CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL CHENNAI

REGIONAL BENCH – COURT NO.III

Customs Appeal No. 247 of 2011
(Arising out of Order-in-Appeal No.30 / 2011 dated 29.03.2011 passed by Commissioner of Customs & Central Excise (Appeals), Tiruchirappalli)

Commissioner of Customs
Custom House, New Harbour Estate,
Titocprom 628 004. **Appellant**

VERSUS

M/s.Sakthi Sugars Ltd.
No.180, Race Course Road,
Post Box No.3775,
Coimbatore 641 018 **Respondent**

APPEARANCE :

Ms. T. Usha Devi, DC (AR)
For the Appellant

Shri M.N.Bharathi, Advocate
For the Respondent

CORAM : HON'BLE MS. SULEKHA BEEVI C.S., MEMBER (JUDICIAL)
HON'BLE MR. ANIL G. SHAKKARWAR, MEMBER (TECHNICAL)

Date of Hearing : 29.01.2020
Date of Decision : 29.01.2020

FINAL ORDER No. 40175 / 2020

PER : SULEKHA BEEVI C.S

Brief facts of the case are that the respondents who are manufacturers of sugar filed an application dated 14.05.2010 for refund of sugar cess paid on raw sugar imported by them under various Bills of Entry. After due process of law, the original authority rejected the refund claim stating that the Notification No.S.O. 102 (E) dt. 07.02.2009 exempting levy of CESS on sugar is not applicable to the refund claim of the appellant and also that since the respondents have not challenged the assessment they are not eligible for refund. An appeal was filed before the Commissioner (Appeals) by the assessee respondents and vide the order impugned herein the Commissioner (Appeals) held that appellants are eligible for refund. Hence this appeal.

2. On behalf of the department, Ld. A.R Ms. T. Usha Devi appeared and argued the matter. It is submitted by her that sugar cess is collected on imported raw sugar as part of additional duty of customs levied under Section 3 (1) of Customs Tariff Act, 1975 like any other Central Excise duty as if the goods are manufactured in India. Additional Customs duty is levied on imported goods which is equivalent to Central Excise duty for time being leviable if produced or manufactured in India, including cess also. During the said period there are no statutory provisions under the relevant Act or Rules or notification exempting levy of sugar cess on imported sugar. The notification relied on by the respondents before the adjudicating authority does not exempt payment of sugar cess directly but exempts cess only in respect of any sugar which has been manufactured out of any raw sugar on which cess has already been paid. Thus it is clear that cess is payable on imported raw sugar in the instant case. The order passed by the Commissioner (Appeals) relating to refund claim is therefore erroneous and requires to be set aside.

3. It is also submitted by her that the Bills of Entry connected to this issue have been assessed which includes payment of Central Excise duty

apart from other duties. The respondent did not request for any provisional assessment at the time of assessment of Bill of entry. If aggrieved by the assessment order, the respondent has an option to file appeal before the appropriate forum. Since assessments have been finalized, the decision in the case of *Priya Blue Industries Ltd. VS CC (Preventive)* - 2004 (172) ELT 145 (SC) and that of *ITC Ltd. Vs CCE Kolkata* - 2019 (368) ELT 216 (SC) would be applicable and the refund claim is not sustainable. The Commissioner (Appeals) ought not to have allowed the appeal.

4. Ld. Counsel Shri M.N. Bharathi appeared on behalf the respondent. It is submitted by him that Commissioner (Appeals) in para-4 has correctly analyzed the facts and the law applicable in the present case. Appellants had imported raw sugar which was used for manufacture of sugar and removed on payment of Central Excise duty. As per Section 3 of Sugar Cess Act, 1982 cess is leviable as the duty of excise on sugar manufactured by any sugar factory. Thus appellants have paid sugar cess while removing the manufactured sugar from their factory. The present refund claim relates to the sugar cess paid by them under protest on the imported raw sugar. At the time of filing of Bill of Entry, appellants were asked to pay sugar cess as part of the additional duty of customs on the imported goods. The appellant then informed the department that they are not liable to pay sugar cess and only to have the goods cleared they paid the cess amount marking their protest. Thereafter refund claim has been filed. The department did not initiate any proceedings by issuing SCN

even though respondent marked their protest while paying sugar cess. The department cannot now turn around and say that respondent has not requested for reassessment of the Bill of Entry.

5. It is further pointed out by ld. counsel that sugar cess is levied by Ministry of Consumer Affairs, Food and Public Distribution. It is collected as duty of excise by the Department of Revenue. As per CBEC Letter No.345/2/2004-TRU dt. 10.08.2004, it is clarified that such cess is not duty of excise. The Commissioner (Appeals) thus correctly held that cess is not payable on the sugar imported into India.

6. Heard both sides.

7. The first issue that arises for consideration is whether decision in the case of *Priya Blue Industries* (supra) and *ITC Ltd*. (supra) would apply to the facts of this case. Ld. A.R has argued that since respondent has not requested for reassessment of the Bill of Entry, they are not eligible for refund. It is not disputed that the respondents have paid the cess at the time of filing the Bill of Entry under protest. The marking of protest itself gives information to the department that there is requirement for re-assessment. Assessment under Section 17 of Customs Act, 1962 cannot be said to be finalized when respondent has marked the protest while paying duty. In case, respondents had paid the entire duty without any mark of protest, in order to claim refund they have to request for reassessment of Bill of Entry. The mark of protest is an information to the

department that the respondent is not making payment of cess voluntarily and then department has to initiate proceedings to vacate protest and pass speaking order for reassessment. If the department fails to do so the respondents cannot be put to any disadvantage of rejecting the refund claim. We find the first ground raised by the Ld. A.R cannot sustain and deserves to be brushed aside.

8. The second issue is whether cess paid by the respondent is eligible for refund. The discussions made by Commissioner (Appeals) in para 4.1 is noteworthy. The same is reproduced as under :

> "04.02 Further the Hon'ble CESTAT in the case of M/s. Andhra Pradesh Paper Mills Ltd. vs. CCE reported in 2009 (235) ELT 474 (Tri.-Bang.) held that "paper cess is levied by the department of Industrial Development, Ministry of Commerce and Industry and hence it is not duty of excise". The Hon'ble Tribunal in the case of M/s. Tafe Ltd. Vs. Commissioner reported in 2008 (222) ELT 80 (T) held that "the automobile cess is levied and collected by the Department of Heavy Industry. Thus automobile cess was not considered as duty of excise". Further, the Hon'ble Tribunal in the case of M/s. Shakari Khand Udyog Mandli Ltd. Vs. CCE reported in 2008 (232) ELT 61 (T) held that "Sugar cess is levied by Ministry of Consumer Affairs, Food and Public Distribution and is not levied by Ministry of Finance though it is collected as "duty of excise" by the Department of Revenue and hence as per CBEC's letter No. 345/2/2004-TRU, dated 10.08.2004 such cess is not duty of excise". In the present appeal, the sugar cess is levied by the Ministry of Consumer Affairs and not to be regarded as duty and not levied by the Ministry of Finance. Therefore the Sugar Cess is not leviable on the imported raw sugar and is leviable on the sugar manufactured by the sugar units in India only."

9. It is also mentioned by the Commissioner (Appeals) that the Board has clarified in a letter dt.10.08.2004 that cess is not a duty of excise. Though there may be decisions in which it is held that sugar cess is also

duty of excise, the circular issued by the Board is binding on the department. Therefore the decision placed before us by the Ld.A.R contending that sugar cess is also duty of excise and therefore payable by the respondent does not find favour with us. We do not find any grounds to interfere with the reasoned order passed by the Commissioner (Appeals). The appeal filed by the department is therefore dismissed being devoid of merits.

(Operative part of the order pronounced in court)

(SULEKHA BEEVI C.S.)
Member (Judicial)

(ANIL G. SHAKKARWAR)
Member (Technical)

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