

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

REGIONAL BENCH – COURT NO.1

Excise Appeal No. 76538 of 2019

(Arising out of Order-in-Appeal No.25/HWH/CE/2019-20 dated 16.04.2019 passed by Commissioner of CGST & Central Excise (Appeals-II), Kolkata.)

M/s. Hindalco Industries

(39, G. T. Road, Belurmath, Howrah-711202)
VERSUS

Appellant

**Commissioner of CGST & Central Excise, Howrah
Commissionerate**

(M. S. Building, Customs House, 15/1, Strand Road, Kolkata-700001)

Respondent

With

Excise Appeal No. 75226 of 2021

(Arising out of Order-in-Appeal No.9/HWH/XAP-27,77,15,91,96 & 20/2017-18 Dated 28.02.2018 passed by Commissioner of CGST & Central Excise, Kolkata North commissionerate)

M/s. Hindalco Industries

(39, G. T. Road, Belurmath, Howrah-711202, Howrah)
VERSUS

Appellant

**Commissioner of CGST & Central Excise, Howrah
Commissionerate**

(M. S. Building, Customs House, 15/1, Strand Road, Kolkata-700001)

Respondent

APPEARANCE :

Mr. Satyaprem Majumdar, Advocate for the Appellant

Mr. S. S. Chattopadhyay, Authorized Representative for the Respondent

CORAM:

HON'BLE MR. R. MURALIDHAR, MEMBER (JUDICIAL)

FINAL ORDER NO.75938-75939/2023

Date of Hearing : 21 June 2023

Date of Decision : 21 June 2023

PER R. MURALIDHAR

The Refund claim of Rs.3,59,444/- was granted by the Adjudicating Authority vide OIO No. 12/R/Refund/Bally-1/2018-19 dated 26/09/2018. Against this OIO, the Department filed an Appeal before Commissioner (Appeals). The Commissioner (Appeals) allowed the Departmental (Appeal) vide OIA No. 25/HWH/CE/2019-20 dated

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16/04/2019. In this OIA, he held that the refund of Rs.1,64,837/- should not have been granted to the Appellant. Being aggrieved by this OIA, the Appellant has filed the present Appeal No. E/76538/2019.

2. Subsequently after passing of the OIO No.12/R/Refund/Bally-1/2018-19 dated 26/09/2018, the Department issued Protective Show Cause Notice dated 01/4/2019 on the ground that the refund was granted erroneously. The Adjudicating Authority decided this Show Cause Notice and held that the refund of Rs.1,64,837/- has been granted erroneously and hence held that this amount is required to be paid along with interest. Being aggrieved, the Appellant filed an Appeal before the Commissioner (Appeals). The Commissioner (Appeals) vide OIA No. 43/HWH/CE/2020-21 dated 03/2/2021 rejected the Appeal by upholding the OIO. Being aggrieved by this impugned OIA, the Appellant has filed the present Appeal No. E/75226/2021.

3. The Learned Advocate submits that when they filed an appeal before the Commissioner (Appeals) being aggrieved by the OIO No. 78-83/DENOVO/Addl Commr/CE/KOL-II/Adjn/2009-10 dated 31.03.2010, the Commissioner (Appeals) passed Stay Order No. 01/KOL-99/2013 dated 02/01/2013, wherein he has asked the Appellant to pre-deposit 50% of duty and 50% of penalty. The Appellant had pre-deposited Rs. 3,59,444/- /- as per the directions of this Stay Order dated 02/01/2013. Thereafter, the Commissioner took up the Appeal for disposal and passed OIA No. 9/HWH/XAP-27 77, 15, 91, 96 & 20/2017-18 dated 28/02/2018 setting aside the OIO No. 78-83/DENOVO/Addl Commr/CE/KOL-II/Adjn/2009-10 dated 31.03.2010. Consequently, the Appellant filed the refund claim for Rs.3,59,444/- with the Jurisdictional Assistant Commissioner. Vide OIO dated 12/R/Refund/Bally-1/2018-19 dated 26/09/2018, the Assistant Commissioner after noting the fact that the pre-deposit was made by the Appellant as per the directions contained in Stay Order dated 02/01/2013 and the Commissioner (Appeals) has acknowledged the pre-deposit of Rs.3,59,344/- in the

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OIA dated 28/02/2018 itself, the Adjudicating Authority granted the refund of Rs.3,59,344/- along with interest of Rs.1,25,616/- vide OIO dated 26/09/2018. The Department preferred an Appeal against this OIO before the Commissioner (Appeals). In their Appeal, the Department took a stand that the Appellant had pre-deposited the entire amount of Rs.3,59,344/- by debiting their Cenvat Account. Out of this, the amount of Rs.1,64,837/- was the pre-deposit towards penalty. The Department took the stand that the Appellant was in error in making the pre-deposit on account of penalty by utilizing their Cenvat Account. Hence, it was contended before the Commissioner (Appeals) that Rs.1,64,837/- has been granted as refund erroneously. The Commissioner (Appeals) vide the impugner OIA No. 25/HWH/CE/2019-20 dated 16/04/2019 allowed the Appeal of the Department.

4. On the same issue after the OIO dated 26/09/2018 was passed granting the refund of Rs.3,59,344/- the Department issued their Protective Show Cause Notice dated 01/04/2019 on the same ground that the Appellant has made the pre-deposit of Rs.1,64,837/- towards penalty by debiting their Cenvat Credit. The Adjudicating Authority held that this amount was erroneously refunded to the Appellant and passed OIO accordingly. Being aggrieved by this OIO, the Appellant filed an Appeal before Commissioner (Appeals) who rejected the Appeal and uphold the OIO.

5. The Learned Advocate submits that in both these OIAs which emanate from the same refund granted by the Adjudicating Authority on 26/09/2018, the Department was in gross error. He submits that when the Stay Order was passed on 02/01/2013 directing the Appellant to pre-deposit 50% of duty and 50% of penalty, the Appellant has paid Rs.3,59,444/- by debiting their Cenvat Account. The Commissioner (Appeals) has considered this as proper pre-deposit and had gone ahead with passing the OIA dated 28/02/2018. Against this OIA, the Department has not filed any Appeal before the Tribunal. Therefore, as

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to whether the Appellant has correctly made the pre-deposit in respect of the 50% on account of penalty cannot be agitated at a much later stage, without agitating this issue before the Tribunal against that OIA. Further he points out that the amount paid is in the nature of pre-deposit only. There cannot be any bifurcation as to which percentage pertains to duty amount and which percentage pertains to penalty amount. When this pre-deposit in the nature of mere deposit, the Department is in error in holding that Rs.1,64,837/- pre-deposit was made towards penalty. On this ground to hold that the refund already granted is erroneous is legally not sustainable. He relies on the case law of Commr. of Customs (Imports), ACC, Chennai Vs. K. Ramanlal 2018 (13) G.S.T.L. 141 (Mad.), wherein it has been held that once final order is passed, the Interim Order gets merged with the Final Order.

6. He relies on the case law of Metal Weld Electrodes Vs CESTAT, Chennai, 2018 (16) G.S.T.L. 39 (Mad.). On the same issue, he also relies on the following case Laws:-

(i) Suvidhe Ltd. Vs. Union of India 1996 (82) E.L.T. 177 (Bom.)

(ii) Eltex Rudy Ltd. Vs. Superintendent of Central Excise, Coimbatore 1994 (70) E.L.T. 208 (Mad.)

7. In the above cases, it has been held that amount deposited at the time of making pre-deposit is mere deposit and has no color of Excise duty or penalty etc. Relying on this case law, the Learned Advocate prays that the Appeals filed by the Appellant may be allowed.

8. The Learned AR submits that it is on record that the Interim Order dated 02/01/2013 passed by the Commissioner (Appeals) had clearly mentioned that the Appellant was required to make pre-deposit 50% of the duty amount and 50% of the penalty amount. Therefore Rs.1,64,837/- is only on account of pre-deposit of penalty amount which could not be pre-deposited by debiting the Cenvat Credit account. Therefore, he reiterates the findings of the Lower Authorities and prays that the Appeals may be dismissed.

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9. Heard both sides and perused the documents.
10. There is no dispute that the amount in question i.e. Rs. 3,59,344/- has been pre-deposited by the Appellant based on the Stay Order passed by the Commissioner (Appeals) on 02/01/2013. They have pre-deposited this amount by debiting their Cenvat Account. The Commissioner (Appeals) thereafter has taken up the Appeal for disposal and decided the issue in their favour. From the OIA dated 28/02/2018 which was passed only after the pre-deposit was made by the Appellant, it is clear that the Commissioner (Appeals) did not take any objection about the Appellant making the pre-deposit of Rs.164,837/- in respect of the Penalty by utilizing the Cenvat Credit. If the Department felt that the Commissioner (Appeals) has erred in taking up the Appeal even when the penalty Pre-deposit of Rs.1,64,837/- was made by utilizing the Cenvat Account, it was open for the Department to file an appeal before the Tribunal. In this case, such a step was not taken up by the Department. Therefore, whatever decision was taken by the Commissioner (Appeals) at his level, has reached finality once this OIA was not challenged before the Tribunal. The Department cannot take this stand that when the refund is granted consequent to the unchallenged OIA passed by the Commissioner (Appeals).
11. Coming to the case law cited by the Learned Advocate, in the case of **Commr. of Customs (Imports), ACC, Chennai Vs. K. Ramanlal 2018 (13) G.S.T.L. 141 (Mad.)**, the Madras High Court has held as under:-
- 3. It is well settled that an interim order passed, merges with the disposal of the main case.*
12. In the case of **Metal Weld Electrodes Vs CESTAT, Chennai, 2018 (16) G.S.T.L. 39 (Mad.)**, the Madras High Court has held as under:-

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3. From the above, it is clear that interim order made in E/S.223/2010, dated 24-7-2012, of CESTAT, Chennai has merged with the final order in E.425-426/2010, dated 12-6-2014.

4. In view of the subsequent order made in E/425-426/2010, dated 12-6-2014, we are not inclined to delve further to the challenge made to an interim order. It is well settled that interim order, merge with the final order.

13. The above decisions of the Hon'ble High Court clarify that the Interim Order would get merge with the Final Order. In the present case, the Stay Order dated 02/01/2013 has got merged with the OIA passed by the Commissioner (Appeals) on 28/02/2018.

14. In the case of **Suvidhe Ltd. Vs. Union of India 1996 (82) E.L.T. 177 (Bom.)**, the Hon'ble Bombay High Court has held as under;-

"2. A deposit under Section 35F is not a payment of Duty but only a pre-deposit for availing the right of appeal. Such amount is bound to be refunded when the appeal is allowed with consequential relief."

15. In the present case, while the Department is bifurcating the pre-deposit amount as pre-deposited towards duty and pre-deposited towards penalty. The High Court decision clarifies that what is pre-deposited under Section 35F of CEA 1944 is to be treated only as pre-deposit and nothing else.

16. Considering the factual details, statutory provisions and the cited case law, the Appeals filed by the Appellant are allowed by setting aside the impugned OIAs.

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

Sd/-

(R. Muralidhar)
Member (Judicial)

Pooja