CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
REGIONAL BENCH AT HYDERABAD
Bench – DB
Court – I

Appeal No. E/2330/2011

(Arising out of Order-in-Appeal No. 141/2009 (V – I) CE dated 23.12.2009, passed by Commissioner(Appeals) Central Excise, Customs & Service Tax - Visakhapatnam)

C.C.E. & C.C- Visakhapatnam-I ....Appellant(s)

Vs.

Jindal Stainless Ltd., …..Respondent(s)

Appearance
Sh. Dora Reddy, (Asst. Commissioner) for the Appellant.
Sh.C. Sumanth, Advocate for the Respondent.

Coram:
Hon'ble Mr. M. V. RAVINDRAN., MEMBER (JUDICIAL)
Hon'ble Mr. C J MATHEW, MEMBER (TECHNICAL)

Date of hearing: 20/02/2018
Date of decision: 20/02/2018

FINAL ORDER No.A/30383/2018

This appeal is directed against Order-in-Appeal No.141 / 2009 (V-I) CE dated 23.12.2009 and it is filed by the revenue.

1. The relevant fact that is arise for consideration are the respondent herein is manufacture of High Carbon Ferro Chrome (HCFC) and clear the same to the sister unit at Haryana for further use in the manufacture of Stainless Steel. The said HCFC is cleared at the rate of 110% of the cost of production; as the cost of production is not known at the time of the

clearance and the same would be known at the time of finalization of accounts, the Respondent opted for provisional assessment which was accepted by the department and assessment were made provisionally. For the year 2008-2009, the Respondent submitted the copies of the audited balance sheet CAS-4 certificates and the related information required for the finalization of provisional assessments, for the period on 01.01.2009; based upon the same and documents submitted, Adjudicating Authority by Order-in-Original finalized provisional assessment and wherein differential duty due was demanded, without giving the appellant an opportunity to offset the Excise Duty paid excess by the Respondent during the same period. It is noticed from records that for the period May 2008 to December 2008 there was short payment of duty however for the period April 2008 to January 2009, there was excess payment of duty. The Respondent agreed before the Adjudicating Authority that said excess payment should be adjusted against short payment of duty, contention was rejected by the Adjudicating Authority. On an appeal the appellate authority accepted the contentions of the Respondent herein and allowed adjustment of excess payment to short payment for the period April 2008 to March 2009. He passed an order on facts and orders Adjudicating Authority to follow the directions in the Impugned Order.

2. Ld. Departmental Representative reiterates grounds of appeal and submits that Rule 7 of Central Excise Rules, 2002, assessment has to be finalized month wise and any short payment of duty during the month needs to be demanded with interest. It is his submission that the provision of Rule 7 are very clear and drawing our attention to his submission that

the total period considered finalization of assessment, in this appeal, is almost 1 year and adjustment short payment of duty to excess payment of duty is incorrect and referring to the provisions submit it would indirectly be refunding the amount of excess payment of duty without considering the doctrine of unjust enrichment. It is his submission that the appellate authority should have contested the matter and should not have remitted it to the lower authorities.

3. Ld. Counsel appearing for the Respondent submits that identical issue has been decided by the Hon'ble High Court of Karnataka in this case of Toyoto Kirloskar Auto Parts Pvt. Ltd., 2012 (276) E.L.T. 332 (Kar.) and in paragraph (8) held that the adjustment of excess payment is possible. He submits that similar issue has been expressed by the Tribunal in the case of Mercedes Benz (I) Pvt. Ltd., 2017 (347) E.L.T. 646 (Tri. – Mumbai) by following the law as laid down by the Hon'ble High Court of Karnataka, he produces the copies of the same.

4. On careful consideration on the submission made and perusal of records, we find that the facts as enumerated is undisputed. Revenue is aggrieved only by the impugned order in which the appellate authority has held that as and when provisional assessment is finalized and any excess payment for the entire period needs to be adjusted with short payment and by passing such directions remitted back the matter to lower authorities for arriving at actual dues. We find that the appeal is devoid of merits as first appellate authority in the impugned order has correctly come to the conclusion, by addressing the issue from the provisions of Rule 7 of the Central Excise Rules 2002. We find that provision of Rule 7 was

considered by the Hon'ble High Court of Karnataka in the case of Toyota Kirloskar Auto Parts Pvt. Ltd (supra). wherein lordships in paragraph 6,7,8 held as under, which settles the law in favour of the Respondent herein. We reproduce relevant paragraphs.

"Provisions of Rule 7(5) of the Central Excise Rules, 2002?

6. Rule 7 reads as under :-

"Rule 7. Provisional assessment :- (1) Where the assessee is unable to determine the value of excisable goods or determine the rate of duty applicable thereto, he may request the Assistant Commissioner of Central Excise or the Deputy Commissioner of Central Excise, as the case may be, in writing giving reasons for payment of duty on provisional basis and the Assistant Commissioner of Central Excise or the Deputy Commissioner of Central Excise, as the case may be, may order allowing payment of duty on provisional basis at such rate or on such value as may be specified by him.

(2) The payment of duty on provisional basis may be allowed, if the assessee executes a bond in the form prescribed by notification by the Board with such surely or security in such amount as the Assistant Commissioner of Central Excise or the Deputy Commissioner of Central Excise, as the case may be, deem fit, binding the assessee for payment of difference between the amount of duty as may be finally assessed and the amount of duty provisionally assessed.

(3) The Assistant Commissioner of Central Excise or the Deputy Commissioner of Central Excise, as the case may be, shall pass order for final assessment, as soon as may be, after the relevant information, as may be required for finalizing the assessment, is available, but within a period not exceeding six months from the date of the communication of the order issued under sub-rule(1) :

Provided that the period specified in this sub-rule may, on sufficient cause being shown and the reasons to be recorded in writing, be extended by the Commissioner of Central Excise for a further period not exceeding six months and by the Chief Commissioner of Central Excise for such further period as he may deem fit.

(4) The assessee shall be liable to pay interest on any amount payable to Central Government, consequent to order for final assessment under sub-rule (3), at the rate specified by the Central Government by notification issued under Sectio 11AA or Section 11AB of the Act from the first day of the month succeeding the month for which such amount is determined, till the date of payment thereof.

(5) Where the assessee is entitled to a refund consequent to order for final assessment under sub-rule (3), subject to sub-rule (6), there shall be paid an interest on such refund at the rate specified by the Central Government by notification issued under Section 11BB of the Act from the first day of the month succeeding the month for which such refund is determined, till the date of refund.

(6) Any amount of refund determined under sub-rule (3) shall be credited to the Fund:

Provided that the amount of refund, instead of being credited to the Fund, be paid to the applicant, if such amount is relatable to-

(a) the duty of excise paid by the manufacture, if he had not passed on the incidence of such duty to any other person;

(b) the duty excise borne by the buyer, if he had not passed on he incidence of such duty to any other person."

7 A perusal of the aforesaid provision makes it clear that, where the assessee is unable to determine the value of excisable goods or determine the rate of duty applicable thereto, he may request the competent authority as provided in the said provision, to permit him to pay the duty on provisional basis at such rate or on such value as may be specified by him. If the authority is satisfied, he may pass an order permitting such payment and taking all necessary steps for payment of any short fall in the duty payable at the end of assessment. Thereafter, a final assessment order is to be passed. If after the final assessment, if it is found that there is a short fall in payment of duty, sub-rule (4) provides for payment of interest on such short payment of duty. Whereas sub-rule (5) provides for refund of excess duty paid.

8. Therefore, it is clear that after a final assessment order is passed, if the duty paid in terms of provisional assessment is less than the duty payable after the final assessment, the assessee is liable to pay the interest on the short fall. In the entire scheme of Rule 7, there is no indication that when an assessee is permitted to pay duty in pursuance of a provisional assessment order, if he is dealing with more than one goods, they have to be treated separately. Even though the duty payable under the Act is to be calculated under each head of each case ultimately it is the total duty payable for all the goods which are the subject matter of the provisional assessment and final assessment which is to be taken into consideration. If after taking into consideration the duty payable in respect of all the goods and the duty paid on pursuance of the final assessment order, if still the assessee is due in any duty, then for the short fall in payment of duty, the assessee is liable to pay interest."

5. It can be seen that the law as settled is correctly followed by the first appellate authority. We do not find any reason to interfere with the impugned order. The impugned order is upheld as correct and legal.

7. The appeal stands rejected.

(Operative part of this order was pronounced in court
on conclusion of hearing)

C J MATHEW
MEMBER (TECHNICAL)

(M. V. RAVINDRAN)
MEMBER(JUDICIAL)

Swapna….