

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

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**REGIONAL BENCH – COURT NO. II**

Single Member Bench

**Excise Appeal No. 30336 Of 2022**

[Arising out of Order-in-Appeal No.GUN-EXCUS-000-APP-111-2022-23 dated 15.07.2022 passed by the Commissioner of Central Tax & Customs (Appeals), Guntur]

**The Andhra Sugars Limited**

Kovvur, West Godavari District  
Andhra Pradesh-534350

**: Appellant (s)**

Vs

**The Commissioner of Central  
Tax- Guntur GST Commissionerate**

C.R. Buildings, Sitaram Prasad Tower,  
Red Hills, Kannavarithota,  
Guntur, Andhra Pradesh-522004

**: Respondent (s)**

APPEARANCE:

Mr. Mohd. Rahim, Advocate for the Appellant

Mr. A.Rangadham, Authorised Representative for the Respondent

**CORAM :**

**HON'BLE Mr. P. ANJANI KUMAR, MEMBER (TECHNICAL)**

**FINAL ORDER No. A/30177/2023**

Date of Hearing: 13.04.2023

Date of Decision:13.07.2023

**Per : P. ANJANI KUMAR**

In this unique case of violation of judicial discipline, the impugned order dated 18.08.2017 passed by Commissioner (Appeals), Guntur, is under challenge.

2. Brief facts of the case are that M/s The Andhra Sugars Limited, the appellants, filed a refund claim before the Assistant Commissioner for an amount of Rs.4,51,294/- for the reason that the quantity of

caustic soda lye, the appellant have supplied to M/s NALCO, was less than the invoiced quantity and therefore, there was excess payment of duty. It is also not disputed that the receiver NALCO has paid the amount equivalent to the quantity of the material received by them and availed CENVAT credit only on the quantity received by them. The Assistant Commissioner has sanctioned the refund claim. The Department being aggrieved of the same filed an appeal before the Commissioner (Appeals) who rejected the Departmental appeal. On an appeal filed by the Department, CESTAT vide Final Order No.30507-30512/2018 dated 17.04.2018 dismissed the Department's appeal. A protective demand dated 10.06.2014 was issued to the appellants on the ground that an appeal was filed against the CESTAT order relied upon by the lower authority for sanctioning the refund. The Adjudicating Authority vide OIO No.25-35/2020 -CE dated 21.09.2020 dropped the proceedings holding that there was no erroneous refund also relying upon Tribunal's Final Order No.968-969/2009 dated 17.05.2009 and the dismissal of Revenue's appeal by the Hon'ble High Court on monetary grounds. The said OIO was again reviewed and an appeal was filed with Commissioner (Appeals) who passed the impugned order dated 15.07.2022.

3. Mr. Mohd. Rahim, appearing on behalf of the appellants submits that it is incorrect for the Department to accept the final order No. A/30507-30512/2018 dated 17.04.2008 and appeal against parallel protective SCN proceedings; the lower authority erred in finding that the previous decision of the Tribunal as "per incuriam"; in doing so, the Department is making the Tribunal to review its previous decisions

instead of following the same; it was open for the Department not to withdraw the appeals pending before Hon'ble High Court even though on monetary grounds; there is no difference in the facts in the current case and the previous decisions of the Tribunal, the principles of *res judicata* should be honoured.

4. On the merits of the case, learned Counsel submits that the contention in the OIA, that the appellant has not paid duty to the Department and hence, he is not eligible for refund under Section 11B of Central Excise Act, 1944, is incorrect; a plain reading of the section makes it clear that "a buyer" who has borne the burden of duty and has not passed on the same can claim refund; Tribunal in the Final Order No.968-969/2009 dated 07.05.2009 has discussed the issue on merits also by applying the provisions of Section 11B to the facts of the case and therefore, the appellants are eligible for refund. Learned Counsel submits that Department is resorting to multiple reviews against the same cause of action, which is not permissible under law; Department is bound by the decisions of Higher Appellate Tribunal and the High Court in the appellant's own case instead of taking a contrary stand. He relies upon the following case laws:

- *Kamlakshi Finance Corporation Ltd.-1991 (55) ELT 433 (SC).*
- *Andhra Sugars Ltd.-2010 (262) ELT 654 (Tri. Bang.) and High Court Order in CEA No.7/2010 dated 28.08.2018- Department's appeal dismissed as withdrawn.*
- *The Andhra Sugars Ltd.- Final Order No.05/2010 dated 07.10.2010 passed by the Hon'ble CESTAT, Bangalore in Appeal No. E/759/2009 and High Court Order in CEA No.278/2010 dated 28.08.2018- Department's appeal dismissed as withdrawn.*

- *The Andhra Sugars Ltd. Final Order No. A/31871-31873/2017 dated 28.11.2017 passed by Hon'ble CESTAT, Hyderabad*
- *The Andhra Sugars Ltd. Final Order No. A/30507-30512/2018 dated 17.04.2018 passed by Hon'ble CESTAT, Hyderabad*

5. Mr. A. Rangadham, learned Authorized Representative for the Department submits that non-filing of appeal in one case is no bar to file in another case as held by the Hon'ble Apex Court in the case of *C.K. Gangadharan Vs CIT, Cochin-2008 (228) ELT 497 (SC)*. He also relies upon *ITC Ltd. Vs Person Incharge, Agricultural Market Committee, Kakinada & Others- (2004) 2 SCC 794* and *CCE, Chandigarh Vs Doaba Steel Rolling Mills-2011 (269) ELT 298 (SC)*.

6. Heard both sides and perused the records of the case. Apart from the merits of the case, which stands decided by the previous order of the Tribunal, issue involved hearing is as to whether the Department can reopen and review the order of the Tribunal, by way of a show cause notice on the grounds that refund granted was erroneous, where no appeal was filed against the order of the Tribunal. The Order-in-Original No.81/2013-CE (R) dated 15.07.2013 was passed by the lower authority following the Final Order No. 968-969/2009 dated 07.05.2009 of CESTAT. The issue travelled up to the Tribunal after the appeal filed by the Department was rejected by the First Appellate Authority. CESTAT vide Final Order No. A/30507-30512/2018 dated 17.04.2018 rejected the Department's appeal. The order was not challenged by the Department. Meanwhile, an appeal against the Final Order No.968-969/2009 dated 07.05.2009 was

dismissed as withdrawn by the Hon'ble High Court on the grounds of monetary limits.

7. Though, the Final Order No. A/30507-30512/2018 dated 17.04.2018 passed by CESTAT was not challenged, the Department issued a show cause notice dated 10.06.2014 seeking to recover the erroneously refunded duty. Lower Authority discharged the show cause notice, along with other cases, vide OIO No.25-35/2020 dated 21.09.2020. However, learned Commissioner (Appeals), vide the impugned order dated 15.07.2022 upheld the contention of the Revenue on merits and also held that the order of the Tribunal was "per incuriam".

8. As a result, the Tribunal's order which attained the finality by not filing an appeal was not implemented in spirit and a review process has been initiated through the back door by issuance of a show cause notice. This is clearly against the principles of judicial discipline. In case, the protective demand was issued before the finalization of the appeal by CESTAT, it was within the permissible limits of the Department to withdraw the same. I find that the Original Authority vide OIO No.25-35/2020 dated 21.09.2020 has rightly discharged the same. I am of the considered opinion that Commissioner (Appeals) cannot sit in judgment of the Tribunal's order and to hold the same to be issued "per incuriam", whereas no appeal has been filed against the CESTAT Order and an appeal filed earlier on a case involving identical issue was withdrawn on monetary grounds. I find that it is curious to note that whereas some 10 to 12 orders were

passed on the issue against the very same appellant covering the periods before and after the period covered in the impugned order. The Revenue contends that there is no "estoppel" in Revenue's matter. Maybe it so, it's not open to the Department to open up a case which attained finality. In passing an order contrary to the order of the CESTAT and holding that the CESTAT order was "per incuriam", learned Commissioner (Appeals) has exceeded his brief. Moreover, in the instant case, I find that the Department has followed 'pick and choose' method making a joke of the judicial process and putting the appellant to unwarranted hardship by refraining from appealing past and future cases and selecting only case for review.

9. I also find that the finding of the Commissioner as regards the applicability of the provisions of Section 11B to the facts of the case are incorrect and are as a result of incoherent reading of the provisions of the statute. I find that CESTAT vide orders cited above has discussed an issue on merits also and concluded that the appellants are eligible for refund.

10. In view of the above, the impugned order is set aside and the appeal is allowed with consequential relief, if any, as per law.

*(Pronounced in the open Court on 13.07.2023)*

**(P. ANJANI KUMAR)**  
MEMBER (TECHNICAL)