CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH – COURT NO. – IV

Customs Appeal No. 51255 of 2022 [DB]

[Arising out of Order-in-Appeal No.06(SM)/CUS/JPR/2022 dated 28.01.2022 passed by the Commissioner of Central Excise & CGST (Appeals), Jaipur]

M/s. Drive India Enterprise Solution Ltd. **...Appellant**
Kamala Executive Part, 7th Floor,
New Vazir Glass Factory,
Off Andheri Kurla Road, Andheri (East),
Mumbai - 400059

VERSUS

Commissioner of Customs - Jaipur **...Respondent**
Air Cargo Complex, Sangner,
Jaipur, Rajasthan - 302011

APPEARANCE:
Shri Pradeep Singh Rawat, Advocate for the Appellant
Shri S.K. Rahman, Authorized Representative for the Respondent

CORAM:
HON'BLE DR. RACHNA GUPTA, MEMBER (JUDICIAL)
HON'BLE MRS. HEMAMBIKA R. PRIYA, MEMBER (TECHNICAL)

DATE OF HEARING: 15.10.2024
DATE OF DECISION: **13.02.2025**

FINAL ORDER No. 50308/2025

DR. RACHNA GUPTA

M/s. Drive India Enterprise Solutions Limited, the appellant imported mobile phones at Air Cargo Complex, Sanganer, Jaipur under 77 Bills of Entry during the period from 30.01.2014 to 20.11.2014 and paid CVD at the rate of 6%. However, pursuant to the Hon'ble Supreme Court judgment in the case of **M/s. SRF Ltd. Vs. Commissioner of Customs, Chennai reported as 2015 (318) ELT 607 (SC),** appellant vide letter dated 25.11.2019 filed refund application under Section 27(1)(a) and 27(1)(b) of the Customs Act, 1962 in respect of excess duty of Rs.8,36,11,598/-

paid (excess CVD paid). In the said letter they also made a request to get the relevant Bills of Entry finally assessed so that the CVD paid towards the Bills of Entry can be applied by them for refund.

1.1 The department formed an opinion that order of self-assessment itself is an order of assessment as per section 2(2) of the Customs Act, 1962, and it hold good unless an order of re-assessment under Section 17(4) of the Customs Act, 1962 is issued against it. Further, Section 27 of the Customs Act, 1962, governing the issue of refund, does not permit setting aside of the order of self-assessment and reassess the duty for making refund. The CBEC vide Circular No. 24/2004-Cus. dated 18.03.2004 has clarified that the refund cannot be claimed under Section 27 of the Customs Act, 1962 directly without challenging assessment as done in the Bill of Entry. Hence refund in the instant case is not maintainable, when the assessee did not challenge the assessment order (self assessment) which has already attained finality. In view of the above, the refund application dated 25.11.2019 was alleged to neither be maintainable nor admissible. Hence refund application dated 25.11.2019 praying for refund of Customs duty amounting to Rs.8,36,11,598/- was proposed to be rejected. The said proposal was accepted by original adjudicating authority vide Order No. 32/2019-20 dated 12.02.2020 on the following grounds:

(i) The importer has never challenged this assessment as no documentary evidence of any sort suggesting any appeal against the said final assessment has been adduced with the application.

(ii) The show cause notice dated 27.12.2019 issued to the importer alleged that instant refund application in not maintainable even on preliminary ground like (i) on limitation & (ii) on reassessment, in light of the existing legal position settled in ITC case.

1.2 The appeal against the said order has been dismissed vide Order-in-Appeal No. 06/2022 dated 28.01.2022 confirming the findings arrived at by the original adjudicating authority. In addition, the appellant found that the instant case does not qualify the bar of unjust enrichment as the impugned imported goods were sold by after importation but prior to the judgment of Hon'ble Apex Court in the case of SRF Ltd. case. Being aggrieved, the appellant is before this Tribunal.

2. We have heard Shri Pradeep Singh Rawat, learned Advocate for the appellant and Shri S.K. Rahman, learned Authorized Representative for the respondent.

3. Learned counsel for the appellant has submitted that issue of limitation under Section 27 of Customs Act, 1962 has wrongly been raised. It is submitted that the appellant was entitled for the benefit under Entry No. 263A of Notification No. 12/2012-C.E. dated 17.03.2012, according to which only 1% of the CVD was to be paid on the imported goods. However, at the relevant time the exemption notification was not available on ICEGATE Portal that the CVD at the 6% was paid by the appellant, however, under protest. The said Section 27 itself says that in case duty is paid under protest, limitation of one year shall not apply. Otherwise also, the

department is under obligation to refund the customs duty which stands paid in excess. Learned counsel has relied upon the decision of Hon'ble High Court of Karnataka in the case of **DHL Express India Pvt. Ltd. Vs. Commissioner of Service Tax, Bengaluru – 1 reported as 2021 (377) ELT 594 (Kar.)**

3.1 It is further impressed upon that along with the request for refund, the appellant had requested for reassessment of the self assessed Bills of Entry. The said request has not been considered by the department. Otherwise also, reassessment of Bills of Entry is no mandatory to claim refund of duty under Section 27 of the Customs Act. The request for reassessment was rejected without any speaking order. One of the ground of appeal before Commissioner (Appeals) was a request for directions for speaking order of reassessment of the impugned Bills of Entry but the order under challenge is silent to the said ground of appeal.

3.2 The issue of unjust enrichment as raised by Commissioner (Appeals) is apparently beyond the scope of show cause notice and also of the Order-in-Original. Suo moto reliance is not permissible. Otherwise also, the appellant had provided the certificate issued by the Chartered Accountant certifying that the excess paid CVD was not recovered from the buyers of the imported goods. Hence, the order under challenge is passed in ignorance of the cogent evidence on record. A letter dated 24.08.2023 was again filed by the appellant requesting for amendment of the Bills of Entry/reassessment thereof but the same has not been processed by Commissioner of Customs, Air Cargo Complex, Jaipur. The request of reassessment is otherwise acceptable in terms of Section 149 and 154 of the Customs Act. The similar request has already been allowed by Commissioner of Customs (Import), New Delhi vide Order-in-Original No. 56/2023-24 dated 14.06.2023 and also vide Order-in-Original No. 285/2023-24 dated 24.01.2024. Even Deputy Commissioner of Customs, Mumbai vide Order-in-Original No. DC/KP/23-24 dated 01.04.2023 had allowed the reassessment. The request of the appellant in the present case was pursuant to those orders. The ignorance thereof and the rejection of the refund claim of appellant is therefore no sustainable. Order under challenge is accordingly set aside and the appeal is prayed to be allowed.

4. While rebutting these submissions, learned Departmental Representative at the outset has reiterated the discussions and the findings of the order passed by the departmental adjudicating authorities. It is submitted that the 77 Bills of Entry were self-assessed in the Year 2014. The issue of the benefit of the Notification No. 12/2012-C.E. dated 17.032012 was never raised by the appellant at the relevant time. Hence, it is wrongly mentioned that the CVD in question was paid under protest. Apparently, the refund claim of the Year 2019 is much beyond the prescribed period of one year limitation, hence has rightly been held as barred by time.

4.1 Learned Departmental Representative has further relied upon the decision of **Hon'ble Apex Court in the case of ITC Ltd. Vs. Commissioner of Central Excise, Kolkata-IV reported as 2019**

(368) ELT 216 (SC) mentioning that the processing of refund claim cannot be done without reassessment. The impugned Bills of Entry have not been reassessed. Even the Board Circular No. 24/2004-Cus dated 18.03.2004 clearly states that a refund claim is not maintainable when the assessment order is final and not challenged. In the present case, though appellant requested for reassessment but the request was rejected. The rejection has nowhere been challenged by the appellant.

4.2 With respect to the additional ground of rejection i.e. unjust enrichment raised by the Commissioner (Appeals) while dismissing the appeal against the Order-in-Original, it is submitted that Commissioner (Appeals) had authority in terms of Section 128A(3) of the Customs Act. In the instant case, duty was born by the buyer of the impugned goods i.e. mobile phones as the goods were sold after the importation and prior filling of the impugned refund, hence there was no scope for not passing the incidence of the duty. Making entry for the duty amount recoverable in Books of Account, when the SRF decision was not in existence, also does not extent any benefit to the appellant. Finally, it is submitted that all the cases relied upon by the appellant have clearly and correctly been distinguished by Commissioner (Appeals). Impressing upon no infirmity in the said order, the appeal is prayed to be dismissed.

5. Having heard both the parties and perusing the records, we observe and hold as follows:

5.1 The refund claim in the present case is with respect to the excess CVD as was paid at the time of import of the mobile phones in the Year 2014. The claim has been filed in the Year 2019 pursuant to the judgment of Hon'ble Supreme Court in the case of M/s. SRF Ltd. (supra). The refund claim has been filed in terms of Section 27 of the Customs Act, 1962. The section reads as follows:

> ***Section 27. Claim for refund of duty.*** *-*
>
> *(1) Any person claiming refund of any duty or interest,-*
>
> *(a) paid by him; or*
>
> *(b) borne by him,*
>
> *may make an application in such form and manner as may be prescribed for such refund to the Assistant Commissioner of Customs or Deputy Commissioner of Customs, before the expiry of one year, from the date of payment of such duty or interest:*
>
> ***Provided*** *that where an application for refund has been made before the date on which the Finance Bill, 2011 receives the assent of the President, such application shall be deemed to have been made under sub-section (1), as it stood before the date on which the Finance Bill, 2011 receives the assent of the President and the same shall be dealt with in accordance with the provisions of sub-section (2):*
>
> ***Provided*** *further that the limitation of one year shall not apply where any duty or interest has been paid under protest.*

5.2 The perusal makes it abundantly clear that in any refund application on any ground whatsoever the same is required to be filed within one year from the date when the duty/excess duty, the refund whereof is claimed, was paid. The second proviso clarifies that one year limitation shall not apply if the duty/excess duty was paid under protest. The appellant otherwise has taken the plea the duty at the rate of 6% was paid under protest which otherwise was to be deposited at the rate of 1%. But we do not find any document on record to corroborate and justify the said testimony. We observe that at the time of payment of duty, the situation as Notification No. 12/2012 dated 17.03.2012 was:

S.No.	Chapter or heading or sub-heading or tariff item of the first Schedule	Description of excisable goods	Rate	Condition No.
(1)	(2)	(3)	(4)	(5)
"263A	8517	(i) Mobile handsets including cellular phones	6%	-
		(ii) Mobile handsets including cellular phones	1%	16"

Conditions:

16.	If no credit under rule 3 or rule 13 of the CENVAT Credit Rules, 2004 has been taken in respect of the inputs or capital goods used in the manufacture of these goods.

Once this was the situation and the decision in **SRF Ltd. (supra)** was in existence there otherwise arises no reason to raise the protest while depositing the duty. In view of this observation, we do not find any fault when it has been held that the refund claim was filed much after the completion of one year from the date of payment of duty ass well as from the date of order of Hon'ble Supreme Court in **SRF LTd (Supra)** . The order to that extent is therefore hereby upheld.

5.3 Coming to the another ground of rejection for want of reassessment, we observe that vide the same letter vide which the impugned claim was filed i.e. the letter dated 25.11.2019, the appellant had requested for amendment of 77 number of Bills of Entry which were of the impugned Bills of Entry. Apparently and admittedly, the said request has been rejected. Admittedly there is no challenge to the said rejection by the appellant. The outcome remains is that the Bills of Entry, though were self-assessed but have not got modified/amended/reassessed prior filing of the impugned refund claim. The Hon'ble Apex Court in the case of **ITC Ltd.** (supra) has held as follows:

> *43. As the order of selfassessment 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 assessee, can also prefer an appeal aggrieved by an order of assessment. It is not only the order of reassessment which is appealable but the provisions of Section 128 make appealable any decision or order under the Act including that of selfassessment. The order of self assessment is an order of assessment as per section 2(2), 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 in case on verification, selfassessment is not found to be satisfactory, an order of reassessment has to be passed under section 17(4). Section 128 has not provided for an appeal against a speaking order but against "any order" which is of wide amplitude. The reasoning employed by the High Court is that since there is no lis, no speaking order is passed, as such an appeal would not lie, is not sustainable in law, is contrary to what has been held by this Court in Escorts (supra).*
>
> *44. The provisions under section 27 cannot be invoked in the absence of amendment or modification having been made in the bill of entry on the basis of which selfassessment has been made. In other words, the order of selfassessment is required to be followed unless modified before the claim for refund is entertained under Section 27. The refund proceedings are in the nature of execution for refunding amount. It is not assessment or re assessment proceedings at all. Apart from that, there are other conditions which are to be satisfied for claiming exemption, as provided in the exemption notification. Existence of those exigencies is also to be proved which cannot be adjudicated within the scope of provisions as to refund. While processing a refund application, reassessment is not permitted nor conditions of exemption can be adjudicated. Reassessment is permitted only under Section 17(3)(4) and (5) of the amended provisions. Similar was the position prior to the amendment. It will virtually amount to an order of assessment or reassessment in case the Assistant Commissioner or Deputy Commissioner of Customs while dealing*

> *with refund application is permitted to adjudicate upon the entire issue which cannot be done in the ken of the refund provisions under Section 27. In Hero Cycles Ltd. v. Union of India 2009 (240) ELT 490 (Bom.) though the High Court interfered to direct the entertainment of refund application of the duty paid under the mistake of law. However, it was observed that amendment to the original order of assessment is necessary as the relief for a refund of claim is not available as held by this Court in Priya Blue Industries Ltd. (supra).*

In view of the said decision, the grounds of grievance raised by the appellant against the impugned order are not sustainable. The order under challenge is therefore found no infirmity to this extent also.

5.4 Coming to the last ground, the additional grounds taken by Commissioner (Appeals) while rejecting the impugned refund application i.e. bar of unjust enrichment, we observe that Commissioner (Appeals) has held as follows:

> *The appellate authority finds that the instant case does not qualify the bar of unjust enrichment. As the impugned goods were sold after importation prior to judgment of SRF judgment. There is hardly any mechanism to make entry in the books of account at later stage when the decision was not in existence. The concept of unjust enrichment, defining it as the retention of a benefit that is considered contrary to justice or equity. Further, the assessment of Mobile phone was based on MRP and the goods are sold in the market accordingly on the basis of declared MRP which include duty components. Once goods assessed on declared MRP having duty component, the incidence of duty is passed on to the buyer of sale of the same.*

5.5 We also observe that in terms of Section 28D of the Customs Act, there arises a presumption about incidence of duty to have been passed on to the buyer. The provision reads as follows:

> ***28D. Presumption that incidence of duty has been passed on to the buyer***
>
> *Every person who has paid the duty on any goods under this Act shall, unless the contrary is proved by him, be deemed to have passed on the full incidence of such duty to the buyer of such goods.*

5.6 We observe that the only evidence produced by the appellant is the certification of Chartered Accountant. No doubt such certificates are admissible into evidence. But perusal thereof reveals that following is the certification given by the Chartered Accountant:

> *"Accordingly, we certify that the claimant has customs duty to the buyer or any other person and hence the requirement to rule out unjust enrichment to the importer/claimant is fulfilled in respect of all goods imported and sold as covered by the subject claim.*

5.7 The perusal makes it clear that there is no actual certification to the effect as to whether the incidence of duty has been passed to the buyers or not by the appellant. In absence thereof, we do not find any reason to differ with the findings arrived at by Commissioner (Appeals) (as quoted above). We rather observe that Hon'ble Apex Court in the case of **Mafatlal Industries Ltd. Vs. Union of India reported as 1997 (89) ELT 247 (SC)** decided on 19.12.1996 has dealt with refund claims. It has been held as follows:

(i) Where a refund of tax duty is claimed on the ground that it has been collected from the petitioner/plaintiff - whether before the commencement of the Central Excises and Customs Laws (Amendment) Act, 1991 or thereafter - by mis-interpreting or mis- applying the provisions of the Central Excises and Salt Act, 1944 read with Central Excise Tariff Act, 1985 or Customs Act, 1962 read with Customs Tariff Act or by mis-interpreting or mis-applying any of the rules, regulations or notifications issued under the said enactments, such a claim has necessarily to be preferred under and in accordance with the provisions of the respective enactment before the authorities specified thereunder and within the period of limitation prescribed therein. No suit is maintainable in that behalf. While the jurisdiction of the High Courts under Article 226 - and of this Court under Article 32 - cannot be circumscribed by the provisions of the said enactments, they will certainly have due regard to the legislative intent evidenced by the provisions of the said Acts and would exercise their jurisdiction consistent with the provisions of the Act. The writ petition will be considered and disposed of in the light of and in accordance with the provisions of Section 11B. This is for the reason that the power under Article 226 has to be exercised to effectuate the rule of law and not for abrogating it.

The said enactments including Section 11B of Central Excises and Salt Act and Section 27 of the Customs Act do constitute "law'' within the meaning of Article 265 of the Constitution of India and hence, any tax collected, retained or not refunded in accordance with the said provisions must be held to be collected, retained or not refunded, as the case may be, under the authority of law. Both the enactments are self-contained enactments providing for levy, assessment, recovery and refund of duties imposed thereunder. Section 11B of the Central Excises and Salt Act and Section 27 of the Customs Act, both before and after the 1991 (Amendment) Act are constitutionally valid and have to be followed and give effect to. Section 72 of the Contract Act has no application to such a claim of refund and cannot form a basis for maintaining a suit or a writ petition. All refund claims except those mentioned under Proposition (ii)

> *below have to be and must be filed and adjudicated under the provisions of the Central Excises and Salt Act or the Customs Act, as the case may be. It is necessary to emphasise in this behalf that Act provides a complete mechacism for correcting any errors whether of fact or law and that not only an appeal is provided to a Tribunal - which is not a departmental Organ-but to this Court, which is a civil court.*

In this case, the Hon'ble Apex Court has even held that:

> *(iv) It is not open to any person to make a refund claim on the basis of a decision of a Court or Tribunal rendered in the case of another person. He cannot also claim that the decision of the Court/Tribunal in another person's case has led him to discover the mistake of law under which he has paid the tax nor can he claim that he is entitled to prefer a writ petition or to institute a suit within three years of such alleged discovery of mistake of law. A person, whether a manufacturer or importer, must fight his own battle and must succeed or fail in such proceedings. Once the assessment or levy has become final in his case, he cannot seek to reopen it nor can he claim refund without re-opening such assessment/order on the ground of a decision in another person's case. Any proposition to the contrary not only results in substantial prejudice to public interest but is offensive to several well established principles of law. It also leads to grave public mischief. Section 72 of the Contract Act, or for that matter Section 17(1)(c) of the Limitation Act, 1963, has no application to such a claim for refund.*
>
> *(v) Article 265 of the Constitution has to be construed in the light of the goal and the ideals set out in the Preamble to the Constitution and in Articles 38 and 39 thereof. The concept of economic justice demands that in the case of indirect taxes Central Excises duties and Customs duties, the tax collected without the authority of law shall not be refunded to the petitioner- plaintiff unless he alleges and establishes that he has not passed on the burden of duty to a third party and that he has himself borne the burden of the said duty.*

5.8 It is finally been held that claims of refund except where provision is held unconstitutional, is to be preferred and adjudicated upon either under Section 11B of Central Excise Act, 1944 or under Section 27 of Customs Act, 1962. It shall be incumbent for the claimant to establish that the burden of duty has not been passed on to third party. The refund claim shall not be maintainable nor even by way of a civil suit the only possible remedy of that under Article 226 before Hon'ble High Court or under Article 32 before the Hon'ble Apex Court. With due regard to the provisions, both the said statutes has to be given and the grant of relevance of refund is to be refused where burden of duty seems passed on to the third party which as and the burden to prove the same raised upon the claimant. In the light of the said decisions, the law of land and in absence of any evidence, other than the afore observed incomplete C.A. Certificate, to discharge the burden, we do not find any reason to differ with the findings arrived at by Commissioner (Appeals). We hereby, sustain the order to this extent as well.

6. In the light of entire above discussion, we concur with the finding with respect to all the grounds based whereupon the departmental adjudicating authorities have rejected the impugned refund claim of CVD paid, we hereby uphold the order under challenge. Consequent thereto, the appeal stands dismissed.

[Order pronounced in the open court on **13.02.2025**]

(DR. RACHNA GUPTA)
MEMBER (JUDICIAL)

(HEMAMBIKA R. PRIYA)
MEMBER (TECHNICAL)

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