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

REGIONAL BENCH – COURT NO. 1

Customs Appeal No. 79541 of 2018

(Arising out of Order-in-Appeal No. 142/Pat/Cus/Appeal/2018 dated 03.10.2018 passed by the Commissioner (Appeals) of Customs, G.S.T. & C.Ex., Patna, 2nd Floor, C.R. Building (Annexe), Bir Chand Patel Path, Patna – 800 001)

Commissioner of Customs (Preventive) **: Appellant**
5th Floor, Central Revenue Building, Birchand Patel Path,
Patna – 800 001

VERSUS

M/s. Dabur India Limited **: Respondent**
Corporate Office, Kaushambi,
Ghaziabad – 201 010

APPEARANCE:

Shri Ashwini Kr. Choudhary, Authorized Representative
For the Appellant-Revenue

Shri Rahul Tangri, Advocate
Smt. Taniya Roy, Advocate
For the Respondent

CORAM:

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

FINAL ORDER NO. 75318 / 2025

DATE OF HEARING: 27.01.2025

DATE OF DECISION: 12.02.2025

ORDER: [PER SHRI ASHOK JINDAL]

The Revenue has filed this appeal against the impugned order wherein the Ld. Commissioner (Appeals) has allowed the refund claim of the respondent by holding that the respondent was able to pass the bar of unjust enrichment.

2. The facts of the case are as under: -

(i) The Respondent 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 Respondent 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 Respondent are covered under the Notification No. 01/2011-CE (2% without CENVAT Credit) as well as Notification No. 02/2011-CE (6% with CENVAT Credit).

(ii) 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 (315) E.L.T. 607 (S.C.)*, for the period 09.05.2015 onwards, the Respondent 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.

(iii) Thereafter, the Respondent preferred an application for refund for the excess duty paid in relation to 285 Bills of Entry during the relevant period i.e., 18.06.2015 to 10.07.2015.

(iv) The ld. adjudicating authority vide the Order-in-Original No. 02-Cus/Refund/DC/Rxl/2018 dated 23.01.2018 held that the refund amount of Rs. 1,04,47,836/- is not payable in cash to the Respondent on the ground of unjust enrichment and thereby credited the said amount in the

Consumer Welfare Fund in terms of Section 12C of the Central Excise Act, 1944.

3. Being aggrieved by the aforesaid Order-in-Original dated 23.01.2018, the Respondent preferred an appeal on two grounds: firstly, the imported products were sold based on MRP which underwent no change during the relevant period and the period subsequent thereto, and therefore the question of passing on burden of excess amount of duty to its customers does not arise; secondly, the Respondent iterated that they had borne the burden of excess amount of duty themselves which was also evident from the Annual Financial Statement of the relevant period where the excess amount had been shown under the head 'advance'.

4. On appeal, the Ld. Commissioner (Appeals) of Customs, G.S.T. and Central Excise, Patna vide the impugned order dated 03.10.2018 granted refund of the excess CVD paid by the Respondent for the relevant period by holding that the unjust enrichment cause is not applicable 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. In furtherance to the impugned OIA, the refund of Rs. 1,04,47,836/- was sanctioned to the Respondent on 21.05.2019. Further, interest on delayed sanction of refund was also allowed to the Respondent vide an Order-In-Original bearing no. 05-Cus/Refund/Rxl/2020 dated 17.12.2020.

5. Aggrieved from the said order, the Revenue has filed this appeal.

6. In support of their contentions, the Ld. Authorized Representative of the Revenue relies on the decision in the case of *Commissioner of C.Ex., Mumbai-II v. M/s. Allied Photographics India Ltd. [2004 (166) E.L.T. 3 (S.C.)]* to say that the Respondent has passed on the duty component to the buyers since the goods were sold on M.R.P. basis.

7. On the other hand, the Ld. Counsel appearing on behalf of the Respondent submits that the respondent has not passed on the incidence of duty to their customers, but have borne the same by themselves by showing the amount of refund as "receivable" in their Books of Accounts. It is submitted that to that effect, a Chartered Accountant's certificate has also been produced by the Respondent. Moreover, it is stated by the Respondent that the goods domestically procured and the goods imported are sold at the same M.R.P. and the excess duty paid by them at the time of importation of the goods is shown as "receivable" in their Books of Accounts and not recovered from their customers. In these circumstances, the Ld. Counsel for the Respondent contends that they have passed the bar of unjust enrichment. In support, he relies on the decision of this Tribunal in the case of *M/s. Birla Corporation Ltd. v. Commissioner of Central Excise, Lucknow [2017 (358) E.L.T. 443 (Tri. – All.)]* and also the decision rendered in the case of *M/s. Girish Foods & Beverages (P) Ltd. v. Commissioner of Central Excise, Pune [2007 (211) E.L.T. 388 (Tri. – Mum.)]*.

7.1. The Ld. Counsel for the Respondent also submitted that the Hon’ble Delhi High Court, in the case of *M/s. Hero Motorcorp Ltd. v. Commissioner of Customs (Import & General) [2014 (302) E.L.T. 501*

(Del.)], has distinguished the decision of the Hon'ble Apex Court in the case of *M/s. Allied Photographics India Ltd. (supra).*

8. Heard the parties and considered their submissions.

9. We find that in this case, the short issue involved in the matter is as to whether the respondent has passed the bar of unjust enrichment of excess duty paid by them which was sought to be refunded or not, when the goods were sold by the respondent on M.R.P. basis, the amount of excess duty paid by the respondent has been shown as "receivable" and also when domestically procured goods have suffered less duty and imported goods have suffered more duty.

9.1. The said issue as to whether on M.R.P. based goods, the bar of unjust enrichment is applicable or not has been dealt with by this Tribunal in the case of *M/s. Birla Corporation Ltd. (supra)* wherein the Tribunal observed as under: -

> *"8. Having considered the rival contentions and the case laws referred to hereinabove, it is an admitted fact that the appellant have received the same price/MRP for clearances of goods on 6 December, 7 December, 8 December, and so on. Accordingly I hold that there can be no presumption that the appellant have passed on the excess duty deposited erroneously on 7 December, to the buyer of the goods. Accordingly, I hold that the doctrine of unjust enrichment has been satisfied by the appellant assessee and I hold them entitled to refund of the amount in question."*

9.2. Further, in the case of *M/s. Girish Foods & Beverages (P) Ltd. (supra),* again this Tribunal had an occasion to examine the said issue. The relevant observations of the Tribunal are reproduced below: -

> *"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. Commissioner (Appeals) has relied upon the Trbunal's decision in the case of Swarup Fibre v. CCE, 2000 (120) E.L.T. 510 (T) and ITC Bhadrachalam Paper v. CCE, 2002 (146) E.L.T. 582 (T). He also referred to a copy of the affidavit dated 2nd September, 2005 duly notarized and solemnly affirming that they have not passed on the burden of duty involved to another person and have also submitted documentary evidence to show that MRP of goods remained constant before and after payment of excess duty.

9. As against the above Revenue has relied upon Calcutta High Court decision in the case of Bata Shoe (P) Ltd., 2004 (169) E.L.T. 3 (Cal.) laying down that when there is no direct collection from customers, duty must have been reflected in ultimate cost of finished goods. They have also referred to Hon'ble Supreme Court decision in the case of Solar Pesticides Pvt. Ltd., 2000 (116) E.L.T. 401 (S.C.), laying down that when duty paid on raw materials is added in the price of the finished goods, incidence of duty is considered to have been passed on to the buyer. Reliance has also been drawn to the Hon'ble Supreme Court's decision in the case of M/s. Allied Photographies India Ltd., 2004 (166) E.L.T. 3 (S.C.). However, I find that all the above decisions are dealing with the general principal that wherever duty is paid, the same gets reflected as a cost of the final product, as per the accounting system and is presumed to be a part of the final cost of the product. However, it is seen that in the instant case, duty is not attracted on the basis of value of the final product. Duty is based upon MRP of the final product, which remained constant irrespective of the fact of payment of higher duty. As such, when the

> *product is leviable to duty in terms of MRP, it cannot be concluded that the value of the final product fluctuated on account of payment of differential duty. Further the appellants contention that MRP in respect of other franchise holders, who were availing exemption remained the same also supports their stand that duty burden was born by the appellant from their own pocket, and was not passed on to the customers. The Revenue has also not rebutted the assessees affidavit affirming that the duty has not been passed on to the buyer. In view of all these, it has to be concluded as a matter of fact that the duty burden was not passed on to the buyers and the refund is not hit by the bar of limitation."*

10. We have examined the decision in the case of *M/s. Allied Photographics India Ltd. (supra)* relied upon by the Revenue. We find that the facts of the said case are altogether different from that of the case on hand inasmuch as in that case, the appellant himself had admitted to have passed on the duty component to his distributors. Therefore, the said decision has no applicability to the facts of this case.

11. In these circumstances, we do not find any merit in the appeal filed by the Revenue and accordingly, the same is dismissed.

(Order pronounced in the open court on **12.02.2025**)

Sd/-
(ASHOK JINDAL)
MEMBER (JUDICIAL)

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

Sdd