IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, KOLKATA

REGIONAL BENCH – COURT NO.1

Customs Appeal No.76240 of 2017
(On behalf of Revenue)

(Arising out of Order-in-Appeal No.Kol/Cus(Port)/AA/241/2017 dated 30.03.2017 passed by Commissioner of Customs (Appeals), Kolkata)

Commissioner of Customs (Port), Kolkata
15/1 Strand Road, Kolkata-700001

Appellant

VERSUS

M/s KEC International Limited
Halwasia Mansion, 6/2, Moira Street, Kolkata-700017

Respondent

WITH

Customs Appeal No.75630 of 2017
(On behalf of Revenue)

(Arising out of Order-in-Appeal No.Kol/Cus(Port)/AA/22/2017 dated 19.01.2017 passed by Commissioner of Customs (Appeals), Kolkata)

Commissioner of Customs (Port), Kolkata
15/1 Strand Road, Kolkata-700001

Appellant

VERSUS

M/s KEC International Limited
Halwasia Mansion, 6/2, Moira Street, Kolkata-700017

Respondent

APPERANCE :
Shri Faiz Ahmed, Authorized Representative for the Appellant
Shri Deepro Sen & Shri Shovit Betal, both Advocates for the Respondent

CORAM:
HON'BLE MR.ASHOK JINDAL, MEMBER (JUDICIAL)
HON'BLE MR.RAJEEV TANDON, MEMBER (TECHNICAL)

FINAL ORDER NO.77608-77609/2023

DATE OF HEARING : 01.12.2023
DATE OF DECISION : 01.12.2023

Per Rajeev Tandon :

The present appeal has been filed by the Revenue assailing the order-in-appeal passed by the ld.Commissioner of Customs (Appeals), Customs House, Kolkata. Vide the impugned order, the Commissioner (Appeals) allowed the refund claims filed by the respondent.

2. The facts of the case are that the respondents are importer of fibre optic cable (DWSM & OPGW) and filed 26 Bills of Entry for clearance of the same.

2.1 At the time of assessment, the dispute regarding classification of the impugned products did arise between the importer and the Department. As a result, provisional assessment of the impugned Bills of Entry were resorted to.

2.2 The Department, therefore, classified the impugned goods under CTH 90011000 attracting Customs duty at the rate of 10% adv. The importer paid the duty under protest and also followed it up by formal letter of protest to the Department. The goods were subsequently got tested from Electronic Regional Test Laboratory (ERTL) whereupon the Department concluded that the subject goods were classifiable under CTH-85447090 attracting nil rate of Basic Customs Duty.

2.3 The respondent herein, thereafter, filed two refund claims with reference to the said 26 Bills of Entry. They also enclosed therewith Chartered Accountant's Certificate indicating that the amount was due as refund of Customs duty and was shown in the Books of Account and not passed on to the buyers. The respondent also submitted Statutory Auditor's Certificate Reference No.SN/2016-17/004 dated 18.04.2016 issued by Deloitte Haskins and Sells, which clearly indicated therein as "Amount due as refund of Customs duty".

2.4 The ld.Adjudicating Authority, however, rejected the said refund claim of the respondent herein on the ground the claimant has failed to satisfy the test of unjust enrichment. The ld.Adjudicating Authority has also observed that the importer had not challenged the assessment order in respect of 24 Bills of Entry.

2.5 Two separate appeals were, therefore, filed by the respondent before the ld.Commissioner (Appeals), Kolkata, who upheld the contention of the importer and allowed the refund claim.

2.6 The Revenue is aggrieved by the said order and has filed the present appeals.

3. Heard both sides, perused the records and considered the submissions.

4. We note that the ld.Commissioner (Appeals), inter alia, has stated as under :

> 18 In the instant case it is clear from the documents filed, that the incidence of duty, has not been passed on by the importer to anybody else and has been borne by the importer himself and the same is evident from the various invoices filed on record which clearly evidences that even when the Appellant suffered the duty incidence of 10%, there was no increase in its Sale Price as compared to the price charged when the incidence of duty on the cable-in question was "NIL". In the case of M/s.VXL Instruments Ltd Vs. Commissioner of Customs, Bangalore, 2013 (294) ELT 320 (Tri.- Bang) it has been held that since as per the Contact with the buyers, the same contract Price was maintained, and that payment of higher duty was under protest, the Refund was not barred by unjust enrichment. The Tribunal in its Order held that since the appellants have maintained the same contract price and since payment of duty at the higher rate and was under protest and was at the insistence of the Department, the importers were entitled to refund and that the claim was not barred by unjust enrichment.
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> Significantly this order of the Tribunal is guided by the Judgment of Hon'ble Supreme Court in the one of Commissioner of Customs, New Delhi Vs. Organan (India) Ltd., 2008(231) ELT 201(SC), wherein it was held as under:
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> *"2. Assessee filed ten Bills of Entry claiming classification of Agglutinating Sera for the detection of human chorionic gonadotrphin in urine under Sub-Heading 3002.90 of the First Schedule to the Customs Tariff Act. That under Notification No. 208/81-Cus., dated 22-9-1981, goods in question were exempt from payment of customs duty and that is why it was not liable to pay any customs duty on the imported goods. Customs authorities did not agree with this contention and consequently asked the assessee to pay customs duty to the tune of Rs. 94, 86,522/-. Assessee paid the whole customs duty 'Under Protest' and got the goods released. Orders of the customs authorities were ultimately reversed by the Tribunal and it was held that the goods imported by the assessee would be classifiable under Sub-Heading 3002.90 and were exempt from payment of customs duty under the aforesaid notification. This order became final.*
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> *3. Assessee thereafter filed an application claiming refund of the customs duty paid by it. The authority-in-original rejected the claim on the ground that the assessee had passed on the burden of the customs duty to its customers and refund of the customs duty would amount to unjust enrichment as provided under Sections 27, 28(C) and (D) of the Act. Assessee challenged the order-in-original before the Commissioner of Customs (Appeals). Commissioner of Customs (Appeals) upheld the order-in-original. Assessee thereafter filed appeal before the Tribunal. Initially, there was a difference of opinion between the Member (Technical) and Member (Judicial) regarding the refund of the customs duty. It was held by the Member (Technical) that the incident of duty has not been passed on to the customers and therefore the assessee is eligible to claim the refund of custom duty whereas Member (Judicial) held it otherwise. The matter was referred to a third Member who agreed with the Member (Technical) holding that the incident of duty had not been passed on to the customers and therefore the assessee is eligible to refund of the customs duty. It is an admitted position that the burden to prove that the customs duty was not passed on to the customers is on the assessee. The Member (Technical) and the third Member on the basis of the following facts:*
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> *(i) in the invoices, it was clearly mentioned that the sale price did not include the customs duty.*
>
> *(ii) that there was no change in price post-levying of the duty. Assessee had filed its price list and the customs duty was imposed thereafter. The goods were sold to the customers at the same price which was stated in the price list.*

(iii) That there was an auditor's certificate certifying that assessee had not passed on the customs duty to the customers came to the conclusion that the assessee had not passed on the burden of the customs duty to its customers. This finding is a finding of fact based on evidence which does not call for any interference."

The ratio of above cited decision of Hon'ble Supreme Court is squarely applicable in the instant case.

19 In the present case, the contracted price with M/s. Power Grid Corporation did not take into account the customs duty and it was done on the belief that the goods were to be classified under CTH 85447090 as earlier imports had taken place under CTH 85447090 only. The contract included that the price is all inclusive, taking into account NIL Customs Duty and any additional duties/taxes, if any, were to be borne by the Appellant.

20. At Para 3 of the Certificate dated 18.04.2016 of the Statutory Auditors, M/s. Deloitte Haskins & Sells clearly states that the refundable amount aggregating to Rs. 11, 14, 52,100/- appearing in the attached Statement and which includes the two Bills of Entry under question and which appear at Sl. Nos. 1 & 2 of the attached Statement is shown in the books of account as "Amount due as refund of customs duty as on March 31, 2016. It has further been certified by the Statutory Auditors in this Certificate that the incidence of duty which is being claimed as refund has not been passed on to the customer.

21.

21. In a judgment passed by the Principal Bench of the CESTAT, New Delhi in the case of M/s. Business Overseas Corporation Vs. C. C. (Import& General), New Delhi, 2015 (317) ELT 6'37 (Tri.-Del.) it has been held that since the Chartered Accountant certified that differential duty was not recovered from customers, the Importer had discharged the burden of proof (as required in Sec. 27 of the Customs Act, 1962) and was entitled to the Refund which was not barred by the provisions of unjust enrichment.

22. The same view was echoed by the West Zonal Bench, Mumbai of the CESTAT in the case of Commissioner of C. Ex, PUNE-I Vs. Crystal Granite & Marble (P) Ltd., 2014 (304) ELT 572 (Tri.-Mumbai). The Tribunal held that since the party provided documents such as Invoices and Chartered Accountant Certificate certifying that the incidence of duty had not been passed to the customers and that the duty had been paid under protest, the importers were entitled to refund and the importers had passed the bar of unjust enrichment as provided in Sec. 27 of the Customs Act, 1962.

23. That merely showing the disputed amount in question as expenditure shall not lead to rejection of the refund claim and further conclusion that burden and incidence of duty has been passed on and CA certificate being there certifying otherwise. Further, mere fact that not passing certain entries cannot lead to rejection of refund claim. The entries in the books of account are not conclusive and must be independently relied upon qua unjust enrichment, if any and if incidence has not been passed then refund may be allowed. Reliance may be placed upon:

i. 2012 (277) ELT 72 (Tri-.Del);

ii. 2010 (261) ELT 379 (Tri.- Ahmd)

24. That as stated there was no increase on sale price after payment of duty under protest and from the sale invoice(s) it was evident that it did not include customs duty.

25. Thus, the Appellant had the necessary documentary evidence to satisfy the requirements of Section 27 of the Customs Act, 1962 and are, therefore eligible for the refund of Customs duty paid.

26. It has been submitted that ever since 2012 the Appellant had been contesting the revised Classification of the Cable imported by it and paying duty under protest. They came to know that they were eligible for refund of excess duty paid only when they received reply from the department only in pursuance to the communication in question regarding change of Classification resulting in refund of Duty was communicated to the Appellant vide letter in question dated 18.6.2015 of the Additional Commissioner of Customs (Port), Appraising Group VA & VB, Kolkata. This letter was in reply to the Appellant's request to the Department for providing a copy of test report. Therefore, earlier when the duty had been paid under protest, the same was booked as expenditure and even then there was no difference in sale price of the goods in question and when the Appellant became eligible for refund, the same was duly shown as recoverable/refundable from the Department in the books of accounts with the Appellant being open for income tax/corporate business tax on the same. It does not matter qua refunds and principle of unjust enrichment as to when the same were booked as expenditure, all that is required that it has to be shown as receivable. So therefore, at some stage the duty has been shown as receivable in their books i.e., in A.Y. 2016-17 (that is only after they became eligible for refund) and the relevant taxes such as income tax/corporate tax would be also borne on that by the Appellant.

27. It is therefore abundantly clear that the Appellant became eligible for Refund only when the change of classification was communicated to it. Till such time as the revised classification was intimated to the Appellant by the letter referred to above, there was no ground for the Appellant to either prefer a claim of refund of duty paid under protest or even show the same as amount receivable from the Department. The refund depends on the revised classification and obviously till the Appellant got the intimation from the Department about the revised classification, the Appellant could not have presumed that they would be entitled for the refund of duty paid by it.

28. It is not necessary to show the amount of refund receivable from the department in the balance sheet/books of account in the same year in which the amount of duty paid has booked as expenditure. Even if the amount has been certified by the Auditor to have been shown as receivable from the department in the subsequent year, the same is not hit by the bar of unjust enrichment. The Appellant has submitted that once it is shown as receivable, it becomes recoverable.

29. Reliance may be placed upon a recent judgment of Hon'ble CESTAT, Mumbai in the case of M/s. Savita Oil Technologies Ltd. Vs. CCE, Belapur; 2016-TIOL-1444-CESTAT-Mum. (Paras 6, 14, 10, 7 and 8). It has been held by Hon'ble Tribunal that "Needless to emphasize and stress that mere booking of the amount of refund as receivable from the department in a year different to the one in which the amount of duty had been paid not have any impact on the sanction of refund." The Hon'ble Tribunal in the aforesaid judgment has categorically held that in a case where the amount of refund receivable from the department has been shown in a different year will not be a case of unjust enrichment particularly where the evidence produced, as in the present case to the effect that the incidence of duty has not been passed on to anybody else and the sanction of the refund cannot be rejected on the ground of unjust enrichment.

30. The relevant portion(s) of the aforesaid referred judgment are being reproduced herein:

"I find that the fact is not under dispute that the refund has arisen out of the finalization of the provisional assessment. The appellant have paid the duty on the basic sale price. However, while raising the sale invoice from the depot they have shown basic price minus discount and on the discounted price excise duty was charged to their customers which clearly shows that the excess paid duty was not collected at least from the customers to whom the goods were sold. The appellant even though shown the excess paid duty as receivable in the balance sheet for the year 2008-09 and not shown the same in the balance sheet for the year 2007-08 does not establish that incidence of duty was passed on to any other persons. Once the amount shown as receivable, it becomes

refundable. Accounting treatment such as not showing the receivable in the 2007-08 and shown the same in 2008-09 is not permitted as per the wish of individual. It is acceptable norms under the Income Tax therefore the lower authority could not have questioned about accounting treatment given in the balance sheet which is audited and accepted by the statutory authority. I do not agree with the contention of the Revenue that if an amount was not shown as receivable in the particular year and it was subsequently shown as receivable the incidence of such amount stands passed on, for the simple reason that if the incidence of particular amount assumably passed on to any other persons then it cannot be permitted under Income Tax law to book the same amount as receivable in the subsequent financial year. Therefore in my view even in the year 2008-09 when the amount was shown as receivable, it can be clearly established that the incidence of duty has not been passed on. The lower authority have presumed that even though the excess paid duty was not directly passed on to these customers to whom the goods were sold but it might have been passed on the any other person. In my view when the amount was shown as receivable coupled with fact that the said excess paid duty was not recovered from the concerned customers, without any contrary evidence it cannot be presumed that incidence was passed to any other person. It is not convincing that burden of an amount related to particularly customer can be shifted to any other person. In the present cut throat competitive commercial world, if the goods are sold at a particular competitive price, just for the sake of recovery of any liability the same cannot be loaded in the price arbitrarily and charged to any customers. No customer would accept such burden therefore the presumption of the lower departmental authority has no basis that the incidence of excess paid duty was passed on to any other person. I find that that evidence produced by the appellant such as booking of amount in the balance sheet as receivable and the fact that excess paid duty was not recovered from the concerned customer, if these evidence are not sufficient as per the lower authority, then it is onus of the department to bring the evidence to show that incidence of duty has actually been passed on. In the present case no such evidence was brought on record by the department that incidence of excess paid duty was indirectly passed on to any other persons. In this regard some judgments relied upon by the Ld. Counsel directly covered the issue of the present case, which are reproduced below..."

"The first appellate authority, in this case, has held against the appellant only on the ground that the appellant has booked the amount in their Profit & Loss Account as expenses and such duty/Service Tax liability having paid subsequently, could not be collected by the appellant from their clients, but arguments have been discarded only on the ground that the appellant has not recorded the payments in balance sheet as 'receivables'. I find that this findings of the first appellate authority is not in consonance with the law in as much as Hon'ble High Court of Punjab & Haryana in the case of Modi Oil & General Mills – 2007 (210) E.L.T. 342 (P & H) = 2007-TIOL-195-HC-P&H-CX, has specifically held that the doctrine of unjust enrichment will not apply to a situation, wherein the assessee is directed to pay the amount and pays the same, on being pointed out by the authorities and he claims the refund of the same when he succeeds in the proceedings."

"The said Chartered Accountant's certificate as reproduced above has been sought to be discarded by the first appellate authority summarily indicating that the said certificate is based on the accounts. In my considered view, these findings of the first appellate authority are far from reality, inasmuch as it can be seen from the Chartered Accountant's certificate that Chartered Accountant has categorically certified that he has verified the books of account like Cash/Bank Book and Ledger Accounts and on verification, he has certified that the amount has not been passed on by the appellant to their clients. In my view, the decision in the case of Crane Betel Nut Powder Works (supra) (wherein I was one of the Member), would directly apply in this case."

"I also find strong force in the contentions of the ld. Counsel that the judgment of the Hon'ble High Court of Gujarat in the case of Mangal Textile Mills Pvt. Ltd. (supra) would apply in as much as the

certificate of Chartered Accountant produced by the appellant was not disputed by the Revenue authorities, by bringing on record any other opinion contrary to the Chartered Accountant's certificate."

"It was held in the above judgments that in case of duty shown to have been collected from particular person then it cannot be presumed the same could have been collected from any other person unless positive evidence is brought on record. As per my above discussion, the facts of the case and settled legal position as referred above, I am of the view that impugned order is not sustainable. The appellant have substantially established that the incidence of excess paid duty has not been passed on to any other person and department could not bring any material contrary to the evidence produced by the appellant. I therefore set aside the impugned order, allow the appeal of the appellant with consequential relief, if any, in accordance with law."

31. Reliance is further placed on the judgment dated 27.03.2014 passed by a Division Bench of Hon'ble High Court of Gujarat in the case of Commissioner of Central Excise and Customs Vs. M/s. Dhariwal Industries Ltd., Tax Appeal No. 344 of 2006.

32. In this said judgment Hon'ble High Court has inter alia held that and discarded this ground for rejection of Refund Claim: *"The second ground for rejecting the refund claim was that mere constant sale value of the goods would not establish non passing of the duty burden to the consumers".*

5. The ld.Commissioner (Appeals) has also relied upon the decision of the Hon'ble Apex Court in the case of Commissioner of Customs, New Delhi Vs. Organan (India) Limited reported in 2008 (231) ELT 201 (S.C.), wherein the Hon'ble Apex Court has observed as under :

> *"**2.** Assessee filed ten Bills of Entry claiming classification of Agglutinating Sera for the detection of human chorionic gonadotrphin in urine under Sub-Heading 3002.90 of the First Schedule to the Customs Tariff Act. That under Notification No. 208/81-Cus., dated 22-9-1981, goods in question were exempt from payment of customs duty and that is why it was not liable to pay any customs duty on the imported goods. Customs authorities did not agree with this contention and consequently asked the assessee to pay customs duty to the tune of Rs. 94,86,522/-. Assessee paid the whole customs duty 'Under Protest' and got the goods released. Orders of the customs authorities were ultimately reversed by the Tribunal and it was held that the goods imported by the assessee would be classifiable under Sub-Heading 3002.90 and were exempt from payment of customs duty under the aforesaid notification. This order became final.*

3. *Assessee thereafter filed an application claiming refund of the customs duty paid by it. The authority-in-original rejected the claim on the ground that the assessee had passed on the burden of the customs duty to its customers and refund of the customs duty would amount to unjust enrichment as provided under Sections 27, 28(C) and (D) of the Act. Assessee challenged the order-in-original before the Commissioner of Customs (Appeals). Commissioner of Customs (Appeals) upheld the order-in-original. Assessee thereafter filed appeal before the Tribunal. Initially, there was a difference of opinion between the Member (Technical) and Member (Judicial) regarding the refund of the customs duty. It was held by the Member (Technical) that the incident of duty has not been passed on to the customers and therefore the assessee is eligible to claim the refund of custom duty whereas Member (Judicial) held it otherwise. The matter was referred to a third Member who agreed with the Member (Technical) holding that the incident of duty had not been passed on to the customers and therefore the assessee is eligible to refund of the customs duty. It is an admitted position that the burden to prove that the customs duty was not passed on to the customers is on the assessee. The Member (Technical) and the third Member on the basis of the following facts :*

(i) in the invoices, it was clearly mentioned that the sale price did not include the customs duty.

(ii) that there was no change in price post-levying of the duty. Assessee had filed its price list and the customs duty was imposed thereafter. The goods were sold to the customers at the same price which was stated in the price list.

(iii) That there was an auditor's certificate certifying that assessee had not passed on the customs duty to the customers.came to the conclusion that the assessee had not passed on the burden of the customs duty to its customers. This finding is a finding of fact based on evidence which does not call for any interference."

6. It is a fact on record that the refund amount has been shown as receivables in the Books of Accounts of the respondent in the year 2015-2016 and is clearly indicated as "claims receivables from the Customs". The plea of the Department that the said claim was shown as "expenditure" in the financial year wherein transactions had taken place, does not carry any force in view of the categorical assertion of the Statutory Auditor's Report and the Certificate issued by the Chartered Accountant as referred in Para 2.3 above and the fact that the Department has cited no evidence in support of their assertion. A bald statement to state that the impugned amount has been shown as expenditure carries no evidentiary value unless substantiated by express irrefutable evidence. Also the Department has not been able to counter the substantiation of the respondent in support of their case.

7. It is a fact on record that the assessee could only indicate the amount shown as receivables, as informed to them by the Department, the respondent has also indicated the same in the accounts as receivables, once they were informed of the test results and for which reasons they had paid the duty at the first instance only under protest. Once certain about the leviability of the imported goods at nil rate of duty, as informed to them by the Department, the respondent has also indicated the same in their books of account. Since the refund amount was contingent upon the outcome of the test report, it is very obvious that the said amount could not be reflected as receivables then and there.

8. We also take note of the fact that in case of **Savita Oil Technologies Limited Vs. Commissioner of Central Excise, Belapur** reported in 2016 TIOL 1444-CESTAT-Mum. wherein the co-

ordinate bench of this Tribunal had held that when the amount actually paid does not lead to obvious conclusion that the burden of duty has been passed on, the date of recording of the said amount in the Books of Accounts is irrelevant. Even otherwise, mere accounting is not conclusive proof that the burden of duty has been passed on and has to be empirically justified.

9. We find that on the very issue, the Hon'ble Bombay High Court in the case of **Commissioner of Central Excise, Pune I Vs. Sandvik Asia Limited** reported in 2015 (323) ELT 431 (Bom.), has held as under :

> *"**4.** On perusal of the impugned order and considering the arguments of both learned counsel, we are unable to agree with Mr. Kantharia. The Tribunal was not concerned with the treatment given to the amount and as deposited in the Assessee's profit and loss account. It is immaterial and irrelevant for the Tribunal and equally for us as to what the Assessee terms this amount in his Books of Account. Even if it is shown on the 'expense side' that does not mean that the presumption that the burden has been passed to the consumer can be raised."*

10. In view of the aforesaid reasons and the law as pronounced by the higher judicial forums including the Hon'ble Apex Court, we are of the view that there is no infirmity in the order-in-appeal passed by the ld.Commissioner (Appeals). Accordingly, the appeal filed by the Department is without merit. The same is, therefore, dismissed and the order of the ld.Commissioner (Appeals) is upheld.

(Operative part of the order was pronounced in the open court)

Sd/
(Ashok Jindal)
Member (Judicial)

Sd/
(Rajeev Tandon)
Member (Technical)

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