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

REGIONAL BENCH - COURT NO. 02

Customs Appeal No. 87638 of 2013

(Arising out of Order-in-Appeal No. 204-205/MCH/DC/CRARS/2013 dated 13.03.2013 passed by Commissioner of Customs (Appeals), Mumbai)

M/s Ajay Exports **.....Appellant**
6658, Gadodia Market,
Khari Baoli,
Delhi – 6
&
C-15, Qutub Inst. Area,
New Delhi - 110016

VERSUS

Commissioner of Customs (Export Promotion) Mumbai **.....Respondent**
New Custom House,
Ballard Estate,
Mumbai - 400001

WITH

Customs Appeal No. 87639 of 2013

((Arising out of Order-in-Appeal No. 204-205/MCH/DC/CRARS/2013 dated 13.03.2013 passed by Commissioner of Customs (Appeals), Mumbai)

M/s Ajay Exports **.....Appellant**
6658, Gadodia Market,
Khari Baoli,
Delhi – 6
&
C-15, Qutub Inst. Area,
New Delhi - 110016

VERSUS

Commissioner of Customs (Export Promotion) Mumbai **.....Respondent**
New Custom House,
Ballard Estate,
Mumbai - 400001

Appearance:

Shri C.M. Sharma, Consultant for the Appellant
Shri MD Shamashad Alam, Authorized Representative for the Respondent

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

FINAL ORDER NO. A/85687-85688/2020

Date of Hearing: 08.01.2020
Date of Decision: 08.01.2020

Per: S.K. MOHANTY

These appeals are directed against the impugned order dated 13.03.2013 passed by the learned Commissioner of Customs (Appeals), Mumbai.

2. Briefly stated, the facts of the case are that the appellant herein M/s Ajay Exports had imported six consignments of cloves @ USD 3,500 PMT and filed the Bills of Entry for duty assessment. Since, the international prices journal reflected the value of cloves as USD 4,250 PMT at relevant point of time; the assessments were made provisional by considering such published price in the journal. The appellant had paid the differential duty of Rs.35,94,794/- under protest, owing to the reason that it had disputed the grade of the impugned goods. The Bills of Entry were finally assessed by considering the declared value of USD 3,500/PMT. This has resulted in a refund of Rs.35,94,794/-. However, while passing the adjudication order 17.07.2007, the original authority had credited such excess paid duty amount to the Consumer Welfare Fund (CWF) on the ground that the appellant had failed to fulfil the conditions of unjust enrichment inasmuch as it had failed to prove that the incidence of excess paid duty has not been transferred to any other person and the same has been borne by it. The adjudication order was appealed against and the Commissioner (Appeals) has set aside the adjudication order with the direction to the original authority for sanction of the refund amount along with interest to the appellant. The said order dated 07.05.2009 of the Appellate Commissioner was challenged before the CESTAT, which was disposed of vide order dated 18.05.2011 by way of remand to the adjudicating authority for verification of the applicability of principles of unjust enrichment. Pursuant to

the remand direction by the CESTAT, the adjudicating authority vide order dated 05.10.2011 had sanctioned the refund amount in favour of the appellant. The order dated 05.10.2011 was appealed against by Revenue before the Commissioner of Customs (Appeals) on the ground that the doctrine of unjust enrichment had not been properly examined by the original authority. The said original order dated 05.10.2011 was also challenged by the appellant herein, contending that interest on the belated refund had not been granted to it. Both the appeals filed by Revenue as well as the present appellant were disposed of by the learned Commissioner (Appeals) vide the impugned order dated 13.03.2013. The learned Commissioner (Appeals) has set aside the original order dated 05.10.2011, holding that the adjudicating authority had not scrutinized the issue with the help of documentary evidences that the principles of bar of unjust enrichment had been crossed or not.

3. Heard both sides and perused the records.

4. On careful examination of the impugned order dated 13.03.2013, we find that for non-submission of proper documentary evidences, the adjudication order dated 05.10.2011 was set aside by the learned Commissioner (Appeals). The appellant also failed to produce any such evidences at this juncture to demonstrate that the excess paid duty had been borne by it and not passed on to any other person. Sub-section (2) of Section 27 of the Customs Act, 1962 mandates that if the amount is refundable to the claimant, then the same may be credited to the CWC. However, the proviso clause contained therein permits grant of refund to the claimant/applicant, if the incidence of duty amount has not been passed on to any other person and the same has been borne by it. In this case, it is an admitted fact of record that the appellant did not submit the evidence either before the Commissioner (Appeals) or before this Tribunal to substantiate its claim that it had suffered the duty incidence by itself and not passed on the

same to the buyers or any other person. Thus, as per the statutory mandates, the appellant should not be eligible for the benefit of refund and in such an eventuality; the amount of refund should appropriately be credited to the CWF. Hence, we do not find any substance in the appeals filed by the appellant that the amount of refund should be paid to it.

5. The learned Consultant for the appellant had filed an application for consideration of the submissions made therein and also with the prayer for recalling the operative part of the order pronounced on 08.01.2020. The said application filed by the appellant was received in the Registry of the Tribunal on 09.01.2020. Since, the operative part of the order was pronounced in the open court on 08.01.2020 in presence of both sides, the said order cannot be recalled inasmuch as on pronouncement of the order portion, the Tribunal became *functus officio* and the only remedy and recourse left to the parties to appeal was for filing of appeal against such order at the appropriate appellate forum. Thus, the application filed by the appellant for recalling the operative part of the present order cannot be considered proper and justified.

6. In view of the foregoing discussions, we do not find any merits in the appeals filed by the appellant. Accordingly, the impugned order sustains and the appeals are dismissed.

(Operative part of the order pronounced in the open court)

(S.K.Mohanty)
Member (Judicial)

(Sanjiv Srivastava)
Member (Technical)

HK