CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
MUMBAI

WEST ZONAL BENCH, MUMBAI

Excise Appeal No. 89791 of 2013

(Arising out of Order-in-Appeal No. NSK-EXCUS-000-APP-280-13-14 dated 30.09.2013 passed by the Commissioner of Central Excise & Customs (Appeals), Nashik.)

M/s Ring Plus Aqua Ltd. ....Appellant
Mr. Vasant Naag
General Manager (Indirect Taxation)
Raymond Limited, Jekegram, Pokhran Road No. 1,
Thane (West) - 400 606

VERSUS

Commissioner of Central Excise & Customs, Nasik ....Respondent
Kendriya Rajaswa Bhavan,
Gadkari Chowk, Nasik – 422 002

APPERANCE:

Ms. Ginita Bodani, Advocate for the Appellant
Ms. Anuradha Parab, Assistant Commissioner, Authorised Representative for the Respondent

CORAM:

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

FINAL ORDER NO. A/86321/2019

Date of Hearing: 11.07.2019
Date of Decision: 29.07.2019

Dismissal of appeal by the Commissioner of Central Excise & Customs (Appeals), Nashik filed by the appellant against the order passed by the Deputy Commissioner of Central Excise and Customs, Nashik-IV Division rejecting refund claim of the appellant on the ground of unjust enrichment and allowing of sanctioned amount of Rs.7,37,586/- to be credited to the Consumer Welfare Fund is assailed in this second round of litigation.

2. Factual backdrop of the appellant's case is that it reversed CENVAT credit of the above amount in September 1995 on protest at the instance of Excise Authorities and subsequently filed refund claim which went up to the CESTAT stage. Vide its order dated 23.01.2009 passed by the Hon'ble Single Member Bench of CESTAT holding that refund claim was admissible and issue of unjust enrichment needed to be looked into by the adjudicating authority and for that limited purpose of examination of the aspect of unjust enrichment, matter was remanded back to the adjudicating authority who gave his finding that incidence of duty had been passed on by the appellant for which it was not eligible for the said refund. Commissioner (Appeals) confirmed the same and hence the appeal.

3. In the memo of appeal and during course of hearing of the appeal, learned Counsel for the appellant Ms. Ginita Bodani submitted that the adjudicating authority had clearly observed that amount was shown as receivable for 10 years and in the financial year 2005-06 appellant had charged the same to their Profit & Loss Account under schedule 15 i.e. "Administrative, Selling and General Expenses" and therefore Learned Commissioner (Appeals) observation that the expenses had been factored into the overall cost for which incidence of duty had passed on is admittedly erroneous in

view of the fact that if the amount is booked as expenses it has not necessarily gone into the cost of manufacturing. She also submitted that ignoring the Cost Accountant certificate and Chartered Accountant certificate, the Commissioner (Appeals) also had given his observation that appellant had not made out a case that the price of goods was fixed and the costing of goods did not vary on count of payment of the said amount is also erroneous in view of the fact that the cost of the goods was absorbed as office expenditure/ administrative expenses after showing it as receivable for 10 years. She also added to his argument justifying the stand of the appellant which it had consistently pleaded in all those years that incidence of duty was never passed on to the customer and no invoice was ever raised on that score for which he prayed to set aside the order of Commissioner (Appeals). Reliance has been placed by her in the case laws reported in *[2008 (223) ELT 514 (Tri.-Mumbai.)]* in the case of *Bombay Dyeing & MFG. Co. Ltd. Vs. Commissioner of Central Excise, Mumbai, [2018 (12) TMI 1169 CESTAT, Mumbai*] in the case of *M/s Pandurang SSK Ltd. Vs. CCT, Pune-II* and other judicial decisions on this issue to support her stand.

4. In response to such submissions, learned Authorised Representative for the respondent-department Ms. Anuradha Parab, Assistant Commissioner submitted with reference to the judgment reported in *[2011 (264) ELT 393 (Tri.-Del.)]* in the case of *Gail India Ltd. Vs. Commissioner of Central Excise, Gwalior* & others case laws that Chartered Accountant who certified that the fact of non-

collection of the duty from buyers may corroborate other evidence concerning non-collection of the duty from buyers which is admittedly not established by the Appellant for which interference in the order passed by the Commissioner (Appeals) is uncalled for.

5. Heard from both sides and perused the case record. It is a strange case where a refund claim of the appellant made in 1995 could not be settled till date under one pretext or the other. The entire case record does not bring out a case of unjust enrichment as refund was claimed against reversal of CENVAT credit which was ultimately held to be admissible by the CESTAT itself and that remained unchallenged so far. It is not understood when no duty was paid and only credits availed were refunded, how come a case of unjust enrichment could come into play when the said amount has been shown as receivable under the head "Loan & Advances" receivable from the respondent-department for a continuous period of 10 financial year and when the said amount is adjusted against 'Profit & Loss Account' under the heading "Administrative, Selling and General Expenses". It is beyond once capability to tress out after laps of a decade as to if such amount could be/was absorbed in the exact cost of manufacturing of final product since price of a product can't remain static in all those years. Moreover, as has been observed in the case of *M/s Pandurang SSK Ltd. (supra),* 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 final product unless there is a proof that pricing of the final

product has specifically increased on that score, since there are various mechanisms available before the manufacturer to absorb the cost say by way of reducing profit margin of its sale, overhead expenditures of the company etc. In the instant case appellant had justified absorbing of the said cost in its administrative expenses overhead and therefore, it can be safely concluded that incidence of duty has not been passed on by the appellant to any other person. Hence the order.

ORDER

6. The appeal is allowed and the order passed by the Commissioner of Central Excise & Customs (Appeals), Nashik vide Order-in-Appeal No. NSK-EXCUS-000-APP-280-13-14 dated 30.09.2013 refusing refund is hereby set aside. The appellant is entitled to get refund of Rs.7,37,586/- along-with applicable interest calculated from 3 months after filing of refund application on dated 4th December, 1995 as per explanation appended to Section 11BB of the Central Excise Act and the respondent-department is directed to pay the same to the appellant within 3 months from receipt of the order.

(Order pronounced in the open court on 29.07.2019)

(Dr. Suvendu Kumar Pati)
Member (Judicial)

Prasad