CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH – COURT NO. IV

EXCISE APPEAL No. 51957 of 2022

(Arising out of Order in Appeal No. DDN/EXCUS/000/APPL/38/2022-23 dated 13/07/2022 passed by Commissioner (Appeals), Central Excise & Central Goods and Service Tax, Dehradun)

M/s. Soltec (Unit-II) **...Appellant**
Khasra No.3964 and 3965
Lal Tapp-ar Industiral Area,
Dehradun

Versus

Commissioner of Central GST,
Dehradun **....Respondent**

APPEARANCE:
Mr. Rajesh Gupta, FCA for the appellant
Mr. Gopi Raman, Authorized Representative for the Respondent

CORAM : HON'BLE DR.RACHNA GUPTA, MEMBER (JUDICIAL)

Date of Hearing/ Decision: **30/01/2023**

FINAL ORDER No. 50118/2023

DR.RACHNA GUPTA

Present order disposes of the appeal arising out of Order-in-Appeal bearing No. 86/2021-22 dated 28.03.2022. The relevant facts in brief are as follows:-

That the appellant is engaged in the manufacture and sale of foot ware components i.e. Uppers/ Footbed/ Midsole, Bottom etc. Appellant was transferring those products to their Unit-1 on payment of Central Excise Duty on such assessable value of the said products as used to be arrived at in terms of Rule 8 of Central Excise (Valuation) Rules, 2000. However, the appellants opted for a provisional assessment of duty on the said products for the clearances in the period of 2016-17.

2. The Department scrutinized the Cost Accounting Standard (CAS) – 4 data of the appellant for the said Financial Year 2016-17. From the month-wise duty liability of the appellant, it was found that during the months from August, 2016 to December, 2016 the appellant had paid total duty of Rs.2,17,328/- in excess. However, for the remaining months from January, 2017 to March, 2017, there was a short payment of duty of Rs.2,21,776/-. The excess payments of the appellant was got verified by the Jurisdictional Range Superintendent who reported that the incidence of excise duty as was paid in excess by the appellant has been passed on to the ultimate consumer through their sister concern. Accordingly, the refund of the said excess was denied by the adjudicating authority at the time of final assessment of the impugned clearances. Finally vide the order / memorandum No.01/2022 dated 11.03.2022, the demand of Rs.221776/- towards the short payment of duty for the months of January, 2017 to March, 2017 was confirmed alongwith the interest. The said order/ memorandum was challenged by the appellant. However, the appeal has been rejected vide the aforementioned Order–in-Appeal under challenge. Being aggrieved, the appellant is before this Tribunal.

3. I have heard Shri Rajesh Gupta, Chartered Accountant appearing for the appellant and Shri Gopi Raman, ld. Authorised Representative for the Department.

4. Ld. Consultant has mentioned that the appellant is having no sister concern as has been alleged by the Department. It is mentioned that appellant is running as one entity only with the help of two different units. Unit No.1 has been existing since March, 2010 and was availing the area based exemption in terms of Notification No.50/2003. However, the said exemption came to an end with effect from March, 2010 itself. The appellant established its second unit in August, 2016. Since then the appellant is discharging its duty liability on cost of production plus at the rate of 10% as per CAS – 4. It is mentioned on behalf of the appellant that duty liability was initially discharged under provisional assessment criteria. When the appellant applied for finalisation of the provisional assessment that the Department has failed to adjust the excess duty paid.

4.1 Ld. Consultant has further impressed upon that since unit No.1 was availing exemption, it was not entitled for any Cenvat Credit. The appellant otherwise has never availed the Cenvat Credit of duty liability discharged. The denial of adjustment of the excess duty or the refund thereof, that too, on the basis of unjust enrichment is mentioned to be highly irrational and illegal. The order confirming the duty demand without the aforesaid adjustments is therefore, prayed to be set aside and appeal is prayed to be allowed.

5. Ld. D.R. while supporting and impressing upon the correctness of the order under challenge has mentioned that the

Adjudicating Authorities have examined on the relevant documents as that of invoices wherein the excise duty element has been separately charged. Based on those documents, it has been held that excise duty charged has been made part of the cost of goods so transferred. It is mentioned that there seems no infirmity in these findings. However, it has been acknowledged that appellant has never availed the Cenvat Credit of the duty liability discharged.

6. Having heard the rival contentions of the parties and perusing the record, I observe and hold as follows:-

The Original Adjudicating Authority vide Memorandum No.1 dated 11.03.2022 has tabulated the month-wise duty liability of the appellant as follows:-

Month	Total Monthly Value as per ER-1 (Rs.)	Total monthly CEX duty as per ER-1 @6% (Rs.)	Total Monthly Value as per CAS-4 (Rs.) (Cost + 10%)	Total Monthly Duty as per CAS-4 @ 6% (Rs.)	Excess duty paid (Rs.)	Short duty paid (Rs.)
1	2	3	4	5	6=(3-5)	7 = (5-3)
Aug. 16	1743176	104591	1533244	91995	12596	NA
Sept.16	6526556	391593	5997912	359875	31718	NA
Oct. 16	4964598	297876	4721323	283279	14597	NA
Nov. 16	8025313	481519	6620488	397229	84290	NA
Dec. 16	6783778	407027	5548329	332900	74127	NA
Jan. 17	6003745	360225	6596928	395816	NA	35591
Feb. 17	5366576	321995	6591218	395473	NA	73478
Mar. 17	9573096	574386	11451544	687093	NA	112707
TOTAL	**48986838**	**2939210**	**49060985**	**2943659**	**217328**	**221776**

7. Hence, it is an admitted fact that appellant has paid an excess duty of Rs.2,17,328/- during the financial year 2016-17. It is also an admitted fact that said duty liability was discharged

based on the provisional assessment. There is also no denial to the facts that Unit-1 was captively consuming the entire manufactured products. In the light of these admitted facts, the only issue remains is as to whether adjustment of duty excess paid during the period of provisional assessment is permitted at the time of finalisation of assessment in terms of rule 7 of the Central Excise Rules when the appellants had neither take the refund of said excess nor had ever availed Cenvat Credit of duty liability discharged. The Larger Bench of this Tribunal in the case of **Hindustan Zinc Ltd. Vs. Commissioner of Central Excise, Jaipur reported as 2016 (336)ELT 328 (Tri-Del.)** has decided this issue. It has been concluded as follows:-

> *"Cumulative reading of all sub-rules of Rule 7 of Central Excise Rules, 2002 would show that amount payable by assessee or refundable to him subjected to outcome of final assessment. If on finalisation of assessment, assessee required to pay shortfall duty during a particular period and denied excess payment made during another period of same financial year, entire purpose of keeping assessment provisional would become a futile exercise. In that case, it becomes a case of short paid/assessed duty for that period and ending with recovery of same. Further, adjustment of excess paid duty against short payment not to be denied on taking of Cenvat credit by sister unit inasmuch as it is assessee's total duty liability after adjustment of short paid duty with excess paid duty which would be available as credit to other unit. Facts in case of Toyota Kirloskar Auto Parts Pvt. Ltd. [2012 (276) E.L.T. 332 (Kar.)] being similar to facts of present case and having been delivered by Karnataka High Court and binding upon Tribunal, Larger Bench decision in Excel Rubber Limited [2011 (268) E.L.T. 419 (Tri.-LB)] were held to have no relevance. Assessee was held entitled to adjustment of excess paid duty with short paid duty in same financial year.*

7.1 The Tribunal, Mumbai Bench in the case of **Mercedes Benz (I) Pvt. Ltd. Vs. CCE, Pune-II as reported in 2017 (347) ELT – 0646** also held as follows:-

> *"Adjustment of excess duty paid is allowable at the time of finalization of provisional assessment even when goods supplied to sister unit, who availed Cenvat Credit."*

7.2 The Tribunal, Mumbai Bench in another case of **Century Rayon vs. CCE, Thane-I as reported in 2014 (306) ELT – 0631** has held as follows:-

> *"Adjustment of excess duty paid against short duty paid is allowable at the time of finalization of provisional assessment if the assessee is able to establish that such excess payment has not been passed on but borne by the assessee."*

8. In the present case, Unit II is not even the sister concern. Appellant admittedly has not taken Cenvat Credit. These admissions when are read with above discussed settled legal position, it stands clear that the adjustment of excess duty paid is liable at the time of finalisation of the provisional assessment. No Cenvat Credit ever been taken, admittedly, by the appellant. The question of any unjust enrichment of the appellant does not at all arise. In view of these observations, it is held that the Adjudicating Authorities below have wrongly denied the adjustment of excess duty of the amount of Rs.2,17,328/- paid by the appellant to the amount of duty confirmed. The order under challenge is accordingly hereby modified. Consequent thereto the appeal stands allowed to that extent.

[Order dictated & pronounced in the open Court]

(DR.RACHNA GUPTA)
MEMBER (JUDICIAL)

Anita