IN THE CUSTOMS, EXCISE & SERVICE TAX
APPELLATE TRIBUNAL
West Block No. 2, R.K. Puram, New Delhi – 110 066.
Principal Bench, New Delhi

COURT NO. I

DATE OF HEARING : 28/12/2017.
DATE OF DECISION : 05/01/2018.

Excise Appeal No. 3716 of 2006

[Arising out of the Order-in-Appeal No. 132/CE/MRT-I/2006 dated 22/08/2006 passed by The Commissioner (Appeals), Central Excise, Meerut.]

M/s HCL Office Automation Ltd. Appellant

Versus

CCE, Meerut – I Respondent

Appearance

Shri Kamal Gupta, C.A. - for the appellant.

Shri R.K. Mishra, Authorized Representative (DR) – for the Respondent.

CORAM : **Hon'ble Shri Justice Dr. Satish Chandra, President**
Hon'ble Shri B. Ravichandran, Member (Technical)

Final Order No. 50023/2018 Dated : 05/01/2018

Per. B. Ravichandran :-

The appeal is against order dated 22/08/2006 of Commissioner (Appeals), Meerut – I. The appellants are engaged in the manufacture of photocopier machines liable to Central Excise duty. A dispute arose regarding certain deductions/ abatements claimed by the appellant when they filed price list for approval on 10/10/1987. The Jurisdictional Assistant

Commissioner disallowed the deductions claimed by the appellant from the retail price of the goods manufactured and sold by the appellant. On the request of the appellant provisional assessment was ordered; appellant paid duty under protest on the higher value without deductions/abatements. After various litigations before the Commissioner (Appeals), Tribunal and Allahabad High Court, finally a position emerged that the claims for refund filed by the appellant covering the period 10/10/1987 to 31/03/1991 was valid and there was an excess payment of excise duty. The Original Authority sanctioned the refunds but credited the amount to the consumer welfare fund as he held that the appellants cannot receive the refund amount in view of the bar due to unjust enrichment in terms of Section 11B of the Central Excise Act, 1944 made applicable to finalization of provisional assessment under Rule 9B also. The appellants contested the above finding and the impugned order upheld the original order.

2. The learned Counsel for the appellant submitted mainly on two issues; first, he submitted that the appellants have not collected excess amount of duty from the buyers and as such they are not covered by principle of unjust enrichment; secondly, he submitted that the concept of unjust enrichment will not apply to the present case as the provisional assessment was finalized by the Jurisdictional Assistant Commissioner vide his order dated 19/02/1999. The provisions of unjust enrichment came into force vide Notification 55/1999-CE (NT) dated 25/06/1999. Relying on the decision of the Apex Court in **CCE, Mumbai vs. Allied**

Photographics India Ltd. – 2004 (166) E.L.T. 3 (S.C.) and **CCE vs. T.V.S. Suzuki Limited – 2003 (156) E.L.T. 161 (S.C.)**, the learned Counsel submitted that the concept of unjust enrichment does not apply in the case of provisional assessment. He also relied on the Larger Bench decision of the Tribunal in **CCE & ST, Vadodara – II vs. Panasonic Battery India Co. Ltd. – 2014 (303) E.L.T. 231 (Tri. – LB)**.

3. The learned AR contested the appeal by relying on the findings recorded in the impugned order and also referring to decision of Hon'ble Bombay High Court in **CCE, Mumbai – II vs. Standard Drum & Barrel Mfg. Co. – 2006 (199) E.L.T. 590 (Bom.)**.

4. We have heard both the sides and perused the appeal record. We take up the legal issue regarding application of concept of unjust enrichment introduced in the Rule 9B of Central Excise Rules, 1944 readwith Section 11B of the Central Excise Act, 1944 w.e.f. 25/06/1999. We note that the provisional assessment in the present case was prior to the said date. There is no dispute on this. The Larger Bench of this Tribunal in **Panasonic Battery India Co. Ltd.** (supra) examined a similar dispute. After referring to various decisions of Apex Court, Bombay and Gujarat High Courts, the Tribunal observed as below :-

> "5. We have carefully heard the rival submissions and perused the records. The concept of 'unjust enrichment' was made applicable to the Central Excise refunds under

Section 11B of the Central Excise Act, 1944 by the Central Excise & Customs (Amendment) Act, 1991 (40 of 1991). A proviso was added to Rule 9B of the Central Excise Rules, 1944 with effect from 25-6–1999 under Notification No. 45/1999-C.E. (N.T.), dated 25-6-1999. Rule-9B(5) dealing with finalization of provisional assessment and after its amendment exists in the following form :

> "(5) When the duty leviable on the goods is assessed finally in accordance with the provisions of these rules, the duty provisionally assessed shall be adjusted against the duty finally assessed, and if the duty provisionally assessed falls short of, or is in excess of the duty finally assessed, the assessee shall pay the deficiency or be entitled to a refund, as the case may be :
>
> Provided that, if an assessee is entitled to a refund, such refund shall not be made to him except in accordance with the procedure established under sub-section (2) of Section 11B of the Act."

6. On the Customs side provisional assessments & refunds arising during finalisation of Provisional assessments is covered by Section 18 of the Customs Act, 1962. By Section 21 of the Taxation Laws (Amendment) Act, 2006, inter alia, sub-section (5) to Section 18 was introduced with effect from 13-7-2006 and the same is reproduced below :

> "(5) The amount of duty refundable under sub-section (2) and the interest under sub-section (4), if any, shall, instead of being credited to the Fund, be paid to the importer or the exporter, as the case may be, if such amount is relatable to —

(a) the duty and interest, if any, paid on such duty paid by the importer, or the exporter, as the case may be, if he had not passed on the incidence of such duty and interest, if any, paid on such duty to any other person;

(b) the duty and interest, if any, paid on such duty on imports made by an individual for his personal use;

(c) the duty and interest, if any, paid on such duty borne by the buyer, if he had not passed on the incidence of such duty and interest, if any, paid on such duty to any other person;

(d) the export duty as specified in section 26;

(e) drawback of duty payable under section 74 and 75".

7. The above amendments in Section 18 of the Customs Act, 1962 and the applicability of doctrine of unjust enrichment to refunds for the provisional assessments prior to 13-7-2006 has been interpreted by Jurisdictional Gujarat High Court in the case of Commissioner of Customs v. Hindalco Industries Ltd. [2008 (231) E.L.T. 36 (Guj.)] in Paras 18 to 21 and are reproduced below :

> "18. On a plain reading it becomes apparent that sub-sections (3) and (4) relate to liability to pay interest or entitlement to claim interest consequent upon final assessment order. However, sub-section (5) is the material amendment which indicates that the Proviso appearing below sub-section (2) of Section 27 of the Act has now been incorporated as a part of Section 18 of the Act. On a plain reading the distinction between Section 18 as it stood prior to amendment i.e. upto 12-7-2006 and subsequent to the amendment i.e. with effect from 13-7-2006 becomes apparent. The difference is stark and revealing and it is not possible to agree with the

contention of revenue that such amendment has to be understood as clarificatory in nature. This is more so, when one reads the amendments made in 1998 and the amendment made in Rule 9B of the Central Excise Rules in 1999 considering the pronouncement of the Apex Court as to the distinction between making of a refund and claiming of a refund; the amendment cannot be considered to be retrospective in nature; and cannot be made applicable to pending proceedings.

19. This can be considered from a slightly different angle. While introducing the Taxation Laws (Amendment) Bill, 2005 (Bill No. 74 of 2005) the Notes on Clauses in relation to Section 18 of the Act indicate that sub-sections (3), (4) and (5) to Section 18 of the Act, have been inserted to provide for a mechanism to regularise the payments of duty short levied and interest thereon and duties that are to be refunded on finalization of provisional assessment and in this context in the report of the Standing Committee on Finance it has specifically been noted that this amendment became necessary because Section 18 of the Act which provides for provisional assessment of duty presently (i.e. upto 12-7-2006) does not provide for various issues arising from the finalization of provisional assessment. Thus it becomes apparent that the amendment in question is substantive in nature when one finds that various provisions have been inserted which were not forming part of the original Section 18 of the Act as it stood upto 12-7-2006. It is not possible to state that the provisions for payment of interest on duty short levied or entitlement to interest on duty paid in excess of the finally assessed duty can be considered to be clarificatory provisions and in the same vein the

newly inserted sub-section (5) deserves consideration. Thus in effect upto 12-7-2006 no provision existed in Section 18 of the Act which would permit revenue to invoke principles of unjust enrichment in relation to duty paid in excess, found to be so, upon finalization of provisional assessment under Section 18 of the Act.

20. Hence, the reference to provisions of Section 27 of the Act which generally deals with claim for refund of duty cannot be of any assistance to the revenue. Similarly the definition of the term assessment under Section 2(2) of the Act also cannot help the revenue in light of the specific provisions of Section 18 of the Act which override all other provisions of the Act. The contention that the Court should not permit a person to derive unjust benefit also does not merit acceptance. The Court can only read the provisions and the statute as they stand, and if necessary, interpret the same but the Court cannot legislate. This is a salutary principle of interpretation. Furthermore, as noticed hereinbefore, the Apex Court has in no uncertain terms drawn the distinction between making of refund and claiming of refund. The High Court cannot equate the two in light of the authoritative pronouncement of law by the Apex Court.

21. Therefore, on both counts, in light of the authorities referred to hereinbefore, and on interpretation of provisions of Section 18 of the Act, on finalisation of assessment if any excess duty is found to have been paid at the time of provisional assessment Revenue is bound in law to make the refund without any claim being required to be made

> by an assessee. This would be the position in law upto 12-7-2006 and not thereafter."

It is relevant to mention that in this judgment, Gujarat High Court has considered both the judgments of Supreme Court in the case of Sahakari Khand Udyog Mandal Ltd. v. CCE (supra) and Mumbai High Court in the case of CCE, Mumbai-II v. Standard Drum & Barrel Manufacturing Co. (supra); relied upon by the learned AR. On the other hand, the judgment of Gujarat High Court in the case of Commissioner of Customs v. Hindalco Industries Ltd. [2008 (231) E.L.T. 36 (Guj.)] was not brought to the notice of CESTAT Larger Bench in the case of Excel Rubber Ltd. v. CCE, Hyderabad [2011 (268) E.L.T. 419 (Tri.-LB)].

8. After analyzing the law laid down by Supreme Court in the case of CCE, Mumbai-II v. Allied Photographics Ltd. [2004 (166) E.L.T. 3 (S.C.)], Hon'ble High Court in para 18 of the order in the case of Commissioner of Customs v. Hindalco Industries Ltd. (supra) has held that there is distinction between making of a refund and claiming of a refund and that the amendment carried out in Section 18(5) on 13-7-2006 cannot be held to be clarificatory and retrospective in nature. In para 21 of the judgment in the case of Hindalco Industries Ltd. (supra) it has been held that department is bound by law to make the refund without any claim being required to be filed for the period up to 12-7-2006. Entitlement to refund and finalization of provisional assessment under Rule 9B of the Central Excise Rules, 1944 is independent from the provision of refund under Section 11B of the Central Excise Act, 1944. Even under the amendment made by Notification No. 45/99-C.E. (N.T.), dated 25-6-1999 only the procedure established under sub-section (2) of Section 11B of Central Excise Act, 1944 has been made applicable to the refunds arising out of finalization of provisional assessments under Rule 9B of

the Central Excise Rules, 1944. Accordingly the procedure regarding application of unjust enrichment to refunds on finalization of provisional assessments will be applicable to the provisional assessments made after 25-6-1999 and not before that date. The addition of proviso to Rule 9B(5) has not been made with retrospective effect. Based on the ratio of the law laid down by Hon'ble Supreme Court in the case of CCE, Mumbai-II v. Allied Photographics Ltd. (supra) and Gujarat High Court in the case of Commissioner of Customs v. Hindalco (supra), the doctrine of unjust enrichment will, therefore, not be attracted to the refunds pertaining to the finalization of provisional assessments for period prior to 25-6-1999 when the linking proviso under Rules 9B(5) of Central Excise Rules, 1944 was not existing. The linking provision under proviso to Rule 9B(5) was made by an amendment with effect from 25-6-1999 and will be applicable only w.e.f. 25-6-1999. The opinion of this Bench on the issue, therefore, goes in favour of the assessee and against the Revenue that for the period prior to 25-6-1999 unjust enrichment will not be applicable for refunds arising out of finalization of provisional assessments pertaining to the period prior to 25-6-1999 even if assessments are finalized after 25-6-1999. The regular Bench of WZB, Ahmedabad to decide the main appeals on the basis of this Larger Bench's view".

5. We note Larger Bench was relying on a decision of Apex Court in **Allied Photographics India Ltd.** (supra) which was again affirmed by the Apex Court in review – **2004 (173) E.L.T. A191 (S.C.)**.

6. As the legal position is held in favour of the appellant in view of the decision above, we are not examining the other issue

of whether or not the impugned order is correct on the fact as to the excess duty has been passed on or not by the appellant to the buyers.

7. Accordingly, the impugned order is set aside. The appeal is allowed with consequential relief.

(Order pronounced in open court on 05/01/2018.)

(Justice Dr. Satish Chandra)
President

(B. Ravichandran)
Member (Technical)

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