 1996 to September 1999. In the appeal against order in

original no. 03/Demand/96 dated 29.02.1996, the Commissioner (Appeals) allowed the appeal vide order in Appeal no. GS/52/APP/97 dated 28/05/1997 whereby it was held that the cost of secondary packing is not includable in the assessable value. The respondent continued to pay the excise duty under protest till September, 1999 since the aforesaid order in appeal dated 28.05.1997 was challenged by the department before CESTAT. Five separate show cause notices were issued by the department demanding differential Excise duty on the ground that the Excise Duty is payable on the value of secondary packing for the period December 1994 to February 1996. The aforesaid Show Cause Notices were adjudicated vide OIO dated 29.01.1998 whereby the demand raised in the Show Cause Notice was confirmed. The respondent filed an appeal before Commissioner (A) who vide order SSS/STR/1728 dated 28/09/1998 remanded the matter to the Adjudicating Authority. The respondent stopped paying duty under protest on value of secondary packing after the issuance of Order in Appeal dated 28.09.1999. The respondents filed the refund application for the duty paid under protest for the period March, 1996 to September, 1999. On this matter of refund, a Show Cause Notice dated 16/10/2000 was issued to the respondent proposing rejection of refund claim filed by them for the period March 1996-September 1999. Pursuant to the order passed by Commissioner (A) allowing the appeal of the respondent on the issue of secondary packing, the respondent filed refund claim of Rs. 3,71,42,093/- for the duty paid under protest for the period March 1996 to September 1999. The said refund claim was rejected by the Dy. Commissioner of Central Excise vide Order in Original dated 22.02.2001 on the ground that the cost of secondary packing is not eligible for deduction. It was held that duty was not paid under protest. An appeal was filed before the Commissioner (A) by the respondent against the order of Dy. Commissioner of Central Excise. Meanwhile vide Order in Original no. 28 to 32/OA/2001 passed by the deputy Commissioner, a demand for the period December 1994 to February 1996 was upheld in de-novo proceedings. Vide Order in Original no. 35-36/OA/2001/passed by the

deputy Commissioner confirming the duty demand for the period October 1999 to March 2000. Vide Order in Original no. 38/OA/2001 passed by the Deputy Commissioner confirming the duty demand for the period April 2000-June 2000. The appeal filed by the department against Order in Appeal dated 28.05.21997 passed by the Commissioner (Appeals) before CESTAT was dismissed vide Final Order No. C-II/2933/WZB/2002 dated 04.10.20052. CESTAT in its order categorically held that there are sales at factory gate and that secondary packing is not done to render the product marketable. This order of the Hon'ble Tribunal has attained finality since same was accepted by the department and no appeal has been filed against the same. On 08/03/2006 two Order in Original No. 35-36/OA/2001 passed by the Deputy Commissioner was set aside by the Ld. Commissioner (Appeals) vide Order in Apeal NO. RS/120-121/SRT-II/2006. Ld. Commissioner (Appeals) also set aside the Order in Original no. 28-32/OA/2001 for the period December 1994 to February 1996 vide his Order in Appeal no. RS/114/SRT-II/07 dated 08.03.2006. The said Order in Appeal dated 08/03/2006 was accepted by the Department. Ld. Commissioner (A) vide Order in Appeal no. RS/116/SRT-II/07 dated 30.03.2007, set aside the Order in Original dated 22/02/2001 rejecting the refund claim and allowed the appeal of the Respondent. Ld. Commissioner (A) held that the department cannot agitate the issue again when order of the CESTAT on merits has been accepted by the department. It was also held that the duty was paid under protest and the invoice also contains endorsement to that effect. Against the said Order in Appeal dated 30.03.2007, department filed an appeal before the CESTAT bearing Appeal no. E/794/2007. The said appeal has been dismissed by the Tribunal vide order dated 09/11/2009. The department also filed an appeal before this Tribunal against Order in Appeal no. RS/114/SRT-II/2007 & Rs/120-121/SRT-II/2006 which was registered as appeal no. E/1062/2008. E/1094/2008 respectively. Appeal No. E/1062/2008 was dismissed by this Tribunal vide Final Order No. A/1917/WZB/AHD/08 dated 12.09.2008. The Appeal no. E/1094/2008 was dismissed by Tribunal vide Final Order No.

A/2309/WZB/AHD/2008 dated 20.10.2008. Against both the orders dated 12.09.2008 and 20.10.2008, the Revenue filed tax appeal bearing no. 160 of 2009 and 318 of 2009 respectively before the Hon'ble High Court of Gujarat. The Hon'ble High Court in its judgment reported at Commissioner of Central Excise and Customs-Surat-ii Vs. Gujarat Borosil - 2015 (319) E.L.T. 32 (Guj.), dismissed the Revenue's Appeal.

2. Shri T.G. Rathore, Ld. Jt. Commissioner (AR) appearing on behalf of the Revenue reiterates the grounds of the appeal. He further submits that the present appeal filed by the Revenue was on the ground that Department's appeal against Tribunal's Order no. A/2349/WZB/AHD/2009 dated 09.11.2009, is pending in the High Court of Gujarat.

3. Shri Anand Nainawati, Ld. Counsel appearing on behalf of the Respondent at the outset submits that the issue on merit that whether value of secondary packing is includable in the assessable value of the final product, i.e. Glass, has been settled by the Hon'ble High Court of Gujarat in the appellant's own case reported at Commissioner of Central Excise and Customs-Surat-ii Vs. Gujarat Borosil (supra). Therefore, the appellant is entitled for the refund of duty paid under protest on the cost of secondary packing.

4. We have carefully considered the submission made by both the sides and perused the records. We find that after long litigation, the issue in dispute that whether the cost of secondary packing that is, wooden crates is includable in the assessable value of the final product of the respondent, i.e. glass has been settled by the Hon'ble High Court of Gujarat in their own case cited (supra). The refund claim in the present case has arisen from the order of demand case which was decided by this Tribunal and the same was upheld by the Hon'ble High Court of Gujarat. In this position, the respondent is *prima-facie* entitled for the refund of duty paid on merit. However, as regard

the issue of unjust enrichment, we are of the view that since refund in the present case is governed by the provisions of Section 11B of Central Excise Act, 1944, the refund under the mandate of said law must pass the test of unjust enrichment. Our this view is also supported by the Hon'ble Supreme Court judgment in the case of *Sahakari Khand Udyog Mandal Limited vs. Commissioner of C. Ex. & Cus. - 2005 (181) ELT 328 (SC)*.

5. As per our above discussion, we dispose of the Revenue's appeal by way of remand to the Adjudicating Authority for passing a fresh order by considering our above observation.

*(Pronounced in the open Court on 06.12.2018)*

**(Raju)**  
Member (Technical)

**(Ramesh Nair)**  
Member (Judicial)

*DS*