**IN THE CUSTOMS, EXCISE & SERVICE TAX
APPELLATE TRIBUNAL KOLKATA
EAST ZONAL BENCH, KOLKATA**

Date of Hearing: 16.5.2018
Date of Pronouncement: 10.07.2018

Appeal No. C/72/2010-DB

(Arising out of Order-in-Appeal No. 46/CUS/b-1/2009 dated 16.12.2009 passed by the Commissioner (Appeals), Central Excise, Customs & Service Tax. Bhubaneswar)

M/s Essel Mining & Industries Ltd. Appellant

Vs.

CC, Bhubaneswar Respondent

Appearance

Shri Ravi Raghvan, Advocate &
Shri R. Raju, C.A. - for the appellant

Shri S. Guhar, A.R. - for the respondent

CORAM: **Hon'ble Mr. P.K. Choudhary, Member (Judicial)**
Hon'ble Mr. Bijay Kumar, Member (Technical)

Final Order No.F/76414/2018

Per Bijay Kumar :

This appeal has been filed by the appellant against the impugned order passed by the ld. Commissioner (Appeals) wherein the appeal filed by the appellant has been rejected upholding the order of the original adjudicating authority.

2. The issue pertains to grant of refund to the appellant in terms of their application, which was adjudicated upon by the lower

adjudicating authority after following the due process of law. The adjudication order resulted into denial of refund claim on the ground that the appellant has failed to produce the evidence regarding unjust enrichment in terms of Section 18(5)(a) of the Customs Act, 1962. Originally the goods were exporting as per Notification No. 116/2008-Cus. dated 31.10.2008. The adjudicating authority after granting the refund deposited the same to the Consumer Welfare Fund in accordance with Section 18(5)(a) of the Customs Act, 1962.

3. The ld. Advocate submitted that the impugned order has not been passed by Commissioner (Appeals) without taking into consideration of the facts and circumstances of the case and not following the set judicial proceedings as enunciated in the following case laws:

(i) ***Sesa Goa Ltd. Vs. CCE & Cus.***- 2014 (313) ELT 317 (T);

(ii) ***Indian Oil Corporation Vs. CCE & Cus***. – 2005 (180) ELT 202 (T);

(iii) ***CCE Vs. Panihati Rubber Ltd.*** – 2004 (172) ELT 310 (Cal.)

(iv) ***CC Vs. Larsen & Toubro*** – 2006 (200) ELT 132 (Tri.-Bang.): and

(v) ***Amadalavalasa Co-operative Sugars Ltd. Vs. CCE*** – 2007 (219) ELT 526 (Tr.-Bang.).

4. At the time of hearing, the ld. Advocate has also drawn our attention towards the fact that the principles of unjust enrichment is

rebuttal presumption and once assessee has disposed of its duty to prove the incidence of duty has not been passed on to the consumer, it is the duty of department to rebut the evidence produced by the appellant. He placed reliance on the following decisions for the aforesaid principle;

(a) ***Business Overseas Corporation Vs. CC*** – 2015 (317) ELT 637 (Tri.-Del.);

(b) ***Tirumala Bearings Pvt. Ltd. Vs. CCE & Cus.*** – 2016 (335) ELT 145 (Tri.-Bang); and

(c) ***CCE Vs. Binakia Synthetics Ltd.*** – 2013 (294) ELT 156 (Tri.-Ahmd.).

5. The ld. DR supported the impugned order on the ground that the appellate authority has fully analysed the contracts relevant for the aforesaid export and realisation of CFR price @ USD 70.00 PDMT in the contract itself proves that the incidence of duty has been passed on to the buyer. Further, at the time of personal hearing before the adjudicating authority the appellant has admitted that they realised from buyer USD 70.00 PMT. This itself suggested the passing the incidence of duty to the buyer.

6. We have considered the submissions made by the parties and also perused the appeal records. From the fact and arguments adduced, it is quite apparent that the ld. Commissioner (Appeals) has not considered the various submissions made by the appellant and

also the case laws cited above for their relevancy in the factual matrix. Accordingly, we set aside the impugned order and allow the appeal by way of remand to the Commissioner (Appeals) for appropriate order following the due process of law. As the case is very old (2009 Appeal) Commissioner (Appeal) is directed to decide the issue within three months from the receipt of this order).

(Pronounced in Court on 10.07.2018)

Sd/ Sd/

(P.K. Choudhary) (Bijay Kumar)
Member (Judicial) Member (Technical)

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