CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, MUMBAI
REGIONAL BENCH

Excise Appeal No. 85279 of 2013
E/Cross/91103 of 2013

(Arising out of Order-in-Appeal No. BC/304/M-III/2012-13 dated 27.09.2012 passed by the Commissioner of Central Excise (Appeals), Mumbai-II)

Commissioner of Central Excise, Mumbai-III **Appellant**
3rd & 4th Floor, Vardaan Centre, MIDC,
Wagle Industrial Estate, Thane (W),
Mumbai 400 604.

Vs.

M/s. CEAT Ltd. **Respondent**
RPG House,
463, Dr. Annie Besant Road,
Worli, Mumbai 400 018.

Appearance:

Shri Amrendra Kumar Jha, Deputy Commissioner, Authorised Representative for the Appellant
Shri Rajesh Ostwal, Advocate, for the Respondent

CORAM:

HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)
HON'BLE DR. SUVENDU KUMAR PATI, MEMBER (JUDICIAL)

Date of Hearing: 22.02.2023
Date of Decision: 22.02.2023

FINAL ORDER NO. 85668/2023

PER: SANJIV SRIVASTAVA

This appeal has been filed by the Revenue against Order-in-Appeal No. BC/304/M-III/2012-13 dated 27.09.2012 passed by the Commissioner of Central Excise (Appeals), Mumbai-II. By the impugned order, following has been held:-

"7. Rule 7 (3) of Central Excise Rules 2002 provides that Assistant Commissioner is required to finalise the provisional assessment. Final assessment order could lead to either demand of short levy or refund of excess duty paid. In case of demand for short levy, the assesseee is liable to pay interest as and vice versa in case of refund, the Dept is liable to pay interest.

8. In the instant case, it is the contention of the Revenue that finalization of provisional assessment should not have been done *in a consolidated manner but should have been done consignment wise which has resulted in the adjustment of short levy and refund together. It is a fact that the finalization of provisional assessment has been done in a consolidated manner which is not disputed. However Revenue has not adduced any evidence that the said consolidation has resulted in the adjustment of short levy and refund together more so when the final assessment order only confirms the differential duty. Department is contesting on a hypothetical situation that adjustment of demand of duty could have happened with refund. However, in the instant case, the Adjudicating Authority has separately finalized the amount of duty payable and the excess amount paid by the assesee. Hence, the question of adjustment of duty payable and the refund does not arise. Moreover, Rule 7 of the said Rules, does not implicitly or explicitly provides for finalization of assessment on Invoice basis.*

9. As regards the case laws cited and relied upon by the Revenue, I observe that:

a) In the case of M/s Shivam Filaments Vs CCE Surat -1 2009 (248) ELT 856 (Tri-Ahmd) the issue was regarding the assessee's claim of abatement of trade discount in respect of trade expenses shown in the invoices and did not relate to the provisional assessment.

b) In the case of Excel Rubber Ltd Vs CCE Hyderabad 2011(268) ELT 419 (Trb-LB), it was concluded that excess amount can certainly be adjusted towards any other duty liability of such assessee under the Excise Act, 1944 and Rules made there under, however, such adjustments are subject to the applicability of the principle of unjust enrichment. Therefore, before grant of adjustment, the authority will have to ascertain whether such excess amount is to be actually refunded to the assessee or is liable either wholly or partly to be credited to the account of consumer benefit fund and only thereafter make an order of adjustment to the extent the amount is found to be actually refundable and not liable to be credited to the account of consumer benefit fund. Here in the instant case the *adjudicating authority have not separately identified specific cases of excess amount paid and short levy of duty. Accordingly the ratio of the said case law cannot be made applicable here.*

c) In the case of ECE Inds 2011(274) ELT 100 (Tri-Del) etc- the issue was regarding the rejection of refund claim which arose on account of the downward revision of price by the buyer subsequent to sales per price variation clause on the basis of unjust enrichment. No provisional assessment was resorted to by the assesee in the cited case. The facts of the case cited case laws are different and hence, the ratio of the said case law cannot be made applicable to the case in hand.

In view of the above discussion, I dismiss the appeal filed by the Revenue and hence, the impugned order sustains."

2.1 Respondent is engaged in manufacture of tyres, tubes, flaps and intermediate products like compound rubber, dipped fabrics, nylon tyres cord fabric etc. falling under Chapter 40 and 54 of CETA, 1985. During the period 2010-11 the respondent vide their letter No. CEAT/BND/Excise/001 dated 01.04.2010 requested the Assistant Commissioner of Central Excise, Bhandup division, Mumbai-III for provisional assessment of the excisable goods at the time of clearance from the factory as per Rule 7(1) of the Central Excise Rules, 2002. The request of the respondent for provisional assessment was allowed vide order dated 17.06.2010 of the Assistant Commissioner, Central Excise, Bhandup division. Vide order-in-original No. 30/11-12 dated 20.01.2012 the assessments were finalized confirming the payment of differential duty of Rs.8,14,258/- on captive clearances to the Nashik plant and payment of excess duty of Rs.53,15,550/- on goods cleared to replacement market and also ordered payment of appropriate interest under Rule 7(4) of the Central Excise Rules, 2002.

2.2 This order was challenged by the Revenue before the Commissioner (Appeals) and the Commissioner (Appeals) has by the impugned order dismissed the Revenue appeal holding as stated in para 1 above. Aggrieved by this order, Revenue has filed this appeal before the Tribunal. Revenue has filed the appeal stating the following grounds:-

"9. (I) Under Central Excise Rules, 2002, the provisional assessment is required to be made in terms of Rule 7 and the said Rule provided as follows:-

"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 rate 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 proper form' 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 or the 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 assessee 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 of twenty four percent per annum 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 of fifteen percent per annum 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 Consumer Welfare Fund:

Provided 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 manufacturer, 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",

(II) There is no question of adjustment of duty in provisional assessment cases as has been held by the larger Bench of Tribunal in the case of Excel Rubber Ltd Vs CCE, Hyderabad reported in 2011(263)E.L.T.419(Trb-LB).

(1) At Para Para 21 & 22 of the said decision, Hon'ble Tribunal has held as follows:-

"21. Apparently, none of the sub-rules of Rule 7 specifically speak of the concept of adjustment of excess amount paid. It is, however, sought to be contended that Rule 7 of Excise Rules,

2001 is in continuation of Rule 9B of the Central Excise Rules, 1944 and as the later rule specifically incorporates concept of adjustment therein, the same shall be deemed to have been comprised in Rule 7 also, whereas it is the contention on behalf the department that the exclusion of the concept of adjustment in the new Rules clearly discloses legislative intent to exclude applicability of such concept while finalizing the assessment.

22. It is true that sub-rule 5 of Rule 98 uses the expression 'adjustment. However, such expression was used with reference to adjustment of duty provisionally assessed against the duty finally assessed. It is not in relation to actual payment of duty by an assessee or in relation to any right of the assessee to get the excess payment being adjusted towards short payment. Sub-rule 5 of Rule 9B is very clear in that regard. Being so, the rival contentions about Rule 7 being continuation of Rule 9B, or about omission to use the word 'adjustment' discloses the intention of legislator to exclude such concept there from are both devoid of substance."

(ii) Hon'ble Tribunal at Para 25 & 26 of the said order have observed that "on joint reading of sub-rule 6 of Rule 7 with Section 11 B of Central Excise Act, 1944, it would be abundantly clear that in order to justify the payment of the refundable amount to the assessee, and non-crediting thereof to the consumer welfare fund, it is necessary for the assessee to apply to the concerned authority, for such refund and thereafter the concerned authority after considering the evidences produced by the assessee should decide as to whether whole or any part of such amount is to be credited to the fund. Obligation to justify the refund without being credited to the fund clearly rests upon the assessee. In other words, claim of the assessee about his entitlement to get the refund cannot get matured unless, the assessee approaches the excise officer with necessary application and the proof in support of his claim subsequent to the finalization of the assessment and within the period prescribed for the same and in terms of the provisions of law. Hence, there is no right to adjustment of duty in the course of finalization of the assessment and the concept of adjustment is

neither implicit nor explicit in the provisions of law comprised under Rule 7 of the said rules nor was it there in Rule 98 of Central Excise Rules 1944.

(iii) Finally, Hon'ble Tribunal at Para 50 of the order have concluded as follows:

"50. The fallout of the above discussion is that once the authority on finalization of assessment finds any amount of money having been paid in excess of the duty liability ascertained in the final assessment, the excess amount so ascertained would become refundable to the assessee. Such excess amount can certainly be adjusted towards any other duty liability of such assessee under the Excise Act, 1944 and Rules made there under, however, such adjustments are subject to the applicability of the principle of unjust enrichment. Therefore, before grant of adjustment, the authority will have to ascertain whether such excess amount is to be actually refunded to the assessee or is liable either wholly or partly to be credited to the account of consumer benefit fund and only thereafter make an order of adjustment to the extent the amount is found to be actually refundable and not liable to be credited to the account of consumer benefit fund. Needless to say, that the burden of proof in this regard would lie upon the assessee."

(III) Subsequently, the referring bench of South Zonal Bench, CESTAT, Bangalore vide Order No.133 & 134/2012 dt.29.2.2012 2012(284)ELT 399- Tri- Bangalore) held that where law provides for filing of monthly returns, payment of duty on monthly basis and finalization of the Provisional Assessment on same basis, any adjustment of excess payment of duty, against short payment of duty cannot be claimed otherwise than on monthly basis. Appellant precluded from claiming total adjustment in go for the entire financial year. They can claim adjustment only within the period covered by each return after surmounting the bar of unjust enrichment.

(IV) From the above, it is amply clear that the adjustment of duty at the time of finalization of provisional assessment is not

allowed unless and until it is explicitly proved with substantial evidence. Thus by resorting to a finalization in a consolidated manner the adjudicating authority has automatically adjusted duty paid in excess erroneously in this case during the finalization of assessment.

10. Hon'ble Tribunal in the case of ECE Industries reported in 2011(274) ELT 100 (Tri-Del) has held at para 13 & 16 as follows:-

"13. In case where the duty is paid provisionally under the Act or rules made there under the claim for refund can be lodged within a period of one year from the date of adjustment of duty after the final assessment thereof. It would obviously disclose that question of refund of duty on the ground of excess payment can arise in relation to the specific matters under Section 118(5) (eb) of the said Act and one of such occasion can be when the duty was provisionally paid and on account of financial assessment, it is revealed that there was excess payment of duty at the time of provisional payment of duty apart from the said provision none of the other provision disclose a situation which could cover the factual matrix of the case in hand. There is no provision under the Act where it is provided that inspite of payment of duty in terms of the price disclosed in the invoices at the time of clearance of the goods if subsequently lesser amount is received by the manufacturer in relation to such goods then the manufacturer would be entitled for reduction in the duty liability in relation to such goods and on that count for refund of the difference in the amount of duty. The fact that there is no such provision under the statute is not in dispute."

16. "it is difficult to accept that on account of variation of price on the lower side by the buyer after the clearance of the product that could evade or in any way result in variation of the valuation of the product for the purpose of determining the duty liability at the time of clearance of the goods. Such a variation of price or lesser payment of price subsequent to the clearance of the goods either on account of some agreement between the manufacturer and the buyer which has no sanction under the *statute dealing with the duty liability can be of no help to the assessee to claim refund".*

11. The finalization of assessment is done on ER-1 basis and consolidation of all ER- 1s for the purpose of assessment results into adjustment/set off of short levy and refund together. In the instant case, the adjustment of demand of duty has happened with refund of excess duty paid. The adjudicating authority as per Para 2.6 of Chapter-3, Part-IV of the CBEC Excise Manual of Supplementary Instructions, should have separately finalized the amount of duty payable and the excess amount paid by the assessee on ER- 1 basis(as the ER-1 is the basic document for assessment). As regards the excess duty paid by the assessee, though there is a refund procedure, assessee would not be eligible for refund of excess of duty paid due to the fact of unjust enrichment. In the present case, the assessee themselves have achieved the benefit of refund of duty paid in excess without undergoing the test of unjust enrichment. Moreover, the finalization of assessment on ER-1 basis could lead to either demand of short levy or refund of excess duty paid. In the case of demand of short levy, the assessee is liable to pay interest, which in this case due to annual consolidation of short levy of duty got adjusted towards the amount of excess duty paid and hence the Department had to forego the interest on the monthly ER-1-wise short levy."

3.1 We have heard Shri Amrendra Kumar Jha, Deputy Commissioner, Authorised Representative for the Revenue and Shri Rajesh Ostwal, Advocate for the respondent.

3.2 Arguing for the Revenue, learned Authorised Representative reiterates the grounds taken in the appeal filed by the Revenue.

3.3 Arguing for the respondent, learned counsel submits:-

- The contention of the Revenue that method of finalization of assessment has resulted in adjustment of excise duty paid in excess is bogus, baseless and without any merit.

- The contention of the Revenue that finalization of assessment should have been done consignment wise and not on a consolidated basis is incorrect.
- Without prejudice there is no restriction in Rule 7 of CER, 2002 for netting off the excess excise duty paid in a particular transaction against excise duty short paid in another transaction. He relies upon the following decisions:-
  - Mercedes Benz (I) Pvt. Ltd. [2017 (347) ELT 646 (T)]
  - Sangam Spinners [2016 (344) ELT 623 (T)]
  - Hindustan Zinc Ltd. [2016 (336) ELT 328 (T)]
  - Jyothi Laboratories Ltd. [2015 (7) TMI 1316 – CESTAT CHENNAI]
  - J.K. Tyre & Industries Ltd. [2018 (10) TMI 697 – CESTAT CHENNAI
  - Hindustan Zinc Ltd. [2017 (5) TMI 1032 – CESTAT NEW DELHI
  - Tata Motors Ltd. [2015 (10) TMI 1032 – CESTAT MUMAI
  - Hindustan Zinc Ltd. [2019 (12) TMI 850 – CESTAT NEW DELHI]
  - Bharat Heavy Electricals Ltd. [2019 (3) TMI 1362 – CESTAT CHENNAI
  - Jonas Woodhead & Sons (I) Ltd. [2015 (329) ELT 577 (T)]
  - Century Rayon [2014 (306) ELT 631 (T)]
  - Castrol India Ltd. [2019 (1) TMI 428 – CESTAT CHENNAI
  - Century Enka Ltd. [2017 (3) TMI 1098 – CESTAT MUMBAI
  - Syndicate Bank [2018 (10) GSTL 555 (T)]
  - Asian Paints Ltd. [2009 (246) ELT 588 (T)]
- The contention of unjust enrichment has been raised by the Revenue for the very first time before this Tribunal. In any case the same is irrelevant to decide the quantum of refund claim.
- Reliance by the Revenue on decision in the case of Excel Rubber Ltd. is misplaced. Revenue in their grounds of appeal has relied on the decision of the Larger Bench of the

Tribunal in the case of Excel Rubber Ltd. [2011 (268) ELT 419 (T-LB)] and the decision of the Tribunal in the case of Excel Rubber Ltd. [2012 (284) ELT 399 (T)], to contend that the amount of excise duty provisionally paid in excess cannot be adjusted against the provisionally short paid duty amount on finalization of provisional assessment.

- The decision in the case of Excel Rubber Ltd. [2011 (268) ELT 419 (T-LB)] and [2012 (284) ELT 399 (T)] has been impliedly overruled by Hon'ble Karnataka High Court in the case of Toyota Kirloskar Auto Parts Ltd. [2012 (276) ELT 332 (Kar.)].

4.1 We have considered the impugned order along with the submissions made in the appeal and during the course of arguments.

4.2 We observe that the grounds raised by the Revenue cannot be sustained in view of the decision of Hon'ble Supreme Court in the case of Mafatlal Industries Ltd. [1997 (89) ELT 247 (SC)] wherein the following has been held:-

*"**95.** Rule 9B provides for provisional assessment in situations specified in Clauses (a), (b) and (c) of sub-rule (1). The goods provisionally assessed under sub-rule (1) may be cleared for home consumption or export in the same manner as the goods which are finally assessed. Sub-rule (5) provides that "when the duty leviable on the goods is asssessed finally in accordance with the provisions of these Rules, the duty provisionally assessed shall be adjusted against the duty finally assessed, and if the duty provisionally assessed falls short of or is in excess of the duty finally assessed, the assessee shall pay the deficiency or be entitled to a refund, as the case may be". Any recoveries or refunds consequent upon the adjustment under sub-rule (5) of Rule 9B will not be governed by Section 11A or Section 11B, as the case may be. However, if the final orders passed under sub-rule (5) are appealed against - or questioned in a writ petition or suit, as the case may be, assuming that such a writ or suit is entertained and is allowed/decreed - then any refund claim arising as a consequence of the decision in such appeal or such*

other proceedings, as the case may be, would be governed by Section 11B. It is also made clear that if an independent refund claim is filed after the final decision under Rule 9B(5) re-agitating the issues already decided under Rule 9B - assuming that such a refund claim lies - and is allowed, it would obviously be governed by Section 11B. It follows logically that position would be the same in the converse situation."

4.3 Further, in the case of Toyota Kirloskar Auto Parts Ltd. [2012 (276) ELT 332 (Kar.)], Hon'ble Karnataka High Court has held as follows:-

*"**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 rate 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 or 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 assessee 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."

7. *A perusal of the aforesaid provision makes it clear that, where the assessee is unable to determine the value of excisable goods or determine the rate of duty applicable thereto, he may request the competent authority as provided in the said provision, to permit him to pay the duty on provisional basis at such rate or on such value as may be specified by him. If the authority is satisfied, he may pass an order permitting such payment and taking all necessary steps for payment of any short fall in the duty payable at the end of assessment. Thereafter, a final assessment order is to be passed. If after the final assessment, if it is found that there is a short fall in payment of duty, sub-rule (4) provides for payment of interest on such short payment of duty. Whereas sub-rule (5) provides for refund of excess duty paid.*

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."*

4.4 Commissioner (Appeals) has in the impugned order examined the decision referred to by the Revenue in their appeal before him and dealt with in para 9 of the impugned order. We do not find any reason to differ with the same.

5.1 We do not find any merits in the appeal filed by the Revenue in view of the above decisions and dismiss the same. The impugned order is upheld.

5.2 Cross objections also disposed of.

(Order pronounced in the open court)

(Sanjiv Srivastava)
Member (Technical)

(Dr. Suvendu Kumar Pati)
Member (Judicial)

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