Customs, Excise & Service Tax Appellate Tribunal
West Zonal Bench At Ahmedabad

REGIONAL BENCH- COURT NO.3
Customs Appeal No.11524 of 2015
(Arising out of OIA-MUN-CUSTM-000-APP-121-15-16 dated 05/08/2015 passed by Commissioner of Central Excise, Customs and Service Tax-MUNDRA)

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

VERSUS

C.C.-Mundra **.........Respondent**
Office of the Principal 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 dated 29/02/2016 passed by Commissioner of CUSTOMS-MUNDRA)

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

VERSUS

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

APPEARANCE:
Shri Prakash Shah, Advocate for the Appellant
Shri P.K. Singh, Superintendent (AR) for the Respondent

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

Final Order No. A/ 10068-10069 /2022

DATE OF HEARING: 30.09.2021
DATE OF DECISION: 31.01.2022

RAMESH NAIR

The present appeals are being disposed of in terms of the directions issued by the Hon'ble Gujarat High Court in its order dated 18-01-2021 whereby the Tribunal's Final Order No. A/12153-12154/2019 dated 07-11-2019 was set aside and matter was remitted back to the Tribunal to decide the assessee's appeal afresh on merit.

2. The brief facts of the case are that Appellant are engaged in manufacture of tyres falling under Chapter 40 of the CETA, 1985. During the period 01.04.2014 to 06.10.20214 they had imported 121 consignments of Natural Rubber at Mundra Port under Advance Licence and claimed exemption under Notification No. 96/2009-Cus dated. 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) dated 20.05.2014 in their own case that cess is not payable, filed refund application for imports involving instant period under Section 27 of the Custom Act for Cess paid by them "Under Protest". They also filed certificate from the Charted Accountant and other records to show that there has been no unjust enrichment. The adjudicating authority sanctioned the refund claim vide claim order dated. 17.12.2014. On an appeal by the revenue the Commissioner (Appeals) vide impugned O-I-A dated. 05.08.2015 allowed the appeal field 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 proceeding and hence the refund was not maintainable. That by exclusive placing reliance upon the Charted Accountant certificate for the purpose of unjust enrichment refund cannot be granted as the same has no validity unless supported the facts available in books of accounts. The Appellant filed appeal No. C/11524/2015-DB against the said order. The Principal Commissioner meanwhile on the basis of order passed by Commissioner (Appeals) issued show cause notice dated. 05.10.2015 towards recovery of sanctioned refund under Section 28(1) along with interest under section 28AA(1) of the Customs Act, 1962. Vide impugned order dated. 07.12.2015 he ordered for recovery of refund amount along with interest. Aggrieved the Appellant has filed appeal No. 11238/2016. Both the appeals are taken up for disposal.

3. Shri Prakash Shah, Learned Counsel appearing for the Appellant submit that the findings of Learned Commissioner (Appeals) that Appellant had paid Rubber Cess on the assessment of bills of entry is factually incorrect and contrary to records. The records clearly show that rubber cess was not paid on assessment of Bills of entry. The assessment of the duty on the bills of entry was nil. No rubber cess was assessed by the proper officer in any of the bills of entry. In view of the nil assessment of the duty on the bills of entry, the question of challenging the assessment order either by filing appeal or otherwise does not arise and the ratio of Judgment of Hon'ble Apex Court relied upon by the Learned Commissioner (Appeals) is inapplicable. In the case of SEAS GOA LTD. -2015 (322) ELT 65(BOM), the Hon'ble Bombay High Court in identical factual situation held that ration of cited judgment of the Hon'ble Apex Court is inapplicable. On unjust enrichment he submits that appellant had shown the amount of rubber cess deposited by it as receivables in books of accounts and imported natural

rubber was physically incorporated in the final products and the final products was exported in discharge of the obligation under the Advance Authorization. In the case of Jindal Drugs, reported in 2017(357) ELT 259(Tri.- Mumbai) this Hon'ble Tribunal in identical facts and situation held that unjust enrichment is not applicable when duty is paid on the goods imported under advance authorization and ultimately exported.

4. Shri P.K. Singh, Learned Superintendent (AR) appearing for the revenue supports the findings of both the impugned orders. He submits that Appellant had not challenged the assessment order and it is well settled law that the assessment order passed by the assessing authority is an appealable order under Section 28 of Customs Act 1962. He relies upon the Judgment of Apex Court in the matter of CCE Kanpur Vs. Flock (India) Pvt. Ltd. [2000 (120) ELT 285 (S.C.] and Priya Blue Industries Ltd. Vs. Commissioner [2004(172)ELT 145(S.C.)]

5. We have carefully considered the submissions made by both the sides and perused the records. The Learned Commissioner (Appeals) denied the refund claim to the appellant on the ground that the appellant have not challenged the assessment of Bills of entry and they have not established the aspect of unjust enrichment. As per the facts of the case, the bills of entry assessed at nil rate of duty. Subsequent to the final assessment of Bills of entry,the revenue has insisted for payment of Rubber Cess in cash on the imported rubber, consequently, the appellant have deposited the Rubber Cess through various challans. We find that since the Bills of entry were assessed at nil rate of duty, there is no issue arises out of the Bills of entry which can be challenged by the appellant. The bills of entry assessed can be challenged only in those cases where the duty was on a higher side and excess duty was not payable in order to claim the refund of such excess paid duty. The assessee is first required to challenge the bills of entry and consequential to outcome of the challenge to assessment the appellant become entitle for the refund. However, in the present case, admittedly the bills of entry were assessed at the nil rate of duty therefore, there was nothing exist to challenge in the Bills of entry. The rubber cess was paid by the appellant separately through challan only on insistence of the department. However, even such payment has not been assessed by the department therefore, as regard the payment of rubber cess there was neither any assessment nor any need to challenge the same therefore, in our considered view the learned Commissioner (Appeals) has wrongly held that the appellants were required to challenge the assessment of Bills of entry. There is no dispute that the rubber cess paid by the appellant was legally not

payable therefore; the amount of rubber cess paid by the appellant under protest became refundable. This very same issue has been considered by the Hon'ble Bombay High Court in the case of SESA GOA LTD.-2015 (322) E.L.T. 65 (BOM) the relevant order is reproduced below:-

"9. With regard to the contention of Shri Ramani, learned Counsel for the appellant, we find that as the provisional assessment as well as the final assessment in respect of all the bills of entry were nil assessment, the question of raising a challenge to the said orders before the Appellate Authority would not arise at all. The appellant cannot be said to be aggrieved by the said orders and consequently, the question of filing any appeal would not arise. The judgment of the Apex Court relied upon by the authorities which levied duties, would not be applicable to the present case. In the cases before the Apex Court, there was an assessment order levying duty which was not challenged. This is not the situation in the present case. In the present case, the assessment order was a nil assessment and no duties were levied and as such, the appellant cannot be said to be aggrieved by such order. In such circumstances, we find that the reliance by the Commissioner (Appeals) and CESTATE on the judgment of the Apex Court in the case of Priya Blue Industries Ltd. (supra) is not justified in the present case.

10. Shri Ramani, learned Counsel in support of his contentions also brought to our notice a judgment of the Delhi High Court in the case of Aman Medical Products Ltd. v. Commissioner of Customs. Upon perusal of the said judgment, we find that taking note of the said judgment in the case of Priya Blue Industries Ltd. (supra), the Delhi High Court has taken a view that once the party is not aggrieved by the assessment order, the question of preferring an appeal challenging the said order would not arise. We are in respectful agreement with the observations in paragraph 5 of the judgment which is as under:

"5 The Tribunal has referred to the cases of CCE, Kanpur v. Flock (India) Pvt. Ltd. - MANU/SC/0484/2000 2000 (120) E.LT 285 and Priya Blue Industries Ltd. v. Commissioner of Customs (Preventive) - MANU/SC/0767/2004 2004 (172) ELT 145 (S.C). In both these cases, referred to by the Tribunal there was an assessment order which was passed and consequently it was held that where an adjudicating authority passed an order which is appealable and the party did not choose to exercise the statutory right of appeal, it is not open to the party to question the correctness of the order of the adjudicating authority subsequently by filing a claim for refund on the ground that adjudicating authority had committed an error in passing his order. These judgments will therefore not apply when there is no assessment order on dispute/contest, like as is in the facts of the present case."

11. Considering the said observations and taking note of the facts of the present case, admittedly, the appellant cannot be said to be aggrieved with the correctness of the order of nil assessment. The order sanctioning refund passed by the Assistant Commissioner dated 14-12-2007 is accordingly justified. Consequently, the orders passed by the Commissioner (Appeals) dated 26-5 2008 and the order passed by the CESTAT dated 17-6-2009 cannot be sustained and deserve to be *quashed and set aside. The substantial question of law is answered accordingly."*

From the above judgment also, it can be seen that when the assessment is at nil rate of duty any amount paid separately, for the purpose of the refund of the same the assessment of bills of entry need not be challenged. Being on identical facts and issue, the ratio of the aforesaid judgment in SESA GOA (supra) is directly applicable to the facts of the present case.

5.1 As regard the issue of unjust enrichment which is based on the fact of each case, we find that the appellant made a detailed submission on the aspect of unjust enrichment. The relevant paragraphs of the order-in-appeals are reproduced below:-

> *(x) They have not debited the rubber cess paid under protest to the profit and loss account. The same is shown as receivable from the government of India by them in their balance sheet under the head "Short Term Loans and Advances" in "Current Assets". They have submitted balance sheet and profit and loss account and an undertaking before the adjudicating authority along with C.A. certificate.*
>
> *(xi) The claimant submitted C.A. certificate as required by the department for examination the principle of unjust enrichment. Since the refund sanctioning authority was satisfied with the C.A. certificate, it did not ask the claimant to furnish other documents. Thus they furnished all documents as required by the refund sanctioning authority.*
>
> *(xii) The department has not produced any evidence on record to prove that the C.A. certificate produced by the claimant is ambiguous and cannot be relied upon. Unless, It is proved that the C.A. certificate cannot be relied upon the refund sanctioned relying on such certificate is legal and proper.*

From the facts narrated in above paras recorded in Order-In-Appeal, we find that the appellant have clearly shown the amount of refund as receivable in their Books of Accounts and the same was reinforced by Chartered Accountant certificate. Therefore, the appellant have established that the incidence of rubber cess paid by them, and for which the refund was sought for, has not been passed on to any other person, accordingly, the refund is not hit by unjust enrichment.

5.2 As per our above discussion and findings, we are of the clear view that the appellant are entitled for the refund of Rubber cess paid by them.

5.3 The Appeal No. C/11238/2016 –DB is against the Order in Original whereby the recovery of refund has been ordered which is consequential to denial of refund by the Learned Commissioner (Appeals). Since the refund is admissible as discussed above. The appeal on the issue of recovery of refund also deserves to be allowed

06. Accordingly, the impugned orders are set aside. Appeals are allowed with consequential relief, if any, in accordance with law.

(Pronounced in the open court on 31.01.2022)

(RAMESH NAIR)
MEMBER (JUDICIAL)

(RAJU)
MEMBER (TECHNICAL)

Mehul