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

APPEAL NO. E/1527/2010

(Arising out of Order-in-Appeal No. PIII/VM/79/2010 dated 16.04.2010 passed by the Commissioner of Central Excise (Appeals), Pune-III.)

M/s Pepsico India Holdings Pvt. Ltd. Appellant

Vs.

CCE, Pune-III Respondent

Appearance:

Shri Rajesh Ostwal, Advocate for Appellant
Shri A.B. Kulgod, Assistant Commissioner (AR) for Respondent

CORAM:

HON'BLE DR. SUVENDU KUMAR PATI, MEMBER (JUDICIAL)
HON'BLE SHRI P. ANJANI KUMAR, MEMBER (TECHNICAL)

Date of Hearing: 24.10.2018
Date of Decision: 12.03.2019

ORDER NO. A/85466/2019

Per: Dr. Suvendu Kumar Pati:

Rejection of refund claim on the ground of unjust enrichment has brought the dispute to the present appellate stage.

2. Factual backdrop of this case is that appellant is a manufacturer of various food products of Cheetos brand falling under chapter sub-heading 2108.99 but department classified the same

under chapter sub-heading 1904.10 and denied exemption benefit on payment of duty. Appellant challenged the same and got a favourable order from the CESTAT that confirmed classification under Chapter sub-heading 2108.99 under which products are exempted from duty. The said order attained finality after respondent-department unsuccessfully challenged the Tribunal's order before the Hon'ble Supreme Court. Appellant sought for refund of excise duty paid on the aforesaid products 'under protest' for the period from 27.09.2006 to 31.10.2006. Refund was granted but directed to be deposited in the Consumer Welfare Account and not to be paid to the appellant on the ground that it had failed to produce concrete evidences to show that the incidence of duty has not been passed to the buyer. Commissioner (Appeals) upheld the Order-in-Original and hence the appeal.

3. In the memo of appeal and during the course of hearing of the appeal, learned Counsel for the appellant Shri Rajesh Ostwal submitted that appellant had intimated to the department vide their letter dated 27.09.2006 that the payment was made under protest and the incidence of duty was being borne and absorbed by the appellant. He further submitted that invoices produced before the Adjudicating Authorities would show that excise duty was not recovered and MRP of the product was not revised, besides the fact that the amount that had been paid as excise duty were shown as receivable in the Balance Sheet and Chartered Accountant certificate had been produced as corroborative evidence to show that burden of

excess excise duty had not been passed on. Learned Counsel further submitted that since amount paid was not towards discharge of duty liability, Section 11B of the Central Excise Act, 1944 is not applicable to the appellant, for which order passed by Commissioner (Appeals) is required to be set aside. He placed his reliance on the decisions reported in *[2007 (211) ELT 388 (Tri.-Mum.)], [2009 (247) ELT 559 (Tri.-Ahmd.)], [2016 (339) ELT 297 (Tri.-Del.)], [2017 (347) ELT 519 (Tri.-Mum.)], [2005 (191) ELT 297 (Tri.-Mum.)]* etc.

4. In response to such submissions, learned Authorised Representative for the respondent-department Mr. A.B. Kulgod, Assistant Commissioner, while reiterating the reasoning and rationality of the order passed by the Commissioner (Appeals), argued that after analysing the submissions made before the Commissioner (Appeals) the refund amount was shown as recoverable. Production of Chartered Accountant certificate etc. were found tobe insufficient proof concerning passing of incidence of dutyto the consumers for which he gave his finding as above, Placing reliance on the decision of *SRF Ltd. Vs. CCE - [2006 (193) ELT 186 (Tri.LB)]* he held that appellant failed in the test to qualify in the doctrine of unjust enrichment for which interference by the Tribunal in the order of Commissioner (Appeals) is uncalled for.

5. We have heard from both sides at length and perused the case record and relied upon judgments. The test of unjust enrichment, in its limited applicability, is confined to the consideration as to who had

borne to the incidence of tax? If it is borne by the appellant and not passed on to any other person- say customer, appellant cannot be regarded as being enriched with refund of such tax component borne by other person. In the instant case, appellant had not only made declaration in writing in advance way back in 2006, that it would not pass the incidence of tax to the customers but also had produced invoice copies as well as Chartered Accountant certificate to establish that MRP of the product remained unchanged and the incidence of tax has been shown as receivable in the Balance Sheet. We fail to find from the order of the Commissioner (Appeals) as to what other kind of proof he was looking for to get him satisfied that appellant had borne the incidence of tax itself. Going by the Indian Evidence Act and applicability of Section-134, it can very well be said that evidence is weighed and not counted by its numbers. If those evidence produced before him are found to be unreliable, he has every right to reject those evidence and give a finding that no sufficient proof was produced before him to pass the test of unjust enrichment. He has not done the same and only relied on *SRF Ltd. (supra)* decision where uniformity of price before and after the assessment was taken as sole ground for establishment of burden of passing of the duty. Without taking into account the evidenciary value of the additional evidence like Chartered Accountant certificate, invoice copies, appellant's own declaration made before- hand, he just gave his opinion that those documents were not sufficient proof. The observation appears to be arbitrary as nothing is forthcoming from his order as to why he disbelieved those documentary evidence or rejected those as insufficient. In a judicial proceeding, order has to be a reasoned one based on judicial analysis where whim and caprice have got no role to play. It appears also improper to reject the Chartered Accountant certificate despite the fact that Hon'ble Bombay High Court in the case of *Commissioner Vs. Kumbhi Sakasi SSK Ltd. – [2008 (232) ELT A199 (Bom.)]* had rejected the appeal of the Commissioner, challenging acceptance of such Chartered Accountant certificate by the Commissioner (Appeals). We are, therefore, of the considered view that appellant had passed the test of unjust enrichment and the denial by the Commissioner (Appeals) to allow the refund to the appellant is not supported by the rule of evidence. Hence the order.

ORDER

6. The Appeal is allowed and the order of the Commissioner of Central Excise (Appeals), Pune-III. vide Order-in-Appeal No. PIII/VM/79/2010 dated 16.04.2010 is here by set aside. The appellant is entitled to refund claim of Rs. 78,45,431/- along with applicable interest and the respondent-department is directed to pay the same to the appellant within three months from the date of receipt of this order.

(Pronounced in court on 12.03.2019)

(P. Anjani Kumar)
Member (Technical)

(Dr. Suvendu Kumar Pati)
Member (Judicial)

Prasad