# CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
## HYDERABAD

### REGIONAL BENCH

## Central Excise Appeal No. 31256 of 2017

(Arising out of order-in-Appeal No.HYD-EXCUS-RRC-APP-008-17-18(APP-i) dated 31.08.2017 passed by Commissioner of Customs & Central Excise (Appeals) Hyderabad)

**My Home Industries Pvt Ltd** ...**Appellant**
"My home Hub", 3rd Block,
9th Floor, Madhapur,
Hyderabad

**Verses**

**The Commissioner of Central Tax** ...**Respondent**
Rangareddy-GST,
Posnett Bhawan,
Ramkoti,
Hyderabad

**APPEARANCE:**
Mr B. Venugopal, Adv for the appellant
Mr S. Hanuma Prasad Authorized Representative for the Revenue

**CORAM:**
**HON'BLE MR. P. V. SUBBA RAO MEMBER (TECHNICAL)**
**HON'BLE DR. RACHNA GUPTA MEMBER(JUDICIAL)**
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**FINAL ORDER NO. 30004/2023**

**Date of Hearing: 10.01.2023**

**PER P.V. SUBBA RAO**

This appeal has been filed by My Home Industries Pvt Ltd (Appellant) to assail the order-in-appeal dated 31.08.2017 passed by Commissioner of Customs and Central Tax (Appeals-I), Hyderabad whereby he upheld the order passed by the original authority and rejected the appellant's appeal. The prayer in this appeal is to set aside the entire order-in-appeal and grant consequential reliefs. However, learned counsel for the appellant submits that the issue in this matter is an application for refund of Rs 6,35,36,825/- of which an amount of Rs 2,12,51,407/- was paid by the appellant during proceedings before the Settlement Commission. He is not pressing for refund of this amount as the amount is paid in pursuance of the proceedings before the Settlement Commission. He prays for refund of the balance of 4,22,85,418/-. The period in dispute in the present case is 1.4.2014 to

8.6.2015. The appellant is a manufacturer of cement and in some cases sells cement to the customers on FOR destination basis. Department has taken a view that the cost of transportation of the goods from the factory of the appellant to the buyers premises is includible in the assessable value in view of the judgement of the Hon'ble Supreme Court in the case of Commissioner Vs Roofit Industries Ltd [2015(319)ELT 221(SC)]. According to the appellant their case is covered by subsequent judgement of the Hon'ble Supreme Court in the case of Ispat Industries Ltd [2015(324)ELT 670(SC) in which it was decided that the buyers' premises can never be the place of removal as the goods have to be sold after removal. The place of removal under Section 4 of the Central Excise Act has necessarily to be relatable to the seller such as the factory of the assessee, Its depots or ware houses or place of it's consignment agents.

2. According to the learned counsel for the appellant, the matter was squarely decided in their favour by this Bench for subsequent period by Final Order No A/30124-30127-2022 dated 28.11.2022. Learned authorized representative for the Revenue agrees that the Final Order squarely covers the matter on merits in favour of the appellant.

3. The present dispute is regarding the amounts paid totaling to Rs. 4,22,85,418/- for the period 2014-15, April 2015, May 2015 and 1.6.2015 to 8.6.2015. During this period the appellant had not included the value of freight between factory and the buyer's premises while paying central excise duty but had consequently paid the following amounts through challans:

| Year | Challan No. & date | Freight (Rs) | Excise duty (Rs) | Interest (Rs) | Total (Rs) |
|---|---|---|---|---|---|
| 2014-15 | 0284/27.06.2015 | 28,63,15,072 | 3,15,40,108 | 35,45,408 | 3,50,85,516 |
| April 2015 | 0485/09.06.2015 | 3,06,62,348 | 34,07,074 | 57,127 | 3464201 |
| May 2015 | 2743/06.06.2015 | 2,89,13,699 | 32,12,570 | 0 | 31,12,570 |
| 1.06.2015 to 8.6.2015 | 4301/06.07.2015 | 47,08,183 | 5,23,131 | 0 | 5,23,131 |
| | TOTAL | | 3,86,82,883 | 36,02,535 | 4,22,85,418 |

After these amounts were paid, no show-cause notice under Section 11A to demand the duty and appropriate the amounts paid by the appellants were issued by the Revenue. On 10.08.2016, the appellant filed a refund claim for the amounts paid on the ground that it was not liable to pay excise duty on the freight amount. Show cause notice dated 29.09.2016 was issued to the appellant seeking to reject the refund claim on merits and also on the ground of time bar.

4. After following due process, the Assistant Commissioner passed order-in-original dated 7.11.2016 rejecting the refund claim of Rs 4,22,85,418/- on merits and also on limitation. Paragraph 28(b) of impugned order is reproduced below:

> "The refund claim for Rs 4,22,85,418/- filed on 21.09.2016 is a claim filed for the second time, being the duty and interest paid on freight charges on goods cleared on FOR basis during the period from April, 2014 to June, 2016 (upto 08.06.2015) is liable for rejection as obsolete inasmuch as(i) the same is not maintainable as discussed in para 24 supra and (ii) is also hit by limitation of time and is liable for rejection as discussed in para 25 supra;"

5. Aggrieved, the appellant filed an appeal before the Commissioner (Appeals) who, by the impugned order, upheld the order-in-original. As the issue has already been decided in favour of the appellant by this Bench on merits, the only question which remains is whether the refund is available to the appellant. According to the learned counsel for the appellant, refund is available to it for the reason that although the payment was made through four challans from 27.06.2015 to 06.07.2015, the amounts which were paid were not duty of excise but only payment of deposit for two reasons: Firstly, it is not liable to pay any excise duty on the freight. Secondly, the amounts which were paid were never appropriated by the Department as duty of excise under Section 11A and therefore continue to be deposits only. For these reasons, the limitation under Section 11B of one year from the date of payment of duty for filing the refund claim does not apply to the appellant's case. The Learned counsel relied on the following case laws:

1) Way to wealth Brokers Pvt Ltd Vs Commissioner of Central Excise Bengaluru [2022(61)GSTL 349(kar)
2) Central Office Mewar Palace Org Vs UOI 2008(12)STR 545 (Raj)
3) Rattan India Power Ltd Vs Commissioner of Customs C.Ex and CGST, Delhi [2022(65)GSTL 122(Tri-Del)]

4) Cadila Healthcare Ltd Vs Commr of Service Tax Ahmedabad [2021(50)GSTL 205(Tri-Ahmd)]
5) Pr Commr of Central Tax & Service Tax Vs Cadila Healthcare Ltd [2022(66)GSTL 99 (Guj)]

6. Learned A.R for the Revenue submits that although the matter is covered in favour of the appellant on merits in it's own case, refund cannot be sanctioned as the claim for refund was filed beyond one year from the date of payment of duty. He points out that while the challans were made between 06.07.2015 to 26.07.2015, application for refund was made only on 10.08.2015, the differential amount was paid by the appellant as duty of excise and not as another amount in challans. Therefore, it cannot be considered as anything but the duty. He asserts that as per Section 11B, application for refund of duty has to be made within one year and this limit cannot be relaxed by the Tribunal. There is nothing on record that the duty was paid under protest. He further submits that once the assessment is complete, any refund can be sanctioned to the appellant only if it is in pursuance of reassessment order or on an appeal whereby the assessment has been modified. He relies on the judgement of the Hon'ble Supreme Court in the case of ITC Ltd Vs CCE Calcutta IV [2019-TIOL-418(SC)-Customs-LB]. On a specific query from the Bench as to whether the amounts were reflected in the ER-1 returns, learned counsel for the appellant, after consulting his client, affirms that these amounts were not reflected either in the ER-1 returns for the period or those for the subsequent months. The order-in-original and the order-in-appeal also do not reflect that these amounts were reflected in the ER-1 returns.

7. We have considered the submissions of both sides and perused the records. Of the total amount claimed in the appeal only an amount of Rs 4,22,85,418 paid through four challans is being pressed by the appellant. Undisputedly, these amounts were not paid in the normal course of self-assessment and were not reflected in the ER-1 returns but were paid as differential duty of excise through those challans after being pointed out by the department. If any duty is not

levied, not paid, short paid, or short paid or erroneously refunded, the procedure to recover the amount is prescribed under Section 11A of the Central Excise Act which requires a notice to be issued to the assessee within the time limits prescribed. If the non-payment of duty is due to fraud, collision or willful misstatement or suppression of facts or violation of Act or Rules with an intent to evade payment of duty such notice can be issued within an extended period of limitation of 5 years. It is essential that a notice under Section 11A has to be issued to recover any differential amount of duty. It often happens during the course of enquiry or investigation, that the assessee pays the some or all of the disputed amount as duty. But that can only be treated as a deposit and it cannot be considered as demand of duty until it has been appropriated through an order issued in pursuance of a show-cause notice issued under Section 11A. In this case the amounts have not been appropriated and therefore they can only be considered as deposits and cannot be considered as duty. Since, no show-cause notice was issued to recover the differential duty, the amounts in dispute can only be considered as deposits. For this reason, the limitation prescribed under Section 11B for refund does not apply to this case.

8. We also consider the submissions of the learned authorized representative for the Revenue that judgement of Hon'ble Supreme Court in the case of ITC Ltd applies to this case. In **ITC Ltd** the Hon'ble Supreme Court dealt with a bunch of cases where duties were paid during the course of assessment and without assailing such assessments (some of which were self-assessments) claims for refund was filed. Hon'ble Supreme Court held that an assessment, including self-assessment attains finality and needs to be appealed against before a Higher Judicial Forum and without such an appeal or modification otherwise of the assessment, no refund can be sanctioned. In the present case, the amounts were not paid during the course of assessment but were paid subsequently. Learned counsel has, after consulting the appellant confirmed that the amounts so paid have not been reflected as duty in the ER-1 Returns

either for those periods or for subsequent period. Therefore, the **ITC Ltd** does not come to the aid of the Revenue.

9. In view of the above, and keeping in view the judgement of Tribunal in Final Order No. A/30124-30127/2022 dated 28.11.2022 in appellant's own case holding that amount of freight to buyer's premises is not includible in the assessable value. We hold that amount of Rs 6,35,36,825/- as paid by the appellants was not their duty liability. However, the amount of Rs 2,12,51,407/- has been accede to have been settled before settlement commission. Hence, we find that the impugned order needs to be modified and the appeal is allowed partially to the extent of sanction of refund of Rs 4,22,85,418(6,35,36,825-2,12,51,407/-) to the appellant.

(Order dictated and pronounced in the open Court)

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

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

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