

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL  
MUMBAI**

REGIONAL BENCH - COURT NO. 01

**Customs Appeal No. 86359 Of 2021**

(Arising out of Order-in-Original No.CC-VA/2020-21 Adj. (I) ACC dated 30.03.2021 passed by Commissioner of Customs (Import), ACC, Mumbai)

**M/s Brightpoint India Pvt. Ltd.**

**.....Appellant**

5<sup>th</sup> Floor, A Wing Empire Plaza, Vikhorli West,  
Mumbai 400 083.

*VERSUS*

**Commissioner of Customs  
Mumbai (Air Cargo Import)**

**.....Respondent**

Air Cargo Complex, Sahar Andheri (East),  
Mumbai - 99.

**Appearance:**

Shri T. Vishwanathan along with Ms Srinidhi Ganeshan, Advocates for the Appellant

Shri Ashwini Kumar, Authorized Representative for the Respondent

**CORAM:**

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

**HON'BLE MR. M. M. PARTHIBAN, MEMBER (TECHNICAL)**

**FINAL ORDER NO. A/85977/2023**

Date of Hearing: 20.06.2023

Date of Decision:20.06.2023

**PER : S. K. MOHANTY**

Briefly stated, the facts of the case are that during the period 17.02.2014 to 24.04.2015, the appellant had imported 'Mobile phones', falling under CTH 851712 90. At the time of import, the appellants have paid Additional Duty of Customs (CVD) at the rate of 6% (upto 28.02.2015) and at the rate of 12.5% on imports

effected from 01.03.2015 onwards. Notification No. 12/2012-C.E. dated 17.03.2012 provided exemption to various goods from the levy of Central Excise duty. In terms of entry at Sl. No. 263A of the said notification, a manufacturer was given an option to pay excise duty at the rate of 1% on mobile phones, subject to the fulfilment of condition that Cenvat credit on inputs and capital goods is not claimed under Rule 3 read with Rule 13 of the Cenvat Credit Rules, 2004. However, at the time of importation, the benefit of said notification could not be availed by the appellants in respect of the 154 nos. of Bills of Entry (B/Es) filed by them, owing to the reason that the EDI system did not have this exemption updated in respect of imported goods. Further, there was also confusion with regard to the additional duty payable on importation of the subject goods and their entitlement to the duty exemption provided under the said notification. The matter went up to the Hon'ble Supreme Court and the Hon'ble Court in the case of *SRF Ltd., Vs. Commissioner of Customs, Chennai, 2015 (318) E.L.T. 607 (S. C.)* have held that for levying CVD on imported goods, exemption notification issued under Section 5A of the Central Excise Act, 1944, with the condition relating to non-availment of input credit be considered and such exemption would apply to the imported goods also.

1.2. Since the notification dated 17.03.2012 (supra) has provided for the beneficial rate of CVD at 1% for the subject goods and the appellants having been discharged the CVD liability at the higher rate of 6% and 12.5%, the differential duty amount was claimed as refund by way of filing the refund applications before the jurisdictional Customs authorities in terms of Section 27 of the Customs Act, 1962.

1.3. Subsequent to filing of refund applications, the appellants made a request vide letter dated 22.12.2015 to the proper officer for amendment of 154 nos. B/Es in terms of Sections 149 *ibid* and 154 *ibid*. The request made by the appellants was acceded to by the department in reassessing the B/Es manually on 28.06.2018 and 24.06.2019. Further, as a consequence of the Hon'ble Supreme Court's judgement in the case of SRF Ltd. (*supra*), the appellants have also filed 16 nos. of appeals before the learned Commissioner (Appeals), Mumbai-III for re-assessment of the finally assessed B/Es. The appeal of the appellant was disposed of by the learned Commissioner (Appeals) vide Order-in-Appeal dated 01.11.2016, in allowing the appeal. Vide the said order, the assessing authority was directed to re-assess the B/Es by passing the speaking order in terms of Section 17(5) *ibid*.

1.4. As a consequence of the re-assessment order passed by the proper officer, the appellants have filed the refund applications on 11.10.2018, 25.06.2019 and 11.10.2018, claiming refund of Rs.3,84,08,541/-, Rs.4,73,50,179/- and Rs.10,35,46,702/- respectively. The refund applications filed by the appellants were favourably considered by the refund sanctioning authority and vide Orders-in-Original 16.04.2019, 03.08.2019 and 26.02.2019, the said amounts of refund claims were sanctioned in favour of the appellants.

1.5. Out of the above original orders, the jurisdictional Commissioner of Customs has accepted the refund claim sanctioned by the original authority in respect of Order dated 16.04.2019. With regard to the order dated 03.08.2019, the reviewing authority has directed the original authority for filing of appeal before the

Commissioner (Appeals) and accordingly the appeal was filed by Revenue against the adjudication order dated 03.08.2019. As regards the adjudication order dated 26.02.2019 is concerned, no review order was passed by competent authority and as such, no appeal was preferred against the said order.

1.6. Subsequent to sanction of refund amounts in favour of the appellants, the department had issued three nos. of show cause notices on 14.02.2020 (2 SCNs) and 26.02.2020 (1 SCN) under Sub-section (1) of Section 28 *ibid*, seeking recovery of alleged erroneous refunds granted earlier by the department. Supplementary SCNs dated 15.01.2021 and 30.12.2020 were also issued by the department seeking recovery of refund amounts along with interest and for imposition of penalty on the appellants under Section 114A *ibid*.

1.7. Appeal filed by the Revenue against the adjudication order dated 03.08.2019 was disposed of by the learned Commissioner (Appeals) vide order dated 22.03.2021, in allowing the appeal of Revenue and by setting aside the original order passed by lower authority. The said Order of the Commissioner (Appeals) was appealed against before the Tribunal, which was disposed of by the Tribunal vide Final Order No. A/87098/2021 dated 09.11.2021, in allowing the appeal with consequential relief to the appellants herein.

1.8. The above show cause notices along with the supplementary notices issued by the department were adjudicated vide order dated 30.03.2021, wherein the learned Commissioner of Customs (Import) has confirmed the demand of Rs.18,93,05,931/- along

with interest and also imposed equal amount of penalty on the appellants under Section 114A *ibid*.

1.9. Feeling aggrieved with the adjudication order dated 30.03.2021 (for short, referred to as 'the impugned order'), the appellants have preferred this appeal before the Tribunal.

2.1. Shri T. Vishwanathan, learned Advocate appearing for the appellants submitted that the re-assessment orders on the B/Es passed by the department were accepted and no further appeals were preferred there against by the Revenue. Thus, he pleaded that since, as a consequence of the reassessment, the appellants have filed the refund applications, the same are maintainable under the statute and the benefit of refund already granted cannot be denied or whittled down by the department. He has also stated that considering the judgement of Hon'ble Supreme Court in the case of *ITC Ltd., Vs. C.C.E., Kolkata-IV 2019 (368) 216 (S.C.)*, the Hon'ble Bombay High Court, in the case of *M/s Dimension Data India Pvt. Ltd., Vs. Commissioner of Customs 2021-TIOL-224-HGC-Mum-CUS*, while disposing of the writ petition have held that rectification done in the Bills of entry through amendment under Section 149 *ibid*, is permissible. The learned Advocate has also referred to order 02.11.2021 passed by this Tribunal in the appellant's own case, to state that since the refund application was filed pursuant to the reassessment done by the department, such application is permissible under the law. Finally, the learned Advocate has prayed for setting aside the impugned order passed by the adjudicating authority.

2.2. With regard to applicability of the doctrine of unjust enrichment, learned Advocate submitted that the incidence of

excess paid CVD amount has been borne by the appellants and such incidence has not been passed on to any other person. To strengthen such stand, learned Advocate has submitted photo copy of the balance sheet for the disputed period.

3. Shri Ashwini Kumar, learned Authorised Representative appearing for Revenue while reiterating the findings of the Commissioner in the impugned order, has further stated that the appellant's executive pursuant to summon issued for recording the evidence in the form of voluntary statement under Section 108 *ibid*, in connection with the investigation has stated that the amount of refunds in question was treated as expenses in the Profit & Loss account (P&L account) and the same was not considered as Receivables in the Balance Sheet under the head 'Current Assets: Loans and Advances'. He has also referred to the statement dated 02.11.2020 recorded from the partner of the Chartered Accountant firm M/s PWC to state that the excess payment was not recognised as 'Receivables', until the judgement was delivered by the Hon'ble Supreme Court in the case of SRF Ltd. (*supra*). Therefore, the learned AR pleaded that the excess paid incidence of duty has been passed on by the appellants and under such circumstances, if the refund is not recoverable, then they will be unjustly enriched at the cost of somebody else and as such, the doctrine of unjust enrichment is squarely applicable in the case in hand for transferring the refund amount to the Consumer Welfare Fund (CWF).

4. Heard both sides and examined the case records.

5.1. It is an admitted fact on record that re-assessment order passed in the disputed B/Es were not questioned or objected to by

the department, which is evident from the fact that no appeals were preferred by the Revenue against the finally assessed B/Es. Thus, under such circumstances, the plea cannot be raised by Revenue that the re-assessment of B/Es are neither proper nor justified. We find that considering the ratio of judgement of Hon'ble Supreme Court in the case of ITC (supra), the Hon'ble Bombay High Court in the case of Dimension Data India P. Ltd. (supra), in a writ petition filed under Article 226 of the Constitution of India, have held that if there is an error in the B/Es, the same can be rectified by amendment in terms of Section 149 of the Customs Act, 1962. In the case in hand, the B/Es were re-assessed by the department pursuant to the applications filed by the appellant under Sections 149 *ibid* and 154 *ibid*. Further, we also find that the Tribunal vide Final Order No. A/87098/2021 dated 02.11.2021 has considered the fact that refund arising out of reassessment of B/Es is permissible under the statute. Therefore, we are of the considered view that refund claims filed pursuant to the reassessed B/Es are in conformity with the statutory provisions.

5.2. In the present case, the facts are not under dispute that the original orders dated 06.04.2019 and 26.02.2019 passed by the adjudicating authority in sanctioning the refunds in favour of the appellants were not challenged by Revenue before the Commissioner (Appeals). Therefore, with regard to those two adjudication orders, the matter has attained finality and the question of maintainability of the refund claims cannot be questioned by Revenue at a subsequent stage, by initiating proceedings under Section 28 *ibid*, for recovery of the refund amounts, considering the same as erroneous refunds. Further, in

respect of the refund sanctioning order dated 03.08.2019, though Revenue's appeal was allowed by the learned Commissioner (Appeals) vide Order-in-Appeal dated 22.03.2021, but the said order was set aside and the appeal was allowed with consequential relief by the Tribunal vide Final Order No. A/87098/2021 dated 02.11.2021. In this case, nothing is available on record to show that the said order of the Tribunal has been set aside or overruled by the higher Appellate forums. Thus, under such circumstances, it cannot also be said that the grant of refund is erroneous and the same should be recovered by taking recourse to Section 28 *ibid*. Therefore, the impugned order, confirming the demand along with interest against the appellants under Section 28(1) *ibid*, read with Section 28(4) *ibid*, and Section 28AA cannot be sustained. Further, penalty imposed under Section 114A *ibid*, cannot also be sustained. Accordingly, the adjudged demands confirmed in the impugned order are set aside.

6.1. Since, we are setting aside the demands confirmed in the adjudication order 30.03.2021, the only question that remains for consideration by the Tribunal is, whether the amount in dispute should be credited to the CWF in terms of sub-section (2) of Section 27 *ibid*, or should it be paid forthwith by crediting the refund amount in favour of appellants in terms of the *proviso* appended to sub-section (2) of Section 27 *ibid*.

6.2. The provisions for grant of refund of duty are contained in Section 27 *ibid*. Sub-section (2) to Section 27 *ibid*, mandates that if the refund sanctioning authority is satisfied that the whole or part of the duty paid by the applicant is refundable, then he may make an order in crediting the refund amount to the CWF. On reading of the

said statutory provision, it transpires that crediting the refund amount to the CWF is the rule and granting of the same as refund to applicant-assessee/importer is an exception, carved out in the *proviso* clause appended thereto. The legislative intent in drafting of such provision is that in case of indirect taxes, the assessee is the intermediary, on one hand between the ultimate buyer of the goods and on the other, with the Government exchequer. That is the reason, a rebuttable presumption has been created under the statute, with the objective that if refund is sanctioned in favour of the assessee, then he will be unjustly enriched at the cost and expense of somebody else, to which he is not legally entitled to. Therefore, heavy burden of proof lies with the assessee, who wishes to rebut or disprove such presumption. The assessee has to prove its case with the help of documentary evidences that the incidence of duty or taxes have not been passed on to the buyer or any other person and the same has been borne by him. In other words, if the assessee proves, beyond any shadow of doubt that the burden and the injury of such excess duty or tax has been suffered/borne by himself alone, then instead of crediting the refund to the CWF, the same should be credited to the account of the assessee. In case of a limited/ private limited company, the more scientific way of proving the doctrine of unjust enrichment is the method adopted in entering the transaction particulars in the financial records. If the expenses incurred on account of duties/taxes is entered in the P & L account, then under such circumstances, it can be said that the incidence of such duties/taxes have been passed on and not been borne by the assessee/importer concerned. In other words, any amounts which are debited to the P & L account, the same represents utility of that expenditure providing the respective benefit in that year and it

relates to generation of the income for that respective year. Thus, any amount debited to the P & L account has to be resulted in generation of revenue and accordingly, there lies no claim for recovery of this amount. On the other hand, without considering the same as expenses in the P & L account, if the same is reflected in the Balance Sheet as 'Claims Receivable' under the head 'Current Assets: Loans and Advances', then it has to be construed that the incidence of the duties/taxes have not been passed on to any other person and the incidence of the same has been borne by the assessee/importer. Under such circumstances only, the benefit of refunds should accrue to the person who has paid such duty/tax to the Government exchequer. To put it differently, it can be said that if an amount paid is not charged to the revenue and carried as an asset in the Balance Sheet, then there lies a claim of recovery from the person against whom these amounts have been considered as recoverable for the given value.

6.3. In the case in hand, though the learned Advocate for appellants has submitted the copy of Balance Sheet, Ledger accounts and work sheets to show that the amount of refunds have been reflected as 'claims receivable from the Statutory authorities', but the said facts were negated in the impugned at paragraph 77 (i) and 77(iii), as pointed out by the Learned AR for Revenue. The relevant paragraphs are quoted herein below:

*"77(i) The statement of Mrs. Meenal Ashish Rane, Financial Controller for M/s. Instagram Micro India Pvt. Ltd. recorded on 28.01.2020 at page no.2 when questioned as to 'How the Customs duty refunds or other Refunds with reference to 1% CVD refund under CENVAT Credit Rule, 2004 before and after the Hon'ble Supreme Court Judgement SRF Ltd. Vs. Commissioner of Customs, Chennai are shown in the*

*Profit and Loss Statement or Balance Sheets of Company M/s. Bright Point India Pvt. Ltd.' wherein she has stated that "it was treated as Expenses (P&L Expenses) and was not treated as Receivables in the Balance Sheet before the Hon'ble Supreme Court SRF Ltd. Vs. Commissioner of Customs, Chennai SRF Ltd. Vs. Commissioner of Customs, Chennai".*

*(emphasis supplied)*

*"77(iii) Shri Arunkumar Ramdas, Partner in M/s. Price Waterhouse & Co. Chartered Accountants LLP in his statement dated 02.11.2020 has elaborated that "The excess payment was not recognized as a receivable until the Supreme Court judgement as this was a contingent asset which could not have been recognized until it was virtually certain as per requirements of Accounting Standard 29 specified under Section 133 of the Act. As it was not certain that the company would be able to claim the excess CVD as a refund, it was not recorded as a receivable. The accounting standard requires such amounts which are in the nature of contingent assets to be recognized only when it is virtually certain i.e. almost fully certain to be received".*

*(emphasis supplied)*

6.4. From the above findings recorded in the impugned order, vis-à-vis, the submissions made by the appellants through their Advocate, we find that there is a contradiction in the stand taken regarding applicability of the doctrine of unjust enrichment. Since, such aspect has to be looked into in great detail, we are of the considered view that the matter should go back to the original authority for proper analysis of the books of accounts maintained by the appellants for a conclusion, as to whether the incidence of excess paid duty (claimed as refund) has been borne by the importer-appellants or transferred/passed on to any other person. The Original authority should more particularly focus on the findings recorded in the impugned order at paragraphs 77(i) and 77(iii) for his satisfaction, and for ascertaining under what circumstances the

expenses on account of CVD was reflected in the P&L account and what further entry/entries were made in nullifying such entry subsequently, in order to reflect such particular refund amount in the Balance Sheet under the head 'Current Assets: Loans and Advances'. The Original authority should also examine the issue, about the date when the contra entry, if any, was passed in the Journal/Ledger account in nullifying the transaction subsequently, as claimed by the learned Advocate for the appellants. If on examination, the Original authority found out that the entry in the P & L account was subsequently reversed within the same financial year and reflected in the Balance Sheet drawn as on 31<sup>st</sup> March of that particular year of booking, then the refund amount in question should be paid forthwith to the appellants, instead of being crediting the same to CWF. The Original authority should also examine the copies of the Balance Sheet prepared by the appellants for the entire disputed period, between deposit of excess CVD amount into the Government exchequer and the date of actual refund sanctioned by the department. It is made clear that examination of such aspect is required for the reason that all throughout the period of dispute, the injury or loss towards such excess payment has been borne alone by the appellants-importer and if, at any given point of time in between the disputed period, the amount has been reduced from the claims 'Receivable account', then the doctrine unjust enrichment would automatically be attracted.

7. In view of the foregoing discussions and analysis, the appeal is allowed by way of remand to the Original authority only for the limited purpose of examination of the applicability of doctrine of unjust enrichment, in line with our above discussions at paragraph

6.1. to 6.4. Needless to say, that the appellants should be granted reasonable opportunity for presenting their case, before *de novo* adjudication of the matter. Since the issue pertains to the period 2014-2015, it is expected that the Original authority should complete the de novo adjudication proceedings preferably within a period of three months from the date of receipt of this order.

(Order Dictated and pronounced in the open court)

**(S. K. Mohanty)**  
**Member(Judicial)**

**(M. M. Parthiban)**  
**Member (Technical)**