FAX : 0532-2400149 REGISTERED / AD

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
38,MG Marg Civil Lines,Old Red Building,Allahabad-211001
Regional Branch, Allahabad

Dated: 28/02/2017

To

Appellant as per address in table below

Respondent as per address in table below

Final Order No. A/70212/2017-SM[BR] dated 22/02/2017

I am directed to transmit herewith a certified copy of order passed by the Tribunal under section 35-C(1) of the Central Excise and Salt Act, 1944.

Asstt. Registrar

Application	Appeal	Name and Address of Appellant
1	E/1976/2009	HEINZ INDIA PVT. LTD. POST BOX NO.1, MANZURGARHI ALIGARH.
		Name and Address of Respondent
2		-C.C.E. LUCKNOW 7-A, Ashok Marg, Lucknow.

Copy To

3Advocate(s) / Consultant(s):

NITYA TAX ASSOCIATES
B-3/58, 3RD FLOOR,
SAFDARJUNG ENCLAVE,
NEW DELHI-110029

4 Bar Association, CESTAT, Allahabad

5 Director Publications, Customs, Excise. I.P. Estate, Delhi

6 M/s Centax Publications Pvt. Ltd., 1512-B. Bhishm Pitamah Marg, New Delhi-3

7 Company Law Institute of India Pvt. Ltd., No.2 (old no.36), Vaithyaram Street, T. Nagar, Chennai-17

8 Taxmann Allied Service Pvt. Ltd., 59/32, New Rohtak Road, New Delhi-110005

9 LAWCRUX Advisors Pvt. Ltd., LAW House. 1-8, Sector-10, Faridabad 121003 (Haryana)

10 TaxIndiaOnline.com Pvt. Ltd., 2nd Floor, Vasant Arcade, Vasant Kunj, New Delhi - 110070

11 Mark Professional Services Pvt. Ltd., 108, Everest Block, Aditya Enclave, Hyderabad – 38

12 The ICFAI society, 52, Nagarjuna Hill,Punjagutta Hyderabad.-500082

13 M/S Knowledge Processing Pvt. ltd.(taxmanagementindia.com),FF-19,1st Floor,Cross River Mall,CBD Ground,Near Karkardooma Court,Delhi-110032

14 C.D.R. 15 Office Copy 16 Guard File

Asstt. Registrar

IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
REGIONAL BENCH : ALLAHABAD
COURT No. I

APPEAL No. E/1976/2009-EX[SM]

(Arising out of Order-in-Appeal No. 28-CE/LKO/2009 dated 24/02/2009 passed by Commissioner of Customs, Central Excise & Service Tax (Appeals), Lucknow)

For approval and signature:

Hon'ble Mr. Anil Choudhary, Member (Judicial)

1.	Whether Press Reporter may be allowed to see the Order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982?	No
2.	Whether it would be released under Rule 27 of the CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not?	Yes
3.	Whether their Lordships wish to see the fair copy of the order?	Seen
4.	Whether order is to be circulated to the Department Authorities?	Yes

M/s Heinz India Private Limited **Appellant**

Vs.

Commissioner of Central Excise, Lucknow **Respondent**

Appearance:

Shri Deepak Suneja, Advocate, for Appellant
Shri Pawan Kumar Singh, Superintendent (AR). for Respondent

CORAM:

Hon'ble Mr. Anil Choudhary, Member (Judicial)

Date of Hearing & Date of Decision: 25/11/2016

FINAL ORDER NO. 70212/2017

Per: Anil Choudhary

The present appeal is filed by the appellant, M/s Heinz India Private Limited, against Order-in-Appeal No. 28-CE/LKO/2009 dated 24/02/2009 passed by Commissioner of Central Excise & Customs (Appeals), Lucknow. The issue in this appeal by the appellant-assessee is whether the refund claim pursuant to finalization of Provisional Assessment for the period from April, 1998 to September, 2000 is hit by unjust enrichment.

2. The brief facts of the case are that the appellant, a Multinational Private Company is engaged in the manufacture of Complan & Glucon-D falling under Sub-heading 2106.90.99 & 1702.30.20 of Central Excise Tariff Act, 1985, among other products which are sold at MRP. During the period of April, 1998 to September, 2000 the appellant transferred the finished goods to its Depot - subjected to Provisional Assessment under Rule 9B of erstwhile Central Excise Rules, 1944. Once expenses related to removal of goods like freight from Factory Gate to Depot, Sales Tax etc. was finalized, the appellant was getting the Provisional Assessment finalized and accordingly resulted in the differential duty or refund claim. The appellant follows the methodology of uniform sale price or MRP of goods to customers across India. For the period of dispute the appellant filed refund claim of Rs.12,09,620/- (Rs.5,75,294/- for April, 1998 to March, 1999+ Rs.6,34,326/- for July, 1999

to December, 1999) and another claim for Rs.2,02,386/- for the period from April, 2000 to September, 2000. Thus, the total claim refund amounting to Rs.14,12,006/-. Vide Order-in-Original dated 29/08/2001 the claim for Rs.12,09,620/- was allowed but the amount was credited to Consumer Welfare Fund holding that the appellant does not satisfy the requirement of unjust enrichment. The second claim of Rs.2,02,386/- was also allowed vide Order-in-Original dated 14/09/2001 and the same was also credited to Consumer Welfare Fund. Vide common Order-in-Appeal No. 321 & 322-CE/2005 dated 14/06/2005 the ld. Commissioner (Appeals) remanded the matter back to the Adjudicating Authority for examining the issue of unjust enrichment, in the second round vide Order-in-Original dated 18/03/2008, the Assistant Commissioner have been pleased to reject the refund, observing that it is evident that neither affidavit nor its Chartered Accountant's certificate is supported with documentary evidence or by balance sheet etc. That the amount of duty mentioned in invoices issued at factory gate, has not been included in the cost of goods on which the buyer had purchased. As the prices of the goods are not based on cost data but at factory gate sale. Hence, holding that the affidavit & Show Cause Notice do not support the test as to unjust enrichment, the refund claim was rejected. It was also observed that there was sale at factory gate and full duty is shown in invoices and nowhere mentioned that less value has been charged from the buyer.

3. Being aggrieved the appellant-assessee preferred appeal before ld. Commissioner (Appeals), who has also been pleased to reject the appeal, observing that as the appellant-assessee have not shown the refund amount receivable, 'as receivable' from the government in their balance-sheet from the period 2001-02 onwards. Accordingly, the contention of the appellant that they have not passed the duty burden is not sustainable because it is hard to understand that if they had received any amount like refund the same is reflected in profit and loss account or balance sheet, but appellant have failed to explain that how the losses and dues from the government is shown in the balance-sheet.

4. The ld. Counsel for the appellant, Shri Deepak Suneja, has drawn my attention, that the appellant company follows accounting standard-29, which provides that an enterprise should not recognize a contingent asset particularly claim, that an enterprise is pursuing through legal process, where the outcome is uncertain. Further, accounting standard provides that contingent gain should not be recognized in the financial statements. On the other hand accounting standards-4 provides that the existence of a contingent loss should be disclosed in the financial statements. The ld. Counsel for the appellant have also demonstrated their pricing pattern which had also been explained to the courts

below wherein it is stated that they removed the goods from the factory to their C & F agent, which is in the nature of stock transfer and there is no sale involved and as such there is no question of passing on any duty to a third party. Further, they explained that the goods are distributed from the Depot mainly through wholesalers and as the goods are subjected to MRP, the appellant themselves absorb the impact of Excise duty to ensure uniform billing by way of transaction value, to ensure a uniform return to the distributor/wholesaler and availability of goods to the consumers at MRP. By way of example the appellant has given the following calculation structure: –

At factory Gate Invoice under Rule 52-A to C & F agent for transfer the goods;

(A) Trade Price (Inclusive of Taxes)		Rs. 10.00
(B) Less: Assumed figure of sales tax.		1.00
(A-B) Trade Price (Exclusive of taxes)		9.00
Less: Equalized Freight 1.2%	0.11	
Less: Trade Discount 5.5%	0.49	0.60
Price Inclusive of Excise duty		8.40
Excise duty paid 8.40 x 16/116		**1.16**

i.e. 16% on A.V. of Rs.7.24/-

At C & F agent place sale invoice issued to the Wholesaler (Stockist)

Trade Price (Inclusive of Taxes)	Rs. 10.00
Less: Assumed Figure of sales tax For the state Maharastra @15%	1.50
Trade Price (Exclusive of taxes)	8.50
Less: Trade Discount 5.5%	0.47
Price Inclusive of Excise duty (Inclusive Rs.1.09 for Excise duty)	8.03

Excise duty payable will be **Rs.8.03 – 0.13 p. for equalized freight (1.60% of Rs.8.03) = 7.90 x 16/116 =** 1.09 against Rs.1.16 paid at factory gate, **thus duty excess paid 0.07 p.**

per unit which is borne by appellant and incidence of same has not been passed on to wholesaler or any other person.

With this illustration the ld. counsel explained that it is evident that the appellant have paid more duty, but have passed on less to the buyers of the goods and the same have been admitted by the Revenue in the finalization of assessment, which is undisputed and the only dispute is, as admittedly the appellant have absorbed the said excess duty paid, or charged the same to the profits and not shown the amount as receivable in the balance-sheet, it is urged that the courts below have erred in holding on facts that the refund claim is hit by unjust enrichment. The ld. Counsel further relies on the ruling of Hon'ble Bombay High Court in the case of Commissioner of Central Excise *Versus* Sandvik Asia Ltd. reported at 2015 (323) E.L.T. 431 (Bombay) where on the issue of unjust enrichment, the Hon'ble High Court did not agree with the argument of Revenue, which was - that the conclusion of the Tribunal that the bar of unjust enrichment have got no application since the assessee had paid the amount. The Hon'ble High Court, further, observed that the Tribunal was not concerned with the treatment given to the amount and/or debited in the assessee's profit and loss account. It is immaterial and irrelevant for the Tribunal and equally for us (HC) as to what the assessee terms this amount in his books of account. Even, if it is shown on the expense side that does not mean that the presumption that the burden, has been passed to the consumer, can be raised.

5. Accordingly, the ld. Counsel stated that the impugned order is directly hit by the Hon'ble Bombay High Court ruling (supra) and accordingly prays for allowing the appeal setting aside the impugned order.

6. The ld. Counsel for Revenue supports the impugned order. He, further, draws my attention to the findings of the ld. Commissioner (Appeals) wherein it has been held that as the refund amount have not been reflected as receivable from the Government, the refund is rightly rejected.

7. Having considered the rival contentions, I find that it is admitted fact that the appellant have paid excess duty. It is further admitted fact that the appellant have charged the duty excess paid to the profits in the relevant accounting year. I, further, find that the impugned order suffers from mistake of fact as the courts below have considered the first transfer from the factory to the Depot by way of sale which is a mistake apparent on the record. I, further, hold that in the facts of the present case where the appellant have written off the excess duty paid to the profits in the relevant accounting year, that does not amount to passing of duty to a third party. The presumption drawn by the Revenue has got no legs to stand. Accordingly, I hold that the claim of refund of the appellant is not hit by the doctrine of unjust enrichment. I also hold that prior to the period 25/09/1999 when

Notification No. 45/1999-CE was issued bringing the doctrine of unjust enrichment applicable to the refund arising out of provisional assessment, is not applicable retrospectively. Accordingly, I allow this appeal with consequential benefits and set aside the impugned order. I, further, direct the Adjudicating Authority to disburse the refund amount within a period of 75 days from the receipt of a copy of this order along with interest as per rules.

(Dictated and pronounced in Court)

-Sd/-
(ANIL CHOUDHARY)
Member(JUDICIAL)

Ansari

प्रमाणित प्रति / Certified True Copy
03/03/17
सहायक पंजीकार / Asstt. Registrar
सीमाशुल्क, उत्पादशुल्क एवं सेवा कर
अपील अधिकरण / (C.E.S.T.A.T.)
38, एम. जी. मार्ग, इलाहाबाद-211001
38, M. G. MARG, ALLAHABAD-211001