CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
SOUTH ZONAL BENCH
BANGALORE

<u>Appeal(s) Involved:</u>

C/21626/2017-SM

[Arising out of Order-in-Appeal No. 399-412/2017 dated 11/09/2017 passed by the Commissioner of Customs , Bangalore-I (Appeals)]

Oriental Trimex Ltd.
No. 26/25, Bazaar Marg,
Old Rajendra Nagar
New Delhi – 110 060

Appellant(s)

Versus

Commissioner of Customs and Service Tax, Bangalore
C.R. Building, Queens Road,
P.B. No. 5400,
Bangalore - 560 001
Karnataka

Respondent(s)

<u>Appearance:</u>

Mr. B.K. Singh, Advocate — For the Appellant

Mr. Madhupsharan, Assistant Commissioner (AR) — For the Respondent

Date of Hearing: 06/02/2018
Date of Decision: 06/02/2018

CORAM:
HON'BLE MR. S.S GARG, JUDICIAL MEMBER

<u>Final Order No. 20463 / 2018</u>

Per: S.S GARG

The present appeal is directed against the impugned order dated 11.09.2017 passed by the Commissioner of Customs (Appeals) whereby the Commissioner (Appeals) has upheld the Order-in-Original dated 09.05.2016 and rejected the appeal of the appellant. Briefly the facts of the present case are that the appellants imported polished/semi polished Marble slabs falling under CTH 68022190 of the Customs Tariff Act 1985 and filed the refund claim of Rs. 21,61,458/- (Rupees Twenty One Lakhs Sixty One Thousand Four Hundred and Fifty Eight only) before the Assistant Commissioner, ICD Bangalore vide their letter dated 10.04.2012. The grounds for the refund claim in respect of 14 Bills of Entry under which the import has taken place during the period 03.11.2011 to 04.02.2012 was that the Department assessed the imported goods at the US$60 per SQM CIF instead of US$50 per SQM CIF. The higher valuation adopted by the Department has resulted in excess payment of customs duty to the tune of Rs. 21,61,458/- (Rupees Twenty One Lakhs Sixty One Thousand Four Hundred and Fifty Eight only) in total and accordingly the refund claim was filed. As per the DGFT Notification No. 65/2011 dated 04.08.2011, the value cap for the aforesaid was enhanced to CIF US$60 per SQM which was previously US$50 per SQM for free importation without license. The appellant filed the 14 Bills of entries under protest by declaring US$60 per SQM and the value was assessed accordingly and appropriate customs duty was paid. The appellant submitted notarized copy of MOU dated 21.12.2010 to the DGFT, New Delhi made with their foreign supplier M/s. International Marble Co. Oman according to which the price of imported goods was agreed upon to be US$50 per SQM. Further the appellant has irrevocable letter of credit furnished by their overseas supplier for supply of polished marble slab at US$50 per SQM. The appellant made a representation to the Customs for accepting the value of imported goods at US$50 per SQM instead of US$60 per SQM. Thereafter a show-cause notice dated 29.06.2012 was issued to the appellant proposing to reject the refund claim. Adjudicating authority after following the due process of law rejected the refund claim of Rs. 21,61,458/- (Rupees Twenty One Lakhs Sixty One Thousand Four Hundred and Fifty Eight only) vide Order-in-Original dated 09.05.2016 on the ground that the duty was not paid under protest and no provisional assessment was adopted and further the claimant has not challenged the assessment in respect of bills of entries assessed prior to issue of DGFT letter dated 28.02.2012. Further the Assistant Commissioner held that the burden of duty has been passed on to the customer and the refund is hit by doctrine of unjust enrichment. Aggrieved by the said order, appellant filed appeal before the Commissioner and the Commissioner vide the impugned order rejected the refund claim.

2. Heard both the parties and perused the records.

3. Learned counsel for the appellant submitted that the impugned order is not sustainable in law as the same has not properly appreciated the facts and the law. He further submitted that on two issues, the appellate authority has reversed the finding of the original authority. He also submitted that the appellate authority has held that the duty was paid under protest and there is no necessity of challenging the assessment order in view of the judgment in the case of *Micromax Informatics (P) Ltd. reported in (2000) 6 SCC 650 Delhi HC (DB)* and *M/s. Aman Medical Pvt. Ltd. Vs. CCE (2010) 250 ELT 30*. He also submitted that the appellate authority has held that the appellant has correctly filed the refund claim as all imports transaction are after 08.04.2011. He further submitted that on the issue of unjust enrichment the appellate authority vide the impugned order has held that the refund is hit

by bar of unjust enrichment. Further the appellate authority has also not considered the CA certificate as the CA certificate was found to be defective as per the opinion of the appellate authority. He further submitted that the appellate authority has not considered the DGFT letter dated 28.02.2012 permitting import quantity of 1,98,547/- Sq. Mtrs. He also submitted that the appellate authority has not considered the application of DGFT letter allowing import at 50$ per SQM. He also submitted that the appellant has affected the import within prescribed limit. In support of his submission, he relied upon the following decisions:

a. *South Eastern Coal Fields Ltd. Vs. CCE & ST, Raipur – 2017 (349) E.L.T. 303 (Tri.-Del.)*
b. *Mennekes Electric India P. Ltd. Vs. CC Chennai-II – 2017 (348) E.L.T. 537 (Tri.-Del.)*
c. *Jindal Steel & Power Ltd. Vs. CCE & ST, Raipur – 2017 (348) E.L.T. 367 (Tri.-Del.)*
d. *Sona Processors India Pvt. Ltd. Vs. CCE, Jaipur-II – 2017 (347) E.L.T. 651 (Tri.-Del.)*
e. *Bajaj Auto Ltd. Vs. CCE, Pune-I – 2017 (347) E.L.T. 519 (Tri.-Mumbai)*

4. On the other hand the learned AR reiterated the findings of the impugned order.

5. After considering the submissions of both the parties, I find that the appellate authority has correctly held that the duty was paid under protest and further that there is no need to challenge the assessment order and the refund claim has rightly been filed. On the bar of unjust enrichment, the appellate authority has held that the incidence of duty has been passed on to the buyer. Further I find that once the appellate Commissioner has held

that the refund has properly been filed and the duty was paid under protest the appellate authority should have also considered the memorandum of understanding between the appellant and his supplier abroad as well as the DGFT letter dated 28.02.2012 permitting the import at 50US$ per SQM. Further I find that the impugned order has simply rejected the appeal of the appellant after holding that the refund claim is barred by unjust enrichment. Once a refund is barred by unjust enrichment then it was incumbent upon the appellate authority to credit the said refund to Consumer Welfare Fund which has also not been done in the present case. Further I also find that the decision which have been relied upon by the appellant showing that the bar of unjust enrichment is not applicable in the present case has also not been considered by the lower appellate authority. In view of all these discrepancies, I am of the considered view that the present case is required to be remanded back to the Commissioner and I do so. Consequently the case is remanded back to the Commissioner (Appeals) with the direction to examine the issue of unjust enrichment in the light of the decisions relied upon by the appellant and other evidences viz. Balance Sheet, credit notes and bank statements etc. The present appeal is allowed by way of remand.

(Operative portion of the Order was pronounced
in Open Court on **06/02/2018**)

(S.S GARG)
JUDICIAL MEMBER

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