CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
ALLAHABAD

REGIONAL BENCH - COURT NO.I

Excise Appeal No.70071 of 2021

(Arising out of Order-in-Appeal No.NOI-EXCUS-002-APP-828-20-21 dated 04/11/2020 passed by Commissioner (Appeals) Central Goods & Service Tax, Noida)

M/s Yadu Sugar Ltd., ...Appellant
(Villagge Sujanpur Ranet Chauraha,
Bisauli, BBadaun-243720)

VERSUS

Commissioner of Central Excise &

CGST, Noida ....Respondent

(Wegman's Business Part, KP-III, Noida-201306)

APPEARANCE:

Shri Aalok Arora, Advocate for the Appellant
Shri Manish Raj, Authorised Representative for the Respondent

CORAM: HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)

FINAL ORDER NO.70434/2025

DATE OF HEARING : 09 April, 2025
DATE OF DECISION : 09 April, 2025

SANJIV SRIVASTAVA:

This appeal is directed against Order-in-Appeal No.NOI-EXCUS-002-APP-828-20-21 dated 04/11/2020 passed by Commissioner (Appeals) Central Goods & Service Tax, Noida. By the impugned order, Commissioner (Appeals) has upheld the Order-in-Original rejecting the refund claim filed by the appellant for an amount of Rs.9,92,878/- by their refund application received in Division Officer on 07.06.2019.

2.1 Appellant is registered with the Central Excise Department. During the audit of the records of the appellant certain amounts were reversed in their Cenvat credit account towards sale of bagasse in terms of Rule 6 of Cenvat Credit Rules, 2004.

2.2 When this issue was finally settled by the Hon'ble Supreme Court in the case of M/s DSCL Sugar Ltd. 2015 (322) ELT 769 (SC) and dropping of the proceeding by the Commissioner vide Order-in-Original No.67/COMMR/HPR/2016-17/1300 dated 16.12.2016. Appellant filed the refund claim.

2.3 After examination of the refund claim, a show cause notice dated 26.08.2019 was issued to the appellant asking them to show cause why the refund should not be rejected.

2.4 The said show cause notice was adjudicated as per the Order-in-Original dated 09.06.2020.

2.5 Aggrieved appellant have filed appeal before Commissioner (Appeals) which has been dismissed as per the impugned order referred in para 1 above.

2.6 Aggrieved appellant have filed this appeal.

3.1 I have heard Shri Aalok Arora learned Counsel appearing for the appellant and Shri Manish Raj learned Authorised Representative appearing for the revenue.

4.1 I have considered the impugned orders along with the submissions made in appeal and during the course of argument.

4.2 Impugned order records findings as follows:-

> *"16 From the records and the ER-1 for the month of March, 2013 which is place on record by the appellant, I find that an amount of Rs. 12,48,912/- was paid in terms of Rule 6 of CENVAT Credit Rules, 2004, but the ER-1 return which is an assessment made by the appellant themselves has no indication that such payment was either made under protest or it was assessed provisionally. This assessment was a Self Assessment and is final for all*

practical purpose, unless such Self Assessment is challenged in the court of higher authorities and the assessment gets unsettled. Apparently, the appellant suo moto filed their refund claim on their own without any order in their favor and even the order of the Commissioner dated 16.12.2016 has no relevance to their refund application. Even assuming that the order of the Commissioner dated 16.12.2016 is applicable in the present case for a moment, without admitting, it is found to be well over beyond the period of one year for them to claim the refund under Section 11B. The relevant date under Section 11B is sacrosanct and the relevant date in instant case is the date of deposit which cannot be changed in any manner, in as much as, there was no relief granted by any authority on account of any Appeal etc. on the issue. The decision of the Hon'ble Supreme Court in the case of DSCL Sugar Ltd. cannot be applied suo moto unless there is a favorable order for the appellant. Since the appellant has not pursued the case in any forum, there is no cause of action for them to file the refund claim as they have not received any favorable order from any authority and that a decision by the Supreme Court in the case of another person cannot be an automatic or unconditional route to allow refund of Central Excise duty and that was the law laid down by the Supreme Court in the case of Mafatlal Industries Ltd. reported in 1997 (89-ELT-247). It is the law of the land that every person has to fight his battle and not unjustly enjoy the benefit of somebody's success. It is well settled that the right to refund has to be earned and that, even in case of wrong levy or un-authorized levy, the period of limitation under Section 11B of the Central Excise Act, 1944 shall apply.

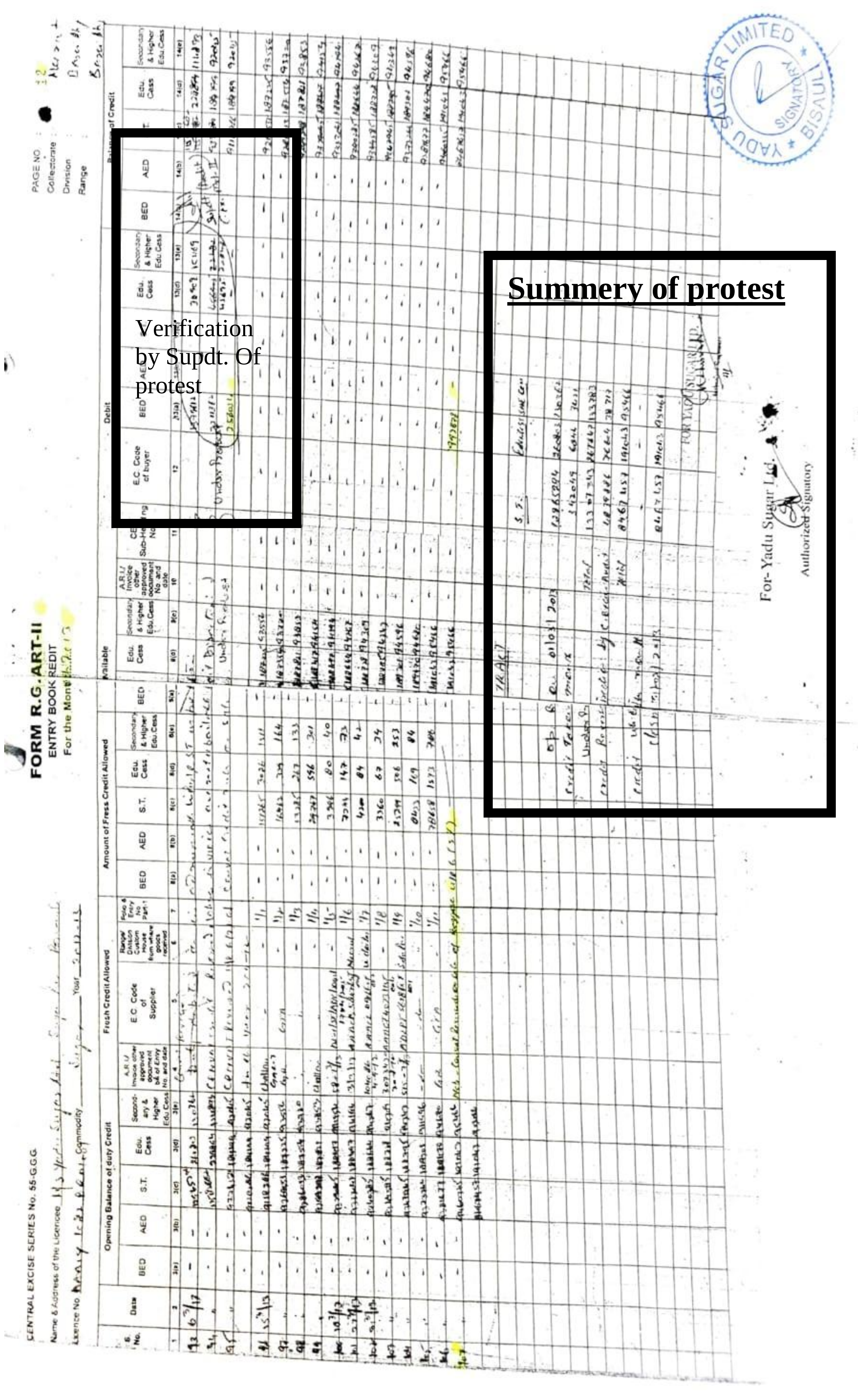
7. 1 also find that filing of the refund claim by the appellant suo moto has no legal basis whatsoever, as the assessment in their ER-1 return for the month of March

2013 was a Self Assessment which was finally assessed, and it cannot be reopened in any manner by way of filing a refund claim. From the records, there is no indication that the ER-1 return was challenged in Appeal by the appellant even though it was a Self Assessment. The Hon'ble Supreme Court in the case of ITC Ltd. vs CCE reported in 2019 (368-ELT-216) recently held that even in the case of Self Assessment no suo moto refund claim can be filed as the assessment cannot be corrected by way of a refund application, and the only route available in such cases is to go for Appeal against such Self Assessment, and get the assessment set aside. Unless the assessment is upset, it cannot be taken up for refund as refund in such a case cannot arise.

8. In view of the above, I find that the suo moto refund application filed by the appellant before the Adjudicating Authority on 07.06.2019 is without any legal basis and it is also thoroughly barred by limitation of time as it is not disputed that the reversal was made in the month of March, 2013. I also find that such reversal made by them was in compliance with the audit observation and such compliance made by them is covered by the provision of Section 11A as a proceeding that is concluded, and therefore, the contention of the appellant that the payment was made under protest has no basis. Moreover, there is no provision whatsoever under the provision of the Central Excise Law during the relevant period for payment under protest."

4.3 Evidently, I find that Commissioner (Appeals) has admitted that appellant had in the return of March, 2013 reversed an amount of Rs.12,48,912/- in terms of Rule 6 of Cenvat Credit Rules. The said entries when co-related with the Cenvat credit records for the corresponding month reproduced below:-

- 45 -


FORM R.G. 23 PART-II
ENTRY BOOK OF CREDIT
CENTRAL EXCISE SERIES No. 55-G.G.G.
PAGE NO.
Collectorate
Division
Range
Verification by Supdt. Of protest
Summery of protest
For- Yadu Sugar Ltd.
Authorized Signatory

As per the above document, I find that the reversal was made under protest.

4.4 Interestingly, revenue does not dispute about the remaining amount which was paid under protest on the same document. I have been informed that refund of this amount has already been allowed to the appellant. What makes revenue to distinguish this amount from other amount is not understood.

4.5 Commissioner (Appeals) in his order has raised a ground that the refund claim would be also hit by the decision of Hon'ble Supreme Court in the case of M/s ITC Ltd. 2019 (368) ELT 216 (SC) and in the case of M/s Mafatlal Industries Ltd. 1997 (89) ELT 247 (SC), accordingly, I do not find any merit in such an averments, the protest made by the appellant needs to be disposed of by way of an speaking order either in any manner. Nothing has been produced on record, whereby it can be shown that this protest has been disposed of by way of speaking and appealable order. Appellant has by way of this refund claim, claimed the benefit of the decision rendered in the case of M/s DSCL Sugar Ltd. by the Hon'ble Apex Court. Revenue authorities while disposing of this refund claim, should be disposed of this protest either by allowing the refund claim or by rejecting the same, saying that the decision of M/s DSCL Sugar Ltd., do not apply in fact of present case. Once appellant have filed the protest against the levy, he is contesting the levy itself and it cannot be said that he have accepted the levy without a demur. These two decisions do not cover the cases where duty has been made under protest and the protest has not been disputed by the revenue authorities till the date of filing of the refund claim.

4.5 In case of Jindal Pipes [2025 (1) TMI 136 – CESTAT ALLAHABAD] following has been held:

> *"4.5 From plain reading of the above it is evident that the amounts have been deposited as per the direction of the departmental officers in respect of certain shortages*

detected at the time of visit. The amounts so deposited on the direction of the departmental officer cannot be said to be voluntary deposit. Further appellant have contested the demand and have finally succeeded in getting the same set aside by the tribunal. As the appellant was contesting the demand the amount paid by them were necessarily not paid voluntarily but were paid under compulsion from the officer and were paid under protest."

4.6 Hon'ble Bombay High Court has in case of Hongkong and Shanghai Banking Corporation Ltd. [2024 (80) GSTL 134 (Bom)] held as follows:

"18.*We have heard Learned Counsel for the parties and with their assistance, we have perused the record. At the outset, some of the admitted facts are required to be noted. It appears to be not in dispute that for the period in question, there was an audit of the petitioner's books. The audit party had raised an objection on non-payment of service tax on the interchange transactions of the petitioner for the period October, 2007 to June, 2012. The petitioner, considering such audit objection and till the department takes an appropriate position in regard to any conclusion which would be drawn, voluntarily deposited the amounts in question, with the respondents in three tranches for the period from 22 October, 2012 to 3 June, 2013 totalling to an amount of Rs. 56,19,80,075/-. Admittedly, such amounts were deposited under protest. In this regard, we are required to refer to the petitioner's letter dated 23 October, 2012 addressed to the Assistant Commissioner, in which the petitioner setting out the relevant facts as prevailing, categorically recorded that the deposit of such amount is being made in good faith, based on the suggestion of the Learned Additional Commissioner. It was also recorded by the petitioner that the deposit should not be construed as acceptance of department's view mentioned in the letter dated 26 September, 2012 and that the petitioner continue* *to hold that the service tax would not be applicable, on the interchange income received by the issuing bank. It would be necessary to note the contents of the said letter as addressed to the Assistant Commissioner, Service Tax-I (Audit), which reads thus :*

***...**………….*

***20.**In the subsequent letter dated 4 June, 2013 addressed by the petitioner to the Assistant Commissioner, Service Tax-I (Audit), under the subject "Payment under protest of service tax and interest on interchange income received by the petitioner as issuing bank", for the period in question, the petitioner again reiterated that the deposit of the said amount as made by the petitioner should not be construed as petitioner's acceptance of the department's view mentioned in the letter dated 26 September, 2012, and that the petitioner continues to hold that the service tax should not be applicable on the interchange income received by the issuing bank.*

***21.**The Final Audit Report also acknowledged the amount of Rs. 56,59,76,901/- being the amount in question received as a spot payment. The relevant extract of the Final Audit Report reads thus :*

> *"In this regard, assessee inform that they have made the payment of Rs. 29,34,521 (including education cess and higher and secondary education cess) along with applicable interest of Rs. 10,58,305 on 9 October, 2012. The copy of the cyber receipt evidencing the proof has been submitted on 10 October, 2012. Further, assessee made the contention that the payment is merely to buy peace with the department and in good faith. The payment should not be construed as acceptance of department's view."*

(Emphasis supplied)

22.*It also appears to be not in dispute that on the above premise, the amounts were continued to be retained by the department, however, the department did not undertake any exercise of ascertaining such liability and/or raising a demand against the petitioner much less by issuance of a show cause notice. In fact, a show cause notice was never issued to the petitioner. It is in these circumstances, the petitioner had moved an application dated 24 May, 2018 praying for refund of such amounts, as deposited by it under protest along with interest. In the Refund Application, the petitioner inter alia made the following submissions :*

During the course of audit, an issue

> *"2. concerning interchange income was detected by the concerned officers. Since the amount involved was high, the department was chasing to pay the amount demanded along with interest. HSBC Bank made the payment of service tax demanded on such activity i.e. for income pertaining to interchange fee. However, the amount was paid under protest. The payment was made for the period October, 2007 to June, 2012. The payment was made on 21 March, 2013 along with the submission that the amount is paid under protest and should not be construed to be acceptance of departments stand on the concerned issue. A copy of the said payment along with the letter submitted is attached as Exhibit C. Further, interest payment for the income i.e. interchange fee was paid by us on 4 June, 2013. A copy of the challan evidencing the payment of interest with the under-protest letter is attached as Exhibit D.*
>
> *3.It is emphasized that HSBC Bank had made this payment under protest and the same was not to be construed as acceptance of departments stand for the interchange fee income. Pursuant to the payment, the department has neither issued any show cause notice nor taken any evasive action in this concern. A significant*

amount of time has lapsed after making the payments and accordingly, in consequence of the above, HSBC Bank is filing the present refund claim with your good office."

(Emphasis supplied)

25. *As noted by us hereinabove, the stand of the respondents in the reply affidavit is nothing but what the impugned order provides for. When the petitioner is before us asserting violation of provisions of Article 265 of the Constitution, which provides that "No tax shall be levied or collected except by authority of law", this would certainly pre-suppose that the amounts which are levied and collected in accordance with law can only be retained and not otherwise. Thus, the department would need to demonstrate that it had authority in law to withhold/appropriate the amounts as deposited by the petitioner towards tax. This is certainly not the case, as the department is alleging that the amounts which are retained by the department are in fact tax levied or collected in accordance with law. The stand taken by the department to retain the amount is only on the basis of a fortuitous circumstances, namely, the petitioner having voluntarily deposited the amount and the legitimacy of any such amounts as deposited is an issue relevant, in the adjudication of the proceedings in the case of Citibank N.A. (supra).*

26. *We are not persuaded to accept the reasons as set out in the impugned order, as urged before us in the reply affidavit, to be any ground which would provide any legitimacy to the department to retain the amounts which were deposited under protest, and which is not an ascertained amount of tax much less levied and collected. We may also observe that when clearly such amounts were deposited by the petitioner under protest and categorically not accepting any liability to pay service tax on such count, the department was not precluded from taking an* *appropriate position at the relevant time, and/or surprisingly it was not advised to do so, to raise a demand against the petitioner in the manner known to law, in contesting the position taken by the petitioner by issuance of a show cause notice. In the absence of such steps being taken, the legal character of the deposit of the said amounts, as made by the petitioner with the department, would continue to remain as amounts deposited under protest and retained by the department not as a tax or under an authority in law.*

27. *In these circumstances, in our opinion, such rejection of the refund application is squarely hit by the provisions of Article 265 of the Constitution, as the action of the department results in withholding/retaining amounts, not levied in accordance with law or collected under authority of law."*

4.7 In view of the above, I do not find any merits in the impugned order.

5.1 Appeal is allowed.

(Operative part of the order pronounced in open court)

(SANJIV SRIVASTAVA)
MEMBER (TECHNICAL)

akp