CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
BANGALORE

REGIONAL BENCH - COURT NO. 1

Central Excise Appeal No. 20847 of 2017

(Arising out of Order-in-Appeal No. BEL-EXCUS-000-APP-088-2016-17 dated 16/02/2017 passed by the Commissioner of Central Excise, Mysore (Appeals)]

Commissioner of Central Excise,
Customs and Service Tax,
Belgaum
No. 71, Club Road,
Central Excise Building,
Belgaum - 590 001
Karnataka

Appellant(s)

VERSUS

Tata Marcopolo Motors Ltd.
Belur Industrial Area, Garag Road
Mummigatti Post
Dharwad - 580 007
Karnataka

Respondent(s)

APPEARANCE:

Mrs. D.S. Sangeetha, Additional Commissioner (AR) for the Appellant
Mrs. Neetu James, Advocate for the Respondent

CORAM:
HON'BLE MR. S.K. MOHANTY, JUDICIAL MEMBER
HON'BLE MR. P. ANJANI KUMAR, TECHNICAL MEMBER

Final Order No. 20215 / 2022

Date of Hearing: 29/04/2022
Date of Decision: 29/04/2022

Per : S.K. MOHANTY

Brief facts of the case are that the appellants herein are registered with the Central Excise Department for manufacture of Buses (motor vehicle for transport of persons), falling under Chapter 87 of the Central Excise Tariff Act, 1885. The appellants are engaged in the activities of building/mounting bus body on the chassis received from their customers. In this case, the appellants have filed an application before the jurisdictional Central Excise authorities, claiming refund of Rs.4,19,60,914/- (Rupees Four Crores Nineteen Lakhs Sixty Thousand Nine Hundred and Fourteen only) of accumulated Cenvat Credit available in the books of accounts for the quarter October to December' 2013. The refund application was filed under Rule 5 of the Cenvat Credit Rules, 2004 read with the notification(s) issued there under. The refund application was forwarded by the jurisdictional Assistant Commissioner to the office of the Range Superintendent, having jurisdiction over the factory of the appellant for verification with regard to correctness and eligibility of the claim as per the statutory provisions. Upon verification of the claim application together with the relevant documents, the Range Superintendent had confirmed that the Buses have been manufactured by the appellants and exported through the merchant exporter M/s Tata Motors Ltd., Mumbai against CT-1 certificates; that the claim had been filed within the stipulated time frame; that the appellants are entitled for refund of Rs.3,84,15,460/-(Rupees Three Crores Eighty Four Lakhs Fifteen Thousand Four Hundred and Sixty only), as against their lodgment of claim amounting to Rs.4,19,60,914/-(Rupees Four Crores Nineteen Lakhs Sixty Thousand Nine Hundred and Fourteen only); and that the provisions of unjust enrichment are not applicable to the case of the appellants. Further, the Range Superintendent had also stated in his report that there was a demand of Rs.8,52,73,990/- (Rupees Eight Crores Fifty Two Lakhs Seventy Three Thousand Nine Hundred and Ninety only) along with applicable interest and penalty, which were confirmed against the appellants for short payment of duty.

1.2 On the basis of the above report submitted by the Range Superintendent, the Original Authority took up adjudication proceedings and vide order dated 22.12.2014 had sanctioned the refund amount of Rs.3,84,15,460/- (Rupees Three Crores Eighty Four Lakhs Fifteen Thousand Four Hundred and Sixty only) in favour of the appellants. But instead of crediting the said refund amount in the appellant's account, the original order had appropriated the same under Section 11 of the Central Excise Act, 1944 against the arrears pending recovery from the appellants in view of the order dated 31.03.2014 passed by the Commissioner of Central Excise, Belgaum Commissionerate.

1.3 On appeal against the original order dated 22.12.2014, the learned Commissioner of Central Excise (Appeals) vide the impugned order dated 14.02.2017 has allowed the appeal in favour of the appellants, with directions for grant of consequential relief. Feeling aggrieved with the impugned order, Revenue has preferred this appeal before the Tribunal. Revenue has assailed the impugned order on the ground that in respect of the appeal along with stay application filed before the Tribunal, recovery proceedings have to be initiated after 30 days from the date of filing of appeal, if no stay is granted or after disposal of the stay petition in accordance with the conditions of stay, if any, whichever is earlier. In this context, Revenue has relied upon the Circular No. 967/01/2013-CX dated 01.01.2013 issued by the CBEC in the grounds of appeal annexed to the appeal memorandum.

2. Heard both sides and examined the case records.

3. We find that while allowing the appeal filed by the appellants, the learned Commissioner (Appeals) vide the impugned order dated 14.02.2017 has held that the Tribunal in the case of the appellant itself, on different issue, had passed the Stay Order No. 20153/2015 dated 07.01.2015, in dispensing with the condition of pre-deposit of balance amount of dues and entire amount of interest and penalty. It

has further been held that since the stay has been granted by the CESTAT, Bangalore against the confirmed demand, the directions given in the Board Circular dated 01.01.2013 (supra) may not be applicable to the present case and the said appropriation would become null and void. We are in agreement with such observations made in the impugned order inasmuch as the amount of Rs. 8,52,73,990/- (Rupees Eight Crores Fifty Two Lakhs Seventy Three Thousand Nine Hundred and Ninety only) is under litigation as on date and as such, not to be considered as the "confirmed dues", in order to proceed against the appellants under Section 11 *ibid* for recovery, considering the same as "sums due to Government". Thus, appropriation of the present refund application under Section 11 *ibid* by the original authority is not proper and justified.

4. The Circular dated 01.01.2013 issued by the CBEC has been considered by this Tribunal in the case of ***Chief Commissioner of Central Excise (Bangalore Zone), Bangalore,*** reported in ***2013 (295) E.L.T. 494 (Tri.-Bang.).*** The Bench had observed that in respect of certain type of cases, the field formations coming within the jurisdiction of the Tribunal shall not resort to any action as proposed in the Board's Circular dated 01.01.2013 (supra). It has further been directed in the said order that where the recovery action is proposed, the officer initiating

action shall clearly indicate that he is satisfied that the assessee/person does not fall in any of the exceptions provided in paragraph 6 in the said order. We find that the said order passed by the Tribunal has not been appealed against by the Revenue, meaning thereby that the said order has attained finality and cannot be agitated by Revenue by placing reliance of the Board's Circular dated 01.01.2013. Further, the Hon'ble Bombay High Court in the case of ***Larsen & Toubro Ltd. Vs. Union of India [2013 (288) E.L.T. 481 (Bom.)]***, by referring to the said Circular issued by Board, has held that recovery of Government dues after appellate order is not proper inasmuch as it deprives assessee even a reasonable time to exercise remedy provided to them under law of moving before the Appellate Authorities by way of filing appeal and application for waiver of pre-deposit. The relevant paragraph in the said judgment is extracted herein below:

> ***"14.*** *Sr. No. 10 of the circular of the Board deals with an appeal to the CESTAT where the Commissioner (Appeals) has confirmed a demand in an order-in-original of the adjudicating authority. The circular stipulates that recovery has to be initiated immediately on the issue of the order-in-appeal. In a situation where the Commissioner (Appeals) has confirmed the demand made in the order of adjudication, the assessee is permitted by*

the provisions of Section 35F to move the Tribunal for a dispensation of the requirement of deposit. But the circular mandates that recovery shall be made immediately on the issue of an order in appeal implying thereby that recovery would be initiated without allowing the assessee, the time which is allowed by the statute for filing an appeal and for applying for a waiver of pre-deposit. Similarly, Sr. No. 11 stipulates that where the Tribunal has confirmed the demand, a recovery would be initiated immediately on the issuance of the order of the Tribunal. The assessee is therefore deprived of even a reasonable period of time to move the High Court against the order of the Tribunal. In our view, the circular which is issued by the Board is in terrorem and its plain effect and consequence is to deprive the assessee of the remedy which is provided under the law of moving, as the case may be, the CESTAT, the High Court or the Supreme Court against an order of adjudication of the competent appellate forum. Initiating recovery proceedings because a stay application has not been disposed of within thirty days of the filing of an appeal would be to penalize an assessee for the inability of the judicial or, as the case may be, quasi-judicial authority to conclude the disposal of the stay application

> *within that period. If the assessee is not responsible for the delay in the disposal of the stay application and the application remains pending for reasons not attributable to the conduct of the assessee, initiation of recovery proceedings would be arbitrary and unfair. However, if the failure to dispose of an application for stay is because of the conduct of the assessee, such as by a resort to dilatory tactics, the revenue would in such a situation be justified in commencing recovery action. Moreover, there is no justification to commence recovery immediately following an order-in-appeal where a period of limitation is laid down by the relevant provision of law for challenging the decision of the Appellate Authority."*

5. On the identical issue, the Hon'ble Karnataka High Court in the case of ***M/s. Sansera Engineering Pvt. Ltd. Vs. Deputy Commissioner of Central Excise, Bangalore [2013-TIOL-321-HC-KAR-CX]*** has directed to keep the demand notice in abeyance, until such time, the Appellate Authority passes an order on the interlocutory application filed by the petitioner in the appeal and thereafter to proceed in terms of the order, that may be passed by the Commissioner (Appeals).

6. In the case of the appellants, since the appeal filed earlier, involving the adjudged demand of duty of Rs. 8,52,73,990/-(Rupees Eight Crores Fifty Two Lakhs Seventy Three Thousand Nine Hundred and Ninety only) is pending disposal before the Tribunal, the contents of the Circular dated 01.01.2013 cannot be considered and acted upon for initiating recovery action by taking recourse to the provisions of Section 11 *ibid,* considering the same as "sums due to Government".

7. Therefore, we do not find any infirmity in the impugned order, insofar as it has allowed the appeal with consequential relief in favour of the appellants. Accordingly, the appeal filed by Revenue is dismissed.

(Operative portion of the order was pronounced
in the Open Court on **29/04/2022**)

(S.K. MOHANTY)
JUDICIAL MEMBER

(P. ANJANI KUMAR)
TECHNICAL MEMBER

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