CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
REGIONAL BENCH AT HYDERABAD

Single Member Bench

Court – I

Appeal No. C/30171/2018

(Arising out of Order-in-Appeal No.VIZ-CUSTM-000-APP-040-17-18 dated 31.10.2017 passed by Commissioner (Appeals), Central Tax & Customs, Visakhapatnam)

S K S Ispat And Power Ltd ….. **Appellant(s)**

Vs.

CCT, Visakhapatnam G.S.T ….. **Respondent(s)**

Appearance

None for the Appellant.

Shri Arun Kumar, Dy. Commissioner/DR for the Respondent.

Coram:

Hon'ble Mr. P.V. SUBBA RAO, MEMBER (TECHNICAL)

Date of Hearing: 29.06.2018
Date of Decision: 29.06.2018

FINAL ORDER No. A/30650/2018

[Order per: P.VENKATA SUBBA RAO]

1. When this matter was called, nobody appeared on behalf of the appellant. I find from the record that this matter was earlier listed on 04.04.2018 and nobody appeared for the appellant. It was adjourned to 27.04.2018 and again nobody appeared on behalf of the appellant. It was again adjourned to 08.06.2018 and none appeared for the appellant and the case is adjourned for today. Again nobody appeared for the appellant. From this is appears that the appellant is clearly not interested in pursuing the

matter. Hence, I proceed to decide on the merits of the case. Heard the Learned Departmental Representative and perused the records including the submissions made in the appeal.

2. The appellant herein imported 1274.19 metric tonnes (MT) of shredded steel scrap declaring a value of USD 352/MT (CIF). This value was not agreed to by the assessing officer and he enhanced the value to USD 408/MT vide Order-in-Original No.52/2015 dated 02.03.2015. Aggrieved, the appellant appealed to the Commissioner (Appeals) who set aside the Order-in-Original. Meanwhile, the appellant had paid the duty on the higher side as decided in the Order-in-Original and cleared the goods. After the Order-in-Appeal was passed, the appellant filed a refund claim of the excess amount of duty paid amounting to Rs.12,13,645/-. The Learned lower authority rejected the refund claim vide Order-in-Original No.314/2016 dated 11.05.2017 on the ground that the appellant had not proved that the burden of Excise Duty has not been passed on to their consumers. The appellant in this case is a manufacturer of steel products and he used steel scrap to manufacture steel products. The question to be considered is whether in such case the incidence of duty on the raw-materials which were imported should be deemed to have been passed on to the customers in the form of prices in the final products or not. This issue is decided by the Hon'ble Supreme Court in the case of Solar Pesticides Pvt Ltd [2000 (116) ELT 401 (SC)]. It was held as follows:

> *"Unjust enrichment means passing not only of the duty directly to another person but also when passed indirectly – Duty paid on raw-materials when added to price of finished goods, incidence of duty considered to have been passed – Section 27(1) of Customs Act, 1962 – Corresponding to Section 11B of Central Excise Act, 1944."*

3. This ratio was followed in the case of Grasim Industries [2015 (318) ELT 594 (SC)] and Bharath Electronics Ltd [2015 (327) ELT 565 (Tri-Mumbai)] and Final Order No.40167/2018 of CESTAT, Chennai, in the case of Chemplast Sanmar Ltd. The learned Assistant Commissioner had rejected the refund claim on the ground that the appellant had utilized the raw-materials in their integrated steel plants manufacturing structural steel products and full incidence of such duty is passed on to the buyer of such goods. Aggrieved, the appellant appealed to the Commissioner (Appeals), Guntur, who vide impugned Order-in-Appeal, rejected their appeal holding that the burden of proof lies on the appellant to prove that the incidence of duty is being borne by them and in the absence of the same, the refund as claimed cannot be sanctioned.

4. The present appeal is against this Order-in-Appeal on the following grounds:

(a) The appellant submits that the order passed by the Learned Assistant Commissioner is not proper.

(b) The Learned Assistant Commissioner did not provide any opportunity to the appellant to defend his case or to produce additional documents or clarification in support of his claim.

(c) Of the total differential duty of Rs.12,13,645/-, they have availed CENVAT credit of Rs.10,33,681/- paying CVD and SAD and filed a refund claim only for Rs.1,79,964/- relating to BCD and Custom Cess.

(d) They neither passed on the burden of this amount to the customers nor availed CENVAT credit.

(e) Unjust enrichment would arise if and only when duty liability has been passed on to the buyers/customers. They also relied on the following case laws:

(i) Shakun Overseas Ltd Vs Commissioner of Customs, Chennai [2002 (140) ELT 444 (Tri-Chennai)]

(ii) Panyam Cements & Minerals Ltd Vs Commissioner of C. Ex., Belgaum [2004 (177) ELT 357 (Tri-Bang.)]

(iii) Agrotech Foods Ltd Vs Commissioner of Customs, Bangalore [2005 (192) ELT 273 (Tri-Bang.)]

5. They prayed that the appeal may be allowed and they may be sanctioned refund of the amount of Rs.1,79,964/- along with interest.

6. I have examined both sides of the matter and perused the record. The Learned Assistant Commissioner was correct in holding that the burden of proving that the unjust enrichment does not apply to their case rests on the person claiming the refund. In this case the appellant had imported steel scrap and used it to manufacture products which they then sold. Of the total amount, the CVD and SAD portion of the differential duty has already been taken as CENVAT credit. They have claimed refund of the BCD portion. They have not produced any evidence to substantiate that this portion was not included in the cost of their final products and thereby the burden has not been passed on to the consumers. Thus, they have failed in discharging their burden of proving that the unjust enrichment does not apply to their case. Even in their appeal before the Commissioner (Appeals) they have not produced any documents to substantiate their claim that the doctrine of unjust enrichment does not apply to their case. Even in their appeal filed

before this Bench, they have not produced any documents to show that the doctrine of unjust enrichment does not apply to their case. In the four opportunities given to them for personal hearing, none appeared nor have they produced any documents to show that the doctrine of unjust enrichment does not apply to their case. This leaves me with no option or to conclude that the appellant have not fulfilled their responsibility in showing that unjust enrichment does not apply to their case. However, as may be seen from Sec.27(2) of the Customs Act, where the refund is liable to be sanctioned but the person claiming the refund has not been able to prove that he has not passed on the burden of duty to their customers, such amount should be sanctioned and credited to the consumer welfare fund. If the person claiming the refund can show that the burden of duty has not been passed on to the customers, it should be given to such person. In this case, the Assistant Commissioner has erred in rejecting the claim on the ground of unjust enrichment. He should have sanctioned the amount and ordered it to be credited to the consumer welfare fund. Therefore the Order-in-Appeal is modified to that extent that the refund of the amount is sanctioned and ordered to be credited to the consumer welfare fund.

7. The appeal is disposed of as above.

(Pronounced in the open Court on 29.06.2018)

(P. VENKATA SUBBA RAO)
MEMBER (TECHNICAL)

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