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

**NEW DELHI**

PRINCIPAL BENCH - COURT NO. IV

**CUSTOMS APPEAL NO. 50071 OF 2020**

(Arising out of Order in Appeal No- IND-EXCUS-000-APP-145-19-20 dated-26.09.2019. passed by commissioner (Appeals), Customs, Indore

**M/s. B. L. Goyal,**
404, 4th Floor, Wallfort Ozone,
Fafadih Chowk, Raipur (C. G)-492001, **...Appellant**

**Versus**

**Commissioner (Appeals),**
**Customs, Central Goods & Service Tax & Central Excise,**
Indore Manik Bagh **Palace**, Post Box No-10
Indore (MP)-452001.

**...Respondent**

**APPEARANCE:**

Ms Aakriti Mathur, Advocate for the appellant

Mr. Rakesh Kumar, Authorized Representative for the Respondent

**Coram:**

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

**HON'BLE Mr. P. V. SUBBA RAO, MEMBER (JUDICIAL)**

**DATE OF HEARING: 05/07/2024**

**DATE OF DECISION: 01/10/2024**

**FINAL ORDER NO. 58763/2024**

**DR. RACHNA GUPTA**

In the present appeal, The importer- appellant has filed 34 Bills of Entry pertaining to the year 2011-12 to 2014-15 with ICD, by self- assessing with Customs duty @30% CVD @ 12% Ed. Cess @ 2% S & H Ed. Cess @ 1% SAD @4% in terms of Section17 of the Customs Act, 1962. The goods imported by them under the aforementioned Bills of Entry, were found exempted from CVD under CBEC clarification dated 28.06.2007. The importer therefore filed an application dated 30.01.2019 for refund of Rs.

50,64,477/- claiming that the refund pertains to the Excess/ advance payment of CVD which is not applicable and does not come under preview of Customs officer to collect the same in pursuance of exemption granted under CBEC clarification dated 28.06.2007. The clarification dated 28.06.2007 exempts the levy of CVD only the goods "Gum Arabic", whereas in the instant case, the goods imported by the applicant are Natural Gum (Natural Gum Siftings/ Natural Gum Rejected/ Natural Gum No. 3 rejected) and not the Gum Arabic. Along with the said Application in prescribed format, The appellants have submitted the documents such as copies of Bills of Entry generated though ICES and copies of Commercial invoices (Purchase invoices), Packing lists, Bills of lading and Duty paying documents (TR6/ Customs cyber Receipt pertains to e-payment).

1. After examining the refund claim and the documents there with, the department observed that Bills of Entry in questions were pertaining to the year 2011-12 to 2014-15 and the first and the last Bill of Entry was filed on 31.10.2011 and 24.09.2014 respectively. Hence, the refund claim was observed to have been filed after the expiry of one year from the date of payment of duty of Customs duty as Contrary to section 27 of the Customs Act, 1962. Also, No evidence was produced by the appellant to prove that they have not passed the burden of said amount of Customs duty (As mentioned in the refund claim). Based on these observations a Show Cause Notice No. 17/2018-19 dated 20.02.2019 was served upon the appellant proposing to reject the refund claim of Rs. 50,64,477/- as was filed on 31.01.2019. The Original Adjudicating Authority vide Order in Original (O-I-O) bearing number 01/2019 dated 22.04.2019, rejected the refund claim holding it to be filed beyond the period of limitation. However, with respect to Bill of Entry No. 117 dated 31-10-2011, 146 dated 31.12.2011, 44 dated 15-03-2012, 89 dated 09-05-2012, 25 dated 13-02-2012 and 69 dated 16-

04-2012, Since the duty was paid under protest by the importer, it was held that the limitation of one year is not applicable in respect of these Bills of Entry. But, the refund claim w.r.t these Bills of Entry was still rejected on the ground of "unjust enrichment". The order rejecting the entire refund claim has been upheld by Commissioner (Appeals) vide Order in appeal (O-I-A) bearing number 145-19-20 dated 26-09-2019 Commissioner (Appeal) has considered one additional ground for rejecting the refund claim i.e the decision of Hon'ble Supreme Court in the case of **ITC limited vs CCE Kolkata-IV in Civil appeal no 293-294 of 2009 decided on 18-09-2019,**

2. We have heard Ms. Aakriti Mathur, learned counsel for the Appellant and Mr. Rakesh Kumar, Authorised Representative for the Respondent-department.

3. Learned Counsel for the appellant has mentioned that the basic allegation against the appellant is that the refund claim dated 31.01.2019 against Bills of Entry pertaining to the year 2011-12 to 2014-15 with first and last Bill of Entry being filed on 31.10.2011 & 24.09.2014 respectively is barred by time and that the importer had not submitted any documentary evidences in support of their claim that the amount of duty, for which refund claim was filed, had neither been passed on by them to any other person nor any credit of the same is availed by them. It is submitted that the CVD was paid under protest the bar of limitation is not applicable on the impugned refund claim and 'Protest' amounts to challenging the assessment order ( Self assessed Bills of Entry). Hence, Commissioner (A) has wrongly applied decision of **ITC Ltd. (Supra).** With these submissions the order rejecting the refund claim of said amount of CVD is prayed to be set aside. The present appeal is accordingly prayed to be allowed.

4. While rebutting these submissions learned DR has reiterated the findings arrived at by the Adjudicating Authority below. The decision of Supreme Court in **ITC limited (Supra)** is impressed upon as the law of land. It is submitted that irrespective appellant later had filed the protest letters but the fact remains is that appellant had self-assessed the amount of CVD i.e the amount in question. The self-assessment of Bill of Entry is also an order of assessment, As per Section 2(2) , as amended by the Finance Act, 2011, the definition of assessment includes self-assessment. Hence, the self-assessment also needs to be modified before claiming refund of any amount of duty, self-assessed and paid (As per **ITC limited, Supra,** Decision). With these submissions it is mentioned that there is no infirmity in the O-I-A when the refund claim of duty paid on unreviewed/ unmodified self-assessed Bill of Entry is rejected, also on the grounds of limitations as stipulated in Section 27 of the Customs Act and on the principle of "unjust enrichment". The order under challenge is accordingly prayed to be upheld and appeal is prayed to be allowed.

5. Having heard the rival contentions and perusing the record of the present appeal we observe and hold as follows:

The appellant had filed the refund claim dated 30.01.2019 seeking refund of amount of countervailing duty(CVD) while importing goods declaring those goods as 'Natural gum in raw form' vide Bills of Entry filed during the year 2011 to 2014 (As tabulated in show cause notice itself).

The impugned refund claim was filed based on CBEC clarifications dated 28.06.2007 Based on the said clarification only the appellant had earlier filed a protest against the CVD paid at the relevant time. In light of these facts, following Two questions need adjudication:

1) Whether in terms of CBEC clarification dated 28.06.2007 the appellant is entitled for exemption from payment of CVD while importing 'Natural gum in raw form' and is thus, eligible for refund of the amount already paid by appellant.
2) Whether the refund claim is rightly rejected on the ground of limitations and that of "unjust enrichment".

**Question No. 1.**

**While claiming the impugned refund, the appellant has relied upon the CBEC clarification dated 28.06.2007 saying that it exempts the import of 'Natural gums in raw form' from liability of CVD However, word 'Natural Gum' is a generic term. This tribunal in the case titled as M/s BL Goyal and others vs. Commissioner appeal Customs, CGST and CE, indore reported as 2020 (7) TMI 325 Tri. Del. as held as follows:**

*The Natural Gums have several varieties, such as Asafoetida, Benjamin ras, Karaya gum as well as Gum Arabic. It is a common knowledge that market price of all these Natural Gum differ widely and, therefore, the import consignments have to be invoiced as per their actual nomenclature and not by a general name like 'Natural Gum'. Thus, we understand that by giving a general description to the import consignments, the importer had not made a true description of the import consignment the exemption Notification No. 96/2008-Customs dated 13 August 2008 exempts only Gum Arabic, classifiable under CTH 13012000 from the levy of the customs duty and not Natural Gum/simpliciter.*

6. We also have perused the said clarification it reads as follows:

*"the process of obtaining Gum Arabic in natural form or raw form is not chargeable to Central Excise duty. Therefore, it is clarified that CVD IS not leviable on imported Gum Arabic in raw form also".*

Vide this clarification the CBEC has exempted only Imported "Gum Arabic" from levy of CVD The Bills of Entry in question have declared the imported goods as 'Natural Gums'. (Natural Gum siftings/ Natural Gum rejected/ Natural Gum No. 3 rejected) thus goods have not been declared as 'Gum Arabic to which the exemption from leviability of CVD is available vide clarification dt. 28.06.2002. No evidence has been produced to show that imported good was 'Natural Gum Arabic'. These observations are sufficient for us to hold with appellant has failed to establish its eligibility of claiming the benefit of exemption from payment of CVD in terms of CBEC clarification dated 28.06.2007. Thus, the CVD self-assessed has rightly been paid. No situation arise for refund of same.

Question no 1, therefore, stands decided against the appellant.

**<u>Question no 2</u>**

The refund of Customs duty is governed by section 27 of Customs Acts, 1962. As per said Section the refund application has to be filed before the expiry of one year from the date of payment of such duty or interest provided this period of limitation shall not apply where any duty or interest has been paid under protest. Though the appellant has taken the plea that protest was filed by the appellant. But we observe that the CVD was paid by the appellant as self-assessed at the time of filing of respective Bill of Entry (34 Bills of Entry are in question), Those BoEs were filed during the period from Oct-2011 to Sep-2014. No protest was admittedly made by the appellant at the said relevant time. Any subsequent letter of protest, to our understanding, is not relevant for the purpose of the aforementioned proviso to section 27 of the Customs Act. Signing of the Bill of Entry itself amounts to passing an order of assessment as it was held by Hon'ble Supreme Court in the case of **Escorts limited vs. Union of India and others reported as 1998(97) ELT TO 11 (S.C.)** The Hon'ble Supreme Court, in another decision in the case of **Priya Blue Industries limited vs Commissioner of Customs (Preventive) reported as 2004 (172) ELT 145 (SC)** held that so long as the order of assessment stands, the duty would be applicable as per that order of assessment. The Hon'ble apex Court also clarified that the order of self-assessment is nonetheless an assessment order passed under the Act, Obviously it would be appealable by 'any person' aggrieved thereby, The expression 'Any person' is of wider amplitude. The revenue, as well as assesse, can also prefer an appeal aggrieved by an order of assessment. Under section 128 of the Custom Act, it is not only the order of re-assessment which is appealable but the provisions of Section 128 make appealable any decision or order under the Act including that of self-assessment.

7. The hon'ble apex court classified that the order of self-assessment is an order of assessment as per Section 2(2) of finance Act 2011. It is apparent from the amended definition that self-assessment , re-assessment and any assessment in which the duty assessed is nil, is an assessment, Assessment includes self-assessment, when the provision of self-assessment has been incorporated in Section 17(1), and corresponding change has been made in the definition of assessment in Section 2(2), Earlier the word self-assessment was not included in the definition of assessment. As such, it is appealable in

case 'any person' is aggrieved by it. There is a specific provision made in Section 17 to pass a reasoned/speaking order in the situation when after verification, self-assessment is not found to be satisfactory. Such order of re-assessment has to be passed under Section 17(4). Section 128 has provided for an appeal not only against a speaking order but against "any order" which is of wide amplitude.

8. The reasoning employed by the said decision has recently been upheld by Hon'ble apex courts in its decision in case of **ITC limited (Supra)** wherein it is held as follows:

*Provisions of refund are more or less in nature of execution proceedings and thus are not open to Authority which processes refund to make fresh assessment on merits and to correct assessment on the basis of mistake or otherwise: Refund claim cannot be entertained unless taking recourse to the appropriate proceedings, not be within ken of section 27 of Customs Act, 1962, to set aside order of self-assessment and reassess duty for making refund. 'Any person' aggrieved by any order including self-assessment had to get order modified under Section 128 ibid or under other relevant provisions of Act.*

9. In the present case apparently and admittedly the appellant has not modified the self-assessment vis-a-vis the impugned amount of CVD. Also, the claim is not covered under proviso to section 27 of the customs Act, 1962. Thus we hold the appellant is not entitled to claim the refund without such modification and the claim is otherwise barred by limitation.

10. Coming to another ground of rejecting the impugned claim i.e we hold: "unjust enrichment" The appellant has mentioned that duty was paid under protest hence, present is not the case of "unjust enrichment" but it is observed that countervailing duty was self-assessed and was paid at the time of filing the impugned Bills of Entry of the year 2011-12 to 2014-15. Protest was raised against payment of CVD by appellant vide subsequent letters. In light of this apparent & admitted fact the contentions of appellant is not sustainable. The doctrine of "unjust enrichment" is that no person can be allowed to enrich equitably at the expense of another. Thus if the assesse has passed the burden of duty paid to the consumer the assesse is not allowed to enrich at the expense of said consumer. As already observe above, duty was paid at the time of clearance of the imported goods to the domestic market. There is no evidence found on record to show that the quantum of self-assessed duty was not the part of the value at which the goods were sold. To our opinion, the present is the case of "unjust enrichment" Refund in such case cannot be allowed.

11. We draw our support from the decision of Hon'ble Supreme Court in the case of **Mafatlal Industries Ltd. vs Union of India reported as 1997 (89) E.L.T. 247 (S.C)** The said decision is a nine-Judge verdict of Hon'ble Supreme Court has decided by a majority of 8:1 as to what rights and remedies are available to a citizen against the State in the matter of refund of unlawfully recovered taxes and imposts. On the one hand, with its seal of approval firmly put on the doctrine of "unjust enrichment", the judgment gives a passive bent to the right of an assessee to seek refund of taxes illegally and unauthorisedly collected from him. On the other hand, with its strict and unsparing interpretation of the "ouster" and "limitation" clauses

contained in the statutes in question viz. the Central Excises and Salt Act, 1944 and the Customs Act, 1962, it curtails the remedies hitherto available to an assessee for seeking such refund in different courts and jurisdictions. The right to refund and the remedy for refund are, indeed, the two mainstreams of the said decision.

12. On the question of right to refund i.e. the assessee's substantive right to refund of the illegally recovered tax, the judgment finally bids farewell to the time-honoured notion that the right to refund flows automatically as an absolute right from the mandates of Article 265 of the Constitution of India and Section 72 of the Indian Contract Act, 1872 and that it cannot be diluted or affected by any such equitable plea as "unjust enrichment", "passing on of burden" etc. The new judicial thesis instead rests on the principles of "economic and distributive justice" enshrined in the Preamble and the Directive Principles of State Policy. It also attaches significance to the unethical consequences which would flow and the fiscal and financial chaos which would follow if no bar of "unjust enrichment" is applied by the courts before ordering refunds. Article 265 and Section 72 should all be read and understood, says the majority view, in the light of "the philosophy and the core values of (the Indian) Constitution" and in keeping with "equity and good conscience". In the words of Jeevan Reddy, J., the State should refrain from conferring "an unearned and unjustifiable windfall" upon the assessees.

13. On the issue of remedies, all the three substantially concurring opinions in Mafatlal, namely, those of Jeevan Reddy, J., Paripoornan, J. as well as Ahmadi, C.J., divide the situations in which claims for refund may be preferred by an assessee into three categories, viz.:

First, where the statutory provision ("law") under which the tax is levied is itself challenged by the assessee on the ground of being violative of some provision of the Constitution, i.e., an unconstitutional levy. "In this class of cases, the claim for refund arises outside the provisions of the Act, for this is not a situation contemplated by the Act."

Second, where the tax is collected by the authorities under a statute by misconstruction or wrong interpretation of the provisions of the Act, Rules or Notifications or by an erroneous determination of the relevant facts, i.e., an illegal levy. "In this class of cases, the claim for refund arises under the provisions of the Act. In other words these are situations contemplated by and provided for by the Act and the Rules."

Third, where an assessee, with or without protest and with or without a few litigative steps being taken by him, has ended up paying a tax which he was not legally obliged to pay and which he is seeking refund of at a later point of time on discovering that he had paid the tax on account of a mistaken impression of the law, i.e., a tax paid under a mistake of law. In regard to this category it is noteworthy that the Supreme Court, on the one hand, refers to the mistake of law as one falling "within the meaning of Section 72" of the Indian Contract Act, 1872 and still, on the other hand, confines it to a mistake of law discovered only upon a decision being pronounced by the Supreme Court in some other assessee's case wherein "the Supreme Court holds, in the case of some other manufacturer that the levy of that kind is not exigible in law"; furthermore, even the Supreme Court decision contemplated is one rendered in a case of "unconstitutional levy" and not of "illegal levy"[3] . The noteworthiness is owing to the fact that Section 72 of the Contract Act itself is not limited to such a qualified category of refund claims founded upon the ground of "mistake of law".

14. On the basis of such categorisation, the majority view proceeds to examine, while acknowledging the true intent and import of the ouster and limitation clauses obtaining in the law concerned, as to in what situations and for what periods of limitation different remedies such as:

(1) writ under Article 226 or Article 32 of the Constitution of India;

or

(2) civil suit under the Code of Civil Procedure; or

(3) statutory application under the law concerned

are expected to be available or unavailable to an assessee desirous of seeking refund of an illegally recovered tax.

15. The above discussed decision of Hon'ble Supreme Court are sufficient to clarify that seeking the refund is not a matter of right and the procedure as discussed in the decision has to be followed. In the present case, apparently none of the said procedure has been followed. infirmity in the same. We hold that the refund claim of appellant is not maintainable in the light of Mafatlal (supra) decision of Hon'ble High Court.

16. As a result of entire above discussion we hereby hold that the appellant is not eligible for the exemption from payment of CVD in terms of CBEC clarification dated 28.06.2007. The Refund claim is otherwise barred by time and by the principle of 'unjust enrichment' and can't be sanctioned in view of above discussed decisions of hon'ble Supreme Court. Hence, both the questioned framed above all decided against the appellant. Thus, we do

not find any infirmity in the order under challenge. The order passed by Commissioner (Appeals)is hereby upheld. Consequent thereto the present appeal is hereby dismissed.

[Pronounced in the open court on 01/10/2024]

**(DR. RACHNA GUPTA)**
**MEMBER(JUDICIAL)**

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

KHUSHNUMA