

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

APPEAL NO. E/86390/2018

(Arising out of Order-in-Appeal No. PUN-CT-APPII-000-322-17-18 dated 16.01.2018 passed by the Commissioner of Central Tax (Appeals), Pune-II.)

M/s Pandurang SSK Ltd.

Appellant

Vs.

C.C.T., Pune-II

Respondent

Appearance:

Shri J.N. Somaiya, Advocate

for Appellant

Shri D.S. Chavan, Superintendent (AR)

for Respondent

CORAM:

HON'BLE DR. SUVENDU KUMAR PATI, MEMBER (JUDICIAL)

Date of Hearing: 06.08.2018

Date of Decision: 20.12.2018

ORDER NO. A/88163/2018

Denial of refund of reversed CENVAT credit noted as inadmissible in Audit that was held to be irregular by the CESTAT Bench Mumbai has brought the dispute to this present forum.

2. The zigzag thread of appellant's case started way back in 2007 when Central Excise Officers made observation on appellant's avilment of CENVAT credit against input services for erection, installation etc. of capital goods during the financial year 2005-06 and 2006-07, as inadmissible for appellant company, engaged in

manufacture of sugar and molasses. Appellant reversed the credit of ₹1,66,000/- + ₹ 600/- including interest of ₹63,191/- on 18.11.2008 and 24.03.2011 but was put to show-cause vide notice dated 31.03.2011 for recovery of the said amount along with interest and penalty that culminated in passing of Order-in-Original dated 16.11.2011, confirming the demand and penalty of equivalent amount. The appeal was preferred before the CESTAT, West Zonal Bench, Mumbai that was allowed vide final order No. A/85139/17/SMB dated 07.12.2016. Consequent upon the final order passed by the Tribunal, appellant filed refund application for ₹1,66,600/- on 22.06.2017 but the same was refused by the Assistant Commissioner of Central Tax, Solapur and unsuccessful attempt made before the Commissioner of Central Excise (Appeals), Pune, resulted in filing of this appeal.

3. In its memo of appeal and during the course of hearing of the appeal, the Learned Counsel for the appellant submitted that the grounds of refusal as found from the show-cause are primarily on two counts. First refund application is time barred as the amount was not reversed on protest and second, the doctrine of unjust enrichment is applicable to the appellant, since it had shown the amount of refund claim as receivable amount in their books of account. He placed reliance on the following judgments:-

- (i) *CCE Vs. Pricol Ltd. – 2015 (39) STR 190 (Mad.)*
- (ii) *Ebiz.Com Pvt. Ltd. Vs. CCE, 2017 (49) STR 389 (All.)*
- (iii) *CCE Vs. Mahalaxmi Exports – 2010 (258) ELT 217 (Guj.)*
- (iv) *Hawkins Cooker Ltd. Vs. CCE - 2017 (346) ELT 298*
- (v) *Universal Heat Exchangers Ltd. Vs. CCE - 2015 (329) ELT 936*

and submitted that such reversal of CENVAT credit should be considered as pre-deposit, during the investigation pending decision of the appeal in which case unjust enrichment is not applicable. He also placed his reliance on these judgments:-

- (i) *Balaji Pressure Vessels Ltd. Vs. CCE - 2016 (5) TMI 132*
- (ii) *Sarnar Buildtech Pvt. Ltd. Vs. CCE - 2015 (8) TMI 64*
- (iii) *Daivesh N. Shah & Company Vs. CCE - 2013 (294) ELT 101*
- (iv) *Jageti & Co. Vs. CCE - 2012 (26) STR 415*
- (v) *Shipping Corporation of India Ltd. Vs. CCE - 2010 (258) ELT 555*
- (vi) *Laxmi Gayatri Iron & Steel P. Ltd. Vs. CCE - 2017 (358) ELT 462*
- (vii) *Icomm Tele Ltd. Vs. CCE - 2016 (6) TMI 779*

To substantiate that if the amount deposited is shown in the assessee's books of account as expenditure and not as receivable, incidence of duty cannot be said to have been passed to make refund claim hit by unjust enrichment as assessee had submitted to such demand during the investigation only with the intention to reduce the litigation. He further argued that no specific instances has been shown to substantiate that the amount was being passed on others and refusal to accept Chartered Accountant's certificate establishing such non-passing of incidence of tax burden on others by Commissioner (Appeals) is improper for which the order is required to be set aside.

4. In response to such submissions, the Learned Authorised Representative for the Department Mr. D.S. Chavan, Superintendent supported the reasoning and rationality of the order passed by the Commissioner (Appeals). In placing reliance on the decisions reported

in *Sahakari Khand Udyog Mandal Ltd. Vs. CCE – 2005 (181) ELT 328 (SC)*, *Union of India Vs. Solar Pesticide Pvt. Ltd. – 2000 (116) ELT 401 (SC)*, the learned AR submitted that doctrine of unjust enrichment can be invoked to deny benefit to which a person is not otherwise entitled. Further he submitted that incidence of such duty not only covers within its ambit, the passing of duty directly to another person but also to cases where it is passed on indirectly and when the appellant has stated such payment of duty in the expenditure account and not recoverable in its Balance Sheet, as pointed out by the Commissioner (Appeals), refunding the same would amount to unjustly enriching the appellant for which interference in the order passed by the Commissioner (Appeals) by the Tribunal is uncalled for.

5. Heard from both the sides at length, perused the case record and gone through the judicial decisions and the order passed by the Commissioner (Appeals). Referring to Section 11B(1) the first Adjudicating Authority had given his finding that the payment was made lastly in February, 2011 without protest and refund claim was filed on 22.06.2017. But such payment being made at the insistence of the Department cannot be considered as time barred and provisions of Section 11B are not applicable in the present case. However, he has not dealt with Section 11B explanation (EC) whereby the period of one year should be computed from the date of judgment decree, order or direction of the Appellate Tribunal. This being not challenged before the Commissioner, no finding is required in this aspect that refund was filed within the prescribed period of limitation.

6. Now coming to the other grounds of rejection i.e. applicability of the doctrine of unjust enrichment to the case of the appellant, it can be noticed that referring to the Balance Sheet of 2005-06 & 2006-07 and for the financial year of 2015-16 & 2016-17 the Adjudicating Authority has given his findings at para 27 that the appellant had not shown the amount of refund claim of ₹1,66,600/- as receivable amount in their Balance Sheet and the Chartered Accountant has not certified that the said amount has been shown in the Balance Sheet to be 'receivable'. Therefore while holding that doctrine of unjust enrichment is applicable to all the cases of refund irrespective of the amount as refund of duty or otherwise. He has relied on the decision of Hon'ble Supreme Court in the Case of *Sahakari Khand Udyog Mandal Ltd. (supra)* and ultimately rejected the refund. In confirming the Order-in-Original, the learned Commissioner (Appeals) has referred to the judgment of Hon'ble Supreme Court in the case of *Union of India Vs. Solar Pesticide Pvt. Ltd. (supra)* wherein it was held that the incidence of such duty should not only pass directly to any other person but also to pass indirectly to justify that appellant was not unjustly enriched. Bringing this proposition of law to the appellant's case, the learned Commissioner (Appeals) has summed up his findings at para 10 of his order while passing and confirming rejection of refund claim. Para 10 of Order-in-Appeal read as here under:-

"10. Now coming to the Certificate of Chartered Accountant, it only states that ".....the said amount of credit and interest is paid by them on their own and they have not recovered the said amounts from their customers

or any other person.” Thus in view of the aforesaid decision of Apex Court, it only confirms the first case i.e. incidence of duty has not been passed on directly, but it completely fails to confirm that the incidence of duty has not been passed on indirectly. As the said amount has been booked under expenditure and not booked under receivables in the books of account, it clearly shows that the amount claimed as refund is also a part of costing of the final product and thus the incidence has been “indirectly” passed on to another person. Therefore the present claim does not pass the test of unjust enrichment in terms of ratio laid down by the Apex Court.”

7. On a close scrutiny to the above para, it appears that learned Commissioner (Appeals) has accepted the Chartered Accountant certificate as a piece of evidence to the extent that incidence of tax has not been passed on directly to any other person and in respect of indirect passing of such incidence of duty, his logic was that the amount has been booked as expenditure in the books of account and not as receivable that would clearly establish that the amount has been absorbed in the costing of final products. This finding appears to be erroneous on many scores:-

(i) Audit was conducted in 2007 in respect of financial year 2005-06 & 2006-07 and thereafter reversal of credit was made in November, 2008 and February, 2011 but the Adjudicating Authority have scrutinised the Balance Sheet of the financial year 2005-06 and 2006-07;

(ii) Order of Commissioner (Appeals) in the first round of litigation was passed on 07.12.2016, after which appellant was entitled to claim a refund as prior to such order, there was no certainty of appellant

getting a judicial finding in its favour so as to carry forward the amount that it would receive back as credit amount but Balance Sheet of the year 2015-16 & 2016-17 was scrutinised wherein the Adjudicating Authority found that such claimed amount of ₹1,66,600/- was shown as receivable;

(iii) Even in case of amount receivable like that from Sundry Debtors, the same gets written off after laps of 3 financial years, as per accounting rules of procedure and it is not expected from the appellant to carry over the reversed credit amount in its Balance Sheet as receivable for more than 11 years;

(iv) Amount reflected in the Balance Sheet as expenditure does not ipso facto absorb the same amount in the cost component of the subsequent manufacturing process and it could never be added in the final product which was cleared in the financial year preceding 2007;

(v) It is not invariably true that when any amount is shown as expenditure or any expenditure is required to be made, the same has to be absorbed in costing of the final product unless there is a proof that pricing of the final product has increased on that score, since there are various other mechanisms/procedures available before the manufacture to observe the cost, say by way of reducing profit margin of its sale, overhead expenditure of the Company etc.

8. From the above observation, I have got no hesitation to hold that rejection of refund claim of the appellant, which it is entitled to get by virtue as the order of this Tribunal, on the ground of unjust

enrichment without any iota of proof of such unjust enrichment is erroneous and is not infirmity to the law. Hence the order.

ORDER

9. The appeal is allowed and the Order-in-Appeal No. PUN-CT-APPII-000-322-17-18 dated 16.01.2018 passed by the Commissioner of Central Tax (Appeals), Pune-II in confirming the rejection of refund order passed by the first Adjudicating Authority is hereby set aside. The appellant is entitled to get refund of ₹1,66,600/- along with applicable interest from date of reversal of credit within 3 months from passing of this order.

(Pronounced in Court on 20.12.2018)

(Dr. Suwendu Kumar Pati)
Member (Judicial)

Prasad