CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL BANGALORE

Regional Bench – Court No. II

Excise Appeal No. 21699 of 2018

(Arising out of Order-in-Appeal No. MYS-EXCUS-000-APP-052-18-19 dated 27.07.2018 passed by the Commissioner of Central Tax (Appeals), Mysuru, S-1 & S-2, Vinaya Marga, Siddhartha Nagar, Mysuru – 570 011)

M/s. WEP Peripherals Ltd., : **Appellant**
Hebbal Industrial Area, Megatalli,
Mysore – 570 016

VERSUS

The Principal Commissioner of Central Tax, : **Respondent**
S-1 & S-2, Vinaya Marga, Siddhartha Nagar,
Mysore – 570 011

APPEARANCE:

Shri. Rajesh Kumar, Chartered Accountant for the Appellant

Shri. Gopa Kumar, Authorized Representative for the Respondent

CORAM:

HON'BLE MR. P. DINESHA, MEMBER (JUDICIAL)

FINAL ORDER NO. 20429/ 2019

DATE OF HEARING: 26.03.2019

DATE OF DECISION: **01.05.2019**

By this appeal, the appellant is seeking refund.

2. A perusal of the impugned Order-in-Appeal No. MYS-EXCUS-000-APP-052-18-19 dated 27.07.2018 reveals *inter alia* that there was allegation of undervaluation by the appellant by not adopting the value as per CAS-4; Show Cause Notices were issued thereafter; that the demands were confirmed in Orders-in-Original; that appeals were preferred, etc., the last of such orders being Order-in-Appeal No. MYS-EXCUS-000-ADC-APP-HAD-104-2014 dated 30.10.2014 wherein the demand and order was held to be not maintainable and accordingly, the same was set aside.

3. A perusal of the latest Order-in-Original dated 17.05.2017 reveals that the assessee had made most of the payments at the time of investigation. The said Order-in-Original also refers to the scope of that order which was consequent to the remand order passed by the Commissioner (Appeals) in Order-in-Appeal No. MYS-EXCUS-000-APP-067-16-17 dated 03.01.2017. The above orders of the lower authorities refer to the pendency of appeal before this forum against the Order-in-Appeal dated 30.10.2014.

4. Be that as it may, as long as the aggrieved party furnishes any Final Orders against the Order-in-Appeal *(supra),* if not, at least a Stay Order staying the operation of the above order, the findings therein will have to be accepted and the Revenue has no choice but to implement the same.

5.1 In the impugned order, however, the Commissioner (Appeals) referring to the above Order-in-Appeal, has only tried to disprove the findings or directions in the above order which in my humble opinion, is not permissible since it would only amount to change of opinions and the subsequent officer can never sit over the judgement of the order or findings of another officer of the same status. In any case, the scope of the appellate proceedings was also limited and guided by the Order-in-Appeal dated 03.01.2017 whereby the Commissioner (Appeals) felt it proper to remand back to the file of the adjudicating authority with some directions.

5.2 Further, as pointed out by the Ld. Advocate, the Revenue had withdrawn the above appeal and rightly or wrongly, the same has reached finality. In the Order-in-Appeal dated 30.10.2014, the Commissioner (Appeals) had clearly touched upon the points of assessee adopting value based on CAS-4 certificate of the previous year as also the issue of netting and had given a finding on both and thus, in the absence of an order of a higher forum interfering with the above findings, the same holds good and the Revenue is bound by the said decision.

6. It is an undisputed fact that the payment was made under protest by the assessee during investigation and a perusal of one of the earliest Order-in-Original dated 30.01.2014 clearly reflects appropriation of payments made by the appellant towards the duty liability and the said order also incorporates the major payment being recovered by way of appropriation, except perhaps penalty. In this background, the decision of the Hon’ble High Court of Madras in the case of ***Commissioner of C.Ex., Coimbatore Vs. M/s. Pricol Ltd. reported in 2015 (320) E.L.T. 703 (Mad.)*** relied

upon by the assessee squarely applies. The Hon'ble High Court while dealing with an almost similar issue and after considering relevant provisions and various decisions, has held as under :

> ***"7.*** *The first question of law, which is raised, relates to the plea of unjust enrichment and much emphasis is laid on the decision of the Supreme Court in Mafatlal Industries case [1997 (89) E.L.T. 247 (S.C.)]. Relevant portion of the order passed by the Supreme Court in Mafatlal Industries case (supra) has been extracted in the grounds (b) and (c). There is no dispute with regard to the proposition of law as laid down by the Supreme Court. In the present case, as is evident from the records, it is not a case of refund of duty. It is a pre-deposit made under protest at the time of investigation, as has been recorded in the original proceedings itself. In this regard, it has to be noticed that it has been the consistent view taken by the Courts that any amount, that is deposited during the pendency of adjudication proceedings or investigation is in the nature of deposit made under protest and, therefore, the principles of unjust enrichment does not apply. The above said view has been reiterated by the High Court of Bombay in Suvidhe Ltd. v. Union of India - 1996 (82) E.L.T. 177 (Bom.), and by the Gujarat High Court in Commissioner of Customs v. Mahalaxmi Exports - 2010 (258) E.L.T. 217 (Guj.), which has been followed in various cases in Summerking Electricals (P) Ltd. v. CEGAT - 1998 (102) E.L.T. 522 (All.), Parle International Ltd. v. Union of India - 2001 (127) E.L.T. 329 (Guj.) and Commissioner of Central Excise, Chennai v. Calcutta Chemical Company Ltd. - 2001 (133) E.L.T. 278 (Mad.) and the said view has also been maintained by the Supreme Court in Union of India v. Suvidhe Ltd. - 1997 (94) E.L.T. A159 (S.C.). 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 adjudication 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 on this issue, this Court answers the first substantial question of law against the Revenue and in favour of the assessee*."

7. Further, I do not see any disputes with regard to the CA certificate furnished by the assessee, on which the adjudicating authority has tried to make an issue. But on the other hand, the appellate authority has not discussed about it.

8.1 The case of the adjudicating authority that the duty was passed on to the appellant's unit at Baddi, Himachal Pradesh, does not hold water since while issuing the remand order, the Commissioner (Appeals) himself in his order dated 03.01.2017 has clearly observed that the amounts which were claimed as refund were relating to the amounts paid after clearance of goods and not passed on, as was contended in the Show Cause Notice and that there is also a categorical observation that the impugned order therein was passed, on wrong premise, which was required to be set aside, and accordingly, the Commissioner (Appeals) has set aside/quashed the same.

8.2 Apparently, there is no challenge against this finding by the Revenue nor has the impugned order found anything wrong with the above findings. Thus, the case of the assessee that it has not passed on the duty element stands established and therefore, there is no scope to allege unjust enrichment. Accordingly, the appellant is entitled for refund.

9. For the above reasons, the impugned order cannot sustain, for which reason the same is set aside and the appeal of the assessee is allowed with consequential benefits, if any, as per law.

(Order pronounced in the open court on **01.05.2019**)

(P. DINESHA)
MEMBER (JUDICIAL)

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