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

REGIONAL BENCH – COURT NO.1

Customs Appeal No.75772 of 2022
(On behalf of Appellant)

(Arising out of Order-in-Appeal No.55/Pat/Cus/Appeal/2022-23 dated 29.07.2022 passed by Commissioner (Appeals) of Customs, CGST & Excise, Patna)

M/s Dabur India Limited
Kaushambi, Sahibabad, Ghaziabad-201010

Appellant

VERSUS

Commissioner of Customs, CGST & Excise, Patna
2nd Floor, C.R.Building (Annexe), Bir Chand Patel Path, Patna

Respondent

APPERANCE :

Shri Rahul Tangri & Ms.Taniya Roy, both Advocates for the Appellant
Shri A.K.Choudhary, Authorized Representative for the Respondent

CORAM:
HON'BLE MR.ASHOK JINDAL, MEMBER (JUDICIAL)
HON'BLE MR.K.ANPAZHAKAN, MEMBER (TECHNICAL)

FINAL ORDER NO.75987/2024

DATE OF HEARING : 03.05.2024

DATE OF PRONOUNCEMENT : **04.06.2024**

Per Ashok Jindal :

The appellant is in appeal against the impugned order wherein their refund claim has been denied holding that the appellant has failed to pass the bar of unjust enrichment.

2. The facts of the case are as under :

2.1 The Appellant is carrying on business of manufacturing and trading of various ayurvedic products and are *inter alia* importing fruit juices from Nepal which are classifiable under the tariff item 2202 9020. Additionally, the Appellant is also importing tooth powder by the name of "Lal Dant Manjan" which is classifiable under the tariff item 3306 1010. The said goods are imported from Nepal through the Land Customs Station at Raxaul. The products manufactured as well as imported by the Appellant are covered under the Notification No. 01/2011-CE (2% without Cenvat credit) as well as 02/2011-CE (6% with Cenvat credit).

2.2 In terms of the decision rendered by the Hon'ble Supreme Court in the case of M/s SRF Limited v. Commissioner of Customs, Chennai reported in 2015 (318) E.L.T. 607 (SC) , for the period 09.05.2015 onwards, the Appellant opted to pay CVD @ 6% under Notification No. 02/2011-CE 'under protest' though it was eligible for benefits under Notification No. 01/2011-CE.

2.3 Thereafter, the Appellant preferred applications for refund for the excess duty paid in relation to 856 BOEs before the relevant authority, out of which 571 BOEs were filed during the impugned period i.e., 09.05.2015 to 17.06.2015 and 285 BOEs were filed during the subsequent period 18.06.2015 to 10.07.2015.

2.4 As regards the subsequent claim, it is pertinent to note that post rejection by the adjudicating authority vide the OIO dated 23.01.2018, upon the Appellant's appeal, the Ld. Commissioner (Appeals) of Customs, GST & Central Excise, Patna vide an order No. 142/Pat/Cus/Appeal/2018 dated 03.10.2018 granted refund of the excess CVD paid by the Appellant for the period 18.06.2015 to 10.07.2015 by holding that the Appellant had satisfied the bar of unjust enrichment in the instant case as the two major conditions i.e. (i) amount being reflected in the Balance Sheet as receivable and (ii) submission of CA Certificate, stood fulfilled. The said order has attained finality since the department has not preferred any appeal against the said order.

2.5 As regards the present claim, despite numerous communications between the Appellant and the department over an extended period, the refund claim for the period 09.05.2015 to 17.06.2015 was ultimately denied by the Ld. Deputy Commissioner by an order-in-original dated 17.06.2021. The denial was on the grounds of unjust enrichment, even though the Appellant had substantiated their claim with a certificate from a Chartered Accountant and also the amount claimed as refund was appearing as a receivable in the books of accounts of the Appellant.

2.6 Being aggrieved by the order dated 17.06.2021, the Appellant preferred an appeal before the Ld. Commissioner (Appeals) Patna. Elaborate submissions were made by the Appellant which were not considered by the Ld. Commissioner (Appeals) who confirmed the order-in-original dated 17.06.2021 by an order-in-appeal dated 29.07.2022. The impugned order rejected the appeal of the Appellant on the ground that the Appellant had been unjustly enriched by recovering the excess duty paid from its customers. The Appellant being aggrieved by such order of the Commissioner (Appeals), Patna dated 29.07.2022 has preferred the current appeal before this Tribunal.

3. The ld.Counsel for the appellant submits that the issue has already been settled in their own case for the subsequent period holding

that the appellant has able to pass the bar of unjust enrichment. Therefore, the adjudicating authority cannot take contrary view.

3.1 He further submits that the appellant has paid duty under protest and has not been passed on its customers. The duty has been paid on MRP basis in terms of Section 4A of the Central Excise Act, 1944. Accordingly, CVD was also paid on MRP basis on valuation. He relied on the decisions in the cases of Birla Corporation Ltd. v. CCE, Lucknow – 2017 (358) E.L.T. 443 (Tri.-All.) and Girish Foods & Beverages (P) Ltd. v. CCE, Pune – 2007 (211) E.L.T. 388 (Tri. - Mumbai).

3.2 He further submitted that the appellant has shown the amount of CVD is receivable in their balance sheet and also produced a Certificate certifying that the duty of incidence has not been passed on. Therefore, the refund claim is admissible.

4. On the other hand, the ld.A.R. for the Revenue, supported the impugned order.

5. Heard both the parties and considered the submissions.

6. We find that it is an admitted fact that the appellant paid the duty under protest at the time of importation of goods and this issue was settled by the Hon'ble Apex Court in the case of M/s SRF Limited (supra), wherein the appellant opted to pay CVD @ 6% under Notification No.2/2011-CE dated 01.03.2011 under protest though it was eligible for the benefit of Notification No.1/2011-CE dated 01.03.2011 and the appellant has filed refund of excess duty paid during the period 09.05.2015 to 17.06.2015. The appellant has also filed refund claim for the subsequent period i.e. 18.06.2015 to 10.07.2015.

7. Subsequently, the refund claim filed by the appellant for the excess duty paid, was allowed to the appellant holding that the appellant has been able to pass the bar of unjust enrichment. For better appreciation, the ld.Commissioner (Appeals) has observed as under :

> "*4. Having gone through the case records and the submissions of the appellant as well as that of the department, I believe, the appellants have a strong case here and the departmental authorities are splitting hairs. The Chartered Accountant is a competent authority in such matters and issues the certificate after examining the relevant financial records. Such a certificate, as decided by the Hon'ble Delhi High Court, in the case of Hero Motocorp Ltd. v/s Commissioner of Customs (Import & Generali-2014(302)ELT501(Del), forms a definitive proof that the burden of excess payment of duty has not been passed on to their customers by the appellant. The We Delhi High Court advices practical and realistic approach in such matters and be oblivious as to nature and character of proof which is available Further, the le Court also states that if the assessee is able to show that the burden of duty been passed on, he asserts and submits affidavits and certificate of a med accountant along with copy of the balance sheet, indicates and shows sales invoices for pre and post-period and when there is no other negative factor or evidence to the contrary to disbelieve, the contention should be accepted. To deny what was paid and has to be refunded by law to the said person is not fair, just and equitable*
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> *5. Now, the question arises about submission of invoices of pre and post-perio. The department claims that the appellants did not submit 'sale invoice issued against ach impugned Bill of Entry' alongwith other documents sought vide letter dated 17.12.2017. The appellant state 'all the relevant fact or the financial transaction with the customers were brought on record before the*

Ld. Adjudicating authority, however, the same has not been considered." Here, I think, the MRP based assessment comes to the rescue of the appellant. In the case of such assessments, if the MRP remains unchanged, as claimed by the appellants, it can be safely presumed that the customer has not paid extra on account of excess payment of CVD and hence, the burden of additional payment has not been passed on to their buyers. The fact that the appellant have shown the excess payment as advance in their balance sheet cements their claim.

6. The CVD is an indirect tax and the tax payer is a mere collector and depositor unless proved otherwise. So the burden to prove that the tax incidence has not been passed on is entirely on the appellant. This presumption however is a rebuttable presumption as the incidence of indirect taxes on goods and services is expected to be borne by the ultimate consumer only. They have tried to discharge their duty by way measures discussed in para 2 above. The accounting requirements in such situations is essentially two, (1) Balance Sheet of the applicant for the financial year in which the duty amount claimed as refund has been paid or credit note has been issued, should indicate the refund amount as "Duty Receivable" under the heading "Current Assets" and (ii) a certificate to this effect is issued by a Charnered Accountant. The appellants have shown the receivable amount under the head 'short term loans and advances' as "Balance with Excise authorities".

6.1 The CEGAT, Delhi, in the case of Commissioner of Customs, Air Cargo unit vs Maruti Udyog Ltd, as reported in [2003 (88) ECC 584, 2003 (155) ELT 523 Tn Delj, in a similar situation deliberated as follows:

"4. We have considered the submissions of both the sides. We observe that the Commissioner (Appeals) has allowed the refund of the duty claimed by the Respondents after being satisfied that the documentary evidence produced by them goes to show that ten of incidence of duty had not been passed on to the buyers of

the car. In the fled by the Revenue no material has been brought on record to rebut the findings of the Commissioner based on the balance sheet, C.A. Certificate and prices of the car remain unchanged brought on record by the Respondents in the grounds of appeal has been merely mentioned that Maruti Vidyog Ltd. must have taken the duty paid by them in consideration while working the cost of end-product. No material, in support of ground has been adduced. The Tribunal in the case of Hero Honda Ltd. has held as under :

"As regard the factual position also, we find that the details shown in the appellants balance sheet and annual report show the disputed refund amounts as receivable from Government. Further entries in their journals extracted at pages 225-226 of the Appeal Papers and the Chartered Accountant's certificate at pages 231-235 thereof also indicate that the appellants have not passed on the incidence of provisional deposit to the customers. We are also satisfied that the appellants have been able to show that the components imported by them have not been consumed in the manufacture of the final products."

Thus we find no reason to interfere with the impugned Order and reject the appeal filed by the Revenue.

6.2 Similarly, in another case and on the same issue, the Hon'ble CESTAT Hyderabad in the matter of Nokia India Sales P. Ltd vs Commissioner of Customs Hyderabad, has passed an order as follows :

"The assessee had imported mobile phones - They paid duty on goods @ 6% CVD and 1% NCD - Subsequently, assessee claimed refund of duty in view of the decision rendered by Supreme Court in case of SRF Ltd. on the ground that they were eligible for concessional rate of duty of CVD @ 1% advalorem by virtue of Sl. No.263A of Notfn.12/2012-CE - Same was rejected by original authority. The only question that remains in both the appeals is whether the assessee is able to prove the hurdle of unjust enrichment has been passed on or not - The CA's Certificate

clearly recorded that for the purpose of examining the case of unjust enrichment, they audited importer's books of mounts and other documents and record of goods, based upon such verification certified that incidence of duty is not passed on As against such clear evidence from Chartered Accountant, Revenue has not adduced contrary evidence to show that assessee had passed on the incidence of duty. In absence of any contrary evidence Certificate needs to be accepted. It is noticed that identical/similar issue come up before High Court of Karnataka, which was disposed of directing Revenue Authorities to sanction the refund, by holding that refund is eligible for granted to them - High Court of Mudras in case of Micromax Informatics on identical set of facts held that refund is admissible. On the face of authoritative judicial pronouncement on self same issue, Lower Authorities have erred in coming to a conclusion that assessee has not passed the hurdle of unjust enrichment - The impugned order is set aside on the question of unjust enrichment : CESTAT".

6.3 As in the cases before the Hon'ble Tribunal cited above, the Department has failed to bring any fact/documents on record which is contrary to whatever the appellant have brought to the table and disprove conclusively the position of the appellant that they have not passed on the burden of CVD to their customers. The appellants have taken recourse to various case laws to strengthen their case.

7. In view of the foregoing, I'm inclined to accept the fact that the burden of incidence of duty has not been passed on and the unjust enrichment clause is not applicable in the instant case. The two major conditions, (i) Amount being reflected in Balance sheet as receivable and (ii) CA certificate stands fulfilled and accordingly, the appellants are entitled to the refund claim.

8. The appeal is allowed with consequential relief."

8. As in the appellant's own case for identical facts, it has been held that the bar of is not applicable to the facts of this case, therefore, we

hold that the appellant is entitled for refund claim and has passed the bar of unjust enrichment by providing certificate issued by the Chartered Accountant to that effect and have shown the amount of refund is receivable from the Department which is reflected in the Balance sheet.

9. Further, we hold that in the case of Girish Foods & Beverages Private Limited (supra), this Tribunal has examined the issue and observed as under :

> *"**7.** After going through the impugned order I find that admittedly during the period February 2003 and March 2003, the appellant was not paying any duty on their clearances on the ground that their factory being situated in the rural area was entitled to exemption in terms of Notification No. 8/03 dt. 1-3-2003. it is also on record that duty for the said period i.e. second fortnight of February 2003 and first fortnight of March 2003 was paid by them only on 24-3-2003 by making one time entry in their Cenvat credit account, against a remark "duty paid under protest". The said debit according to the appellant was made in pursuance to the visit of the Dy. Commissioner in their factory and on his insistence. The question which arises is that when the appellant had paid the said amount of Rs. 8,132/- for the past clearance under protest, can it be said that the subsequent clearances were cleared on payment of duty by the assessee without any reservations and the same were voluntary payments. The entire process of payment of duty started with the appellants lodging a protest. This fact, in my views, is sufficient to hold that the subsequent clearances were not voluntary but the protest initially lodged on 24-3-2003 continued to cover subsequent clearances and payment of duties, though, the appellant did not follow the elaborated procedure of payment of duty under protest. The entire idea of payment of duty under protest is to inform the*

Revenue that the assessee is not in agreement with the Revenue's view but to avoid any confrontation at that particular point of time, duty is being paid and the assessee reserves his right to settle the same on the out come of the final verdict on the disputed issue. As such it cannot be said that though the initial payment on 24-3-03 was under protest, the subsequent payments were voluntary and were hit by the bar of limitation. It has to be concluded that the appellant paid the duty under protest and on the final dispute about exemption being settled in their favour, was entitled to the refund of the same. Gujarat High Court in the case of Shree Ram Food Industries, 2003 (152) E.L.T. 285 (Guj.) has observed that payment having been made by the petitioner pursuant to demand and threat made by the Deputy Commissioner & Superintendent, not a voluntary payment but to be treated as payment under protest and limitation will not apply. As I hold that the appellant having lodged the protest at the time of first payment of duty under the instruments of Dy. Commissioner, cannot be said to have paid the subsequent duties voluntarily. In such a case, limitation would be in applicable.

***8.** As regards the Revenue's appeal in respect of unjust enrichment, I find that the appellants were manufacturing drinking water as a franchisees of M/s. Dhariwal Industries Ltd. The goods attracted to duty in terms of Section 4A of Central Excise duty on the basis of MRP, which is being fixed by M/s. Dhariwal Industries Ltd. and the appellants are not free to challenge or alter the MRP so fixed. MRP of the product during the period when normal rate of duty was paid and after 24-8-04 remained the same. It has also been noticed by the appellate authority that some of the other franchisee also availed exemption under Notification No. 9/02 dt. 1-3-2002 but the MRP of all of them remained unchanged during the entire period. This clearly indicate that duty burden has not been passed on to their customers………………………………..."*

10. Admittedly, in this case, the appellant has paid the duty under protest and the duty is payable by the appellant on MRP basis, therefore, relying on the decision of Girish Foods & Beverages Pvt. Limited (supra), the appellant is entitled for refund of excess duty paid under protest and bar of unjust enrichment is not applicable.

11. In view of these observations, we hold that the appellant has been able to pass bar of unjust enrichment. Consequently, the appellant is entitled for refund as claimed.

12. The appellant has also claimed that they are entitled for interest for delayed refund in terms of Section 27A of the Customs Act, 1962 and the decision of the Apex Court in the case of Ranbaxy Laboratories Ltd.Vs. Union of India reported in 2011 (273) ELT 3 (S.C.). We hold that the appellant is entitled to interest of refund claim after three months from the date of filing of refund claim till its realization.

13. Therefore, the impugned order is set aside and the appeal is allowed with consequential relief, if any.

(Pronounced in the open court on **04.06.2024**)

Sd/
(Ashok Jindal)
Member (Judicial)

Sd/

(K.Anpazhakan)
Member (Technical)

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