**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,
WEST ZONAL BENCH AT MUMBAI**

REGIONAL BENCH - COURT NO. 02

Excise Appeal No. 1507 of 2011

(Arising out of Order-in-Appeal No. AKP/NSK/165/2011 dated 29.07.2011 passed by Commissioner of Central Excise & Customs (Appeals), Nasik)

M/s Ceat Limited .....**Appellant**
463, Dr. Annie Besant Road,
Worli, Mumbai-400030

VERSUS

Commissioner of Central Excise, Nashik .....**Respondent**
Kendriya Rajaswa Bhavan,
Gadkari Chowk,
Nasik-422002

Appearance:

Ms. Anjali Hirawat, Advocate for the Appellant
Shri N.N. Prabhudesai, Authorized Representative for the Respondent

CORAM:
HON'BLE MR. S.K. MOHANTY, MEMBER (JUDICIAL)

FINAL ORDER NO. A/85680 / 2020

Date of Hearing: 27.02.2020
Date of Decision: 27.02.2020

Per: S.K. MOHANTY

This appeal is directed against the impugned order dated 29.07.2011 passed by the learned Commissioner (Appeals), Central Excise and Customs, Nasik.

2. Briefly stated, the facts of the case are that the appellant is engaged in the manufacture of tyres, tubes and flaps, falling under Chapter 40 of the Central Excise Tariff Act, 1985. During the disputed period i.e. 2008-09, the appellant was not in a position to ascertain the assessable value of the goods manufactured by it and accordingly, opted for provisional assessment as per Rule 7 of the erstwhile Central Excise Rules, 1944, which was acceded to by the jurisdictional central excise authorities. The provisional assessment was finalized on the basis of the information furnished by the appellant. On the basis of final assessment order passed by the central excise

department, the appellant had filed the application, claiming refund of excess central excise duty paid by it during the course of provisional assessment of the goods. The refund application filed by the appellant was considered favourably by the original authority. However, instead of paying the refund amount to the credit in the appellant's account, the department had credited the same to the Consumer Welfare Fund, created under Section 11D of the Central Excise Act, 1944. On appeal against the original order dated 31.03.2011, the learned Commissioner (Appeals) vide the impugned order dated 29.07.2011 has upheld the said order and rejected the appeal filed by the appellant. Feeling aggrieved with the impugned order, the appellant has preferred this appeal before the Tribunal.

3. The learned Advocate appearing for the appellant submits that the refund amount in question was not considered as expenditure in the profit and loss account and the refund amount was duly reflected in the balance sheet under the accounting head of "Loans and advances", showing the amount receivable from the government authorities. She also submitted the Chartered Accountant certificate dated 12.05.2010 to demonstrate that the incidence of central excise duty in dispute was borne by the appellant and the same has not been transferred either to the buyer of goods or to any other person. She further submits that in an identical case, this Tribunal in the case of appellant itself (other unit), reported in 2016 (342) E.L.T. 440 (Tri.-Mumbai) has sanctioned refund amount to the appellant, instead of crediting the same to the Consumer Welfare Fund. Further, she has also relied upon the decisions of this Tribunal in the case of Swastika Suitings Ltd. Vs. Commissioner of Central Excise, Jaipur-II, 2018 (359) E.L.T. 415 (Tri.-Del.)], Jindal Steel & Power Ltd. Vs. Commr. of C.Ex. & Service Tax, Raipur, 2017 (348) E.L.T. 367 (Tri.-Del.), Salve Pharmaceuticals Pvt. Ltd. Vs. Commissioner of C. Ex. Delhi-I, 2016 (339) E.L.T. 297 (Tri.-Del.) and Saint Gobin Gyproc India Ltd. Vs. Commissioner of C.Ex., Delhi-III, 2016 (335) E.L.T. 120 (Tri.-Del.) to state that when the refund amount has been reflected in the balance sheet as claims receivable from the department, the

same amount should be credited to the account of the assessee and should not be transferred to the Consumer Welfare Fund.

4. On the other hand, the learned AR appearing for the Revenue reiterates the findings recorded in the impugned order and further submits that since the appellant had passed on the duty element to its ultimate consumer, while selling the goods, the presumption provided under Section 12B *ibid* is satisfied and accordingly, the authorities below have correctly transferred the refund amount to the Consumer Welfare Fund. He has relied upon the judgment of Hon'ble Supreme Court in the case of Commissioner of Central Excise, Madras Vs. Addison & Co. Ltd., 2016 (339) E.L.T. 177 (S.C.) to strengthen the case of Revenue that when the credit note has been issued, mentioning the duty component, the same amount should appropriately be transferred to the Consumer Welfare Fund and should not be credited to the books of accounts of the assessee.

5. Heard both sides and perused the records.

6. In support of upholding the findings recorded in the original order, learned Commissioner (Appeals) vide Para 18.3 has observed as under:-

> *"18.3 I observe that present refund claim pertains to the year 2008-09 and same is governed by Rule 7 as reproduced above. As per proviso to sub-rule (6) of above Rule, any amount of refund determined while finalizing the provisional assessment shall be credit 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 the duty of excise paid by the manufacturer, if he had not passed on the incidence of such duty to any other person. Thus the present Rule 7 is having independent provision in respect of bar of unjust enrichment. There is in fact no need to take recourse of sub-section (2) of Section 11B of CEA, 1944, for transferring the refund to Consumer Welfare Fund. Due to this explicit provision in present rule 7, the decision of Hon'ble Supreme Court in the case of Mafatlal is of no use to the appellant. In the present case, it is already concluded that the appellant, though may have passed on the incidence of excise duty to the dealers, but same is not passed on to ultimate consumer, the refund arising out of provisional assessment*

> *is required to be credited to Consumer Welfare Fund in terms of sub-rule (6) of Rule 7 as the appellant failed to comply with condition (a) of proviso to said sub-rule (6) of Rule 7. I, therefore, I observe that adjudicating authority has rightly denied the request of appellant to sanction refund to them and rightly transferred the same to Consumer Welfare Fund. However, I would like to mention here that AC has transferred the refund to Consumer Welfare Fund under Section 11D of CEA, 1944 instead of sub-rule (6) of Rule 7 of CER, 2002."*

7. On careful consideration of the above observations made in the impugned order, I find that the amount in question was credited to the Consumer Welfare Fund on the ground that the incidence of excess duty has been passed on to the dealers of the excisable goods. On scrutiny of the financial records submitted by the appellant, I find that the amount in question, for which the refund claim was filed by the appellant was all along been reflected "as claims receivable from the government authorities". The said entry made in the balance sheet for the period 31.03.2009 was all along reflected in the balance sheet prepared as on 31.03.2019. It is an admitted fact on record that the excess paid central excise duty by the appellant during the provisional assessment of the excisable goods were not reflected as part of expenditure in the profit and loss account prepared for the relevant period. Thus, in absence of reflection of such amount as an element of expenditure in the profit and loss account, the profitability of the company has not suffered. Further, reflection of the refund amount in the balance sheet under the head of "loans and advances", clearly depicts that the incidence of excess paid duty amount has all along been borne by the appellant. Therefore, under the circumstances, it cannot be said that the element of excess paid central excise duty had been transferred to the dealers and for that purpose, the appellant should not be entitled for the benefit of refund and the amount in question should be transferred to the Consumer Welfare Fund. I find that in an identical situation, this Tribunal in the case of appellant's (other unit) (supra) has remanded the matter to the original authority to

examine the issue of crediting the amount of refund to the Consumer Welfare Fund. Pursuant to the remand direction of the Tribunal vide order dated 13.06.2016, the original authority took up adjudication proceedings and passed the original order dated 27.07.2018 and sanctioned the refund amount to the assessee. Further, I also find that in the relied upon decisions by the learned Advocate, this Tribunal has held that reflection of the amount of refund as claims receivable under the head of loans and advances should conclusively prove that the incidence of excess paid duty has not been passed on to the buyer or any other person and same has been borne by the assessee. Further, I also find that on the basis of books and accounts maintained by the appellant, the Chartered Accountant vide the certificate dated 12.05.2010 has confirmed that incidence of duty has been borne by the appellant. Thus, under the facts and circumstances of the present case, I am of the considered opinion that the refund in question instead of being credited to the Consumer Welfare Fund, should be eligible for refund to the appellant. The judgment relied upon by the learned AR in the case of Commissioner of Central Excise, Madras Vs. Addison & Co. Ltd. (supra) is distinguishable from the fact of the present case inasmuch as mentioning of refund amount in the balance sheet under the head of “loans and advances” was not the subject of dispute in the said decided case.

8. In view of the foregoing discussions, I do not find any merits in the impugned order, insofar as it has upheld the adjudication order in crediting the refund amount to the consumer welfare fund. Hence, by setting aside the same, the appeal is allowed in favour of the appellant, with consequential benefit of refund.

(Dictated and pronounced in the open court)

(S.K.Mohanty)
Member (Judicial)

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