IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
CHENNAI

REGIONAL BENCH – COURT NO. I

Customs Appeal No. 40269 of 2019

(Arising out of common Order-in-Appeal Nos. 210 & 211/2018-TRY(CUS) dated 16.11.2018 passed by the Commissioner of G.S.T. and C.Ex. (Appeals), Coimbatore at Tiruchirappalli, No.1,Williams Road, Cantonment, Tiruchirappalli – 620 001)

M/s. Chemplast Sanmar Limited **: Appellant**
SIPCOT Industrial Complex,
Phase 1, Semmankuppam,
Cuddalore – 607 005

VERSUS

The Commissioner of Customs **: Respondent**
Tiruchirappalli Commissionerate,
No.1,Williams Road, Cantonment, Tiruchirappalli – 620 001

WITH

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APPEARANCE:

Shri V.S. Manoj, Advocate for the Appellant

Ms. T. Usha Devi, Authorized Representative (A.R.) for the Respondent

CORAM:

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

FINAL ORDER NOs. 41601-41602 / 2021

DATE OF HEARING: 15.04.2021

DATE OF DECISION: **23.06.2021**

Order :

The appellant, during the year under consideration had imported "Vinyl Chloride Monomer (VCM)" and sought for clearance vide (1) Bill-of-Entry No. 3602100 dated 12.10.2017 for 5000.319 MTs and (2) Bill-of-Entry No. 3722146 dated 23.10.2017 for 6809.948 MTs, of the same. It is not disputed that the above goods attracted Basic Customs Duty ('BCD' for short) of 2.0% also.

1.2 The appellant sought for provisional assessment for clearance of the above, since they were unable to produce original documents required at that point of time, and also requested for permission to pay the Customs Duty for the Bill-of-Lading quantity with an undertaking to pay the differential duty, if any, with applicable interest in case the quantity discharged was more than the declared quantity. Based on the above request for provisional assessment, the Bills-of-Entry in question were provisionally assessed by adopting the quantity and price as declared therein and the duty liability was determined at Rs. 5,45,12,779/- for the Bill-of-Entry dated 12.10.2017 and at Rs. 8,06,11,353/- for the Bill-of-Entry dated 23.10.2017. The Adjudicating Authority observes that during the course of provisional assessment, the importer-appellant had also executed Provisional Duty Bond for an amount of Rs. 2,59,43,118/- along with a Bank Guarantee for Rs. 16,36,000/- as security for the PD Bond for the Bill-of-Entry dated 12.10.2017 and another Provisional Duty Bond for an amount of Rs. 3,83,63,664/- along with a Bank Guarantee for Rs. 24,19,000/- as security for the PD Bond for the Bill-of-Entry dated 23.10.2017. There is also an observation that the goods were thereafter cleared on payment of provisional duty of Rs. 5,45,12,779/- paid through e-payment on 13.10.2017 in respect of the first Bill-of-Entry and on payment of provisional duty of Rs. 8,06,11,353/- paid through e-payment on 24.10.2017 in respect of the second Bill-of-Entry.

2.1 It appears that thereafter, the appellant sought for final assessment after furnishing all original documents, as required, vide its letter dated 16.11.2017, wherein it appears that the actual unit price was adopted at USD 783.5 per MT as against USD 809 (CFR) per MT as declared in the invoice in respect of the Bill-of-Entry dated 12.10.2017 and at USD 864.75 per MT as against USD 879.75 (CFR) per MT as declared in the invoice in respect of the Bill-of-Entry dated 23.10.2017. This had resulted in the excess duty payment by the appellant while getting the provisional assessment and accordingly, refund of the same was sought. The relevant observations of the Adjudicating Authority in the Order-in-Original No. 43/2017-18 dated 28.03.2018 reads as under:

> *"10. Accordingly, the importer submitted their reply vide letter dated 01.12.2017 wherein they have inter alia stated that <u>they have availed the IGST portion of the refundable amount as Input Tax Credit; that they intend to utilize the same to discharge their duty liability towards outward supply of goods</u>; that they have submitted the journal entries of books of accounts for reversal of BCD & Cess Portion of refundable duty from the cost of the goods; that they have submitted the SAP Print out of stock movement of both VCM and PVC (opening balance, production and closing balance) for the period 17th October 2017 (Goods Receipt Date) to 4th November 2017; they are adopting weighted average method of inventory valuation in their books of accounts; that <u>they request to process the refund of BCD & Cess portion only</u>."*

(Emphasis in original)

2.2 In the Orders-in-Original, the Adjudicating Authority determines the excess duty paid and the refund claims of BCD and thereafter, proceeds to examine the claims of the appellant from the perspective of unjust enrichment, if the duty was passed on, in terms of Section 18(5)(a) of the Customs Act, 1962. The Adjudicating Authority thereafter proceeds to examine the usage of raw materials in the production of the final product (i.e., PVC) based on the entries in the Books of the appellant *vis-à-vis* stock movement and vide Order-in-Original Nos.43/2017-18 (FAO) dated 28.03.2018 and 44/2017-18 (FAO) dated 28.03.2018 *inter alia* concluded that an amount of Rs. 17,14,470/-(BCD: Rs. 1,67,832/-, Customs Education Cess: Rs. 5,035/- and IGST: Rs. 15,41,603/-) becomes the excess paid duty in respect of the first Bill-of-Entry and an amount of Rs. 13,74,283/- (BCD: Rs. 1,34,531/-, Customs Education Cess: Rs. 4,035/- and IGST: Rs. 12,35,717/-) becomes the excess paid duty in respect of the second Bill-of-Entry; that the importer having availed the IGST portion of the duty as Input Tax Credit, had claimed only the refund of BCD and Cess portion of the excess duty paid to the tune of Rs. 1,72,867/- and Rs. 1,38,566/- respectively; that from the details of stock between 17.10.2017 to 04.11.2017, he was of the opinion that the whole quantity of imported goods, for which the duty element of BCD and Customs Education Cess was included, had been utilized in the manufacture of final product namely, Poly Vinyl Chloride (PVC) Resin and held that the PVC manufactured out of the imported raw material was transferred by way of sale to the ultimate buyer by 04.11.2017 (the date when the reversal entry was made), etc., and finally concluded that the duty element, to the extent of which refund was claimed, was passed on to the buyer and that therefore the claim of the appellant was hit by unjust enrichment. Thus, vide the above Orders-in-Original, the refund was sanctioned, however, was ordered to be credited to

Consumer Welfare Fund in terms of Section 18(5) of the Customs Act, 1962.

3. The appellant preferred First Appeal against the above action of AA directing credit into welfare fund before the Commissioner of Customs and Central Excise (Appeals), Tiruchirappalli, but it having not met with success there in its first appeal where the Commissioner (Appeals) vide common impugned Order-in-Appeal Nos. 210 & 211/2018-TRY(CUS) dated 16.11.2018 dismissed the appeals, has filed the present appeals before this forum.

4. Heard Shri V.S. Manoj, Learned Advocate appearing for the appellant and Ms. T. Usha Devi, Learned Departmental Representative for the Revenue and perused the documents placed on record.

5.1 The only issue that arises for my consideration is: whether the Revenue is justified in ordering the refund amount to be deposited in Consumer Welfare Fund? A perusal of the adjudication orders reveals that the Adjudicating Authority has mainly verified the usage of raw materials in the production of the final product between 17.10.2017 and 04.11.2017(19 days) in respect of first BOE/Order and between 27.10.2017 and 04.11.2017 (9 days) in respect of second BOE/Order. However, there is no finding at all as regards the primary contention of the appellant that the Basic Customs Duty itself was not legally payable, but was paid in excess.

5.2 Further, stock movement is traced from the date of its import, to its usage (19/9 days), but a finding is given to the effect that the same was sufficient to hold the passing on of the duty element. However, there is no finding at all as to what was actually passed on; rather, the exact amount of duty that was passed on is not there which is very vital. The Adjudicating Authority has very comfortably adopted the amount of refund claimed as the amount of duty passed on without demonstrating the specific amount, from the books or the Balance sheet.

6. Moreover, the stock of materials for a very short period i.e., 19 days and 9 days respectively as regards each Bill-of-Entry, alone are considered. What then happens to the opening stock as at the beginning of the year? Has it remained a part of the closing stock in the balance sheet at the end of the year? Was it never utilized? A clear finding on all these aspects is very much necessary, besides a positive finding on the exact amount of duty that is passed on, which are not there.

7. For the above reasons, I am of the clear opinion that the impugned order is not sustainable, is liable to be set aside and accordingly, the same is set aside. The matters are remanded to the file of the Adjudicating Authority to determine the above factual matrix after giving sufficient and reasonable opportunities to the appellant and then pass a speaking order as per law. All the contentions are left open.

8. The appeals are allowed by way of remand.

(Order pronounced in the open court on **23.06.2021**)

Sd/-
(P. DINESHA)
MEMBER (JUDICIAL)

Sdd