CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL MUMBAI

WEST ZONAL BENCH

EXCISE APPEAL NO: 1814 OF 2012

[Arising out of Order-in-Appeal No: BR/46/MV/2012 dated 13th August 2012 passed by the Commissioner of Central Excise (Appeals), Mumbai Zone – I.]

Ginza Industries Ltd
49/394/395 Motilal Nagar No.1, Road No. 10
Goregaon West, Mumbai – 400104 … ***Appellant***

versus

Commissioner of Central Excise
Mumbai – V
C-24 Utpad Shulk Bhavan, Sector – E
Bandra-Kurla Complex, Bandra (E), Mumbai - 400051 ***…Respondent***

APPEARANCE:

Ms Pooja Reddy, Advocate for the appellant

Shri Xavier R Mascarenhas, Superintendent (AR) for the respondent

CORAM:

HON'BLE MR C J MATHEW, MEMBER (TECHNICAL)
HON'BLE MR AJAY SHARMA, MEMBER (JUDICIAL)

FINAL ORDER NO: A / 87076/2023

DATE OF HEARING: 12/05/2023
DATE OF DECISION: 01/11/2023

PER: C J MATHEW

M/s Ginza Industries Ltd, a manufacturer of 'branded garments' and excluded from liability to duties of central excise by notification no. 30/2004-CE dated 9th July 2004, claimed to have paid duties on stock manufactured prior to 1st March 2011 and lying unsold in their warehouse owing lack of clarity in law and, consequent upon communication dated 25th March 2011 of Central Board of Excise & Customs (CBEC) from F No. B-1/3/2011-TRU, filed claim for refund of ₹ 95,169 out of the liability of ₹ 3,06,745 paid for clearances of March 2011 upon rescinding of benefit of exemption to 'branded garments' *vide* notification no. 12/2011-CE dated 1st March 2011. The appellant claimed that details of the goods had already been furnished to central excise authorities in letter of 4th March 2011 and copy was also enclosed along with other relevant documents.

2. The application was responded to with notice proposing rejection which was confirmed by the competent authority on the finding that the impugned goods were merely 'stock transfer' from which clearances are subsequently made and that, in the absence of challan evidencing clearance at 'nil' rate of duty, these should be presumed as liable to duty. Failure of appeal before Commissioner of Central Excise (Appeals), Mumbai Zone –I, communicated in order[1] now impugned, has led to this appeal before us.

3. Having heard Learned Counsel for appellant and Learned

[1] [order-in-appeal no. BR/46/MV/2012 dated 13th August 2012]

Authorized Representative, we take not the three different stands are before us from the Revenue while the appellant is before us with the stark fact that, after the benefit of exemption availed by them was rescinded, duty liability had been discharged on entire stock sold by them even as those reported as removed from the factory before the levy came into force was not liable to duty.

4. The original authority held that the transfer to warehouse was merely ‘stock transfer’ and duty is liable on all stock, as and when sold after the levy became applicable, and rejected the claim of the appellant for non-production of challans showing ‘nil’ payment of duty on those goods in the warehouse. The first appellate authority, citing the essentials of prescribed documents and of the bar of ‘unjust enrichment’, held that lack of evidence to substantiate the latter warranted rejection of the claim. Learned Authorized Representative came up with the proposition that the refund can be claimed in cases of self-assessment for duty leviability only by challenge to assessment as held by the Hon’ble Supreme Court in *ITC Ltd v. Commissioner of Central Excise, Kolkata-IV [2019 (368) ELT 216 (SC)]*.

5. It is well-settled that show cause notice is the foundation of all proceedings and in appellate disposal, only the issue in appeal may be argued or abetted. Failure to challenge assessment as an impediment to sanction of refund was not an issue thus far in the present dispute

and in the absence of appeal/memorandum of cross-objections on behalf of Revenue, a fresh ground entered by Learned Authorized Representative does not merit consideration.

6. The first appellate authority had raised the issue of limitation which is attendant on the presumption that refund is otherwise eligible for sanction but such conclusion can only be based on ascertainment of the finding of the original authority as legal and proper which has not been undertaken.

7. The original authority has premised ineligibility with the finding that the date of sale of goods being undisputedly after the levy came into force, there is no alternative but for duty to be discharged. This is an improper appreciation of the nature of this levy and, more so, on induction of impugned goods into the list of taxable goods. Being a tax on manufacture, goods produced prior to the levy having come into force are not to be subjected to duties of central excise. Registration, as well as acknowledgement, as a factory is necessary only after the levy came into force and, till then, there could be no distinction between production facility and storage facility inasmuch as both are not under the ambit of the taxing statute. Therefore, ‘stock transfer’, as an internal nomenclature, has nothing to do with clearance of goods which would be subjected to dutiability from 1st March 2011. It is clear from the communication of the Central Board

of Excise & Customs (CBEC) *supra* that the specific aspect referred to in the order of the original authority is restricted to goods lying in the registered factory premises as on date of imposition of levy which, uncontestedly, is not the issue here. The explanation therein relating to private store room in conjunction with clearance at 'nil rate' of duty is mere clarification and cannot be taken as intent to levy duty on goods that are, without doubt, outside the factory even though under the ownership of assessee. That would be travesty of law. The finding of the original authority does not meet the test of law.

8. As the impugned goods were not dutiable, eligibility for refund should follow. The claim of the appellant being that duty had, nonetheless, been discharged, it was incumbent upon them to demonstrate such payment. The appellant had submitted details of goods lying elsewhere and to the extent that these can be correlated, that onus will stand discharged. It is on record that the appellant had, in proceedings before the original authority, submitted that challans could be produced and it is on record that these had not been. Therefore, it is only appropriate that this be complied with and, upon such, there need be no further controversy over duty having been discharged on non-dutiable goods.

9. Section 11B mandates that all refunds undergo the test of bar of 'unjust enrichment' and it falls upon the appellant to successfully

navigate that.

10. To fulfill these pre-requisites, we set aside the impugned order and restore the refund application before the original authority for fresh processing on the terms *supra*.

(Order pronounced in the open court on 01/11/2023)

(AJAY SHARMA)
Member (Judicial)

(C J MATHEW)
Member (Technical)

**/as*