

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI**

PRINCIPAL BENCH

SERVICE TAX APPEAL NO. 52983 OF 2018

[Arising out of the Order-in-Appeal No. 180(AG)/CE/JDR/2018 dated 22/03/2018 passed by Commissioner (Audit), CGST, Jodhpur (Raj.)]

**M/s Chambal Fertilizers and
Chemicals Limited,**
Village – Gadepan, District – Kota

...Appellant

versus

**The Commissioner, Central Goods
and Service Tax,**
Udaipur (Raj.).

...Respondent

APPEARANCE:

Ms. Shagun Arora, Advocate for the appellant.
Shri Rajeev Kapoor, Authorized Representative for the Department

CORAM:

**HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT
HON'BLE MR. P.V. SUBBA RAO, MEMBER (TECHNICAL)**

**Date of Hearing: 04.01.2023
Date of Decision: 30.01.2023**

FINAL ORDER NO. 50085/2023

JUSTICE DILIP GUPTA:

M/s Chambal Fertilizers and Chemicals Limited¹ has filed this appeal to challenge the order dated 22/26.03.2018 passed by the Commissioner (Audit), Central Excise and CGST, Jodhpur² by which the order dated 30.04.2010 passed by the Commissioner confirming the demand of service tax with interest and penalty has been upheld and the appeal has been dismissed.

2. The appellant is engaged in the manufacture of fertilizers and ammonia. In the year 2006-2007, the appellant entered into various

1. the appellant
2. the Commissioner (Appeals)

agreements with foreign parties for procurement of rights and licenses for use of technical information for manufacturing fertilizers. Such technical information was in the form of designs, flow drawings, vessel sketches, operating philosophy and material specifications along with other details.

3. A show cause notice for demand of service tax was issued to the appellant on 28.07.2008 proposing recovery of Rs. 1,42,79,138/- on license fee paid to foreign parties for import of technical know-how and engineering design license alleging that the appellant had imported 'intellectual property rights' service, which was susceptible to service tax in the hands of the appellant. The demand of service tax was confirmed by the Commissioner by order dated 26.04.2010. An appeal was filed by the appellant before the Tribunal bearing Service Tax Appeal No. 1037 of 2010 and an amount of Rs.1,26,59,954/- was deposited by the appellant under protest. The appeal was ultimately allowed by the Tribunal by order dated 22.07.2016. It was held that no service tax was payable on import of technical know-how and engineering design license as they were not intellectual rights recognized under any law in India.

4. Pursuant to the order of the Tribunal, the appellant filed claims for refund on 03.08.2016 and 08.08.2016 for an amount of Rs. 1,26,59,954/-, which had been paid by the appellant under protest. However, a show cause notice dated 05.10.2016 was issued to the appellant proposing to reject the refund on the ground that the appellant had not produced any documentary evidence to show that the incidence of tax had not been passed on to the ultimate buyer. A reply was filed by the appellant contesting the proposal made in the show cause notice contending that the test of unjust enrichment

would not apply in respect of refund of deposits made under protest and that duty could not have been passed on to the buyers after the goods were cleared.

5. An order dated 02.11.2016 was passed by the Commissioner rejecting the claim for refund made by the appellant by holding that the burden of tax had passed on as the amount was booked as 'expense' by the appellant.

6. The appeal filed by the appellant before the Commissioner (Appeals), Jaipur was rejected by order dated 22.03.2018 for the same reason that the appellant had not passed the test of unjust enrichment.

7. It is this order passed by the Commissioner (Appeals) that has been assailed in this appeal.

8. Ms. Shagun Arora, learned counsel for the appellant, made the following submissions:

- (i) The test of unjust enrichment would not apply to refund of an amount deposited during the course of investigation or proceedings and in this connection reliance has been placed upon the decision of the Tribunal in **Dewsoft Overseas Pvt. Ltd. vs. Commissioner of Service Tax, Delhi³**;
- (ii) The amount paid during pendency of proceedings is in the nature of a deposit;
- (iii) The method of accounting of deposit does not impact the admissibility of refund and in this connection reliance has been place on the decisions of the Tribunal in **Commissioner of Customs vs. U.T. Electronics**

3. 2019 (6) TMI 904-Cestat New Delhi

Pvt. Ltd.⁴ and Applied Chemical & Pharmaceuticals

Pvt. Limited vs. CCE & ST, Jaipur-I⁵; and

(iv) In any case the appellant had booked the amount has 'recoverable' in its books under the head 'current assets' in 20016-17 when the appeal was allowed by the Tribunal.

9. Shri Rajeev Kapoor, learned authorised representative appearing for the department, however, supported the impugned order passed by the Commissioner (Appeals) and referred to it at length. Learned authorised representative also submitted that unjust enrichment means passing not only of duty directly to another person but also indirectly.

10. The submissions advanced by the learned counsel for the appellant and the learned authorised representative for the department have been considered.

11. It transpires that in 2008, the service tax department had initiated proceedings against the appellant and issued a show cause notice proposing to demand service tax on services imported by the appellant from foreign companies. The department was of the view that designs, drawings and technical know-how received by the appellant from foreign companies qualified as intellectual property rights services, and when imported, these services were subject to levy of service tax in the hands of the appellant on reverse charge mechanism in terms of section 66A of the Finance Act. The appellant, on the other hand, contested the demand on the ground that technical know-how, designs and drawings did not qualify as

4. 2019 (12) TMI 1219-Cestat New Delhi

5. 2019 (2) TMI 849-Cestat New Delhi

intellectual property rights services as these intellectual property rights were not recognized under any law in force in India. After filling an appeal before the Tribunal against the order confirming the demand, the appellant paid an amount of Rs. 1,26,59,954/- under protest. Subsequently, when the appeal was allowed by the Tribunal, the appellant filed a claim for refund of the amount deposited under protest. This refund has been rejected on the ground that the appellant did not pass the test of unjust enrichment.

12. The issue as to whether unjust enrichment has to be examined while considering a claim for refund of an amount deposited during investigation or proceedings arose before the Madras High Court in

Commissioner of Central Excise, Coimbatore vs. Pricol Ltd.⁶

Investigations revealed that the assessee had cleared waste and scrap without payment of duty. Adjudication proceedings were initiated but during the pendency of these proceedings, the assessee deposited Rs. 1.55 Crores. A show cause notice dated 2 December, 1998 was, thereafter, issued to the assessee. After adjudication, the demand was confirmed by Order dated 11 May, 2001 and the amount of Rs. 1.55 Crores deposited by the assessee was directed to be appropriated. The assessee filed an Appeal against the aforesaid Order before the Tribunal. The Appeal was allowed by Order dated 17 December, 2004 and the Order passed by the Adjudicating Authority was set aside. The assessee thereafter filed a claim for refund of the deposit. The said refund was sanctioned by the Assistant Commissioner by Order dated 31 March, 2005. An Appeal was, however, filed by the Department. The Appeal was allowed and a direction was issued to the adjudicating authority to examine the plea

6. 2015 (320) E.L.T. 703

of unjust enrichment. Feeling aggrieved by the remand order, the assessee filed an Appeal before the Tribunal. The Tribunal held that there was no case of unjust enrichment on the facts of the case as the assessee had produced a certificate of the Chartered Accountant that refund claim had not been passed on to the customers. Against this order of the Tribunal, the department filed an Appeal before the Madras High Court. The plea of unjust enrichment was examined and the High Court found that it was not a case of refund of 'duty' since the assessee had deposited the 'amount' under protest at the time of investigation. The High Court found that the Courts had consistently taken a view that any amount deposited during the pendency of adjudicating proceedings or investigation is in the nature of deposit made under protest and, therefore, the principles of unjust enrichment would not apply when a refund is claimed for this amount. The relevant portion of the judgement of the High Court is reproduced below:

"7. The first question of law, which is raised, relates to the plea of unjust enrichment and much emphasis is laid on the decision of the Supreme Court in **Mafatlal Industries case (1997 (89) ELT 247 (SC))**. Relevant portion of the order passed by the Supreme Court in **Mafatlal Industries case** (supra) has been extracted in the grounds (b) and (c). There is no dispute with regard to the proposition of law as laid down by the Supreme Court. In the present case, as is evident from the records, it is not a case of refund of duty. It is a pre-deposit made under protest at the time of investigation, as has been recorded in the original proceedings itself. In this regard, it has to be noticed it has been the consistent view taken by the Courts that any amount, that is deposited during the pendency of adjudication proceedings or investigation is in the nature of deposit made under protest and, therefore, the principles of unjust enrichment does not apply. The above said view has been reiterated by the High Court

of Bombay in **Suvidhe Ltd. v. Union of India (1996 (82) ELT 177 (Bom.))**, and by the Gujarat High Court in **Commissioner of Customs v. Mahalaxmi Exports (2010 (258) ELT 217 (Guj.))**, which has been followed in various cases in **Summerking Electricals (P) Ltd. v. Cegat, New Delhi (1998 (102) ELT 522 (All.))**, **Parle International Ltd. v. Union of India (2001 (127) ELT 329 (Guj.))** and **Commissioner of Central Excise, Chennai v. Calcutta Chemical Company Ltd. (2001 (133) ELT 278 (Mad.))** and the said view has also been maintained by the Supreme Court in **Union of India v. Suvidhe Ltd. (1997 (94) ELT A159 (SC))**. There are also very many judgments of various Courts, which have also reiterated the same principles that in case any amount is deposited during the pendency of adjudication proceedings or investigation, the said amount would be in the nature of deposit under protest and, therefore, the principles of unjust enrichment would not apply. In view of the catena of decisions, available on this issue, this Court answers the first substantial question of law against the Revenue and in favour of the assessee."

(emphasis supplied)

13. A similar issue arose before the Allahabad High Court in **EBIZ. Com Pvt. Ltd. vs. Commissioner of Central Excise, Customs & Service Tax and Ors⁷**. The assessee was engaged in the business of developing and selling various online/offline educational software packages. The Anti-Evasion Branch of Central Excise Department, NOIDA conducted a search in its premises on 12 January, 2007 and the assessee deposited an amount of Rs. 25,55,000/-. The assessee also deposited an amount of Rs. 2,59,000/- on 21 March, 2007 towards interest. Thereafter, a show cause notice dated 3 July, 2007 was issued to the assessee demanding service tax. The demand was confirmed, against which an appeal was filed which was dismissed by

7. 2016 (9) TMI 1405

the Commissioners (Appeals) on 29 August, 2008. The assessee filed an appeal before the Tribunal which was allowed by order dated 23 December, 2012 and the matter was remanded to the Commissioner (Appeals). The Commissioner (Appeals), thereafter, by order dated 29 August, 2012 allowed the appeal and set aside the order passed by the adjudicating authority. The assessee thereafter, filed a refund claim on 27 January, 2014. A show cause notice dated 2 April, 2014 was issued requiring the assessee to explain why the refund claim should not be rejected for the reason that it had not been made within one year. No order was passed and, therefore, a writ petition was filed in the Allahabad High Court. The Allahabad High Court examined the provisions of Section 11AB of the Central Excise Act, 1944, which contemplates that the amount shall be refunded to the assessee provided the incidence of such duty had not been passed on by him to any other person. The Allahabad High Court held that any amount deposited during the pendency of the adjudicating proceedings or investigation is in the nature of a deposit under protest and, therefore, the principles of unjust enrichment would not be attracted. In coming to this conclusion, the Allahabad High Court placed reliance upon the decision of the Madras High Court in **Pricol Ltd.**

14. The aforesaid decisions of the Madras High Court and the Allahabad High Court in **Pricol Ltd.** and **EBIZ. Com Pvt. Ltd.** were followed by the Allahabad High Court in **Commissioner of Central Excise, Lucknow Vs. Eveready Industries India Ltd**⁸.

8. 2017 (357) E.L.T. 11

15. This issue was also examined by the Tribunal in **Commissioner of Customs, Bangalore vs. Motorola India Pvt. Ltd**⁹. The Tribunal upheld the view of the Commissioner(Appeals) that the power of unjust enrichment would not be applicable for refund of an amount deposited during investigation and the relevant paragraph is reproduced below:

"10. It is clear that the Commissioner(A) dealt with two refund claims in respect of each of the appeal filed before him. The fact that the amounts were paid during investigation is not in dispute. The duty liability on the Respondents is settled consequent to Commissioner's order dated 6.10.2003 in respect of Appeal No. 44/05. But as regards Appeal No. 45/05, the Respondents filed the refund claim before the Asst. Commissioner as earlier as 9.11.2001 though the Commissioner passed his order on 27.2.2004. The point is that in respect of both the claims, the amounts were deposited during the course of investigation by the DRI. **The Commissioner (A) has elaborately discussed the issues and come to the conclusion that the excess amount deposited after taking into account the duty liability determined by the Commissioner is in the nature of a deposit and therefore, the bar of unjust enrichment is not applicable. We agree with the learned Consultant's submission (for the Respondent) that when the duty paid during the pendency of an appeal before the appellate authority is considered as deposit, there is no reason why the amount deposited during investigation cannot be considered as deposit.** We also find that the decision of the larger Bench in the case of **Jayant Industries** (Supra) has merged with the Apex Court's decision in the case of **ITC** (Supra). Hence, the bar of unjust enrichment would not be applicable even to the amounts deposited during investigations. The contentions raised by Revenue are not tenable. Hence, we do not want to interfere with the findings of the appellate authority."

(emphasis supplied)

9. 2006 (206) E.L.T. 370

16. It is, therefore, clear from the aforesaid decisions of the High Courts and the Tribunal that any amount deposited during the pendency of adjudication or investigation is in the nature of a deposit and, therefore, cannot be considered to be towards payment of service tax or excise duty. The principles of unjust enrichment, therefore, would not apply if a refund is claimed for refund of this amount.

17. It also needs to be noted that the refund claim has been rejected on the ground that in 2006-07, the amount deposited was accounted as 'expense' in the Profit and Loss account of the appellant, meaning thereby that the burden of duty had passed.

18. The method of accounting followed by an assessee does not impact the admissibility of refund, and cannot be made a basis to hold that the incidence of duty had passed. In this regard, reliance can be placed on the decision of the Tribunal in **Commissioner of Customs, ACC Import Commissionerate, New Customs House, New Delhi vs. UT Electronics Private Limited**¹⁰. The Tribunal held that merely because the excise duty is booked as 'expenditure' in Profit and Loss account, it cannot be said the incidence of duty had passed. A similar view was taken by the Tribunal in **Allied Chemicals & Pharmaceutical Private Limited vs. CCE & ST, Jaipur-I**¹¹. In any case, the entry made by the appellant of the amount in 2006-07 was neutralized by the appellant in 2016-17, when the appellant booked the same amount as 'recoverable' in its books under the head 'current assets', after the appeal was allowed by the Tribunal.

10. 2020-TIOL-386-CESTAT, Delhi

11. 2019 (2) TMI 849- CESTAT New Delhi

19. It further needs to be noted that the price of the goods has been fixed by the Government of India. The cost of goods manufactured by the appellant is ascertained on the basis of cost of inputs, which are, gas and cost of production, plus profit. Considering the nature of goods, and for the purposes of extending subsidy thereon, the Government of India determined the Maximum Retail Price of the goods for sale to the ultimate buyers. The difference between the cost of production and the Maximum Retail Price is reimbursed by the Government of India to the appellant. If the price of goods is fixed by the Government of India, such price cannot be altered by inclusion of any duty. Thus, the issue of unjust enrichment would not be applicable. This is the view taken by the Supreme Court in **State of Rajasthan vs. Hindustan Copper Limited**¹², and the relevant observations are as follows:

2. On the question of refund, an affidavit of Shri rashant Swarup, authorised representative of the respondent, has been filed wherein it has been stated that there is no question of any unjust enrichment of the respondent as a result of the refund of the excise duty paid on rectified spirit because the respondent has not passed on the duty to any consumer of the final product, viz., copper, manufactured by the respondent. **It has been stated in the said affidavit that the price of copper has always been fixed by the Mineral & Metal Trading Corporation (MMTC) on the basis of the prevailing price fixed by the London Metal Exchange (LME) and this was done not only for the period in question but also for prior and subsequent period and that only such price could be charged and that no part of the duty in respect of rectified spirit captivity consumed in the manufacture of copper could be added to the price of copper which was fixed on the basis of the LME prices.** We have no reason to

12. 1997 (11) TMI 516-Supreme Court

doubt the correctness of the aforesaid statement contained in the said affidavit. In the circumstances, no case is made out for interference with the direction contained in the impugned judgment of the High Court regarding refund of excise duty paid by the respondent on import of rectified spirit used in the manufacture of copper. The appeals are, therefore, dismissed. No order as to costs."

(emphasis supplied)

20. In view of the aforesaid discussion, the order dated 22/26.03.2018 passed by the Commissioner (Appeals) cannot be sustained and is set aside. The appeal is, accordingly, allowed. The appellant would be entitled to refund of the amount of Rs.1,26,59,954/- with interest at the applicable rate.

(Order pronounced on **30.01.2023**)

(JUSTICE DILIP GUPTA)
PRESIDENT

(P.V. SUBBA RAO)
MEMBER (TECHNICAL)

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Date of Hearing: 04.01.2023

Order pronounced on **30.01.2023.**

**(JUSTICE DILIP GUPTA)
PRESIDENT**

**(HEMAMBIKA R PRIYA)
MEMBER (TECHNICAL)**