CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
MUMBAI

REGIONAL BENCH – COURT NO.1

Excise Appeal No.936 of 2011

[Arising out of Order-in-Appeal No.PKS/9/BEL/2011, dt.03.05.2011, passed by the CCE (Appeals), Belapur]

M/s I.G. Petrochemicals ......**Appellant**
T-2, MIDC Industrial Area,
Taloja, Dist: Raigad

VERSUS

Commissioner of Central Excise, ...**Respondent**
5th Floor, CGO Complex,
CBD Belapur,
Navi Mumbai 400 604

Appearance:
For Appellant : S/Shri Ashwin Shetye, Neel Kothari – Advocates
For Respondent : Mrs. A.S. Parab, AC (AR)

CORAM:

HON'BLE DR. D.M. MISRA, MEMBER (JUDICIAL)
HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)

FINAL ORDER NO.A/87049/2019

Date of Hearing: 14.11.2019
Date of Decision: 14.11.2019

PER: DR.D.M. MISRA

Heard both sides.

2. This appeal is filed against Order-in-Appeal No.PKS/9/BEL/2011, dt.03.05.2011, passed by the CCE (Appeals), Belapur

3. Briefly stated the facts of the case are that during the relevant period i.e. July 2004 to August 2008, the Appellant, an

100% EOU, paid Education Cess third time in discharging the duty liability when the clearance were made to DTA. Later, it was found that the education cess for the third time cannot be leviable in view of the principle of law laid down by this Tribunal in the case of Sarla Performance Fibres Ltd Vs CCE Vapi – 2010 (253) ELT 203 (Tri-Ahmd), later upheld by Hon'ble Supreme Court as reported at 2014 (307) ELT A 79 (SC). In the mean time, the Appellants paid the said amount under protest consequent to issuance of Show Cause Notice dt.30.06.2008. When the issue was decided in their favour, they filed refund claim on 23.04.2010. Since the amount was paid in 2008, the Adjudicating authority rejected the refund claim observing that the claim is barred by limitation. Aggrieved by the said order, they filed appeal before the learned Commissioner (Appeals). The learned Commissioner (Appeals), even though did not agree with the observation of the Adjudicating authority that the refund claim is barred by limitation, rejected the refund claim on the ground of unjust enrichment and other issues not considered by the Adjudicating authority. Hence, the present appeal.

4. At the outset, the learned Advocate for the Appellant has submitted that the learned Commissioner (Appeals) has set aside the observation of the Adjudicating authority on the issue of limitation and held that the refund claim was filed within time. Against the said observation, no appeal has been filed by the Revenue. He submits that they have placed all evidences before Commissioner (Appeals), in establishing the fact that the incidence of duty has not been passed on to their customers/others, but borne by them. Therefore, the question of unjust enrichment does not

arise. However, the learned Commissioner (Appeals), without appreciating the evidences, observed that the appellants failed to establish that the burden of duty has not been passed on to the customers. He fairly accepts that even though all documents were not placed before the Adjudicating authority, but on the evidences produced by them, no specific findings have been recorded on the issue of unjust enrichment and other issues affecting the quantum of refund. He submits that he has no objection in remanding the matter to examine the documents in detail by the Adjudicating authority.

5. The learned A.R. for the Revenue fairly submits that no appeal has been filed by the Revenue against the order of Commissioner (Appeals) holding that refund is not barred by limitation. He has no objection in remanding the matter to the Adjudicating authority to examine the issue of unjust enrichment and other issues viz. discrepancy in challan and the quantum of refund etc.

6. Heard both sides and perused the records. We find that the refund was filed by the Appellant pursuance to the order of the Tribunal holding that education cess for the third time cannot be levied when the clearances are made by an 100% EOU in DTA. The Adjudicating authority initially rejected the refund claim on the ground of limitation since the same was filed in 2010 for the payment made under protest. However, the Appellate Commissioner in the order set aside the said findings observing that the education cess was paid for the third time under protest, therefore, not barred by limitation under Section 11B of Central Excise Act, 1944.

However, he concludes that since the Appellant failed to establish that the burden of duty has not been passed on to the customer, therefore, not eligible for refund. The documents referred to by the Commissioner (Appeals) have not been examined by the Adjudicating authority, while analysing the refund claim. He has passed the order only on the issue of limitation, without scrutiny of other issues.

7. Therefore, in the interest of justice, it is necessary to remand the matter to the Adjudicating authority to analyse the relevant documents relating to unjust enrichment, quantum of refund admissible, etc. Needless to say that a reasonable opportunity of hearing be given to the Appellant. It is expected that the Adjudicating authority shall complete the de-novo proceedings within six months from the date of communication of the order.

8. Appeal is allowed by way of remand to the Adjudicating authority.

(Dictated and pronounced in the open court)

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

(Sanjiv Srivastava)
Member (Technical)

Bahalkar