IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, CHENNAI

Excise Appeal Nos.40110 to 40113 of 2015

(Arising out of Order-in-Appeal No. TCP-CEX-000-APP-134 to 137/2014 dated 13.10.2014 passed by the Commissioner of Customs and Central Excise (Appeals), Trichy)

M/s. Shobika Impex Pvt. Ltd. **Appellant**
No. 34, Sannathi Street
Vennamalai Post
Karur – 639 006.

Vs.

Commissioner of GST & Central Excise **Respondent**
No. 1, Williams Road, Cantonment
Trichy – 620 001.

<u>APPEARANCE:</u>

Shri S. Durairaj, Advocate for the Appellant
Shri M. Selvakumar, AC (AR) for the Respondent

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Hon'ble Shri M. Ajit Kumar, Member (Technical)

Final Order Nos. 41021 to 41024/2024

Date of Hearing : 06.06.2024
Date of Decision: 02.08.2024

These appeals arise out of a common Order in Appeal No. 134 to 137/2014 dated 13.10.2014 passed by the Commissioner of Central Excise (Appeals), Trichy.

2. Brief facts of the case are that the appellant is a manufacturer and exporters of long-lasting insecticide HDPE mosquito bed nets. Appellants, being an EOU, exported the goods and claimed refund of accumulated CENVAT credit under Rule 5 of CENVAT Credit Rules, 2004 read with notification 27/2012-CE (NT) dated 18.6.2012, by filing the refund application after debiting the refund amount in the CENVAT credit register. The refund claims were allowed by the refund

sanctioning authority. Revenue filed appeals before Commissioner (Appeals) who vide the impugned order, allowed the appeals of the department on the grounds of certain procedural infirmities in the refund claims as mentioned in para 5 of the order. He set aside the order passed by the Ld. Original Authority, with directions that the refund is to be recovered along with interest. Hence these appeals before this Tribunal.

3. Shri S. Durairaj, learned counsel appeared for the appellant and Shri M. Selvakumar, learned Assistant Commissioner (AR) appeared for the respondent.

3.1 The learned counsel for the appellant submitted that the issue involved in all the appeals is related to the recovery of refund sanctioned under Rule 5 of CENVAT Credit Rules, 2004 as detailed below.

Sl No	Period	Refund Amount	Cestat A.No
1	April 2013 to June 2013	2,38,321/-	E/40110/2015
2	Jan 2013 to March 2013	2,28,829/-	E/40111/2015
3	July 2013 to Sep 2013	2,05,901/-	E/40112/2015
4	Oct 2013 to Dec 2013	3,01,400/-	E/40113/2015

He submitted that substantial benefits cannot be denied for procedural infirmities. The claims were verified by the Range Officer and also by the refund Sanctioning Authority before its sanction. However, the Revenue's appeal was preferred based on the post-audit officer's report without furnishing the same to the appellants, which amounts to violation of natural justice. He stated that the Commissioner (Appeals) has simply forwarded appeal memorandum [EA-2] of the Revenue to them and granted personal hearing. He has not issued any notice to show cause against the proposed order as required under 2nd proviso to Section 35A(3) of the Central Excise Act, 1944. Reliance was placed by him on the decision of the Hon'ble Supreme Court in the case of **Gujarat Machinery Manufacturers Ltd Vs CCE, Baroda** – 1996 (9) TMI 121 and also on the decision rendered by the Hon'ble High Court of Gujarat in the case of **Patel Filters Ltd Vs UOI** - 2008 (4) TMI 283. He stated that ineligible CENVAT credit cannot be recovered by way of denying the refund. It should be demanded by issuing a show cause notice by invoking Rule 14 of CENVAT Credit Rules, 2004. He also relied on the decision of the Tribunal in Final Order A/87226/2023 dated 13.12.2023**.** He prayed that the impugned orders may be set aside and the appeals allowed.

3.2 The learned Authorized Representative reiterated the findings of the Ld. Appellate Commissioner.

4. Heard both sides and perused the records. I find that the issue for consideration is that although the claims were sanctioned after being verified by the Range Officer and also by the refund Sanctioning Authority, Revenue's appeal was preferred based on the Post-Audit report without furnishing a copy of the same to the Appellants, which amounts to violation of natural justice. A show cause should have been issued to the appellant incorporating the said report before passing the proposed order as required under 2nd proviso to Section 35A(3) of the Central Excise Act, 1944.

5. I find that the Commissioner, Appeals has forwarded the appeal memorandum [EA-2] filed by revenue to the appellant and granted personal hearing. It's not clear whether the Audit note was enclosed

along with the appeal memorandum or whether the allegations in the note were substantially a part of the appeal filed. However, it is felt that the appellant cannot demand a copy of the post-audit note which is an internal document of the department. The department is free to use the said note in its entirety or only in part as is felt necessary for framing its appeal. No violation of natural justice is done even if the post-audit note of the department which is a correspondence between one wing of the department and another is not supplied to the appellant. The appellant is only required to meet the averments made in the appeal arising from within the issues before the Original Authority. However, if a copy of the audit note is made available to the Commissioner Appeals and is not a part of the appeal memorandum, it must normally be made available to the appellant also, unless the Commissioner Appeals has some valid reasons for not doing so and the reason for which is made clear in the order.

6. It's the appellants contention that a show cause notice against the proposed order was required to be issued to them by the Commissioner Appeals, under 2nd proviso to Section 35A(3) of the Central Excise Act, 1944. The said section is reproduced below for easy reference.

> 35A. Procedure in appeal.–
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> (1) The Commissioner (Appeals) shall give an opportunity to the appellant to be heard, if he so desires.
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> (2) The Commissioner (Appeals) may, at the hearing of an appeal, allow an appellant to go into any ground of appeal not specified in the grounds of appeal, if the [2][Commissioner (Appeals)] is satisfied that the omission of that ground from the grounds of appeal was not wilful or unreasonable.
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> (3) The Commissioner (Appeals) shall, after making such further inquiry as may be necessary, pass such order, as he thinks just and

> proper, confirming, modifying or annulling the decision or order appealed against:
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> Provided that an order enhancing any penalty or fine in lieu of confiscation or confiscating goods of greater value or reducing the amount of refund shall not be passed unless the appellant has been given a reasonable opportunity of showing cause against the proposed order:
>
> Provided further that where the Commissioner (Appeals) is of opinion that any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded, no order requiring the appellant to pay any duty not levied or paid, short-levied or short-paid or erroneously refunded shall be passed unless the appellant is given notice within the time-limit specified in Section 11A to show cause against the proposed order.
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> (4) The order of the Commissioner (Appeals) disposing of the appeal shall be in writing and shall state the points for determination, the decision thereon and the reasons for the decision.
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> (4A) The Commissioner (Appeals) shall, where it is possible to do so, hear and decide every appeal within a period of six months from the date on which it is filed.
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> (5) On the disposal of the appeal, the Commissioner (Appeals) shall communicate the order passed by him to the appellant, the adjudicating authority, the Principal Chief Commissioner of Central Excise or Chief Commissioner of Central Excise and the Principal Commissioner of Central Excise or Commissioner of Central Excise.

7. A plain reading of the second proviso to Section 35A(3) of the CEA 1944 shows that if the Commissioner (Appeals) is of opinion that any duty of excise has been erroneously refunded, no order requiring the appellant to pay any duty erroneously refunded shall be passed unless the appellant is given notice within the time-limit specified in Section 11A to show cause against the proposed order.

8. I however find that both the issues, which are a mixed question of fact and law, were not taken up before the Ld. Commissioner Appeals. The Appellant did not file any cross-objections to the appeals nor did they appear for a personal hearing on any of the three dates given to them. The Tribunal has an inherent power, indeed a duty, to prevent the right of appeal being abused by an appellant who keeps

back till the stage of appeal, points of law or fact which he could have raised before the lower authority, without showing any reason and thus places the other side at a disadvantage. Persons with good cause of action should pursue the remedy with reasonable diligence at every available opportunity. In the circumstances, due to the non-joining of the appellant in the appeal proceedings, the factual position relating to the audit note and the alleged non-issue of SCN or the view of the Commissioner Appeals on these legal issues is not available before me. I feel that in the circumstances of this case and in the interest of justice the matter merits to be remanded.

9. I accordingly set aside the impugned order and remand the matter back to the Ld. Commissioner Appeals for a decision afresh. The lower authority shall follow the principles of natural justice and afford a reasonable and time bound opportunity to the appellant to state their case both orally and in writing if they so wish, before issuing a speaking order in the matter. The appellant should also co-operate with the Ld. Commissioner Appeals in completing the process expeditiously and in any case within ninety days of receipt of this order. The appeals are disposed of accordingly.

(Order pronounced in open court on 02.08.2024)

(**M. AJIT KUMAR**)
Member (Technical)

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