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

Appeal(s) Involved:

**C/20227/2018-SM**

[Arising out of OIA No. 993-995-2017 dated 08/12/2017
passed by Commissioner of CUSTOMS ,
BANGALORE(Appeals)]

**C.C-Mangalore-cus**
NEW CUSTOMS HOUSE
PANAMBUR
MANGALORE
KARNATAKA
575010

Appellant(s)

**Versus**

**Mangalore Chemicals And Fertilizers Ltd**
Panambur,mangalore
MANGALORE
KARNATAKA
0

Respondent(s)

**Appearance:**

Dr. J. Harish, Jt. Commissioner(AR) — For the Appellant

Shri Ravi Raghavan, Advocate
LAKSHMI KUMARAN & SRIDHARAN — For the Respondent

Date of Hearing: 29/11/2018
Date of Decision:27/02/2019

**CORAM:**
**HON'BLE SHRI S.S GARG, JUDICIAL MEMBER**

## Final Order No. 20225 /2019

**Per : S.S GARG**

The Revenue has filed the present appeal against the impugned order dt. 08/12/2017 passed by the Commissioner(Appeals) whereby he has allowed the appeal of the assessee and directed the Department to refund the amount within 4 weeks.

2. Briefly the facts of the present case are that the respondents are regular importers of raw materials for manufacture of fertilizers and have imported Phosphoric Acid in bulk from M/s. Maroc Phosphore S.A., Casablanca, Morocco under a sale and purchase agreement vide three Bills of Entry. The respondents have self-assessed the Bills of Entry as the Risk Management System (RMS) in ICES had facilitated the same and there was no assessment and examination of the goods by the Department. The provisional unit price of the impugned goods (Phosphoric Acid in bulk) was USD 715 per MT and accordingly import duty was paid. Thereafter, the unit price was finalized by the seller at USD 620 per MT. since the respondent had paid excess duty, refund claim was filed on 07/11/2016 with Assistant Commissioner(Refunds), Mangalore seeking refund of excess paid duty of Rs.47,04,817/-. The Department issued a deficiency memo dt. 10/11/2016 directing the respondent to produce the assessment order passed by the Department for the final invoice value of USD 620 and also to produce the certificate from Chartered Accountant towards unjust enrichment. Thereafter the appellant vide letter dt. 23/11/2016 requested the Asst. Commissioner of Customs, Mangalore to amend the three Bills of Entry and accordingly submitted the relevant documents. The Additional Commissioner of Customs, Mangalore, after following the principle of natural justice, rejected the request for amendment of the Bills of Entry under Section 149 of the Customs Act, 1962. Aggrieved by the said order, appellant filed appeal before the

Commissioner(Appeals) who set aside the Order-in-Original and allowed the appeal of the respondent/assessee. Hence the present appeal by the Revenue.

3. Heard both sides and perused records.

4. Learned AR for the Revenue submitted that the impugned order is not sustainable in law as the same has been passed without properly appreciating the provisions of law. He further submitted that the final invoices indicating lower unit price of USD 620 were not submitted at the time of clearance of goods. He also submitted that it is the responsibility of the respondent to opt for provisional assessment and declare correct information to the tax authorities in the era of self-assessment. He also submitted that the appellate authority cannot admit new evidence in terms of Rule 5(2) of the Customs Appeals Rules, 1982 and further the clause of unjust enrichment as discussed by the appellate authority is beyond the scope of Order-in-original dt. 29/06/2016.

5.1. On the other hand, the learned counsel for the respondent defended the impugned order and submitted that the price variation in the value of imports was known to the Department at the time of import. He referred to various clauses of the sale and purchase agreements entered into between the supplier and the respondent and Clause 5.4 provides that till the finalization of the price for the relevant contract year, the supplies of phosphoric acid shall continue to be delivered and as per Clause 5.4.3, the provisional prices will be invoiced by the supplier, pending final agreement on the price and other terms and conditions of phosphoric acid delivered for the considered period and also in terms of Clause 5.4.4., upon finalization of price, the tonnage delivered during the considered period and having being invoiced provisionally, will be settled on the basis of the final price agreed for the considered period. He also submitted that import invoice No.17273 dt. 13/04/2016 clearly provides for 'provisional price per metric ton' as USD 715.00. On finalization of price, the final invoice provides for 'Price Per Metric Ton' as USD 620. He also submitted that the time of filing the Bill of Entry, the Department was well aware of the fact that the price adopted was a provisional price and accordingly the duty was paid on such provisional price and subsequently, the price was finalized and due to reduction in the price per metric ton, the refund became due to the respondent. Learned counsel also submitted that in terms of Rule 5(1)(b) of the Customs (Appeals) Rules, 1982, assessee shall be entitled to produce any evidence before the Commissioner(Appeals) whether oral or documentary, other than the evidence produced during the course of proceedings before the adjudicating authority, where the appellant was prevented by sufficient cause from producing the evidence which was called upon to produce by the adjudicating authority. He also submitted that in the present case, e-mails from the supplier were received by the respondent on 17/08/2017 after the Order-in-Original dt. 29/06/2017 had been issued and therefore the respondents had sufficient cause for not producing the same before the original adjudicating authority. He also submitted that refund claims cannot be rejected only on the ground that the assessment of Bill of Entry was not put to challenge, especially when the duty stands paid. In support of this submission, he relied upon the following decisions:-

i. Micromax Informatics Ltd. Vs. UOI & Ors. [2016-TIOL-978-HC-DEL]
ii. Aman Medical products Ltd. Vs. CC, Delhi [2010(250) ELT 30 (Del.)]
iii. Bharat Electronics Ltd. Vs. CC, Bangalore [2017(352) ELT 245 (Tri. Bang.)]
iv. Surendra Industries Vs. CC, Jaipur [2018-TIOL-1452-CESTAT-DEL]
v. CC, Nhava Sheva Vs. Physical Research Laboratory [2017(357) ELT 475 (Tri. Mum.)]

5.2. He also submitted that the amendment can be made to a Bill of Entry in terms of Section 149 of the Customs Act if any documentary evidence is in existence. In support of this submission, he relied upon the following decisions:-

i. Mohit Overseas Vs. CC, New Delhi [2016(335) ELT 18 (Del.)]
ii. Steel Authority of India Ltd. Vs. CC, Chennai [2016(343) ELT 602 (Tri. Chennai)]
iii. PTC Industries Ltd. Vs. CCE, Jaipur-I [2016(340) ELT 563 (Tri. Del.)]
iv. Sankhla Udyog Vs. CCE, Jaipur-II [2014(314) ELT 350 (Tri. Del.)]
v. CC&CE, Hyderabad-III Vs. Premier Explosives Ltd. [2008(226) ELT 729 (Tri. Bang.)]

5.3. Further as far as unjust enrichment is concerned, the learned counsel submitted that question of unjust enrichment does not arise as the price of the fertilizers are directly fixed and controlled by the Government of India, Ministry of Chemicals and Fertilisers. Further excess duty paid by the respondent is recorded under the head account of ‘receivables’ in their books of accounts and the respondent has also produced Chartered Accountant certificate dt. 23/11/2016 certifying that the refund claim does not attract the doctrine of unjust enrichment.

6. After considering the submissions both sides and perusal of material on record, I find that in this case, price was provisional and this fact was known to the Department and at the time of filing the Bill of Entry also, it was stated that the price is provisional. More over the variation clauses of sale and purchase agreement entered into between the respondent and the supplier clearly show that the price was provisional. Further I find that on finalization of price, the respondent filed refund claim though inadvertently provisional assessment was not done. Further I find that in terms of Rule 5(1)(b) of the Customs (Appeals) Rules, 1982, the assessee is entitled to produce any evidence before the adjudicating authority, if that evidence was in existence. Further I find that e-mails received from the supplier were after the Order-in-original was issued and therefore the respondent was justified in producing the same before the Commissioner(Appeals) who considered the same. Further I find that the Commissioner(Appeals) has also considered the aspect of unjust enrichment and has held that the same is not applicable in the present case because the excess duty paid by the respondent is recorded under the head of ‘receivables’ and also Chartered Accountant has issued a certificate certifying that the refund claim does not attract doctrine of unjust

enrichment. In view of my discussion above, I am of the considered view that there is no infirmity in the impugned order which is upheld by dismissing the appeal of the Revenue.

(Order was pronounced
in Open Court on **27/02/2019**)

**S.S GARG**
**JUDICIAL MEMBER**

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