

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

REGIONAL BENCH – COURT NO. 03

CUSTOMS Appeal No. 10141 of 2021-DB

Stay Application No. :-**C/Stay/10083/2021**

CROSS Application No.:-C/CROSS/10286/2021

[Arising out of Order-in-Original/Appeal No KDL-CUSTOM-000-APP-47-20-21 dated 06.11.2020 passed by Commissioner of CUSTOMS-KANDLA]

C.C.-KANDLA

Custom House,
Near Balaji Temple,
Kandla,
Gujarat

.....Appellant

VERSUS

GOODEARTH MARITIME LTD

Now Ms Jakhau Salt Company Pvt Ltd
Salt Field Jakhau Tal Abdasa
Kutch,
Gujarat

.....Respondent

WITH

CUSTOMS Appeal No. 10139 of 2022-DB

Stay Application No. :-**C/Stay/10100/2022**

CROSS Application No.:-C/CROSS/10155/2022

[Arising out of Order-in-Original/Appeal No KDL-CUSTM-000-APP-41-21-22 dated 30.11.2021 passed by Commissioner of CUSTOMS-KANDLA]

C.C.-KANDLA

Custom House,
Near Balaji Temple,
Kandla,
Gujarat

.....Appellant

VERSUS

GOODEARTH MARITIME LTD

Salt Fields Jakhau Taluka Abdasa
Kachchh,
Gujarat

.....Respondent

APPEARANCE:

Shri G. Kirupanandan, Superintendent (AR) for the Appellant
Shri Naresh Satwani, Consultant for the Respondent

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

FINAL ORDER NO. A/10260 - 10261 / 2023

DATE OF HEARING: 17.01.2023

DATE OF DECISION: 06.02.2023

RAMESH NAIR

The issue involved in the present case is that whether the appellant is eligible for refund of Cost recovery charges paid by them.

2. The brief facts of the case are that the cost recovery charges was recovered by the department was ordered to be refunded by the learned commissioner (Appeals) in pursuance to this Tribunal order No. A/10788/2020, dated 12.03.20, whereby the demand of cost recovery charges was set aside and appeal of the Respondent was allowed against the sanction of refund ordered by the Learned Commissioner (Appeals), the present appeals are filed by the revenue.

3. Shri G. Kirupanandan, Learned Superintendent (AR) appearing on behalf of the Revenue submits that since the Tribunal order on the basis of which the Learned Commissioner (appeals) has granted the refund has been challenged by the revenue before the Hon'ble Gujarat High Court, these appeals were filed by the revenue. He submits that since the demand issue is pending before the high court, the stay from the order of the commissioner (appeals) be granted.

4. Shri Naresh Satwani, Learned Consultant appearing on behalf of the revenue submits that though the department has challenged the order of this Tribunal but no stay has been granted by the Hon'ble High Court. Therefore, the learned Commissioner (appeals) has rightly granted the refund on the basis of this Tribunal's order.

5. We have carefully considered the submission made by both the sides and perused the records. We find that the Learned Commissioner (appeals) has granted the refund in pursuance to this Tribunal's order No. A/10788/2020, dated 12.03.20, whereby on merit the demand of cost recovery charges was set aside. Hence this refund is consequential relief to the afore said Tribunal's order. Though the revenue has challenged the order of this tribunal before the High Court but, since there is no stay, the order of the Commissioner (Appeals) cannot be disturbed. Therefore, in view of this Tribunal's order No. A/10788/2020. Since the demand of cost recovery charges has been set aside. The appellant was rightly granted the refund by the learned commissioner (appeals).

The Central Board of Excise and Custom has repeatedly clarified that when any refund arises out of any order of adjudication/Commissioner (Appeals)/ CESTAT. unless a stay order is obtained refund must be granted after 3 months from the date of the order. The relevant CBEC Circular No. 572/9/2001-CX., dated 22.02.2001 is reproduced below:

"Refund/Rebate claims — Disposal of claims where application pending at appellate level

Circular No. 572/9/2001-CX, dated 22-2-2001

F. No. 201/20/2000-CX.6

Government of India

Ministry of Finance (Department of Revenue)

Central Board of Excise & Customs, New Delhi

Subject : Central Excise & Customs — Disposal of refund/rebate claims where application is pending at appellate level — Instructions - Regarding.

I am directed to state that it has come to notice of the Board that doubts prevail in the field formations in regard to action to be taken for disposal of refund/rebate cases where the matter is pending with different appellate

authorities. In this regard, attention is drawn to the CBEC Circular No. 398/31/98-CX., dated 2nd June, 1998 and the CBEC Circular No. 76/95-Cus., dated 28th June, 1995. After examining the issue in detail and in suppression of the aforementioned Circulars, the Board has decided to issue the following guidelines in this regard, which will be applicable to both Customs and Central Excise matters :-

(1) Cases where it is considered advisable to contest an adverse High Court's Judgment, inter alia, involving substantial refund or release of any seized/confiscated goods by filing Special Leave Petition (SLP) including Stay Application, in the Hon'ble Supreme Court.

(a) In such cases most speedy action should be taken by concerned Commissioner to submit, considered comments, grounds for appeal and all relevant papers to Board for taking Law Ministry's advice and if agreed filing SLP & Stay Petition against the order of the High Court. (Where appropriate considering the stakes and urgency of the matter conversant officer dealing with the case be also deputed to help expedite the aforesaid action).

(b) In terms of the present practice in the Supreme Court Registry, the SLPs/Stay Applications filed in the Supreme Court are listed for hearing in their own turn according to the dates of their filing. However, in case of urgency, there is a procedure of mentioning before the bench headed by the Chief Justice of India for ad interim stay till the stay application is heard and disposed of by the Supreme Court. For this purpose, the Central Agency Section is requested to file an application with the Registrar of the Supreme Court giving reasons justifying out of turn hearing of the stay application. In case the Registrar is satisfied about the urgency, the application is included in the "list of cases for urgent mentioning" and it is then possible to mention the case on the following day before the bench headed by the Chief Justice of India.

In view of the aforesaid procedure, it may not be possible to move the Supreme Court for out of turn hearing of stay applications in every case in a routine way. We will have to justify the urgency and serious implications if the adverse order is not stayed. It may also not be always possible to get our applications listed according to our wish. The Commissioners should, therefore, while ensuring submission of proposals for SLP/Stay on top priority basis also take steps simultaneously so that non-implementation of the High Court's Order without obtaining stay from the Supreme Court does not create complications. In such cases, therefore the following action is advised :-

(i) Where a High Court has stipulated any time-limit for implementation of its order, the Customs House/Central Excise Commissionerate apart from taking steps for filing SLP/Stay Petition before the deadline, as mentioned in para (a) above, should simultaneously file an application before the High Court intimating steps taken for filing SLP/Stay Petition before the Apex Court, and request be made for extension of time-limit for implementation of the order till the department's Stay Application is heard or disposed of by the Hon'ble Supreme Court. If the High Court rejects the application, a copy of the application filed and the order of the High Court should be immediately faxed to the Board, so that even this could be produced to Supreme Court Registry, while seeking out of turn/urgent hearing for stay.

(ii) Where no time-limit is stipulated by the High Court for implementing its order, but the petitioner files a contempt petition/notice in the High Court, the same should be immediately faxed to the Board, for similar action as mentioned in (i) above for pressing for urgent hearing of our stay.

It would be possible for the Board's office to file SLP/Stay Petition with relevant documents showing justification for **urgency petition** before the Registrar of the Supreme Court (for inclusion of department's application for out of turn hearing in the 'list of cases for urgent of monitoring'), and to get interim stay in time, from the Supreme Court when we have a good case, only if Commissioners and the Legal Cells keep very strict personal watch for taking time bound & speedy action suggested above.

No unilateral decision should be taken by the Commissioners to release the goods/order refund in a case where it is decided in consultation with our Counsels in the field, and Law Ministry, to file SLP/Stay Application before the Apex Court against the order of the High Court and till this is pending decision before the Apex Court. The decision in such cases where there is any urgency & stay of Apex Court is not forthcoming, should be taken only in consultation with the Board.

(2) Cases where Civil Appeal (CA) is proposed against adverse decision of the CEGAT involving high refund and or release of seized/confiscated goods.

The guidelines applicable to SLPs mentioned above should be followed *mutatis mutandis* even in such cases involving Civil Appeals/Stay Petitions. The relevant papers relating to Civil Appeals should be sent latest within 2 weeks of the receipt of CEGAT Order and active liaison should be kept with the concerned senior officer in the Board and even Central Agency Section till the Department's Stay/CA petitions is heard and decision given by the

Apex Court. Where considered advisable, considering the stakes involved conversant officer to be deputed for briefing the Senior Counsels/Law Officer who may be moving for stay petition.

(3) The cases where refund arises due to order of Commissioner (Appeals) or Commissioner of Central Excise/Customs and decision is taken to contest them before CEGAT.

In such cases appeal/stay application should be filed expeditiously well before the expiry of stipulated period of three months (and not waiting for the last date of filing of appeal). However, no refund/rebate claim should be withheld on the ground that an appeal has been filed against the order giving the relief, unless stay order has been obtained. It would be the responsibility of the concerned Commissioner to obtain stay order expeditiously where the orders passed by Commissioner (Appeals) suffer from serious infirmities and it involves grant of heavy refunds.

(4) Cases where refund arises due to order of a Central Excise Officer/Customs Officer subordinate to Commissioner of Central Excise/Cus-toms and decision is taken to file appeal before Commissioner (Appeals).

In such cases also, appeal/stay application should be filed expeditiously within the stipulated period (but without waiting for the last date of filing of appeal). However, no refund/rebate claim should be withheld on the ground that an appeal has been filed against the order giving the relief, unless stay order has been obtained. It would be the responsibility of the concerned Commissioner to move expeditiously and obtain stay order from Commissioner (Appeals), especially where the orders passed by such Central Excise Officer/Customs Officer suffer from serious infirmities and it involves grant of heavy refunds.

(5) General

In all types of cases mentioned above, processing of refund application should simultaneously start separately from the point of view of unjust enrichment provisions and accordingly the assessee/claimant should be asked to submit the evidence to establish his claim that incidence of duties whose refund is claimed has been borne by him and that the same has not been passed on to the buyer(s). Where the claimant is unable to furnish this evidence or otherwise is not entitled to refund, passing of appropriate orders on refund requested could be considered by competent authority irrespective of the outcome of SLP/Civil Appeals/Stay Petitions pending

before Supreme Court or other appeals etc. before lower appellate authorities.

In all other cases, not involving any dispute, refund applications should be processed on merits speedily and a decision taken within a period of three months from the date of application to avoid any interest liability - where refund is held admissible."

The relevant amendment to the above circular was made vide following circular:

"Refund/Rebate claims — Disposal of, during pendency of stay application before Apex Court — Clarifications

Circular No. 695/11/2003-CX., dated 24-2-2003

F. No. 268/38/2000-CX.8

Government of India

Ministry of Finance (Department of Revenue)

Central Board of Excise & Customs, New Delhi

Subject: Central Excise and Customs - Disposal of refund/rebate claims where Special Leave Petition/Civil Application along with stay application is pending at Supreme Court - Regarding.

I am directed to refer to clauses (1) and (2) of Board's Circular No. 572/9/2001-CX., dated 22-2-2001 [2001 (129) E.L.T. T7] which inter alia provides that in cases where the Department has filed Special Leave Petition/Civil Application along with stay application against the adverse order of High Court/CEGAT as the case may be, no unilateral action should be taken by the Commissioners to release goods/order refund and decision in such cases where stay order is not forthcoming, should be taken only in consultation with the Board. In this connection, a number of references from field formations have been received.

2. Board has examined the matter. It is observed that the above guidelines requiring consultation with Board in such cases dilute the legal position that the order of High Court/Tribunal should be implemented unless a stay has been obtained from the higher judicial forum on the implementation of the order. Further, consultation with Board in such cases may cause into delay in finalisation of the refund claims. Accordingly, Board has decided to permit jurisdictional Commissioners to take decision in such cases on merits at their level to grant refund or release goods without seeking permission/clearance from the Board. However, in the matters concerning Supreme Court, the jurisdictional

Commissioners should continue to pursue with the Board for early disposal of stay application.

- 3. Board's Circular bearing No. 572/9/2001-CX., dated 22-2-2001 stands modified to the above extent.*
- 4. Field formations may please be informed suitably.*
- 5. Receipt of the same may please be acknowledged.*
- 6. Hindi version will follow."*

In the above circular the board has reiterated its earlier circular No. 572/9/2001-cx dated 22.02.01 which clarified that against the order from which the refund arises is not stayed by the higher authority within 3 months the refund must be granted. In the present case the Department has withheld the refund merely for the reason that this Tribunal's order dated 12.03.2020, has been appealed against before the Hon'ble High Court of Gujarat under tax Appeal No: 299 of 2020. However, even after 2 years of filing tax appeal no stay could be obtained by the revenue. Therefore, in the light of the above board Circular which is binding on the departmental officers as per Hon'ble Larger Bench judgment in the case of Ratan Melting & Wire Industries- 2008 (231) ELT 22 (S.C), which is reproduced below:

"On a reference made by a Bench of three Judges in Commissioner of Central Excise, Bolpur-V v. Ratan Melting and Wire Industries, Calcutta [2005 (3) SCC 57], these matters were placed before this Bench. The reference was necessitated because of certain observations by a Constitution Bench in Collector of Central Excise v. Dhiren Chemical Industries [2002 (2) SCC 127]. During the hearing of the appeal before the three-Judge Bench it was fairly conceded by the parties that the decision of this Court in Collector of Central Excise, Patna v. Usha Martin Industries [1997 (7) SCC 47] on which the Customs, Excise and Gold (Control) Appellate Tribunal placed reliance was overruled by the subsequent decision of the Constitution Bench in Dhiren Chemical's case (supra). But learned counsel for the assessee-respondent submitted that paragraph 11 of Dhiren Chemical's case (supra) operates in its favour. It reads as under :

"We need to make it clear that regardless of the interpretation that we have placed on the said phrase, if there are circulars which have been issued by the Central Board of Excise and Customs which place a different

interpretation upon the said phrase, that interpretation will be binding upon the Revenue."

2. *It was noted by the three-Judge Bench that the effect of the aforesaid observations was noted in several decisions. In Kalyani Packaging Industry v. Union of India and Anr. [2004 (6) SCC 719], it was noted as follows:*

"We have noticed that para 9 (para 11 in SCC) of Dhiren Chemical case [2004 (6) SCC 722] is being misunderstood. It, therefore, becomes necessary to clarify para 9 (para 11 in SCC) of Dhiren Chemical case [2004 (6) SCC 722]. One of us (Variava, J.) was a party to the judgment of Dhiren Chemical case and knows what was the intention in incorporating para 9 (para 11 in SCC). It must be remembered that law laid down by this Court is law of the land. The law so laid down is binding on all courts/tribunals and bodies. It is clear that circulars of the Board cannot prevail over the law laid down by this Court. However, it was pointed out that during hearing of Dhiren Chemical case because of the circulars of the Board in many cases the Department had granted benefits of exemption notifications. It was submitted that on the interpretation now given by this Court in Dhiren Chemical case the Revenue was likely to reopen cases. Thus para 9 (para 11 in SCC) was incorporated to ensure that in cases where benefits of exemption notification had already been granted, the Revenue would remain bound. The purpose was to see that such cases were not reopened. However, this did not mean that even in cases where the Revenue/Department had already contended that the benefit of an exemption notification was not available, and the matter was sub judice before a court or a tribunal, the court or tribunal would also give effect to circulars of the Board in preference to a decision of the Constitution Bench of this Court. Where as a result of dispute the matter is sub judice, a court/tribunal is, after Dhiren Chemical case, bound to interpret as set out in that judgment. To hold otherwise and to interpret in the manner suggested would mean that courts/tribunals have to ignore a judgment of this Court and follow circulars of the Board. That was not what was meant by para 9 of Dhiren Chemical case."

3. *The three-Judge Bench agreed with the view expressed in Kalyani's case (supra) and observed that the view about invalidation was sufficient to clarify the observations in paragraph 11 of Dhiren Chemical's case (supra). On taking note of the fact that Dhiren Chemical's case (supra) was decided by a bench of five Judges it was felt appropriate that a bench of similar strength should clarify the position. That is why reference was made.*

4. *Learned counsel for the Union of India submitted that the law declared by this Court is supreme law of the land under Article 141 of the Constitution of India, 1950 (in short the 'Constitution'). The Circulars cannot be given primacy over the decisions.*

5. *Learned counsel for the assessee on the other hand submitted that once the circular has been issued it is binding on the revenue authorities and even if it runs counter to the decision of this Court, the revenue authorities cannot say that they are not bound by it. The circulars issued by the Board are not binding on the assessee but are binding on revenue authorities. It was submitted that once the Board issues a circular, the revenue authorities cannot take advantage of a decision of the Supreme Court. The consequences of issuing a circular are that the authorities cannot act contrary to the circular. Once the circular is brought to the notice of the Court, the challenge by the revenue should be turned out and the revenue cannot lodge an appeal taking the ground which is contrary to the circular.*

6. *Circulars and instructions issued by the Board are no doubt binding in law on the authorities under the respective statutes, but when the Supreme Court or the High Court declares the law on the question arising for consideration, it would not be appropriate for the Court to direct that the circular should be given effect to and not the view expressed in a decision of this Court or the High Court. So far as the clarifications/circulars issued by the Central Government and of the State Government are concerned they represent merely their understanding of the statutory provisions. They are not binding upon the court. It is for the Court to declare what the particular provision of statute says and it is not for the Executive. Looked at from another angle, a circular which is contrary to the statutory provisions has really no existence in law.*

7. *As noted in the order of reference the correct position vis-a-vis the observations in para 11 of Dhiren Chemical's case (supra) has been stated in Kalyani's case (supra). If the submissions of learned counsel for the assessee are accepted, it would mean that there is no scope for filing an appeal. In that case, there is no question of a decision of this Court on the point being rendered. Obviously, the assessee will not file an appeal questioning the view expressed vis-a-vis the circular. It has to be the revenue authority who has to question that. To lay content with the circular would mean that the valuable right of challenge would be denied to him and there would be no scope for adjudication by the High Court or the Supreme Court. That would be against very concept of majesty of law declared by this Court and the binding effect in terms of Article 141 of the Constitution.*

8. *The reference is accordingly answered holding that the correct view has been expressed by Kalyani's case (supra) as noted in the reference order.*

9. *The appeals filed by the revenue are allowed while those filed by the assessee stand dismissed."*

Therefore, in view of above legal position, the revenue has no option except to grant the refund to the respondent. Accordingly, neither the stay application nor the appeal against the order of the Commissioner (Appeals) granting refund are not maintainable.

6. Therefore, we do not find any infirmity in the orders of the Commissioner (Appeals), hence, the same are upheld Revenue's appeals are dismissed. Since the appeals itself are disposed of. The stay applications became infructuous and dismissed, accordingly, COs also stand disposed of.

(Pronounced in the open Court on 06.02.2023)

RAMESH NAIR
MEMBER (JUDICIAL)

(RAJU)
MEMBER (TECHNICAL)