

**IN THE CUSTOMS, EXCISE & SERVICE TAX
APPELLATE TRIBUNAL
SOUTH ZONAL BENCH, CHENNAI**

C/41946/2013

(Arising out of Order-in-Appeal C. Cus. No.831/2013 dated 17.6.2013 passed by the Commissioner of Customs (Appeals), Chennai)

Commissioner of Customs, Chennai

Appellant

Vs.

M/s. Bellary Iron Ores Pvt. Ltd.

Respondent

Appearance

Shri K. Veerabhadra Reddy, JC (AR) for the Appellant

Shri M.S.Nagaraja, Advocate for the Respondent

CORAM

Hon'ble Ms. Sulekha Beevi C.S., Member (Judicial)

Hon'ble Shri Madhu Mohan Damodhar, Member (Technical)

Date of Hearing : 01.11.2017

Date of Pronouncement: 21-11-2017

Final Order No. 43004/2017

Per Bench

The respondent exported iron ore in bulk vide Shipping bill dated 13.6.2008 and as per the practice in vogue, during the material period, they discharged the export duty taking the export price (FOB) as cum-duty price. Department issued a demand notice to the respondents dated 26.6.2008 on the ground that the respondent should have paid export duty on the entire FOB value and hence differential duty of



Rs.1,96,75,425/- would be required to be paid. Subsequent to issue of this notice, appellant paid the amount on 8.7.2008. The respondent thereupon preferred a refund claim on 28.8.2009, seeking refund of Rs.39,35,925/- in view of the said circular dated 10.11.2008. Vide order dated 22.3.2011, the original authority rejected the refund claim as time barred. On appeal, Commissioner (Appeals) vide the impugned order dated 17.6.2013, held that the export duty paid during the relevant period should be treated as paid under protest and hence refund claim cannot be treated as time barred and held that the respondents are eligible for refund of the excess amount of Rs.39,35,925/- paid by the respondent. The lower appellate authority thus set aside the order of the original authority. Aggrieved, the department has filed this appeal.

2.0 Today, when the matter came up for hearing, Id. AR Shri K. Veerabhadra Reddy reiterated the grounds of appeal and made oral submissions which can be broadly summarized as under:-

2.1 The respondent should have filed the refund claim within the stipulated period of six months from the date of payment of duty.

2.2 No protest has been launched by the appellant at the time of the amount demanded in the demand notice of Rs.1,96,75,425/-. Hence the observation of the appellate



authority that differential duty should be considered as paid under protest is not acceptable.

2.3 The respondent had not tried to get assessment corrected even after issue of CBEC Circular dated 10.11.2008.

2.4 The letter dated 4.7.2008 of the respondent conveyed the payment of differential duty liability demanded in the demand notice does not indicate that they are paying the same under protest.

3.0 On the other hand, Id. counsel Shri M.S. Nagaraja appearing for the respondent submitted as under:-

3.1 Although the demand notice was issued to them on 26.6.2008, however, the said notice was never adjudicated and no speaking order was issued. When a demand notice is issued it gives rise to a lis/dispute. The amount was paid and reply filed. The department did not issue any speaking order appropriating the amount paid. Hence the amount of Rs.1,96,75,425/- deposited after issue of the show cause notice has not been appropriated by way of issue adjudication order. This being the case, the deposit of the said amount when not appropriated will require to be considered as an amount of deposit which has been paid under protest. In support of this, he relied upon the following case laws:-

- a. *Commissioner of Central Excise, Coimbatore Vs. Pricol Ltd. – 2015 (320) ELT 703 (Mad.)*



- b. *Ebiz.com Pvt. Ltd. Vs. Commissioner of Central Excise 0 2016 (49) STR 389 (All.)*
- c. *Commissioner of Central Excise, Madurai Vs. Servalakshmi Paper and Boards Pvt. Ltd. - 2011 (263) ELT 476*
- d. *Commissioner of Customs Vs. Mahalaxmi Exports - 2010 (258) ELT 217 (Guj.)*

3.2 In the circumstances, the amount deposited should be considered as having been paid under protest, which has not been vacated as observed by the Commissioner (Appeals) and therefore refund claim will not be hit by limitation. In the circumstances, there is no justification for interfering with the impugned order.

4. Heard both sides and gone through the facts.

5. The issue in dispute has emanated by issue of show cause notice dated 13.6.2008 to the respondent pursuant to issue of Customs Notification No. 79/2008 dated 13.6.2008. The differential duty of Rs.1,96,75,425/- was paid proximate to issue of notice on 8.7.2008. It is seen that the amount was paid without any protest. Thereafter, the CBEC vide Circular No. 18/2008 dated 10.11.2008 clarified that the existing policy of computation of export duty and cess by taking FOB value as cum-duty value would continue till 31.12.2008. Based on this clarification, the respondent preferred a refund claim for Rs.39,35,952/-. While the original authority held the refund claim as time-barred, the lower appellate authority allowed the



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appeal on the ground that the export duty paid should be treated as paid under protest.

5.2 Department has contended that as the respondent has neither paid duty under protest nor sought provisional assessment, normal period of six months under section 27 of the Customs Act, 1962 would apply. It is also contended by the department that respondent had not got the assessment corrected even after the issue of Board's Circular.

5.3 It cannot be denied that the facts leading to the filing of refund claim have occurred due to the change in stand of the department. In the first place, the Notification dated 13.6.2008 created a situation requiring issue of show cause notice for differential duty. Nonetheless, the Board Circular dated 10.11.2008 did a "U" turn in the existing practice and clarified that till 31.12.2008, the FOB price would be treated as cum-duty price.

5.4 We find that in an identical issue, in fact in a case ^{also} involving this ^{very} respondent, was decided by the CESTAT, Bangalore Bench, in Final Order No. 1071 to 1075/2010 dated 15.7.2010. The Tribunal in that case addressed the department's contention that the shipping bills were not provisionally assessed and also addressed the submissions of the department with regard to Flock India Pvt. Ltd. Judgment of the Hon'ble Supreme Court. However, following the earlier



Tribunal's decision in CC Vs. Sameera Trading Company – 2011 (264) ELT 678 (Tri. Bang.), the appeal of the department was rejected. We find that the appeal filed by the department against the above Tribunal's decision was dismissed by the Hon'ble Supreme Court as reported in 2015 (319) ELT 226 (SC).

5.5 We also find that the Hon'ble jurisdictional High Court in the case of Commissioner of Central Excise Vs. Pricol Ltd. – 2015 (320) ELT 703 (Mad.). has categorically laid down that any amount that is deposited during the pendency of the adjudication proceedings or investigation is in the nature of deposit made under protest.

6. Following the ratio of the above case laws, we do not find any merit in the appeal filed by the department for which the same is dismissed.

(Pronounced in open court on 21-11-2017)



(Madhu Mohan Damodhar)
Member (Technical)


(Sulekha Beevi C.S.)
Member (Judicial)

Rex



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सहायक पंजीकार / Assistant Registrar
सीमा शुल्क, उत्पाद शुल्क एवं सेवा कर अपील अधिकरण,
चेन्नई / CESTAT, CHENNAI - 600 006.