IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL, KOLKATA
EASTERN ZONAL BENCH : KOLKATA

REGIONAL BENCH - COURT NO.2

Excise Appeal No.76477 of 2017
(Arising out of Order-in-Appeal No.40/DIB/CE(A)/GHY/2017 dated 17.05.2017 passed by Commissioner, Customs & Central Excise(Appeals), Guwahati.)

Commissioner of Central Excise & Service Tax, Dibrugarh
(H.No.30, Milannagar 'F' Lane, Dibrugarh-786003.)

...Appellant

VERSUS

M/s.Oil India Limited

.....Respondent

(PO-Duliajan, Dibrugarh,
Assam-786602.)

APPEARANCE

Shri S.S.Chattopadhyay, Authorized Representative for the Appellant (s)
Shri K.K.Acharya, Advocate for the Respondent (s)

CORAM: HON'BLE SHRI P.K.CHOUDHARY, MEMBER(JUDICIAL)
HON'BLE SHRI P.ANJANI KUMAR, MEMBER(TECHNICAL)

FINAL ORDER NO. 75412/2020

DATE OF HEARING : 13 January 2020
DATE OF DECISION : 13 January 2020

P.K.CHOUDHARY :

The facts of the case in brief are that the respondent is registered with the Central Excise department vide Registration No.AAACO2352CXM002 under the provisions of erstwhile Central Excise Laws and is engaged in the business of exploration, development and production of crude oil and natural gas. The Respondent is liable to pay Oil Industry Development Cess ("OID Cess) on the quantity of crude oil sold to the refineries as per section 15(1) of the Oil Industry Development Act, 1974 ('the OID Act'). Further, the respondent was also liable to pay Education Cess ('EC') and Secondary and Higher Education Cess ('SHEC') at the rate of 2% and 1% respectively of all duties on excise leviable by the Ministry of Finance (Department of Revenue). The Respondent was under a bonafide belief that EC and SHEC is payable on OID Cess as a duty of excise levied by the Ministry of Finance (Department of Revenue). Thus, the Respondent initially discharged EC and SHEC on OID Cess. In 2004, a clarification was issued by the Department vide Circular No.F.No.345/2/2004-TRU (Pt.) dated 10.08.2004 wherein it was clarified that EC is to be calculated on duties which are levied and collected by the Department of Revenue. In view of the aforesaid clarification, the Respondent vide their letter dated 01.11.2004 intimated to the Department that they intend to discontinue the payment of EC on OID Cess from November 2004. However, Department vide letter dated 12.01.2005 intimated to the Respondent that Education Cess is leviable on all kinds of cesses collected as a duty of excise and further directed the Respondent to pay arrear EC and continue payment of the same. Following the instructions of the Department, the Respondent continued payment of EC and SHEC on Oil Cess. Thereafter in 2014, the Department issued Circular No.978/2/2014-CX dated 07.01.2014 wherein it was clarified that EC and SHEC are not to be calculated on cesses which are levied under the Acts administered by the Department/Ministries other than Ministry of Finance (Department of Revenue). In view of the aforesaid Circular, the Respondent vide its letter dated 26.09.2014 informed the Appellant that they have stopped the payment of EC and SHEC on OID Cess w.e.f. January 2014. The Respondent also submitted a refund claim under Form “R” on 26.09.2014 along with related documents seeking refund of EC and SHEC amounting to INR 252,66,33,609/- on the OIB cess paid on the crude oil cleared during the period from July 2004 to December 2013 under Section 11B of the Central Excise Act, 1944.

2. Pursuant to refund claim, a Show Cause Notice (‘SCN’) dated 04.02.2015 was issued to the Respondent proposing to deny the refund of Rs.2,52,66,33,609/- on the ground that such refund claim is hit by the element of ‘unjust enrichment’ as laid down in Section 11B(1) of the Act. Further, it was also alleged that major portion of the amount claimed as refund is time barred on the ground that the amount claimed is beyond one year from the relevant date as laid down in Section 11B(1) of the Act. The Respondent vide their letter dated

11.04.2015 filed detailed reply to the above SCN. Despite legal submissions made in the reply by the Respondent, the refund clailm filed by the Respondents was rejected vide the Order-in-Original dated 27.12.2016 ("OIO") after a period of one and a half year from the date of filing of SCN reply. The refund claim was rejected by holding that the limitation of one year provided in section 11B of the Act is applicable to the present case. It was further held that the claim is hit by the doctrine of unjust enrichment.

3. Being aggrieved by the said order, the Respondent preferred an Appeal before the lower Appellate Authority. The learned Commissioner(Appeals) vide the Order-in-Appeal dated 17.05.2017 passed the order of remand on the ground that adjudicating authority has not observed the principles of natural justice as the order was passed after expiry of one and half year without explaining any reason for such delay. Hence, the matter was remanded to the adjudicating authority for re-adjudication. The said remand order passed by the learned Commissioner(Appeals) was reviewed by the Committee of Commissioners under Section 35B (2) of the Act and passed a Review Order No.03/COC/CE & ST/DIB/2017-18 dated 09.08.2017 ("Review Order"). Vide the review order, direction was given to the Additional Commissioner to file an Appeal against the Order-in-Appeal No.40/DIB/CE(A)/GHY/17 dated 17.05.2017 before this Tribunal since pursuant to an amendment made in section 35A(3) w.e.f. 11.05.2001, the learned Commissioner(Appeals) has no authority to remand back the case to lower authority. Hence the present appeal.

4. The learned Authorized Representative appearing on behalf of the appellant Revenue submits that Section 35A(3) of the Central Excise Act, 1944 as it existed before 11.05.2001 provides that Commissioner(Appeals) shall, after making such further enquiry as may be necessary, pass such order, as he thinks just and proper, confirming, modifying or annulling decision or order appealed against or

may refer the case back to the adjudicating authority with such direction as he may think fit for a fresh adjudication or decision as the case may be, after taking additional evidence, if necessary.

5. The learned Advocate appearing on behalf of the respondent has submitted that the present appeal involves a substantial refund amount to the tune of Rs.2,52,66,33,609/-.

The Department has filed this appeal to challenge the power of Commissioner(Appeals) to remand back the case to adjudicating authority. The main issue i.e. rejection of refund claim of EC and SHEC paid on OID cess by adjudicating authority was neither discussed by the learned Commissioner(Appeals) in its order nor by the Department in the present appeal.

6. The learned Advocate further submits that the main controversy (rejection of refund claim on account of limitation) involved in the present case stands concluded in favour of the Respondents by the Hon'ble High Court of Gujarat in Joshi Technologies International, INC-India Projects v. Union of India, 2016 (339) E.L.T. 21 (Guj.). In this case, same issue as the present one came up for consideration before the Hon'ble High Court. Here, the assessee had filed for refund of education cess and SHE cess paid on Oil Cess based on the Circular dated 07.01.2014. In this regard, the Court held that rejection of refund on the aspect of time bar is incorrect. That the limitation under section 11B would not be applicable to this case, as the said provision is applicable only to duty of excise and Oil Cess under OID Act under the OID Act is not a duty of excise.

7. Heard both sides and perused the appeal records.

8. We find that as regards the issue of violation of principle of natural justice, as noted by the learned Commissioner(Appeals) in his impugned order, the only issue taken into consideration for remanding

the case to adjudicating authority is delay in passing the order from the date of personal hearing.

9. We observe that the issue is no more *res integra* and has been decided by the Hon'ble Hon'ble Supreme Court in the case of Mil India Ltd. vs. Commissioner of C.Ex., Noida reported in 2007 (210) E.L.T. 188 (S.C.). The relevant portion of the decision is extracted below:-

> ***"4.*** *In our view the High Court had erred in holding that the Tribunal could not have examined the question of dutiability, once on merits, the order of the Commissioner (A) dated 22-3-2000 became final. Firstly, one must understand that excisability is a matter of principle. The Tribunal is the highest authority in hierarchy to decide on facts whether the bought out items were dutiable or not. The Tribunal was not bound by the decision of the Commissioner (A) on the question of dutiability or excisability. By order dated 22-3-2000 the Commissioner (A) had remanded the matter to the adjudicating authority the question of quantification. Therefore, it was open to the appellant to appear before the adjudicating authority and submit contentions on quantification of duty liability. In the present matter in the second round the appellant appeared before the adjudicating authority and pointed out in the alternative that the duty demanded from the appellants at the rate of Rs. 94,03,500 was erroneous as the appellants were entitled to the benefit of Modvat credit. From this it cannot be said that the question of excisability or dutiability had become final. The conclusion of the Commissioner (A) in his order dated 22-3-2000 was not binding on the Tribunal. Further one needs to understand the concept of assessment. An order of assessment under the taxing law does not become final before the adjudicating authority in every matter. It is subject to before the Commissioner (A). The Commissioner (A) can even add or subtract certain items from the order of assessment made by the adjudicating authority and that order of the Commissioner (A) could also be treated as an order of assessment. In complicated cases where costing in involved the adjudicating authority can also refer the matter to an expert. The Act*

also makes provision for special audit. However, when the principle of law is evolved an appeal lies to the appellate Tribunal under the said Act. In fact, the power of remand by the Commissioner (A) has been taken away by amending Section 35A with effect from 11-5-2001 under the Finance Bill, 2001. Under the Notes to clause 122 of the said Bill it is stated that clause 122 seeks to amend Section 35A so as to withdraw the powers of the Commissioner (A) to remand matters back to the adjudicating authority for fresh consideration. Therefore, the Commissioner (A) continues to exercise the powers of the adjudicating authority in the matters of assessment. Under Section 35B any person aggrieved by the order of the Commissioner as an adjudicating authority is entitled to move the Tribunal in appeal. Section 35B indicates that the decision of order passed by the Commissioner (A) shall be treated as an order of an adjudicating authority. In the circumstances the High Court had erred in holding that the assessee was not entitled to agitate the question of dutiability in appeal before the Tribunal."

In view of the above discussion, the appeal filed by the department is allowed by way of remand to the adjudicating authority to decide the Refund claim in view of the decisions of the superior Courts. Since, the matter is an old one, the Adjudicating Authority is directed to pass the order within 3(three) months from the date of receipt of this order.

(Operative part of the order was pronounced in the open Court.)

SD/
(P.K.CHOUDHARY)
MEMBER (JUDICIAL)

SD/
(P.ANJANI KUMAR)
MEMBER (TECHNICAL)

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