CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
MUMBAI

WEST ZONAL BENCH

Excise Appeal No. 2123 of 2010

(Arising out of Order-in-Appeal No. PKS/311/BEL/2010 dated 21.09.2010 passed by the Commissioner of Central Excise (Appeals), Mumbai III)

M/s. Savita Oil Technologies Ltd. **…..Appellant**
17-A, Thane Belapur Road,
PO Vashi,
Navi Mumbai

Vs.

Commissioner of Central Excise, Belapur **…..Respondent**
1st Floor, CGO Complex,
CBD Belapur, Navi Mumbai

APPEARANCE:

Shri Rajesh Ostwal, Advocate for the appellant
Shri N.N. Prabhudesai, Supdt.(Authorised Representative) for the respondent

CORAM: **HON'BLE MR C J MATHEW, MEMBER (TECHNICAL)**
HON'BLE DR. SUVENDU KUMAR PATI, MEMBER (JUDICIAL)

FINAL ORDER No: A/86138 / 2019

DATE OF HEARING : 03.01.2019
DATE OF DECISION : 20.06.2019

PER: C J MATHEW

This appeal lies against order-in-appeal no. PKS/311/BEL/2010 dated 21st September 2010 of Commissioner of Central Excise (Appeals), Mumbai III. Briefly appellants had claimed refund of ₹5,55,856/- for the period from April 2002 to December 2003, ₹10,29,637/- for the period from 1st January 2004 to 30th June 2005, ₹10,79,333/- for the period from July 2005 to March 2006 and ₹65,04,529/- for the period from July 2005 to March 2006. The rejection of refund claims of ₹10,79,333/- and ₹65,04,529/- as withdrawn was carried in appeal, and remanded back to the original authority. The refund claim for ₹5,55,856/-, though rejected was allowed by the first appellate authority. Insofar as the refund claim of ₹10,29,637/- is concerned, it was disposed off and a further demand ₹8,46,150/- was confirmed by the original authority. These were also remanded by the first appellate authority on appeal. The original authority in fresh proceedings disposed off the seven refund claims; hence the demand for April 2002 to March 2006 and and the provisional assessment from April 2002 to June 2005, which were upheld by the first appellate authority, are now before us along with refund claims.

2. Appellant is in the business of manufacturing of 'lubricating oil for automotive as well as industrial use' and some being sold in containers of capacity of 20 litre/18 kgs, are subject to valuation under section 4A of Central Excise Act, 1944 while for the others of higher capacity assessment is in accordance with section 4 of Central Excise Act, 1944. At the time of clearance of 'lubricating oil,' the value was determined by deducting the VAT as well as the discount offered in

the circulated schemes. The computation of the transaction value from 1st January 2004 to 30th June 2005 led to the discovery of excess amount of ₹10,29,637/- having been paid. At the same time, acknowledging short payment to the extent of ₹8,46,150/- for the same period, assessee sought adjustment of the excess paid towards the short-paid duty. The confirmation of demand without adjusting the excess payment led to the first round of dispute. The adoption of the proper assessable value for the clearances effected between April 2007 to March 2008 paved the way for finalisation of the provisional assessment for this period and, based on this, the transaction values for 2005-06 and 2006-07 was computed. The issues in this dispute are, according to Learned Counsel for appellant, covered by the decision of the Tribunal in *Raptakos Brett & Co Ltd v. Commissioner of Central Excise, Mumbai III [2016-TIOL-138-CESTAT-MUM]*, of Hon'ble High Court of Karnataka in *Toyota Kirloskar Auto Parts Pvt Ltd v. Commissioner of Central Excise, LTU, Bangalore [2012 (276) ELT 332 (Kar.)]* and by the decision of the Tribunal in *Savita Chemicals Ltd v. Commissioner of Central Excise, Belapur [2018 (12) TMI 1474-CESTAT-MUMBAI]*.

3. According to Learned Authorised Representative, there was no request from the appellant herein for subjecting the goods to provisional assessment and that it was the first appellate authority who directed that the assessment should be deemed to be provisional. He

also contended that insofar as the refunds are concerned, the bar of unjust enrichment had not been crossed. Placing reliance on the decision of *My Car Pune Pvt Ltd v. Commissioner of Central Excise, Pune I [2015-TIOL-412-CESTAT-MUM]*, he contends that none of the decisions cited by Learned Counsel would advance the case for adjustment of excess payments against liabilities arising from short payment without the excess paid having to undergo the test of unjust enrichment. According to him, at no stage in the proceedings, had it been asserted on behalf of the appellant that the incidence of duty had indeed been borne by them.

4. The issue in this dispute pertains to the quantification of, and the manner in which, the duty liability arising from adoption of the transaction value for clearance of 'lubricating oil' that are not sold in retail packs is concerned. It is common ground that during certain periods, there has been an excess discharge of duty liability and that there has been short payment of duty also. The quantum of duty differential that remains to be paid is not in dispute. On behalf of the appellant, it is contended the excess amount should be adjusted against the dues which was refused while finalising the provisional assessment.

5. The decision of the Tribunal in *re Savita Chemicals Ltd* held that

'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.'

The Hon'ble High Court of Karnataka in *re Toyota Kirloskar Auto Parts Pvt Ltd* has held that

'8. Therefore, it is clear that after a final assessment order is passed, if the duty paid in terms of provisional assessment is less than the duty payable after the final assessment, the assessee is liable to pay the interest on the short fall. In the

entire scheme of Rule 7, there is no indication that when an assessee is permitted to pay duty in pursuance of a provisional assessment order, if he is dealing with more than one goods, they have to be treated separately. Even though the duty payable under the Act is to be calculated under each head of each case ultimately it is the total duty payable for all the goods which are the subject matter of the provisional assessment and final assessment which is to be taken into consideration. If after taking into consideration the duty payable in respect of all the goods and the duty paid in pursuance of the final assessment order, if still the assessee is due in any duty, then for the short fall in payment of duty, the assessee is liable to pay interest.

9. In the instant case, admittedly for certain items the Adjudicating Authority has held the short fall in payment of duty after the final assessment order as Rs. 10,63,417/-. In respect of other items, the assessee has paid Rs. 1,77,20,157/- in excess. But before imposing interest, the authority should have deducted the short fall in the excess payment made. If there is no short fall in payment of duty, payment of interest does not arise. They have treated the duty payable under two categories. It was found in respect of some items the duty payable after the final order is more than what was paid under provisional assessment. The approach of the authorities in this regard is erroneous, unwarranted and unsupported by any statutory provision. If we keep in mind the principle underlying the provisions, it is only when the duty is due and it is not paid within the stipulated time and the duty is paid thereafter, in order to compensate the revenue, interest is imposed. If that is to be kept in mind, in the instant case, when the assessee has paid a sum of Rs. 1,66,56,740/- excess duty which is entitled to claim refund, he cannot be taxed with payment of excess duty in the form of *interest. The entire approach of the department is unreasonable, contrary to the scheme of the Act and negatives the principle underlying these provisions. Therefore, all the authorities were in error in levying and upholding the levy of interest. In that view of the matter, we pass the following :'*

The Tribunal in *re Raptakos Brett & Co Ltd,* held that

'5. On perusal of the records and the judgment in the appellant's own case as decided on 3.11.2014, we find that the issue is same and squarely covered in the appellant's favour. The reliance placed by the Tribunal in the case of Toyota Kirloskar Auto Parts (supra) is correct and we reproduced the findings recorded by this Bench in the appellant's own case:-

"5. The substantial question of law which arises for consideration in this appeal is whether the Tribunal was right in confirming the demand of interest under rule 7(4) of the Central Excise Rules, 2002 without harmoniously reading the provisions of rule 7(5) of the Central Excise Rules, 2002?

6. Rule 7 reads as under:-

"Rule 7. Provisional assessment - (1) Where the assessee is unable to determine the value of excisable goods or determine the rate of duty applicable thereto, he may request the Assistant Commissioner of Central Excise or the Deputy Commissioner of Central Excise, as the case may be, in writing giving reasons for payment of duty on provisional basis and the Assistant Commissioner of Central Excise or the Deputy Commissioner of Central Excise, as the case may be, may order allowing payment of duty on provisional basis at such raw or on such value as may be specified by him.

(2) The payment of duty on provisional basis may be allowed, if the assessee executes a bond in the form

prescribed by notification by the Board with such surety or security in such amount as the Assistant Commissioner of Central Excise or the Deputy Commissioner of Central Excise, as the case may be, deem fit, binding the assessee for payment of difference between the amount of duty as may be finally assessed and the amount of duty provisionally assessed.

(3) The Assistant Commissioner of Central Excise of the Deputy Commissioner of Central Excise, as the case may be, shall pass order for final assessment, as soon as may be, after the relevant information, as may be required for finalizing the assessment, is available, but within a period not exceeding six months from the date of the communication of the order issued under sub-rule (1):

Provided that the period specified in this sub-rule may, on sufficient cause being shown and the reasons to be recorded in writing, be extended by the Commissioner of Central Excise for a further period not exceeding six months and by the Chief Commissioner of Central Excise for such further period as he may deem fit.

(4) The assesses shall be liable to pay interest on any amount payable to Central Government consequent to order for final assessment under sub-rule (3), at the rate specified by the Central Government by notification issued under Section 11AA or section 11AB of the Act from the first day of the month succeeding the month for which such amount is determined, till the date of payment thereof.

(5) Where the assessee is entitled to a refund consequent to order for final assessment under sub-rule (3), subject to sub-rule (6), there shall be paid an interest on such refund at the rate specified by the Central Government by notification issued under Section 11BB of the Act from the first day of the month succeeding the month for which such refund is determined, till the date of refund.

(6) Any amount of refund determined under sub-rule (3) shall be credited to the Fund:

Provided that the amount of refund, instead of being credited to the Fund, be paid to the applicant if such amount is relatable to-

(a) the duty of excise paid by the manufacture, if he had not passed on the incidence of such duty to any other person; or

(b) the duty of excise borne by the buyer, if he had not passed on the incidence of such duty to any other person."

6. In view of the foregoing in the facts and circumstances of this case, we find that the impugned order is unsustainable and liable to be set aside and we do so. The impugned order is set aside and the appeal is allowed with consequential relief, if any.

On the other hand, in *re My Car Pune Pvt Ltd* it was held that

'5.1 As regards the demand of service tax on 'Renting of Immovable property' we find that the appellant had discharged the service tax liability as and when the rental income were received and the details of the challans for the payments made are available. A few of these challans were produced before us. Therefore, the demand of service tax on the entire amount without giving any credit for the payments already made is incorrect in law. It is also seen that the appellants have short paid the service tax on these heads in a few years namely October 2007 to March 2008, 2008-09 and 2010-11, and they have excess paid service tax in 2009-10, 2011-12 and April, 2012 to June 2012. The appellant has sought to adjust excess payment with the short payments. This is not permissible. The excess payments have to be claimed by way of refund and short payments have to be made good by the appellant to the department as principles of unjust enrichment might be involved in any refund claim.

Nevertheless, the appellant has to be given due credit for the payments already made. Inasmuch as this has not been done, the mater has to go back to the Adjudicating Authority for recomputation of the correct service tax demand.

5.2 Similarly, in respect of demand under the taxable service category of 'Authorised Service Station', here also we find that the appellant has discharged part of the service tax liability through Cenvat Credit account and part in cash. However, due credit for these payments have not been given by the Adjudicating Authority for the reason that the payments through Cenvat Credit was not correctly reflected in the ST-3 returns filed by the appellant, even though for the period of the return, the total amount of Cenvat Credit utilised in payment of service tax was reflected. If the appellant had debited Cenvat Credit account, the said fact could be easily verified from the Cenvat Credit register maintained by the appellant. They have also discharged part of the tax liability in cash through TR-6 challan which could be verified from the TR-6 challans. The Adjudicating Authority should have verified the claims of the appellant in this regard and should have given them the benefit wherever the tax liability has been discharged. Inasmuch this exercise has not been undertaken by the Adjudicating Authority, the demand in its entirety cannot be sustained. According to the appellant, the net payment required to be made after making adjustment for excess payment towards short payment is Rs. 1,66,669/-. However, such adjustments are not permissible. Wherever there are short payments, they have to be made good by the appellant by paying through cash or Cenvat credit along with interest thereon and wherever there is excess payment the appellant has to make a claim for refund of the same in accordance with law.

5.3 The main and the last issue pertains to demand of service tax under the category of Business Auxiliary Service. As against the total demand of Rs. 1,84,53,425/- the appellant has conceded their liability on the income received under PDI charges which is Rs. 4,85,94,830/-. As regards miscellaneous income of Rs. 28,40,620/- the appellant's claim is that this income is derived from sale of scrap and nothing to do with any service rendered. This is a verifiable fact and the appellant has to lead evidence in support of how the income has originated and corresponding bills/invoices issued towards this income. The main dispute relates to incentive received from Maruti Suzuki Ltd. The appellant's claim is that this income is nothing but trade discount received by them which is in the nature of quantity discount and has been passed on to the appellant by Maruti Suzuki Ltd. by way of credit notes. It is also the submission that the credit notes indicate the period to which the discount relates and the corresponding discount circular issued by Maruti Suzuki Ltd. It is also submitted that they have made correspondence with the Maruti Suzuki Ltd. which would clearly indicate that the amount, even though described as incentive, is in fact a trade discount. However, it is clearly submitted that the correspondence with Maruti Suzuki Ltd. were not furnished before the Adjudicating Authority at the time of adjudication. Therefore, the appellant should be given a fair opportunity of producing these documents to satisfy the Adjudicating Authority with respect to their contention that these are nothing but trade discounts. Alternately, the department can also find out from the excise authorities in charge of Maruti Suzuki Ltd. as to how the amount given by way of incentives has been treated for excise purposes. If the amount is already included in the value of cars sold and duty liability discharged, the question of subjecting the same under Business Auxiliary Service would not arise. If no excise

> *liability has been discharged, then also it can be verified that whether the incentive given has been treated as trade discount for excise purposes. If it is so, then the question of demanding service tax under Business Auxiliary Service would not arise at all. These factors which are relevant for consideration have not been taken into account while passing the impugned order. Therefore, in the interest of justice, the matter has to go back to the Adjudicating Authority for considering the various contentions raised by the appellant. The appellant is also at liberty to produce whatever documentary evidence they want to rely upon in support of their contention. The Adjudicating Authority also shall verify from the jurisdictional authorities of Maruti Suzuki Ltd. as to how the incentive given to the appellant by Maruti Suzuki Ltd. was treated for excise purposes and thereafter, the Adjudicating Authority shall pass a reasoned order after giving a reasonable opportunity to the appellant of being heard.'*

6. Therefore, it appears that a number of disputes on setting off of excess duty paid against short payment has withstood the test of law. In terms of the decision in *re My Car Pune Pvt Ltd* such adjustments are possible but only upon sanction of the refund claims. The appellant herein has furnished the refund claims and we find that there has been no proper disposal of those claims. Such disposal would require an ascertainment of eligibility for refund at the threshold and, upon it being shown the incidence of duty has not been passed on, to be allowed as refund. The right to refund of eligibility amount is vested in the hands of the individual/entity who has borne the duties and it cannot be retained by the exchequer.

7. In order to ensure that there is a proper compliance with the settled law on sanction, as well as adjustment, of refund, we set aside the impugned order and remand the matter back to the adjudicating authority to decide the claim afresh by taking into account the observation *supra*.

(Order pronounced in open court on 20.06.2019)

(C J Mathew)
Member (Technical)

(Dr. Suvendu Kumar Pati)
Member (Judicial)

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