

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

Division Bench
Court – I

Customs Appeal No. 3452 of 2012

(Arising out of OIA No. 08/2012 (V-II) Cus dt.13.09.2012 passed by Commissioner
(Appeals), Customs & Central Excise, Visakhapatnam)

**Commissioner of Customs & Service
Tax, Visakhapatnam - Cus**

4th Floor, Customs House, Port Area,
Visakhapatnam, AP – 530 035

.....Appellant

VERSUS

Atlantic Shipping Pvt Ltd

Ayodhya Nagar, Near Dairy Farm Centre,
Kakinada, Andhra Pradesh – 533 001

.....Respondent

and

Customs Appeal No. 3453 of 2012

(Arising out of OIA No. 09/2012 (V-II) Cus dt.13.09.2012 passed by Commissioner
(Appeals), Customs & Central Excise, Visakhapatnam)

**Commissioner of Customs & Service
Tax, Visakhapatnam - Cus**

4th Floor, Customs House, Port Area,
Visakhapatnam, AP – 530 035

.....Appellant

VERSUS

Atlantic Shipping Pvt Ltd

Ayodhya Nagar, Near Dairy Farm Centre,
Kakinada, Andhra Pradesh – 533 001

.....Respondent

Appearance

Shri A. Rangadham, AR for the Appellant.
Shri Muralidhar M. Panicker, Advocate for the Respondents.

Coram:

HON'BLE MR. ANIL CHOUDHARY, MEMBER (JUDICIAL)

HON'BLE MR. A.K. JYOTISHI, MEMBER (TECHNICAL)

FINAL ORDER No. A/30285-30286/2023

Date of Hearing: 02.08.2023

Date of Decision: 02.08.2023

[Order per: A.K. JYOTISHI]

These Appeals are filed by the Revenue against the impugned Order-in-Appeals No. 08/2012 (V-II) Cus & 09/2012 (V-II) Cus both dated 13.09.2012.

2. The Respondents are agents of Shipping Liners. As per the prevailing guidelines regulating conversion of 'foreign going vessels' for 'coastal run' and subsequent reversion to foreign going, the stocks of bunkers and consumables were assessed to duty provisionally, vide Bill of Entry No.74 & 75 both dated 21.09.2007 and accordingly, the agents paid customs duty of Rs. 1,12,88,432/- on 11.10.2007 along with interest of Rs. 78,868/-. Subsequently, as on reversion of ship from coastal run to foreign run on 19.04.2008, after taking into account the closing inventory of goods, the assessments in respect of the said bills of entry was finalized on 04.07.2011. As a consequence of finalization, it was noticed that there has been an excess payment of duty for amount of Rs. 21,01,534/-.

3. The Respondents filed a refund claim of Rs.21,01,534/- and Rs.14,682/- on authorization from the shipping liner - M/s Associated Maritime Company Ltd. The Adjudicating Authority while sanctioning the said refund claim, invoked the provision of Sec 27(1A) and held that the refund in this case was not payable to the Respondents, and instead was liable for credit to the 'consumer welfare fund' in terms of Sec 12(C) of Central Excise Act read with Proviso to Sec 27(2) of the Customs Act, 1962.

4. Aggrieved by this Order, the Respondents filed an Appeal before the Commissioner (Appeals), who, after going through their submissions in support of their case, that doctrine of unjust enrichment was not applicable, came to the conclusion by agreeing with the submissions of the Respondents and allowed the Appeal.

5. Similarly, another Order-in-Original was passed by the Adjudicating Authority vide 38(R)/2012/LVR/KKD-1/CUS dated 28.05.2012, whereby refund of interest was disallowed on account its being paid towards interest on delayed payment of duty. However, though an amount of Rs.33,12,268/- was sanctioned, it was ordered to be credited to 'Consumer Welfare Fund' in terms of Sec 12(C) of Central Excise Act, 1944 read with Proviso to Sec 27(2) of Customs Act. The issue is identical except here the refund was filed in relation to Bill of Entry No.13 dated 16.01.2008 and it was filed on authorization from M/s Associated Maritime Company Ltd, Hongkong. The arguments by the Appellants are almost similar and grounds taken by the Original Authority are also similar for crediting the sanctioned amount to the Fund.

6. Since in both the Appeals issues are identical and the grounds given in impugned Order of Commissioner (Appeals), allowing the Appeals of the Appellants (here Respondents) are almost similar, we intend to take both the Appeals filed by the Revenue together.

7. The Department is in appeal (C/3452/2012 & C/3453/2012) against this OIA Nos. 08/2012 (V-II) Cus & 09/2012 (V-II) Cus both dated 13.09.2012 passed by the Commissioner of Customs & Central Excise (Appeals), Visakhapatnam.

8. The Respondents relied on the judgment in their own case CC, Vijayawada vs Atlantic Shipping Pvt Ltd (Final Order No.A/30092/2017 dated 25.01.2017), wherein, under identical facts, Appeal of Revenue against Commissioner (Appeals) Order was dismissed. They have also relied on another Order in their own case (Final Order No.A/30212/2016 dated 26.02.2016), wherein, the Hyderabad Bench of this Tribunal dismissed the Appeal of Revenue relying on the judgments in their case in CCE, Pune vs Atlantic Shipping Pvt Ltd [2014 (307) ELT 776 (Tri-Mumbai)].

9. In their grounds, the Appellant/Revenue have primarily submitted that Commissioner (Appeals) has relied on certain case laws, which are distinguishable in the facts of the instant case. They have mainly relied on the fact that there is lack of material evidence to prove that incidence of duty has not been passed on in terms of Sec 27(1A) of the Customs Act, 1962 and therefore, in absence of material evidence, in terms of Sec 28D, it shall be presumed that incidence of duty has been passed on to the buyers in the absence of evidence to the contrary. The Department has also relied on the judgment in the case of Ambica Maritime Ltd [2006 (205) ELT 1007 (Tri-Mumbai)] to support their contention that there is no exception, whether the excess duty paid is utilized in India or abroad and therefore, the refund of duty on provisional assessment is subject to procedure prescribed in the Customs Act. This decision was further fortified by the decision of Hon'ble Supreme Court in the case of Sahkari Khand Udyog Mandal Ltd [2005 (181) ELT 328 (SC)] and the Hon'ble High Court's decision in the case of Bussa Overseas & Properties Pvt Ltd [2003 (158) ELT 135].

10. According to the Department, the rationale given by the Commissioner that since the balance consumables on which refund is sought were on board the vessel, the question of passing on incidence of duty does not arise, is not

correct since in the subject case the persons claiming the refund were basically port agents, who extend service for handling conversion, reversion from foreign run to coastal run and vice versa and therefore, being an agent it cannot be presumed that claimant had borne the duty incidence. They also emphasize that even if a Certificate is issued by a Chartered Accountant (CA) in the case of claimants being importer, one cannot presume that excess duty was not charged to their customer, whether directly or indirectly.

11. On the other hand, the Respondents in the Memorandum of Cross Objection in Appeal C/3453/2012 have mainly contended that the grounds taken by the Revenue that there was lack of material evidence to prove that incidence of payment of duty has not been passed on, is not correct, in as much as, they had submitted CA Certificate and also ledger extract of the Books of Accounts. They further submitted that the CA Certificate was duly considered by the Commissioner (Appeals), relying on the judgment of *Atlantic Shipping Pvt Ltd, Sikka* [2012 (281) ELT 292 (Tri-Ahmd)] in support of their contention that CA Certificate cannot be brushed aside.

12. The Respondents have also submitted that reliance placed by the Revenue on Sec 28D is also misplaced, in as much the provisions of this section would be applicable only in those cases where at the time of clearance of goods, the amount of duty that forms part of the prices on which such goods are to be sold, should be indicated in all documents relating to the assessment. Whereas in the instant case, there was no clearance or sale of goods in respect of bunkers and other consumables, which remained on board the vessel, after reversion of vessel to foreign run. Refund has been sought on goods which remained on board and have not been cleared and therefore, no sale of goods is involved. Therefore, when there is no seller or buyer, Sec 28D is not applicable.

13. The Respondents have also tried to distinguish certain case laws relied by the Appellant/Department i.e., *Bussa Overseas & Properties Pvt Ltd* [2003 (158) ELT 135], *M/s Sahakari Khand Udyog Mandal Ltd* [2005 (181) ELT 328 (SC)] & *M/s Ambica Maritime Ltd* [2006 (205) ELT 1007 (Tri-Mumbai)], on the grounds that the facts are clearly distinguishable. In *Bussa Overseas* (cited supra), the issue related to refund of duty made for home consumption. Similarly, in the case of *Sarkari Khand Udyog Mandal Ltd* (cited supra), it was related to refund of excess duty paid on goods produced in India which is not the case in the present Appeal. The Appellants also tried to distinguish the case of *Ambica Maritime Ltd* (cited supra) which was related to refund of duty after finalization

of assessment, whereas in their case, the claim was filed for refund of duty paid on unutilized bunker after finalization of bill of entry, as per the procedure and guidelines mentioned in the Board Circular No. 58/97 dated 06.11.1997 read with Board's letter F.No.450/66/2005-Cus-IV dated 24.11.2005. Therefore, when refund is being sought for the goods, which have not been consumed during the coastal run and therefore, it was neither removed from the custom charge nor sold to any other person and accordingly, unutilized duty paid bunker was available with the master of the vessel for foreign run. They have also relied on certain provisions under Sec 18(5)(e) of the Customs Act and Proviso to Sec 11B(2), in support that the doctrine of unjust enrichment is not applicable in this case on similar lines as applicable to rebate of duty of excise on excisable goods exported out of India or on excisable materials used in the manufacture of goods which are exported out of India and therefore, the principle of unjust enrichment is not applicable in their case as well.

14. The factual matrix in case laws namely, *Ambica Maritime Ltd* [2007 (220) ELT 887 (Tri-Ahmd)] and *Atlantic Shipping Pvt Ltd, Sikka* [2012 (281) ELT 292] are identical with instant case. In the case of *Ambica Maritime Ltd* (cited supra), the Tribunal held that the duty paid on provisional assessment as per the Board's Circular dated 06.11.1997 on bunkers to be consumed by the vessel during coastal run is a notional duty deposit and hence the doctrine of unjust enrichment is not applicable in refund claim of excess duty paid in respect of unutilized store. They have also relied on another judgment in the case of *CC, Mangalore vs Agrotech Foods Ltd* [2010 (249) ELT 348 (Kar)] in support of their contention that the principle of unjust enrichment is not attracted in the facts of the case.

15. On the other hand, the learned DR reiterates the grounds of Appeal given in the Appeal memorandum. In addition, they have relied on the following judgments:

- i) *Bussa Overseas & Properties Pvt Ltd vs UOI* [2003 (158) ELT 135 (Bom).
- ii) *Gail India Ltd vs CCE, Gwalior* [2011 (264) ELT 393 (Tri-Del)].
- iii) *CCE, Bangalore-III vs Toyota Kirloskar Motor Pvt Ltd* [2010 (256) ELT 671 (Kar.)]

in support that bar of unjust enrichment is applicable in the case of provisional assessment also and that mere production of CA's Certificate cannot substantiate non passing of duty incidence to buyer.

16. All the above judgments are primarily in support of the fact that all the claims of refund under the Customs Act must pass the test of unjust enrichment and unless it is established that duty element has not been passed on to others, no refund can be granted. Similarly, in the case of GAIL Ltd (*supra*), the Department has relied to explain that unless non-collection of duty is established by cogent evidence, the mere recording of amount being recoverable in accounts book cannot approve the fact of non-collection of duty.

17. Heard both the parties and perused the documents.

18. The issue, in brief, is whether in the given facts, the Appellate Authority i.e., Commissioner (Appeals) was correct in setting aside the Order of Adjudicating Authority invoking the principle of unjust enrichment while sanctioning the refund or otherwise. The admitted facts are that the Appellants were agents for liners who filed refund claim under authorization given to them in respect of excess customs duty paid on bunkers and other stores in connection with conversion and reversion of vessel, as per the procedure provided in Circular 58/97 dated 06.11.97. They had submitted, *inter alia*, CA Certificates dated 11.02.2012. They have also submitted ledger account extracts of the Respondents in support that said amount, were recorded as receivable.

19. The CBEC has prescribed a procedure for collection of duty on ship's stores and bunker consumed during coastal run vide Circular No. 58/97 dated 06.11.1997. This special procedure, *inter alia*, provides that the duty on the bunkers like diesel, furnace oil, etc., may be recovered at 110% of duty leviable on the quantity estimated to be consumed during the coastal run at the time of conversion from foreign run to coastal run on provisional assessment basis. It also provides that steamer agent may file refund claim, if any, to get refund of duty at the time of reversion from coastal run to foreign run and detailed procedure has been prescribed for the same. This procedure also provided that either master of the vessel or the steamer agent can make an application to the Customs for checking the inventories on which the duty has been paid and for which they would be claiming refund of duty paid and on the basis of the receipt of copy of inventory, steamer agent is required to file refund claim.

20. The Commissioner (Appeals) in his findings, *inter alia*, considered the case of Ambica Maritime Ltd [2006 (205) ELT 1007 (Tri-Mum)] and held that it is not relevant as the said judgment has relied on two judgments viz., Bussa

Overseas & Properties Pvt Ltd (supra) and Sahkari Khand Udyog Mandal Ltd (supra), and the facts in these two cases are clearly distinguishable, as the matter here is relating to unutilized bunkers, which have not been removed from the custom charge, but remained on board the vessel and no sale of goods happened. On the other hand, he found that the judgment in the case of Agrotech Foods Ltd (supra) is relevant. He observed that in this case, unutilized bunkers remained on Board the vessel which was set for foreign run and were within the physical control of customs, and hence unutilized bunkers cannot be available for any commercial transaction. He has also relied on two other cases viz., Ambica Maritime Ltd [2007 (220) ELT 887 (Tri-Ahmd)] and Atlantic Shipping Pvt Ltd (supra). In the case of Ambica Maritime Ltd, the Tribunal, *inter alia*, held that duty paid on provisional assessment as per Board Circular No. 58/97 dated 06.11.1997 on the bunkers to be consumed by the vessels during the coastal trade, is a notional duty deposit, and hence doctrine of unjust enrichment is not applicable in refund of excess duty paid in respect of unutilized store.

21. Similarly in the case of Atlantic Shipping Pvt Ltd vs CC, Jamnagar [2012 (281) 292 (Tri-Ahmd)], the Tribunal held that doctrine of unjust enrichment is not applicable in the case of refund claim of excess duty paid in respect of stores remained on board, on reversion of vessel to foreign run.

22. Admittedly, the respondent agent is following the procedure prescribed for the steamer agents in terms of Board Circular dated 06.11.1997 and Board's letter dated 24.11.2005. It is essentially meant for recovery of applicable customs duty on the quantity consumed during the coastal run and based on the actual consumption, the duty could turn out to be either short or excess than quantity on which duty was paid, based on estimated quantity. Therefore, even though the assessment has been referred to as provisional assessment, the payment of duty is more in the nature of deposit. There is also force in the Respondents's contention that the principle of unjust enrichment is not invocable in respect of certain categories of refunds viz., drawback payable under Sec 74 & 75 as these are cases where goods are getting exported.

23. Before we analyze different aspects, we find that matter is no longer *res integra*. In their own case, the Coordinate Bench in their Order (No. A/30212/2016) relying on earlier judgment in the case of CCE, Pune vs Atlantic Shipping Pvt Ltd [2014 (307) ELT 776 (Tri-Mumbai)] dismissed the Appeal of Revenue. In this case, Commissioner (Appeals) had upheld the decision of

granting refund by Original Authority and Revenue had appealed against the Commissioner (Appeals) Order. The relevant portion is cited below:

"3. Being aggrieved, the department filed appeal before the Commissioner of Customs (Appeals), Visakhapatnam. However, vide the impugned order the Commissioner (Appeals) upheld the sanction of refund. Hence the present appeal filed by Revenue mainly on three grounds. Firstly that the claim of refund is hit by doctrine of unjust enrichment; That the Dy. Commissioner erred in holding that since the balance consumables on which the refund is sought is on board the vessel, the question of passing of incidence of duty does not arise. Secondly, that the person claiming the refund viz. M/s Atlantic Shipping Pvt Ltd are basically Port agents who extend service for handling conversion/reversion of vessel from foreign run to coastal run and vice versa. That being an agent, it cannot be presumed that the claimant had borne the incidence of duty. Thirdly, that the appellant has not produced a Chartered Accountants Certificate to establish that duty was not charged on their customers whether directly or indirectly.

4. The learned AR Shri G.S.Saraj appearing for the Revenue strongly argued that above contentions raised in the grounds of appeal. He submitted that the respondents have not established that the incidence of duty has not been passed on and that therefore, as per Section 27 of the Customs Act, 1962, the refund is liable to be rejected. The learned consultant shri Antony Irineus Carneiro, submitted that the refund has been rightly sanctioned and paid to the respondents. He reiterated the contentions filed in the cross objections by the respondents. He pointed out that the appellant has produced the certificate issued by a Chartered Accountant, in which it has clearly stated that the incidence of duty has not been passed on to any other person directly or indirectly. Further, that the Circular No.58/97 dated 06.11.97 provides that the duty on bunkers like diesel, furnace oil, etc. may be recovered at 110% of the duty leviable on the quantity estimated to be consumed during the coastal run at the time of conversion from foreign run to coastal run on provisional assessment basis. The circular also states that a steamer agent may file refund claim, to get refund of duty at the time of reconversion from coastal run to foreign run. The learned consultant relied upon the judgment laid in the appellant's own case reported in 2014 (307) ELT 776 (Tri-Mumbai)."

24. Later, this Tribunal again in the case of CC, Vijayawada vs Atlantic Shipping Pvt Ltd (Final Order No. A/30092/2017 dated 25.01.2017) held that in the given facts, doctrine of unjust enrichment is not applicable. The relevant portion is cited below:

"3. None appeared on behalf of the respondent though notice was issued. The appeal is taken up for disposal after hearing the learned AR and also after perusal of records. The only contention raised by the Department is that the refund claim has not passed the test of unjust enrichment. On perusal of records, it is seen that the authorities below have considered the issue of unjust enrichment also. The respondents had paid provisional duty amount of Rs.74,84,736/- towards duty on the bunkers and consumables etc. on board the vessel before converting the vessel into coastal run. The vessel was reverted to foreign run on 6.10.2010 and the assessment was finalized on 4.7.2011 showing the excess duty paid of Rs.25,87,580/-. The respondents have filed refund claim of this excess duty. The authorities below have found that the said consumables are on board the vessel and therefore the question of passing the incidence of duty on these goods obviously does not arise. Therefore I do not find any merits in the contention

of the Department that the refund claim is hit by unjust enrichment. The appeal is dismissed."

25. As far as reliance on case law of GAIL India Ltd vs CCE (cited supra) is concerned, wherein it was held that a CA Certificate would be a corroborative piece of evidence but the corroborative piece of evidence cannot be a main piece of evidence regarding the fact which has to be proved by the party, this case is also distinguishable in as much as several documents were submitted by the Respondents including CA's Certificate. They have submitted "disclaimer certificate" from the ship owner in favour of Respondents wherein, *inter alia*, they have also mentioned that the remittance of customs duty on conversion of their charter/agency vessel from foreign run to coastal run is done by the Respondents only. In addition, the Respondents have given the Certificate from CA which also indicates that Certificate is being issued based on charter party account as well as on the information/explanation given and based on that they have certified that the refund claim by the Respondents on behalf of the owner has not been passed on to the charterer/any other person. The Respondents had also submitted an "extract of ledger accounts" for the relevant period according to which the said amount of refund has been mentioned when the said amount has been deposited and shown as customs duty receivable. Thus, it is not merely CA's Certificate that has been submitted by Respondents to prove that refund is not hit by unjust enrichment.

26. Therefore, on holistically evaluating all the documents submitted at the time of claiming refund, it would show that the Respondent had given enough evidence in support of the fact that duty incidence has not been passed on to the customer of the goods on which the duty has been paid. It is also noted that Department has relied on Sec 28D of the Customs Act to invoke presumption on the Respondents. However, a plain reading of the provisions would indicate that provision will be attracted only when there is sale of goods to buyer, which is not the case in the instant case. Therefore, deeming provision for presumption against Respondent would not be applicable in the facts of the case.

27. Therefore, without prejudice to the fact that there are clear judgments in favour of the Respondents supporting their contention that doctrine of unjust enrichment is not applicable in their case, even on account of submission of their documents and the relevant fact in support that the goods remained on board the vessel and had not been cleared out of custom charge and in view of submission of various documents including CA's Certificate, unjust enrichment

would not be applicable. The Revenue has no evidence to support that the incidence in this case has been passed on to anybody.

28. We, further find that the matter is no longer *res integra* and therefore, respectfully relying on various judgments, including the Final Order No. A/30092/2017 dated 25.01.2017 & Final Order No. A/30212/2016 dated 26.02.2016 passed by this Bench in the Respondent's own case, we do not find any merit in the Appeals filed by the Revenue and accordingly, we dismiss both the Appeals.

(Operative part of the Order was pronounced in the Open Court)

(ANIL CHOUDHARY)
MEMBER (JUDICIAL)

(A.K. JYOTISHI)
MEMBER (TECHNICAL)