CUSTOMS EXCISE & SERVICE TAX APPLELLATE TRIBUNAL
NEW DELHI
PRINCIPAL BENCH,COURT NO. 1

SERVICE TAX APPEAL NO. 54488 OF 2014

(Arising out of Order-in-Appeal No.49 (ST)/RPR-I/2014 dated 31.03.2014 passed by Commissioner of Central Excise & Customs, Raipur (CG).)

COMMISSIONER, CENTRAL EXCISE AND CUSTOMS-RAIPUR (CG)	**Appellant**

Vs.

BAGADIYA BROTHER PVT LTD Bagadiya Mansion Ground Floor, Jawahar Nagar, Raipur (CG).	**Respondent**

Appearance:
Present for the Appellant : Shri Ravi Kapoor, Authorised Representative
Present for the Respondent: Shri Bipin Garg & Ms Kainaat, Advocates

CORAM:
HON'BLE Mr.JUSTICE DILIP GUPTA, PRESIDENT
HON'BLE Mr.HEMAMBIKA R. PRIYA, MEMBER(TECHNICAL)

Date of Hearing : **08/02/2023**
Date of Decision : **08/02/2023**

FINAL ORDER NO. 50132 /2023

JUSTICE DILIP GUPTA

The Department has filed this appeal to assail the order dated 31.03.2014 passed by the Commissioner (Appeals) by which the order passed by the Deputy Commissioner sanctioning refund of Rs.53,73,949/- to the respondent has been upheld and the appeal has been dismissed.

2. It transpires from the records that the respondent had filed a refund claim of Rs. 93,17,618/- on the basis of a Notification dated 07.07.2009 claiming refund of service tax paid on services relating to export of iron ore fines. A show cause notice dated 29.01.2013 was

issued to the respondent by the Assistant Commissioner and the allegations made in the show cause notice are as follows:

> "7. As per notification no.17/2009-ST dated 07.07.2009, where the amount of refund sought is more than 0.25% of the FOB value of export, documents enclosed with the claim shall contain a certificate from the chartered accountant who audits the annual accounts of the exporter(claimant) for the Companies Act, 1956 (1 of 1956) or the Income Tax Act, 1961(43 of 1961). The instant claim is above 0.25% of FOB value of export. However, the Noticee have not submitted relevant invoices/bills raised by various service providers in respect of various services utilized for export of iron ore fines pertaining to instant refund claim of Rs.93.17,618/- duly certified by the chartered accountant who audit their annual report, as required under the said notification dated 07.07.09."

3. The respondent filed a reply to the show cause notice and ultimately the Deputy Commissioner, by order dated 03.07.2013, sanctioned refund of Rs.53,73,949/- but rejected the claim made by the respondent for refund of Rs. 39,43,669/-.

4. Feeling aggrieved by that portion of the order that rejected the refund claim of Rs. 39,43,669/-, the respondent filed an appeal before the Commissioner (Appeals), who by order dated 23.06.2014 sanctioned the refund. This order has attained finality as no appeal has been filed by the department to assail this order.

5. The department however, filed an appeal against that portion of the order dated 31.3.2014 passed by the Assistant Commissioner that sanctioned refund of Rs.53,73,949/-. This appeal was dismissed by the Commissioner (Appeals) by order dated 23.06.2014. Apart from other factual aspects, the Commissioner (Appeals) also noted that the respondent had filed the refund claim on the basis of quantity of iron ore fines shown in the respective Bills of Lading which were actually loaded /exported.

6. The department has filed this appeal alleging that the findings of the Commissioner (Appeals) are not correct.

7. Shri Ravi Kapoor, learned authorised representative appearing for the department submitted that the Commissioner (Appeals) committed an error in recording a finding that the respondent had filed the refund

claim on the basis of quantity of iron ore fines shown in the respective Bills of Lading that were actually loaded/exported.

8. Shri Bipin Garg, learned counsel appearing for the respondent has however, submitted that the findings recorded by the Commissioner (Appeals) do not suffer from any illegality so as to call for any interference by the Tribunal.

9. The submissions advanced by the learned authorised representative appearing for the Department and the learned counsel appearing or the respondents have been considered.

10. As can be seen from the show cause notice dated 29.01.2013 that was issued to the respondent, the allegation was that the condition set out in the Notification dated 07.07.2009 that requires, in a case where refund sought is more than 0.25% of the declared Free on Board value of export, a certificate of the Chartered Accountant who audits the annual accounts of the exporter for the purposes of the Companies Act, to be furnished had not been satisfied. The show cause notice also alleged that the respondent had not submitted the relevant invoices / bills raised by the various service providers in respect of services utilized for export of iron ore fines pertaining to the refund claim.

11. These two charges alleged in the show cause notice have been elaborately dealt with, both by the Adjudicating Authority as well by the Commissioner (Appeals), in the impugned order and it is after the careful examination of the relevant invoices/ bills that a finding has been recorded that the respondent is entitled to the refund of Rs.53,73,949/-.

12. The show cause notice does not allege that the respondent had actually exported lesser quantity of iron ore fines than shown in the shipping bills. Though it was not a charge in the show cause notice, but a finding has still been recorded by the Commissioner (Appeals) that the respondent had filed the refund claim on the basis of quantity of iron ore fines which were actually loaded / exported. The show cause notice is the foundation on the basis of which any order can be passed

and in the absence of any allegation in the show cause notice, it is not permissible for the department to raise this ground in the appeal that has been filed.

23. In such circumstances, the appeal is liable to be dismissed and is dismissed.

(JUSTICE DILIP GUPTA)
PRESIDENT

(HEMAMBIKA R. PRIYA)
MEMBER(TECHNICAL)

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