IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
WEST ZONAL BENCH AT MUMBAI
COURT No.

APPEAL No. E/87530/2018

(Arising out of Order-in-Appeal No. MKK/650/RGD/APP/2017-18 dated 23.3.2018 passed by Commissioner of Central Excise (Appeals), Raigad)

Savita Chemicals Ltd. **Appellant**

Vs.

Commissioner of Central Excise, Belapur **Respondent**

Appearance:

Shri Mehul Jivani, C.A., for appellant
Shri Prabhudesai, Superintendent (AR), for respondent

CORAM:

Hon'ble Dr. D.M. Misra, Member (Judicial)

Date of Hearing: 20.11.2018
Date of Decision: 20.11.2018

ORDER No. **A/87940/2018**

This is an appeal filed against order-in-appeal No. MKK/650/RGD/APP/2017-18 dated 23.3.2018 passed by Commissioner of Central Excise (Appeals), Raigad.

2. Briefly stated the facts of the case are that the appellant is engaged in the manufacture of excisable goods, inter alia, lubricating oil falling under Chapter 27 of the Central Excise Tariff Act, 1985. During the period from July 2005 to March 2006, the appellant had cleared lubricating oil to their various depots/C&F

agents, discharging duty on the transaction value arrived in accordance with Section 4(1)(a) of the Central Excise Act, 1944. The said goods were cleared to their depots on stock transfer basis and later sold at a higher price in comparison to the price at which duty was discharged at the factory gate. The appellant later filed a refund claim of Rs.10,79,333/- on 13.11.2006 indicating that for the period July 2005 to March 2006, there was short payment of duty of Rs.6,44,517/-. Hence, the same should be adjusted against the refund claim being filed for the excess amount of duty paid during the relevant period. Show cause notice was issued to the appellant on 16.11.2007 invoking extended period of limitation to recover the amount of Rs.6,44,517/- requested in their letter dated 13.11.2006 to adjust against their liability for clearances made during July 2005 to March 2006. On adjudication, the demand was confirmed with interest and penalty. Aggrieved by the said order, the appellant filed appeal with the learned Commissioner (Appeals) who, in turn, rejected their appeal. Hence, the present appeal.

3. Learned Chartered Accountant, Shri Mehul Jivani, for the appellant, submits that the lubricating oil cleared from their factory on the basis of the transaction

value to their depots and from where certain discounts were passed to the buyers when the goods were ultimately sold from depots. In their letter dated 1.6.2001 while filing their price declaration, they have intimated the department that from the depot price, certain discounts were allowed to their customers, the exact quantum of such discount would be known only after a period of time, therefore, the assessment of the goods cleared on payment of duty were to be on provisional basis and after receiving the data, the differential duty would be paid accordingly. Thereafter, this practice has been followed by the appellant and the assessment has been considered by the department as provisional only. It is his contention that for the impugned period, i.e. from July 2005 to March 2006, an amount of Rs.6,44,517/- was short paid, which they requested to be adjusted against the refund claim filed subsequently. It is his contention that even though the original authority in para 8 of the order dated 2.9.2008 categorically held that the assessment was provisional, the learned Commissioner (Appeals) in para 6 recorded that since the appellant had not followed the procedure prescribed, therefore, the assessment cannot be considered as provisional. Hence, the duty short paid during the relevant period cannot be adjusted against the duty excess paid.

3.1 The learned Chartered Accountant further submitted that in all their ER-1 returns, they disclosed to the department that assessment was provisional. Therefore, the finding of the learned Commissioner (Appeals) that the assessment is not provisional, therefore, the appellant is not eligible to adjust the duty short paid during the period July 2005 to March 2006, cannot be sustained. He has referred to the subsequent order of the learned Commissioner (Appeals), bearing No. MKK/648-649/RGD/APP/2017-18 dated 23.3.2018, whereunder the learned Commissioner (Appeals) allowed adjustment of short payment with the excess payment of duty during a particular period of assessment considering the entire assessment was provisional.

3.2 Further, the learned Chartered Accountant for the appellant submitted that in adjusting the amount of duty short paid, the principles of unjust enrichment are not applicable in view of the judgment of this Tribunal in the case of *Sangam Spinners vs. CCE, Jaipur-II – 2016 (344) ELT 623 (Tri.-Del.)*.

4. Learned AR for the Revenue reiterated the findings of the learned Commissioner (Appeals).

5. I have carefully considered the submissions of the learned AR for the Revenue as well as the learned C.A. for the appellant.

6. The short issue for determination is whether the duty short paid by the appellant amounting to Rs.6,44,517/- during the period from July 2005 to March 2005 would be adjusted against the refund of Rs.10,79,333/- claimed by the appellant for excess amount of duty paid. It is the contention of the Revenue that since the assessment was not provisional in accordance with Rule 7 of the Central Excise Rules, 2002, therefore, the appellant is precluded from adjusting the excess/shortage of duty against their liability. I find that the adjudicating authority has categorically held that the self assessment undertaken by the appellant was on provisional basis. Also, from the records, particularly the letter dated June 2001 and the ER-1 returns filed from time to time to the department, the appellant has categorically claimed that their assessment was provisional and no communication was addressed by the Revenue denying the said facility of assessment on provisional basis. In these circumstances, I do not find merit in the observation of the learned Commissioner (Appeals) that the assessment was since not provisional, therefore, the

appellant is not entitled to adjust the duty short paid against the amount excess paid during the particular period of assessment. In the result, the appellant is entitled to adjust the duty short paid during the relevant period with that of excess paid. Consequently, the impugned order is set aside and the appeal is allowed with consequential relief, if any, as per law to the appellant.

(Pronounced in court)

(Dr. D.M. Misra)
Member (Judicial)

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