IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,WEST ZONAL BENCH AT MUMBAI

COURT No. I

APPEAL No.E/1042/08 & E/264/09
Appln.No.E/CO/36/09

(Arising out of Order-in-Original No.03/SHH/2008-2009 dated 04/09/2009 & Order in Appeal No.AH/52&53/M-III/2008 dated 31/12/2008 passed by Commissioner of Central Excise Mumbai-III, Commissioner (Appeals), Central Excise, Mumbai-II)

For approval and signature:

Hon'ble Mr.Ramesh Nair, Member (Judicial)
Hon'ble Mr. Raju, Member (Technical)

1.	Whether Press Reporters may be allowed to see the Order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982?	:No
2.	Whether it should be released under Rule 27 of the CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not?	:Yes
3.	Whether Their Lordships wish to see the fair copy of the Order?	:Seen
4.	Whether Order is to be circulated to the Departmental authorities?	:Yes

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CEAT Ltd. **Appellant**

Vs.

Commissioner of Central Excise, Mumbai **Respondent**

Appearance:

Ms.Anjali Hirawat, Advocate for appellant
Shri.Ajay Kumar, Addl. Comm. (AR) for respondent

CORAM:

Hon'ble Mr. Ramesh Nair, Member (Judicial)
Hon'ble Mr. Raju, Member (Technical)

Date of Hearing : 05/04/2018
Date of Decision : 24/05/2018

ORDER NO. A/86526-86527/2018

Per: Ramesh Nair

1. There are two appeals filed by the appellants. Appeal No.E/1402/2008 is in respect of *suo moto* re-credit amount in PLA of the amount which was paid in compliance of High Court Order whereby the appellants proforma credit was disallowed. Subsequently, the Hon'ble Supreme Court decided the matter in favour of the appellant.

2. The second appeal No.E/264/2009 is in respect of the refund matter of the same amount which was taken as suo motu re-credit. In this case, the issue involved is unjust enrichment.

3. Ms.Anjali Hirawat, Ld. Counsel appearing on behalf of the appellant with regard to appeal No.E/1408/2008 submits that since the issue involved in the present appeal is whether the appellant taken suo moto credit in their PLA against cash payment towards the proforma credit which was finally decided in their favour by the Hon'ble Supreme Court is in order or otherwise. She submits that the appellant had paid proforma credit amount in cash in compliance to the High Court order. However, subsequently, the Hon'ble Supreme Court allowed the proforma credit to the appellant. They approached the department but due to inaction of the department they have taken suo moto re-credit. Simultaneously, they also filed refund claim to regularize this suo moto re-credit, which was rejected

on the ground of unjust enrichment. Against this, Appeal No.E/264/2009 was filed. She further submits that since the matter was under litigation in the Hon'ble Supreme Court the amount deposited in cash is nothing but a pre-deposit. Therefore, in case of pre-deposit, no formal refund application is required and the appellant is entitled to take suo moto re-credit. Therefore, the provisions of unjust enrichment is also not applicable in case of refund of pre-deposit. She place reliance on the following judgements:

<u>Suo moto taking of credit is correct in law:</u>

a) CEAT Ltd. – 2010 (254) ELT 349 (T) affirmed in 2013 (298) ELT 525 (Bom)
b) ICMC Corporation Ltd. – 2014 (302) ELT 45 (Mad)
c) Krishnav Engineering Ltd. – 2016 (331) ELT 391 (All)
d) Finolex Industries Ltd. – 2016-TIOL-2825-CESTAT-MUM
e) Motorola India Pvt. Ltd. – 2007 (7) STR 613 (T) affirmed in 2006-(206) ELT 90 (Kar)
f) Sopariwala Exports Pvt. Ltd. – 2013 (29) ELT 70 (T)

Applicability of unjust enrichment to refund of pre-deposit:

g) Sandvik Asia Ltd. – 2015 (323) ELT 431 (Bom
h) Rocket Engg. Corporation Ltd. – 2014 (306) ELT 33 (Bom)
i) Pricol Ltd. – 2015 (320) ELT 703 (Mad)
j) Suvidhe Ltd. – 1996 (82) ELT 177 (Bom) affirmed by Supreme Court – 1997 (94) ELT A159 (SC)
k) Universal Speciality Chemicals Pvt. Ltd. – 2015 (315) ELT 106 (Tri-Bom)
l) Arviva Industries (India) Ltd. – 2011 (267) ELT 599 (Bom)
m) Godrej Industries Ltd. – 2007 (213) ELT 259 (Tri-Mum)
n) Rajiv Plastics Industries – 2009 (245) ELT 274 (Tri-Ahmd)
o) Madura Coats Ltd. – 2014 (301) ELT 161 (SC)
p) Ghaziabad Ship Breakers Ltd. – 2010 (259) ELT 522 (Guj)
q) JM Baxi & Co. – 2011 (271) ELT 19 (Bom)

r) Hawkins Cookers Ltd. – 2017 (6) GSTL 308 (Tri-Chan)
s) Dew-Pond Engineers P Ltd. – 2017 (348) ELT 714 (T)

4. Shri Ajay Kumar, Ld. Addl. Comm. (AR) appearing on behalf of the Revenue reiterates the findings in the impugned order. She further submits that any refund of excise duty has to be processed only under Section 11B, therefore all the provisions of 11B will be applicable for sanction of refund and one of the provisions is unjust enrichment. Therefore, the provisions of unjust enrichment is clearly applicable in the present case. He placed reliance on the following judgements:

a) BDH Industries Ltd. – 2008 (229) ELT 364 (Tri-LB)
b) Ridice Ispat (India) Ltd. – 2008 (227) ELT 407 (Tri-Kol)
c) Suvidhe Ltd. – 1996 (82) ELT 177 (Bom)
d) Brooke Bond Liptons (P) Ltd. – 1999 (107) ELT 228 (Tri)
e) Karam Chand Thapar & Bros (CS) Ltd. – 2003 (151) ELT 342 (Tri-Kol)
f) Nestle India Ltd. – 2003 (154) ELT 567 (Kar)
g) Ambica Hydraulics (P) Ltd. – 2003 (158) ELT 299 (Tri-Del)
h) Gujarat Insecticides Ltd. – 2005 (183) ELT 9 (Guj)

5. We have carefully considered the submissions made by both sides and perused the records.

6. As regards the admissibility of the proforma credit to the appellants, the issue has been decided by the Hon'ble Supreme Court. Therefore, the appellant is in principle entitled for the refund of amount paid during the litigation. However, the appellants have paid the amount in compliance with the High Court judgement. According to which, the appellants proforma credit was denied. Therefore, it is the amount of proforma credit which otherwise duty paid by the appellant, it cannot be said it is

a pre-deposit. For the reason that for filing appeal in the Supreme Court no need of any pre-deposit, therefore, the amount paid by the appellant cannot be considered as pre-deposit. The Hon'ble Supreme Court in the case of Sahakari Khand Udyog Mandal - 2005 (181) ELT 328 (SC) - *it is clear that the doctrine of unjust enrichment is based on equity and has been accepted and applied in several cases. In our opinion, therefore, irrespective of applicability of Section 11B of the Act, the doctrine can be invoked to deny the benefit to which a person is not otherwise entitled. Section 11B of the Act or similar provisions merely given legislative recognition to this doctrine. That, however, does not mean that in the absence of statutory provisions, a person can claim or retain undue benefit".*

Therefore, in the present case the refund is governed by Section 11B, therefore, the provisions of unjust enrichment is clearly applicable. Even in the case of suo moto re-credit though in principle, the appellant is entitled but subject to test of unjust enrichment. Since right from the beginning the appellants have harped upon the issue that the unjust enrichment is not applicable, the facts that the incidence of duty so claimed as refund whether passed on to any other person or not has not been examined. We are therefore of the view that in the interest of justice an opportunity can be given to the appellant to establish their case that incidence of duty has not been passed on to any other person. Accordingly, we allow both the appeals by way of remand to the adjudicating authority only on the aspects of the unjust enrichment.

(Pronounced in Court on 24/05/2018)

(Raju) **Member (Technical)**	**(Ramesh Nair)** **Member (Judicial)**

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