

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
CHENNAI**

REGIONAL BENCH – COURT NO. III

Excise Appeal No. 40449 of 2020

(Arising out of Order-in-Appeal No. CMB-CEX-000-APP-017-20 dated 29.06.2020 passed by the Commissioner of G.S.T. and Central Excise (Appeals), Coimbatore, 6/7, A.T.D. Street, Race Course Road, Coimbatore – 641 018)

M/s. ACC Limited (Unit: Madukkarai Cement Works) : Appellant
Madukkarai,
Coimbatore – 641 106

VERSUS

The Commissioner of G.S.T. and Central Excise : Respondent
Coimbatore Commissionerate
6/7, A.T.D. Street, Race Course Road, Coimbatore – 641 018

APPEARANCE:

Shri Pradeep Sawant, Senior Manager (Indirect Taxation) for the Appellant

Shri Arul C. Durairaj, Authorized Representative for the Respondent

CORAM:

HON'BLE MS. SULEKHA BEEVI C.S., MEMBER (JUDICIAL)

FINAL ORDER NO. 42438 / 2021

DATE OF HEARING: 18.11.2021

DATE OF DECISION: **22.11.2021**

Order :

The appellant is aggrieved by the rejection of its claim for refund of duty of Rs.7,54,303/- and interest.

2. Brief facts are that the appellant is engaged in the manufacture of cement. During the course of manufacturing cement, various kinds of capital goods are used of which some lose their efficiency with continuous usage. These used capital goods become unfit for further use and they are discarded as worn out capital goods and

sold as waste and scrap. As these goods are sold as waste and scrap, the appellants were of the view that no duty is payable.

3. The Department verified the records of the appellant and informed that they have to pay duty on the worn out machinery cleared as waste and scrap. Thereafter, the appellant vide their letter dated 02.01.2008 submitted that since the goods are cleared as 'waste and scrap', they are not liable to pay duty; however, it was stated that they would be paying duty under protest.

4. Later, Show Cause Notice dated 06.08.2009 was issued proposing to demand Excise Duty on such waste and scrap cleared by the appellant. On receipt of the Show Cause Notice, the appellant paid the duty and intimated the same to the Department vide letter dated 22.09.2009. Thereafter, the appellant had opted for Large Taxpayer Unit (LTU) scheme from September 2009 and all the files were transferred to LTU, Mumbai.

5. Thus, the Assistant Commissioner, LTU, Mumbai adjudicated the Show Cause Notice vide Order-in-Original dated 05.03.2012 whereby the demand of Rs.7,54,303/- was confirmed along with interest and imposed penalty. The amount already paid by the appellant was appropriated. Aggrieved by such order, the appellant filed appeal before the Commissioner (Appeals), LTU, Mumbai and the appeal was allowed by setting aside the demand vide Order-in-Appeal No. 47/2013 dated 28.03.2013.

6. Though the appellant was eligible to claim refund of the amount of Rs.10,18,495/- (Rs.7,54,303/- being the duty plus Rs.2,64,192/- being the interest), the appellant did not prefer an application for refund. With the introduction of G.S.T., the LTU, Mumbai was dismantled and all the case files of the appellant were once again transferred to the respective jurisdiction under the G.S.T. regime. Accordingly, the impugned case file of the

appellant was transferred to the Commissioner of G.S.T., Customs, Central Excise and Service Tax, Headquarters Office, Coimbatore.

7. It is seen that without considering the previous adjudication of the Show Cause Notice, the appellant was called upon for personal hearing and adjudication of the very same Show Cause Notice was done whereby Order-in-Original dated 20.11.2017 was passed wherein the duty demand of Rs.7,54,303/- was confirmed under Section 11A of the Central Excise Act, 1944 along with equal penalty under Rule 15(2) of the CENVAT Credit Rules, 2004 read with Section 11AC (c) of the Central Excise Act, 1944. The appellant challenged the above order by filing appeal before the Commissioner (Appeals), Coimbatore. During the course of personal hearing, it was brought to the notice of the Commissioner (Appeals) that the matter had already been decided in favour of the appellant vide Order-in-Appeal dated 28.03.2013. The Commissioner (Appeals), Coimbatore, vide Order-in-Appeal No. CMB-CEX-000-APP-053-18 dated 27.02.2018 set aside the Order-in-Original dated 20.11.2017 being null and void *ab initio* and allowed the appeal of the appellant.

8. The appellant then filed a claim for refund dated 23.03.2018 of the amount paid in regard to the above Show Cause Notice.

9. The Department issued Show Cause Notice dated 19.07.2018 proposing to reject the refund claim as being time-barred; it was also held by the Original Authority that the appellant has not established that the incidence of duty has not been passed on and thus failed to pass the test of unjust enrichment. After adjudication, the refund claim of the appellant for Rs.10,18,495/- dated 23.03.2018 was rejected vide Order-in-Original No. 18/2019 dated 20.12.2019. The appellant preferred an appeal before the Commissioner (Appeals), Coimbatore,

who vide order impugned herein upheld the order of rejection. Hence, this appeal.

10.1 Learned Senior Manager Shri Pradeep Sawant appeared and argued on behalf of the appellant and also made written submissions. He submitted that the restrictions provided under Section 11B of the Central Excise Act, 1944 will not be applicable to the present case as the amount paid is deposit during the pendency of the adjudication proceedings. It is also submitted by him that vide letter dated 02.01.2008, the appellant had intimated that the amount was paid under protest. That the amount paid by the appellant does not fall under "duty" and the same being a deposit made during pendency of the litigation, Section 11B *ibid.* will not be attracted.

10.2 In this regard, he placed reliance upon the decision of the Hon'ble High Court of Madras in the case of *Commissioner of C.Ex., Coimbatore v. M/s. Pricol Ltd.* reported in 2015 (320) *E.L.T.* 703 (*Mad.*).

10.3 It is also submitted by the Learned Senior Manager appearing for the appellant that since the payment was made pursuant to the Show Cause Notice, the allegation that the incidence of duty has been passed on is without any basis.

10.4 He prayed that the refund claim may be allowed.

11. Learned Authorized Representative Shri Arul C. Durairaj appeared on behalf of the Department. He supported the findings in the impugned order.

12. Heard both sides and perused the records.

13. From the narration of facts, it is clear that the litigation with regard to the demand raised in the Show Cause Notice dated 06.08.2009 has continued till 27.02.2018 whereby the Commissioner (Appeals), Coimbatore has set aside the demand, interest and penalties confirmed in the Order-in-Original. Though after

the first adjudication and consequent appeal (whereby the demand was set aside), the appellant ought to have filed the refund claim within a period of one year, since the Department has adjudicated the Show Cause Notice for a second time and confirmed the demand again, it cannot be said that the refund claim filed by the appellant is time-barred. In fact, the refund claim is filed within one month after passing of the second Order-in-Appeal which is dated 27.02.2018. The claim having been made within one year from the date on which the demand was set aside by the Commissioner (Appeals) finally, I am of the view that the rejection of refund claim as time-barred under Section 11B of the Central Excise Act, 1944 is not justified. Moreover, the amount having been paid as duty pursuant to the Show Cause Notice, the question of unjust enrichment does not arise.

14. From the foregoing, I have no hesitation to hold that the appellant is eligible for the refund. The impugned order is set aside.

15. The appeal is allowed with consequential reliefs, if any, as per law.

(Order pronounced in the open court on **22.11.2021**)

Sd/-
(SULEKHA BEEVI C.S.)
MEMBER (JUDICIAL)

Sdd