

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

**PRINCIPAL BENCH**

**CUSTOMS APPEAL NO. 52935 OF 2019**

(Arising out of Order-in-Appeal No. CC(A)/CUS/D-I/EXP/NCH/278/2019-20 dated 26.06.2019 passed by Commissioner of Customs (Appeals), Delhi Zone, New Customs House, New Delhi)

**Commissioner of Customs,**

ACC Export Commissionerate  
New Customs House,  
New Delhi-110037

**...Appellant**

Versus

**M/s. Intex Technologies (India) Ltd.,**

Plot No. D-18/2, Okhla Industrial Area,  
New Delhi-110020

**...Respondent**

With

**CUSTOMS CROSS APPLICATION NO. 50112 OF 2020**

**APPEARANCE:**

Shri Manish Kumar Chawda, Authorized Representative for the Department

Shri Tarun Gulati, Senior Advocate with Shri Rony John and Shri Piyush Swami, Advocates for the Respondent

**CORAM:**

**HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT**

**HON'BLE MR. P. ANJANI KUMAR, MEMBER (TECHNICAL)**

**Date of Hearing: 15.05.2023**

**Date of Decision: 03.07.2023**

**FINAL ORDER NO. 50811/2023**

**JUSTICE DILIP GUPTA:**

The Commissioner of Customs (ACC Export), New Customs House, New Delhi<sup>1</sup> has filed this appeal to assail the order dated 26.06.2019 passed by the Commissioner of Customs (Appeals)<sup>2</sup> on the appeal filed by the department on 16.01.2017 to assail the order dated

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- 1. the department**
  - 2. the Commissioner (Appeals)**

22.09.2016 passed by the Assistant Commissioner rejecting the refund application filed by M/s. Intex Technologies (India) Ltd.<sup>3</sup> under section 27 of the Customs Act, 1962<sup>4</sup> for refund of duty of Rs. 1,47,16,78,904.21/-.

2. It is difficult to comprehend as to why the department would file an appeal before the Commissioner (Appeals) as the Assistant Commissioner, by the order dated 22.09.2016, had rejected the refund application filed by Intex, but what is more disturbing is the fact that the appeal was filed by the department on 16.01.2017, much after the Delhi High Court had on 08.11.2016 in a Writ Petition filed by Intex after taking note of the fact that the impugned order dated 22.09.2016 passed by the Assistant Commissioner had rejected the refund claim, held that the claim of the Writ Petitioner had to succeed and, accordingly, issued a direction to the respondents to pay the appropriate refund amount to the Writ Petitioner together with interest applicable till the date of actual payment within three weeks from the date of the order. It also needs to be noted that the Assistant Commissioner, pursuant to the aforesaid directions issued by the Delhi High Court, sanctioned the refund claim to Intex with interest by the order dated 29.11.2016, which order was subsequently modified in view of the rectification application filed by Intex and the correct balance amount of interest was ordered to be refunded. The amount with interest was ultimately also received by Intex through RTGS facility.

3. Two things are, therefore, clear. The first is that the department had filed an appeal to assail the order dated 22.09.2016 passed by the Assistant Commissioner which order was in favour of the department as

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**3. Intex**  
**4. The Customs Act**

the refund application filed by Intex had been rejected. Secondly, the Writ Petition filed by Intex in the Delhi High Court against the order dated 22.09.2016 was allowed by the High Court by order dated 08.11.2016 with a direction to the department to pay the refund amount with interest within three weeks from the order of the High Court and this order of the Delhi High Court had been duly complied with the Assistant Commissioner by order dated 29.11.2016 and the refund amount with interest had also been paid to Intex. What is also important to note is that the appeal was filed by the department before the Commissioner (Appeals) on 16.01.2017 much after the Delhi High Court had passed the order on 08.11.2016 and the refund amount had also been paid to Intex. It also needs to be noted that the department had also filed a Special Leave Petition before the Supreme Court against the order dated 08.11.2016 passed by the Delhi High Court and this petition was dismissed by the Supreme Court on 07.07.2017.

4. The present appeal has been filed by the department to assail the order dated 20.06.2019 passed by the Commissioner (Appeals). The Commissioner (Appeals), after recording that neither the appellant (the department) nor the respondent (Intex) attended the personal hearing, noticed that the Assistant Commissioner had rejected the refund application filed by Intex on the ground that the judgment of the Supreme Court in **SRF Ltd. vs. Commissioner of Customs, Chennai**<sup>5</sup> would not be applicable and, therefore, Intex would not be entitled to benefit of the exemption notification. The Commissioner (Appeals) also noted the contention advanced by the department in the appeal that since the assessment order was not challenged by Intex, refund could

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5. **2015 (318) ELT 607 (SC)**

not be granted. The Commissioner (Appeals), therefore, set aside the order dated 22.09.2016 passed by the Assistant Commissioner and remanded the matter to the Assistant Commissioner for a fresh decision. Thus, even though the contention that was advanced by the department before the Commissioner (Appeals) was accepted and the matter was remanded to the Assistant Commissioner to pass a fresh order in the light of the observation made by the Commissioner (Appeals), the department has filed this appeal contending that the order passed by the Commissioner (Appeals) is not correct in view of the decision of the Supreme Court in **M/s. ITC Limited vs. Commissioner of Central Excise, Kolkata IV**<sup>6</sup>.

5. In order to appreciate the contentions advanced by Shri Manish Kumar Chawda, learned authorized representative appearing for the department and Shri Tarun Gualti, learned senior counsel appearing for Intex, it would be necessary to briefly narrate the essential facts.

6. Intex is in the business, inter alia, of import and sale of electronic products such as mobile phones in India. As part of its business activities, it imported mobile handsets, including cellular phones, during the period between 30.03.2015 to 14.07.2015 and filed Bills of Entry for home consumption and paid additional duty of customs by way of scrips in terms of section 3(1) of the Customs Tariff Act, 1975<sup>7</sup> at the rate of 13.5% of the value of the said goods.

7. The Central Government had issued a Notification dated 17.03.2012 in exercise of the powers conferred under section 5A of the Central Excise Act, 1944<sup>8</sup> exempting certain excisable goods from part

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6. Civil Appeal No. 293294 of 2009 decided on 18.09.2019  
7. the Tariff Act  
8. the Excise Act

of or whole of the excise duty payable on such goods. Serial no. 263A of this Notification was applicable to "mobile handsets including cellular phones" and provided for an effective rate of duty @ 1% of central excise duty provided no CENVAT credit had been taken on the inputs or capital goods used in the manufacture of these goods.

8. In view of the express provisions of the said Notification dated 17.03.2012, excise duty on mobile handsets including cellular phones was payable at the rate of 1% of the value of such goods. Intex was, therefore, required to pay additional duty of customs at the rate of only 1% of the value of the imported goods instead of at the rate of 13.5% paid by it. Intex, therefore, could claim refund of the excess additional duty of customs paid at the time of import of the said goods provided it had not taken credit on the inputs or capital goods used in the manufactures of such goods.

9. The applicability of the excise duty exemption under the said Notification to circumstances similar to that of Intex was settled by the Supreme Court in **SRF**. Accordingly, on the basis of the judgment of the Supreme Court in **SRF**, Intex applied for refund of the excess additional duty of customs paid contending that since the manufacturer of imported goods is outside India, CENVAT credit could not have been taken and so it should be treated that the condition of non-availment of CENVAT credit attached to the Notification stood satisfied.

10. The said refund application dated 07.03.2016 was filed by Intex before the Assistant Commissioner of Customs (Refund), New Delhi<sup>9</sup> in respect of the additional duty of customs paid under section 3(1) of the Tariff Act on the imports made during the period from 30.03.2015 to

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9. the Assistant Commissioner

14.07.2015. Intex also submitted a certificate of a Chartered Accountant with the refund application that certified that the amount of refund claimed was shown in the books of accounts as amount due and the same had not been passed on to the buyers of the goods.

11. The Assistant Commissioner rejected the refund application on merits by order dated 22.09.2016 and the findings are as follows:

- (i) To be covered under Condition No. 16 of the said Notification, the goods manufacturer should have to first be eligible for availing CENVAT credit;
- (ii) Only if a person is eligible to avail CENVAT credit can such a person exercise the option to not taking such credit, as required under Condition No. 16;
- (iii) The ratio of the Supreme Court judgment in **Motiram Tolaram vs. Union of India**<sup>10</sup> case was squarely applicable;
- (iv) The Supreme Court delivered the judgment in **SRF** in the context of a different notification and goods; and
- (v) It cannot be presumed in fiction that the importer is a manufacturer of goods and was eligible to claim the CENVAT credit because no one can claim to forfeit the benefit if it did not accrue in the first instance.

12. Feeling aggrieved by the rejection of its refund application by the order dated 22.09.2016 passed by the Assistant Commissioner, Intex filed **Writ Petition (Civil) No. 10818/2016** before the Delhi High Court claiming the following reliefs:

- "a) That this Hon'ble Court be pleased to declare Order dated 22.09.2016 in Refund Application No. ACE/64/2016 issued by Respondent No. 3 as null and void, in violation of

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10. 1999 (112) ELT 749 (SC)

the principles of natural justice and contrary to Article 141 of the Constitution of India by being in violation of the settled law of the Supreme Court in SRF Ltd. vs. Commissioner of Customs, Chennai, 2015 (318) ELT 607 (SC);

**b)** That this Hon'ble Court be pleased to issue a writ, order or directions in the nature of certiorari or any other writ, order or direction of like nature, to call for, examine the records in relation to, and quash the Order dated 22.09.2016 in Refund Application No. ACE/64/2016 issued by Respondent No. 3 as the order is contrary to Article 141 of the Constitution of India by being in violation of the settled law of the Supreme Court in SRF Ltd. vs. Commissioner of Customs, Chennai, 2015 (318) ELT 607 (SC);

**c)** That this Hon'ble Court be pleased to issue a Writ of mandamus, or a Writ in the nature of mandamus, or any other appropriate Writ, order or directions, directing the Respondents to process the Petitioner's applications for refund of the excess additional duty of customs for the period from 30.03.2015 to 14.07.2015 in accordance with the law settled in SRF Ltd. vs. Commissioner of Customs, Chennai, 2015 (318) ELT 607 (SC);

**d)** For such further and other reliefs, including costs of this Petition, as this Hon'ble Court may deem fit and proper in the nature and circumstances of the case."

13. The High Court allowed the Writ Petition by judgment and order dated 08.11.2016 and directed the Assistant Commissioner to pay the appropriate refund amount together with applicable interest till the date of the actual payment within three weeks from the date of the said order. The observations and directions contained in the order of the High Court are as follows:

"3. The petitioner seeks a direction for the respondents to process its application for refund under Section 27 of the Customs Act claiming a refund of additional customs duty made on import under Section 3(1) of the Customs Tariff Act. The petitioner had imported mobile handsets including cellular phones and according to it had made excess payments under protest and complied with condition no. 16

of Notification No. 12/2012-Ex. Dated 17.03.2012. This notification was admittedly amended vide Notification No. 12/2012CE.

4. **The impugned order of the Asstt. Commissioner of Customs rejected the refund claim. The adjudicating authority held that the petitioner could not establish its entitlement to CENVAT credit and, therefore, was ineligible for the refund. The petitioner had relied upon the ruling of the Supreme Court in SRF Ltd. vs. Commissioner of Customs, Chennai, 2015 (318) ELT 607 (SC) and the order of this Court in Micromax Informatics Ltd. vs. UOI and Ors. in WP(C) No. 4712/2016 decided on 28.09.2016. \*\*\*\*\***

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6. **In the light of the law laid down by the Supreme Court in SRF Ltd. (supra) the Court is of the opinion that the claim in these proceedings has to succeed. A direction is issued to the respondents to process the petitioner's refund claim and pass appropriate orders having regard to the fact the petitioner had filed supporting certificates in the form of a Chartered Accountant's clarification/certificate etc., claiming that the benefit sought was not passed on to the customers. The respondents are further directed to pay the appropriate refund amount together with interest applicable till date of actual payment within three weeks from today.**

7. The writ petition is allowed in the above terms."

**(emphasis supplied)**

14. To ensure compliance of the above directions of the Delhi High Court, the Assistant Commissioner passed the order dated 29.11.2016 sanctioning the refund of Rs. 147,16,78,904/-, which amount was the excess additional duty of customs claimed by Intex, with Rs. 50,80,316/- as interest calculated with effect from 08.11.2016 to 28.11.2016. The following findings were recorded by the Assistant Commissioner in the aforesaid order dated 29.11.2016:

"8. Aggrieved, the "Claimant" filed a writ petition before the Hon'ble Delhi High court. Hon'ble Delhi High court vide its order dated 08.011.2016 directed to "process the petitioner's refund claim and pass appropriate orders having regard to the fact the petitioner had filed supporting certificates in the form of a Chartered Accountant's clarification/certificates etc., claiming that the benefit sought was not passed on to the customers. The respondents are further directed to pay the appropriate refund amount together with interest applicable till date of actual payment within three weeks from today."

9. I have gone through the facts and records of the case afresh and find that the amount claimed has been correctly computed. **I have also noted that the benefit sought has not been passed on to the customer, therefore, the claim is not hit by unjust enrichment clause governing refund claims.** Although, the initial order rejecting the claim was passed by the undersigned yet, in accordance with tenets of judicial discipline, **I am bound by the orders of the Hon'ble High Court in the matter especially in view of the fact that no stay against the Hon'ble High Court's order has been obtained so far.**

ORDER

**In view of the above, I sanction the refund claim of Rs. 1,47,16,78,904/-** (Rupees One Hundred Forty Seven Crore Sixteen Lakhs Seventy Eight Thousand Nind Hundred Four Only) **along with interest amounting** to Rs. 50,80,316/- (Rupees Fifty Lakhs Eighty Thousand Three Hundred Sixteen Only) (w.e.f. 08.11.2016 to 28.11.2016) to M/s. Intex Technologies (India) Ltd. Plot No. D-18/2, Okhla Industrial Area, Phase – II, New Delhi-110020, under Section 27(1)(A) of the Customs Act' 1962 payable through RTGS"

**(emphasis supplied)**

15. On 30.12.2016, Intex filed an application under section 154 of the Customs Act for rectification of the mistake in the order dated 29.11.2016 of the Assistant Commissioner. The Assistant Commissioner allowed the application for rectification and sanctioned the payment of

balance amount of interest of Rs. 3,72,55,652/- in terms of section 27A of the Customs Act.

16. The amount together with interest was received by Intex through RTGS Facility.

17. In February 2017, the department filed a Special Leave Petition (C) No. 18123/2017 before the Supreme Court against the order dated 08.11.2016 passed by the Delhi High Court and in this Special Leave Petition, the department raised grounds regarding the maintainability of the refund application under section 27 of the Customs Act. The Supreme Court dismissed the Special Leave Petition filed by the department by order dated 07.07.2017. As a result of the dismissal of the Special Leave Petition, the order dated 08.11.2016 of the High Court directing the department to grant refund of the excess customs duties paid by Intex with interest attained finality and the department was bound by the order.

18. After over seven months from the dismissal of the Special Leave Petition filed by the department before the Supreme Court, Intex received a notice dated 15.02.2018 issued by the Commissioner (Appeals), stating that the department had filed an appeal on 16.01.2017 against the order dated 22.09.2016 passed by the Assistant Commissioner rejecting the refund application filed by Intex and Intex was directed to appear before the Commissioner (Appeals) for personal hearing on 12.03.2018.

19. Intex submitted a letter dated 11.03.2018, in response to the personal hearing notice dated 15.02.2018, and informed the Commissioner (Appeals) that it had not received a copy of the appeal purportedly said to have been filed against order dated 22.09.2016. A

request was, therefore, made in the letter that a copy of the said appeal be provided to Intex so that appropriate submissions could be made. Intex also informed the Commissioner (Appeals) about the order dated 08.11.2016 of the Delhi High Court and the order dated 07.07.2017 of the Supreme Court. These two orders pertained to the order dated 22.09.2016 passed by the Assistant Commissioner, against which the appeal had been filed by the Department.

20. By a letter dated 10.04.2018, Intex reiterated its request before the Commissioner (Appeals) that a copy of the appeal be provided to it and also explained that the matter had already been concluded by the orders of the High Court and the Supreme Court.

21. The Commissioner (Appeals), however, without even making any reference to the orders passed by the High Court and the Supreme Court, passed the impugned order dated 27.06.2019 setting aside the order dated 22.09.2016 passed by the Assistant Commissioner with a direction that a fresh order be passed within two months of the communication of the order. The relevant portions of the order passed by the Assistant Commissioner are reproduced below:

“13.1 Against this OIO, department has filed the appeal on grounds mentioned in paras above and mainly that assessment order was not challenged by the importer and hence refund cannot be granted without a review of the assessment order passed. That the order of rejection of refunds is bad in law.

14. Let me examine the departmental appeal. I find that in the case of Aman Medical Products Ltd. 2010 (250) ELT 30 (Del), the Hon'ble Delhi High Court vide its order set aside the order dated 03.04.2008 of the CESTAT and remanded the matter to the original authority to examine the merits of the matter in accordance with law after providing due opportunity to the appellant.

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In a similar case of Micromax Informatics Ltd. Versus UNION OF INDIA in W.P. (C) Nos. 523-524 and 529 of 2016 decided on 26-2-2016, the Hon'ble Delhi High Court vide its order dated 26.2.2016 set aside the orders of the Assistant Commissioner of Customs (Refund) and remanded the case for passing a fresh order in the case.

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I find that the ratio of the above judgments, prima facie, seems applicable to this case. **In due consideration of Departmental appeal, I am therefore of the view that the order passed by the Assistant Commissioner of Customs (Refund) merits for passing a fresh order in view of the aforementioned orders of the Hon'ble Delhi High Court and Hon'ble SC decision M/s SRF Ltd., supra.**

Order

In view of the foregoing discussion and findings, I set aside the order of the Assistant Commissioner of Customs (Refund) with the direction to pass a fresh order as discussed above within two months of the communication of this order."

**(emphasis supplied)**

22. The first issue that arises for consideration in this appeal is as to whether the department could have filed an appeal against the order dated 22.09.2016 passed by the Assistant Commissioner rejecting the refund application filed by Intex, as it has been strongly urged by the learned senior counsel appearing for Intex that there was no plausible reason for the department to file the appeal since the refund application had been rejected by the Assistant Commissioner. What is more important to notice is that the appeal was filed by the department on 16.01.2017, much after the order was passed by the Delhi High Court on 08.11.2016 in the Writ Petition filed by Intex against the said order dated 22.09.2016 passed by the Assistant Commissioner. The reliefs

that had been claimed by Intex in the Writ Petition were to declare the order dated 22.09.2016 as null and void and to quash it as it was in violation of the law declared by the Supreme Court in **SRF**. A further relief that was claimed by Intex was to direct the department to process the application for refund in accordance with the law declared by the Supreme Court in **SRF**.

23. The Delhi High Court held that in view of the law laid down by the Supreme Court in **SRF**, the claim of the writ petitioner had to succeed. A direction was, accordingly, issued to the department to process the refund claim filed by the writ petitioner and pass an appropriate order. A further direction was issued to the respondent to pay the appropriate refund amount together with applicable interest till the date of actual payment within three weeks. The Assistant Commissioner, pursuant to the aforesaid directions issued by the Delhi High Court on 08.11.2016, examined the refund application afresh and noticed that the amount claimed by Intex had been correctly computed and that the principle of unjust enrichment would not apply. The Assistant Commissioner, accordingly issued directions for refund of the excess duty paid by Intex with interest, and the said amount was actually paid to Intex.

24. Thus, when the High Court had examined the correctness of the order dated 29.11.2016 passed by the Assistant Commissioner in the Writ Petition filed by Intex, the department could not have filed the appeal before the Commissioner (Appeals) to assail the same order dated 29.11.2016 before the Commissioner (Appeals). The said order, by necessary implication, stood set aside by the Delhi High Court. Further, the directions issued by the High Court had also been duly

complied with by the Assistant Commissioner in the fresh order dated 29.11.2016 and payment had also been paid to Intex. The only course open to the department was to have challenged the order passed by the Delhi High Court on 08.11.2016 before the Supreme Court, which the department did by filing a Special Leave Petition in February 2017, but the Petition was dismissed by the Supreme Court on 07.07.2017.

25. Thus, when the appeal was filed by the department before the Commissioner (Appeals) against an order the correctness of which stood decided against the department by the Delhi High Court, the order dated 26.06.2019 passed by the Commissioner (Appeals) on 26.06.2019 would be without jurisdiction. This appeal has been filed by the department to assail the order dated 26.06.2019 passed by the Commissioner (Appeals). The facts stated above would leave no manner of doubt that the department had not only unnecessarily filed the appeal before the Commissioner (Appeals), but this appeal has also been unnecessarily filed by the department before the Tribunal.

26. The present appeal would, therefore, have to be dismissed and is dismissed. The Cross Application filed by Intex stands disposed of.

(Order pronounced on **03.07.2023**)

**(JUSTICE DILIP GUPTA)**  
**PRESIDENT**

**(P. ANJANI KUMAR)**  
**MEMBER (TECHNICAL)**

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**PRINCIPAL BENCH**

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**CORAM:**

**HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT**

**HON'BLE MS. HEMAMBIKA R. PRIYA, MEMBER (TECHNICAL)**

**Date of Hearing: 15.05.2023**

**Date of Decision: 03.07.2023**

**ORDER**

Order pronounced.

**(JUSTICE DILIP GUPTA)  
PRESIDENT**

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