CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
BANGALORE

REGIONAL BENCH - COURT NO. 1

Appeal(s) Involved:

C/21175/2018-SM

[Arising out of Order-in-Appeal No. 78/2018 dated 07/02/2018 passed by Commissioner of CUSTOMS , BANGALORE-I(Appeal)]

JK Cement Ltd
Kamla Tower
KANPUR - 208001
UTTAR PRADESH

Appellant(s)

VERSUS

Commissioner of Customs Mangalore-cus
NEW CUSTOMS HOUSE
PANAMBUR
MANGALORE - 575010
KARNATAKA

Respondent(s)

Appearance:

Ms. Neetu James, Advocate
LAKSHMI KUMARAN & SRIDHARAN
WORLD TRADE CENTRE NO.404-406, 4TH FLOOR, SOUTH WING BRIGADE GATEWAY CAMPUS NO.26/1, DR. RAJKUMAR ROAD,
BANGALORE - 560 055
KARNATAKA

For the Appellant

Shri Gopakumar, Jt. Commissioner(AR) — For the Respondent

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

Final Order No. 20364 / 2019

Date of Hearing: 25/04/2019
Date of Decision: 25/04/2019

Per : S.S GARG

The present appeal is directed against the impugned order dt. 07/02/2018 passed by the Commissioner(Appeals) whereby the Commissioner(Appeals) has allowed the Department's appeal against the Order-in-Original and set aside the Order-in-Original.

2. Briefly the facts of the present case are that the appellant had filed a refund claim for Rs.8,54,738/- being excess paid duty in connection with the import of petroleum coke vide Bill of Entry No.196 dt. 23/09/2013. The importer had stated that the total duty was assessed to Rs.1,19,53,459/- out of which Rs.1,15,79,813/- was debited to various duty scrip licenses and Rs.12,28,004/- was paid through TR6 challan No.915 dt. 11/10/2013 thereby resulting in excess payment of customs duty. Thereafter the appellant filed an application for refund of the excess duty and the original authority after examining the claim of the appellant has sanctioned the refund of Rs.8,54,358/- in cash. Aggrieved by the said order, the Department, after reviewing the Order-in-original, filed appeal before the Commissioner(Appeals) which was accepted by the Commissioner(Appeals). hence the present appeal by the appellant.

3. Heard both sides and perused the material on record.

4. Learned counsel for the appellant submitted that the impugned order is not sustainable in law as the same has been passed without properly appreciating the facts and the law and the binding judicial precedent. She further submitted that the excess payment of duty has been made in cash as the debit in the FPS licence was not reflected in the system due to technical error. She further submitted that since the excess payment of duty made in cash, the appellant is

entitled to the refund thereof in cash. She also submitted that if the refund in cash can be granted only for the cash deposited, then the Department should treat the refund out of Rs.12,28,004/- which was deposited in cash by the appellant. She further submitted that the Circular No.6/2008 dt. 28/04/2008 which was relied upon by the Commissioner(Appeals) to set aside the Order-in-Original has been held ultra vires of the Customs Act as it seeks to impose an additional restriction for grant of refund of SAD under Notification No.102/2007-Customs in the case of Allen Diesels India Pvt. Ltd. Vs. UOI [2016(334) ELT 624 (Del.)]. She also submitted that FPS scrip is valid only for 18 months in terms of para 3.11.7 of the Hand Book of Procedures 2012-13 and in the absence of any provision for extension of the validity of the scrip, the appellant is entitled to refund in cash and not by way of recredit.

5. On the other hand, the learned AR defended the impugned order and submitted that the excess duty paid through FPS licence dt. 26/08/2013 can be refunded by way of recredit in the license and not in cash. He further submitted that the Commissioner(Appeals) has relied upon the CBEC Circular No.6/2008 dt. 28/04/2008 which clarified that 4% CVD paid through DEPB scrip should be recredited on the relevant scrip instead of being refunded in cash. The learned AR also relied upon the following two decisions in support of his submission that refund can only be given by way of recredit and not in cash.

i. Milton Laminates Ltd. Vs. CC, Kandla [2006(206) ELT 797 (Tri. Del.)]
ii. CCE, Indore Vs. Midland Plastics Ltd. [2009(240) ELT 251 (Tri. Del.)]

6. After considering the submissions of both sides and perusal of the material on record, I find that the appellant has made excess payment of duty in cash when the appellant was asked to deposit an

amount of Rs.12,28,004/- which was deposited by the appellant in cash. Further I find that the observation of the Commissioner(Appeals) in the impugned order that the appellant has claimed the refund by way of recredit in the licence is factually incorrect because in the application for refund, which is on record, it is nowhere mentioned that the appellant has claimed the refund by way of credit whereas the fact of the matter is that the appellant has filed the application seeking refund of the excess duty paid by them by debit in the license No.1510019864 dt. 26/08/2013 which was left over while considering the amount of duty paid. Further I find that the Circular No.6/2008 dt. 28/04/2008 which was relied upon by the Commissioner(Appeals) to reject the refund in cash has been held ultra vires of the Customs Act in the case of Allen Diesels India Pvt. Ltd. cited supra. Further I find that the decision relied upon by the Department in the case of Milan Laminates Ltd. and Midland Plastics Ltd. are not applicable in the facts and circumstances of the present case because in the cited cases the entire Customs duty payment was made through scrip whereas in the present case, about Rs.12,28,004/- was paid through cash also. Further I find that the whole situation has arisen due to the fact that licence was debited but the same was not reflecting in the system and as a result the appellant had to pay in cash. Subsequently, mistake was detected but the authorities did not correct the same on their own but the appellant was compelled to seek refund. It is a settled law that the Department cannot take advantage of its own wrong as held in the following cases:-

i. India Household and Healthcare Ltd. Vs. L.G. Household and Healthcare Ltd. [(2007) 5 SCC 510]
ii. MD, HSIDC Vs. Hari Om Enterprises [(2009) 16 SCC 208]
iii. National Highway Authority of India Vs. Bumihiway DDB Ltd.(JV) [(2006) 10 SCC 763]
iv. Padan Kumar Agrawal Vs. Addl. Collector [AIR 1972 SC 542]

7. In view of my discussion above, I am of the considered view that the impugned order is not sustainable in law and therefore, I set aside the same by allowing the appeal of the appellant with consequential relief, if any.

(Operative portion of the Order was pronounced
in Open Court on **25/04/2019**)

S.S GARG
JUDICIAL MEMBER

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