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

REGIONAL BENCH – COURT NO. 1

Excise Appeal No. 70 of 2011

(Arising out of Order-in-Appeal No. 57/CE/B-I/2010 dated 29.11.2010 passed by the Commissioner (Appeals), Central Excise, Customs and Service Tax, C.R. Building, Rajaswa Vihar, Bhubaneswar – 751 007)

M/s. UAL-Orissa **: Appellant**
(Prop. M/s. UAL Industries Limited),
Vill./P.O. – Korian, District: Dhenkanal,
Odisha – 759 013

VERSUS

Commissioner of Central Excise and Service Tax **: Respondent**
Bhubaneswar-I Commissionerate,
C.R. Building, Rajaswa Vihar, Bhubaneswar – 751 007 (Odisha)

APPEARANCE:

Shri S.P. Majumder, Advocate for the Appellant

Shri K. Chaudhuri, Authorized Representative for the Respondent

CORAM:

HON'BLE SHRI ASHOK JINDAL, MEMBER (JUDICIAL)
HON'BLE SHRI K. ANPAZHAKAN, MEMBER (TECHNICAL)

FINAL ORDER NO. 75943 / 2024

DATE OF HEARING / DECISION: 06.05.2024

Order: [PER SHRI K. ANPAZHAKAN]

The present appeal has been filed against the Order-in-Appeal No. 57/CE/B-I/2010 dated 29.11.2010 passed by the Commissioner (Appeals), Central Excise, Customs and Service Tax, Bhubaneswar wherein the Ld. Commissioner (Appeals) has upheld the demands confirmed in the Order-in-Original No.AC/CTC/DKL-I/60/2010(R) dated 29.03.2010.

2. The facts of the case are that the appellant, M/s. UAL-Orissa had sold their final products viz. 'Asbestos Cement Sheets' from their depots as well as through consignment agents at uniform price (inclusive of excise duty), on 'FOR' destination basis, as per their price list. The appellant offered discounts including year-end discounts as per their trade circulars by way of issuing credit notes. Since the quantum of such discounts could be known subsequent to removal of their goods from their factory, the appellant resorted to provisional assessment as per Rule 7 of the Central Excise Rules, 2002.The provisional assessments for March 2008 and April 2008 were finalized by ORDER OF FINALISATION OF PROVISIONAL ASSESSMENT vide C.No. IV(16)8/Tech/CTC/05/7286 dated 29.09.2008. As per this provisional assessment finalization order, it was found that the appellant had short-paid Rs.25,52,416/- along with an excess payment of Rs.4,55,260/-. The appellant was asked to pay the short-paid amount of Rs.25,52,416/- along with interest and was also asked to prefer refund claim for the excess paid amount ofRs.4,55,260/-.

3. The appellant filed the refund claim, which was rejected by way of the Order-in-Original dated 29.03.2010 on the ground of unjust enrichment.

4. On appeal, the ld. Commissioner (Appeals) vide the impugned order upheld the rejection of the refund claim.

5. Aggrieved against the rejection of the refund, the appellant has filed this appeal.

6. The appellant submits that Rule 7 of the Central Excise Rules, 2002 allows adjustment of short-paid duty and excess duty paid at the time of finalization of provisional assessment; had the proper officer allowed the adjustment by way of Rule 7, there would not have been any necessity to file the refund claim. It is contended that since the adjustment was not allowed, they were asked to file the refund claim and the Show Cause Notice came to be issued to deny the refund claim.

6.1. The appellant also submits that the Notice raised the issue of time-bar in terms of Section 11B(1) of the Central Excise Act, 1944 to deny the refund claim; the issue of unjust enrichment was not in the Notice; however, both the authorities below have disallowed the refund claim on the ground of unjust enrichment. Thus, they submit that the impugned order has travelled beyond the scope of the Show Cause Notice and thus is liable to be set aside on this ground alone.

6.2. The appellant submits Ld. Commissioner (Appeals) has rejected their refund claim on the sole ground that the appellant had failed to prove that the duty element claimed to have been returned through credit notes to the immediate buyer, had ultimately reached the consumer and thus, the appellate authority held that the claim of refund was hit by the clause of unjust enrichment. In this regard, it is contended that the buyers of the goods were not registered dealers who could not avail CENVAT Credit and pass it on to subsequent buyers/dealers; accordingly, the question of passing on the duty element to any other person, including the ultimate consumer, by the dealers does not arise.

6.3. The appellant further submitted that on the very same issue in respect of their unit situated at Uttar Pradesh viz. UAL-Uttar Pradesh, the refund claim arising on account of finalization of provisional assessment was initially rejected by the ld. adjudicating authority on the ground of unjust enrichment, but the appellate authority allowed their refund claim; the Revenue preferred appeal against the said appellate order before the CESTAT and the CESTAT has dismissed the Revenue appeal vide order as reported in *2015 (329) E.L.T. 622 (Tri. – Del.)*. The appellant also placed reliance on the decision in the case of *Shyam Steel Industries Ltd. v. Commissioner of C.G.S.T. and Excise [2021-TIOL-650-CESTAT-Kol]* wherein on the same issue, the CESTAT allowed the refund holding that the principle of unjust enrichment would not be applicable. They also cited the decision of *Commissioner of Central Excise, Madras v. Addison & Co. Ltd. [2016 (339) E.L.T. 177 (S.C.)=2016-TIOL-146-SC-CX-LB]* wherein it was held that credit notes are valid documents for the purpose of passing post-clearance discounts and that an assessee is entitled for filing claim of refund on the basis of credit notes raised by them.

6.4. The appellant has produced a Chartered Accountant's certificate to the extent that the appellant has not passed on the incidence of duty on discounts to its dealers.

6.5. In view of the above, the appellant submits that the impugned order rejecting the refund claim on account of unjust enrichment is not sustainable. Accordingly, the appellant prayed for setting aside the impugned order allowing their appeal.

7. The Ld. Authorized Representative for the Revenue reiterated the findings in the impugned order.

8. Heard both sides and perused the appeal documents.

9. We observe that the issue involved in the present appeal is refund arising on account of finalization of provisional assessment. In the present case, upon finalization of provisional assessment vide Order dated 29.09.2008, it was notice that there was short payment as well as excess payment of duty. The proper officer ought to have allowed adjustment of the short paid and excess duty paid as per Rule 7 of the Central Excise Rules, 2002. However, it was not allowed and the appellant was asked to file refund claim for the excess paid amount of Rs.4,55,260/-

10. It is observed that the Show Cause Notice was issued for denial of the refund on the ground of time-bar. However, both the authorities below have denied the refund claim on the ground of unjust enrichment. Thus, we agree with the submission of the appellant that the impugned order has travelled beyond the Show Cause Notice and therefore, the same is liable to be set aside on this ground alone.

11. We also observe that the appellant has sold the goods through dealers and consignment agents. These dealers are not registered dealers who can pass on the CENVAT Credit to their customers. We also observe that the appellant has produced a certificate issued by a Chartered Accountant wherein it has been categorically submitted that the incidence of duty on discounts had not been passed on by the dealers of the goods. From the sample certificate issued by the dealers, we observe that all the dealers were not registered under the Central Excise Law for the purpose of availing or passing on the credit. Therefore, the question of any dutiable component in the form of refund of excise duty on the component of discounts as well as CENVAT Credit on the component does not arise.

11.1. Further, we find that the certificate from the dealers also confirms that the incidence of duty has not been passed on by the appellant to the buyers.

11.2. Accordingly, we observe that the appellant has produced sufficient evidence to establish that unjust enrichment is not applicable to this case.

12. We observe that the appellant has relied upon the decision of the CESTAT in their own case, in the case of UAL-Uttar Pradesh [*2015 (329) E.L.T. 622 (Tri. – Del.)]* wherein under similar circumstances where the refund which was initially rejected on the ground of unjust enrichment was allowed by the appellate authorities, the appeal filed by the Revenue was dismissed and hence, the decision attained finality.

12.1. In the case of *Commissioner of Central Excise, Madras v. Addison & Co. Ltd. [2016 (339) E.L.T. 177 (S.C.)]*, it has been categorically held that credit notes are valid instruments for the purpose of passing post-clearance discounts and the assessee would be entitled to file refund claim on the basis of credit notes raised by them towards the discounts.

13. In view of the decisions cited above and the evidence available on record which clearly indicates that the appellant has not passed on the duty element to the ultimate customers, we hold that the impugned order denying the refund claim filed by the appellant on the ground of unjust enrichment is not sustainable.

14. In view of the above, we set aside the impugned order and allow the appeal filed by the appellant.

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

Sd/-
(ASHOK JINDAL)
MEMBER (JUDICIAL)

Sd/-
(K. ANPAZHAKAN)
MEMBER (TECHNICAL)

Sdd