CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL ALLAHABAD

REGIONAL BENCH - COURT NO.I

Excise Appeal No. 70226 of 2020

(Arising out of Order-in-Appeal No. GZB/EXCUS/000/APPL-MRT/374/2019-20 dated 24.02.2020 passed by Commissioner (Appeals), Central Goods & Service Tax, Meerut)

Commissioner **.....Appellant**
Central Goods & Service Tax
202, Wing-A, C.G.O. Complex-II
Kamla Nehru Nagar
Ghaziabad (U.P.)-201002.

VERSUS

M/s Uttam Industrial Engineering **....Respondent**
Private Limited
A-8, Meerut Road, Industrial Area
Ghaziabad -201301.

APPEARANCE:

Shri Anupam Kumar Tiwari, Authorised Representative for the Appellant

Shri Bipin Garg & Ms. Jawaria Kainaat, Advocates for the Respondent

CORAM:

HON'BLE MR. ANIL CHOUDHARY, MEMBER (JUDICIAL)
HON'BLE MR. P. ANJANI KUMAR, MEMBER (TECHNICAL)

FINAL ORDER NO.70245/2021

DATE OF HEARING/DECISION: 05.08.2021

ANIL CHOUDHARY:

Brief facts are that the respondent-assessee is engaged in the manufacture of sugar mill machinery and parts thereof classifiable under Chapter 84 of the Central Excise Tariff Act, 1985. On the basis of investigations conducted by the Officers of erstwhile Central Excise, Ghaziabad (the department) a show cause notice dated 02.06.2009 was issued to the appellant for demand and recovery of wrongly taken cenvat credit of Rs. 2,03,32,135/-. An amount of Rs. 2,00,90,000/- deposited/ reversed by the assessee during the investigation was proposed to be appropriated. The Commissioner of erstwhile Central Excise Commissionerate, Ghaziabad, vide OIO No. 22/Commr/GZB/2010 dated 20.09.2010, confirmed the demands and imposed penalties as were proposed in the show cause notice dated 02.06.2009. The Tribunal vide Final order No. A/72576-72577/2018-EX(DB) dated 14.11.2018 (F.O. dated 14.11.2018) set aside the OIO No. 22/Commr/GZB/2010 dated 20.09.2010 and allowed the appeal filed by the assessee with consequential relief. Consequent to the F.O. dated 14.11.2018, the appellant asked for the refund of the amounts of Rs.2,00,90,000/-, vide letter / application dated 02.05.2019, which was deposited by them during the course of investigation. The Adjudicating Authority, vide the impugned order, sanctioned the said refund, but ordered it to be credited to the Consumer Welfare Fund, stating that the assessee had failed to submit any evidence showing that the incidence of tax, for which claim had been filed, had not been passed on to anyone else.

2. Being aggrieved, the assessee preferred appeal before the Commissioner (Appeals) on the following grounds:-

(i) The law of unjust enrichment was not applicable as the amount of Rs.2,00,90,000/- was deposited/ reversed during investigation and not passed on to the customers;

(ii) The amount in question was deposited under protest during the investigation and as such the department cannot retain the same.

(iii) It is settled law that such amount has to be treated as pre-deposit and has to be refunded. The principle of unjust-enrichment is not applicable in such case.

(iv) The findings of the adjudicating authority, that the said amount was debited to profit and loss account is to be considered as revenue expenditure and shall amount to addition to the cost of finished goods/ services provided, is contrary to the fact that the said amount has been charged to profit and loss account under "Exceptional item" and it has been deducted from profit before tax as such the same cannot be treated as cost of the finished goods/ services provided. Therefore, denial of refund on the ground that said amount was shown in profit and loss account, and hence the burden must have been passed to the customers, is not correct.

(v) They also relied following case laws in support of contentions:-

- Ebiz Com Pvt. Ltd. vs. CCE & ST -2017 (49) STR 389 (All.)

  "23. It has been consistent view of various Courts that any amount, deposited during pendency of adjudication proceedings or investigation is in the nature of deposit made under protest or pre-deposit and, therefore, principles of unjust enrichment would not be attracted.

  35. The consensus of the authorities of various High Courts as well as Supreme Court is that any amount received by Revenue, as deposit or pre-deposit i.e. unauthorisedly or under mistaken notion, etc., cannot be retained by Revenue since it has no authority in law to retain such amount and it must be refunded with interest".

- CCE, Lucknow vs. Eveready Industries India Ltd. -2017 (357) ELT 11 (All.)

  "4. ---payment was made during investigation by assessee. Subsequently, show cause notice was issued and Assessing Officer passed order adjudicating liability of Central Excise and amount deposited by assessee was appropriated against such determined liability. Subsequently, in appeal, assessment order was set aside and question of refund arose. An argument was raised that unless assessee proves that he has not passed on incidence of duty to any other person, refund cannot be allowed. Court held, it is not a case of refund of duty but return of pre-deposit made by assessee at the time of investigation under protest.......

"There are also very many judgments of various Courts, which have also reiterated the same principles that in case any amount is deposited during the pendency of adjudicating proceedings or investigation, the said amount would be in the nature of deposit under protest and, therefore, the principles of unjust enrichment would not apply. In view of the catena of decisions, available in this issue, this Court answers the first substantial question of law against the Revenue and in favour of the assessee.

3. Learned Commissioner (Appeals) have recorded in para 5.1 of the impugned order that the amounts so paid during investigation on the insistence of the Department became refundable to the assessee alongwith interest, once the demands were set aside by this Tribunal vide Final Order dated 14.11.2018. It was further held that the Adjudicating Authority was in serious error in crediting the amount to the Consumer Welfare Fund, which was in fact payable to the appellant alongwith interest from the date of deposit/ reversal. It was further held that assessee were entitled for grant of refund in cash alongwith interest from the date of deposit till the date of payment of refund.

4. Being aggrieved, Revenue is in appeal before this Tribunal on the ground that the said amount of Rs.2,00,90,000/- was appearing in the balance sheet of the assessee as a contingent liability till the fiscal year 2012-13. Thereafter, in the accounting year 2013-14, the said amount has been debited in the profit and loss account and accordingly the same was absorbed in the cost of finished goods and the incidence of duty have been indirectly passed on to the customer/ other persons on account of increased value of finished goods. Further, the certificate of Chartered Accountant is not

conclusive proof certifying that the incidence of duty has not been passed. Reliance has been placed on the ruling of Hon'ble Supreme Court in the case of **Mafatlal Industries Ltd.,** vs. **UoI -1997 (89) ELT 247 (SC),** wherein it has been observed that refund claims arising out of appellate/ revisionary orders are also subjected to amended Section 11B of the Central Excise Act, 1944. Refund not to be ordered unless claimant establishes that the burden of duty has not been passed on to others. Reliance is also placed on the ruling of Hon'ble Supreme Court in the case of **Sahakari Khand Udyog Mandal Ltd.** vs. **Commissioner of C. Ex. & Customs -2005 (181) ELT 328 (SC)**, wherein it has been held that doctrine of 'unjust enrichment' is applicable to deny benefit to which a person is not otherwise entitled. Before claiming the relief of refund, appellant to show that he has paid the amount for which relief is sought, and he has not passed on the burden on the consumers and if such relief is not granted he would suffer loss.

5. Learned Authorised Representative for the Revenue relies on the grounds of appeal and prays for setting aside of the impugned order.

6. Learned Counsel appearing for the respondent-assessee urges that it is an admitted fact that cenvat credit was taken. The same on being disputed, was reversed/ paid in the year 2006. Show cause notice was issued on 02.06.2009 as the dispute was with regard to input credit, there is no question of passing on the same to the buyer of the dutiable goods. Further, admittedly the assessee had paid / reversed and thereafter has shown the same in the books

of accounts in the balance sheet as contingent liability. Thus, under the principles of accountancy, if the amount could have been passed on to the third person, the same would not have appeared as a contingent liability for several years. Further, subsequent right off of the said amount of contingent liability, by debiting the same to the profit and loss account does not amount to absorption in the cost of the finished goods by any stretch of imagination. Accordingly, he relied on the ruling of Hon'ble Supreme Court in the case of **CCE vs. Suvidhe Limited – 1997 (94) ELT A-159**. Accordingly, learned Counsel prays for dismissing the appeal of Revenue with direction to the Adjudicating Authority to disburse the refund alongwith interest @ 12% p.a.

7. Having considered the rival contentions, we are satisfied that the assessee have, ipso facto or based on the facts on record, i.e. have deposited /reversed the duty, input credit under dispute, which was appearing in the balance sheet for several years as a contingent liability, is sufficient proof that the burden is borne by the appellant himself. Subsequently, righting off of the contingent liability by debiting to the profit and loss account after six –seven years does not amount to adjustment in the value of the finished goods and/or recovery from the buyers of the finished goods, by any stretch of imagination. The grounds of appeal by Revenue are mis-conceived and have no legs to stand. No evidence has been brought on record by the Revenue in support of the grounds, save and except presumptions and assumptions.

8. Accordingly, this appeal by Revenue is dismissed. The Adjudicating Authority is directed to grant / disburse the refund with interest @ 12% per annum from the date of deposit/ reversal till the date of payment.

(Operative part of the order pronounced in open Court).

(ANIL CHOUDHARY)
MEMBER (JUDICIAL)

(P. ANJANI KUMAR)
MEMBER (TECHNICAL)

Pant