CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL MUMBAI

WEST ZONAL BENCH

EXCISE APPEAL NO: 89888 OF 2013

[Arising out of Order-in-Appeal No: SDK/88/Bel/2013-14 dated 27th September 2013 passed by the Commissioner of Central Excise (Appeals), Mumbai – III.]

Savita Oil Technologies Ltd
A-405 TTC Industrial Area, MIDC, Mahape
Navi Mumbai … ***Appellant***

versus

Commissioner of Central Excise
Belapur
CGO Complex, CBD Belapur, Navi Mumbai 400614 ***…Respondent***

APPEARANCE:

Shri Mehul Jivani, Chartered Accountant for the appellant

Shri Xavier 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 / 87180/2023

DATE OF HEARING: 21/08/2023
DATE OF DECISION: 30/11/2023

PER: C J MATHEW

The dispute in this appeal lies within the narrow compass of denial of access to eligible refund of duties of central excise, arising from finalization of provisional assessment for clearances effected from April 2011 to June 2011, by invoking the bar of ‘unjust enrichment’ in section 11B of Central Excise Act, 1944.

2. The appellant, M/s Savita Oil Technologies Ltd is a manufacturer of ‘lube oil’ among several other products effecting sale through ‘clearing & forwarding (C&F) agents’ and their own depots at several places. As the price at which an independent sale takes place was not available at the time of clearance, the appellant had adopted the practice of ‘provisional assessment’ at estimated price for payment of duty and, subsequent to actual sale from the downstream premises, the appropriate duty liability was discharged in full on finalization of assessment as provided for in rule 7 of Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000.

3. For the disputed period, the jurisdictional central excise authority determined that some of the clearances had been effected on payment of excess duty of ₹ 4,01,506 while, for others, ₹ 10,388 had been short-paid. The resultant claim for refund of the excess paid which was sanctioned but appropriated to the ‘Fund’ as prescribed in section 11B of Central Excise Act, 1944, on the ground that non-inclusion of ‘duties of central excise’ in the invoice issued by the downstream entity and that certificate of chartered account unacceptable, for failure to overcome the bar against release of refund.

The upholding of the denial in order[1] of Commissioner of Central Excise (Appeals), Mumbai-III was carried to the Tribunal and remanded back to the first appellate authority for passing detailed order which is now in challenge before us.

4. Learned Chartered Accountant, appearing for appellant, submits that the issue had been festering for a time and that the Tribunal, in their own disputes for other periods, had held in their favour. Reliance was placed on the decision of the Tribunal in *Savita Oil Technologies Pvt Ltd v. Commissioner of Central Excise, Belapur [2017-TIOL-279-CESTAT-MUM]* pertaining to April 2010 to June 2010 and it was also submitted that similar denial for December 2011 to March 2013 was, after reversal by the first appellate authority, not pursued for restoration by Revenue; the reference to acceptance thereof, by order of 16th June 2015 on review by competent Committee of Commissioners, in order implementing the said appellate decision has been cited as precluding a contrary stand in the present proceedings. Similar denial for 2010-11 by order[2] of Commissioner of Central Excise (Appeals), Mumbai-III was reversed by the Tribunal by final order[3] in *Savita Oil Technologies Pvt Ltd v. Commissioner of Central Excise, Belapur* and for the period from October 2009 to March 2010 was resolved in favour of the appellant

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[1] [order-in-appeal no. SDK/88/Bel/2013-14 dated 27th September 2013]
[2] [order-in-appeal no. BC/348/Bel/2012-13 dated 30th October 2012]
[3] [final order no. 88508/2023 dated 22nd February 2023 in excise appeal no. 85267 of 2013]

by final order[4] in *Savita Oil Technologies Pvt Ltd v. Commissioner of Central Excise, Belapur* disposing off challenge to order[5] of Commissioner of Central Excise (Appeals), Belapur.

5. We have heard Learned Authorized Representative and perused the records. It is seen that several orders of the Tribunal have held that such refunds cannot be withheld on the ground of unjust enrichment. Furthermore, these were not only accepted but also those in which first appellate authority followed the decision of the Tribunal were.

6. For a detailed exposition of the stand adopted by the Tribunal, we may gainfully rely upon

> *'4.2 We find that for subsequent period as well as earlier period, the issue has been decided in favour in appellant's own case and the same has been accepted by department:*
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> - *For the subsequent periods i.e. from December 2011 to December 2012 the refund was rejected on the identical ground by the Assistant Commissioner. The appellant had filed the appeal before Commissioner (Appeals) and Commissioner (Appeals) has set aside the order of Assistant Commissioner and allowed the refund vide Order- In-Appeal No. CD/116/Bel/2015 dated 03.02.2015; Order-In-Appeal No. CD/108/Bel/2015 dated 03.02.2015 and Order-In-Appeal No. CD/105/Bel/2015 dated 03.02.2015. (Copy of the said order is attached in case law compilation at sr.no.2- page 12 to 33). The said order has been accepted by the department, the sane can*

[4] [final order no. A/86656-86657/2019 dated 30th July 2019 in excise appeal no.1722, 1722 of 2011]
[5] [order-in-appeal no. PKS/97-98/Bel/2011-12 dated 6th September 2011]

be evidencing from second last para on internal page 4 of the Order- In-Original No. MK/69-71/DC/Bel-II/SAVITA/15-16 dated 17.06.2015 (Copy of the said order is attached in case law compilation at sr.no.2- page 34 to 38) passed by the Deputy Commissioner for granting the said refund, wherein he has noted that said Order-In-Appeals passed by the Commissioner (Appeals) has been accepted by the Committee of Commissioner on 16.06.2015.

- *For earlier period October 2009 to March 2010 the refund was rejected on the identical ground by the Assistant Commissioner and Commissioner (Appeals). The same was set aside and refund was allowed by the CESTAT vide Order No. A/86656- 86657/2019 dated 30/07/2019 arising out of Excise Appeal No. 1722 of 2011. (Copy of the said order is attached in case law compilation at sr.no.2- page 39 to 43). The said order has been accepted by the department, the same can be evidencing from para 6 of the Order-In-Original no. R-154/SD/DC/Bel-III/RV/Savita/Refund/2019-20 dated 24.12.2019 (Copy of the said order is attached in case law compilation at sr.no.2- page 44 to 48) passed by the Deputy Commissioner for granting the said refund, wherein he has noted that said cestat has been accepted by the Committee of Commissioner on 16.10.2019.*

- *Further, for the period April 2006 to February 2007, Assistant has granted the refund on the identical facts vide OIO no. R-01/Bel-II/22-23 dated 01.06.2022. The copy of the said order is attached in case law compilation at sr.no.2- page 49 to 60.*

- *For the subsequent periods i.e. from December 2011 to March 2013 the refund was rejected on the identical* *ground by the Assistant Commissioner. The appellant had filed the appeal before Commissioner (Appeals) and Commissioner (Appeals) has set aside the order of Assistant Commissioner and allowed the refund vide Order-In- Appeal No. CD/112-115/Bel/15 dated 12.02.2015. The said order has been accepted by the department, the same can be evidencing from second last para on internal page 4 of the Order-In-Original No. Belapur/Bel-IV/R-I/SAVITA/AC/HP/15-16 dated 30.07.2016 passed by the Deputy Commissioner for granting the said refund, wherein he has noted that OrderIn-Appeal No. CD/112-115/Bel/15 dated 12.02.2015 passed by the Commissioner (Appeals) has been accepted by the Committee of Commissioner on 16.06.2015.*

- *Even for the period 2010-11 for the other unit, refund claim has been adjudged in their favour as reported in M/s. Savita Oil Technologies Ltd 2017-TIOL-279-Cestat-Mum, wherein following has been held:*

> *"5. On the issue of time-bar, I find that the refund is in consequence of finalisation of provisional assessment. Any duty collected in excess during the pendency of finalisation of provisional assessment is in excess of that authorized by law and must, perforce, be returned to the assessee. There is no requirement for a separate application for refund. The original authority erred in directing that a claim be filed in consequence to finalisation and the first appellate authority erred in concurring with the finding that a part of the claim was barred by limitation.*
>
> *6. It is also seen that that the appellant has produced a certificate of Chartered Accountant that the amount receivable has been shown in the accounts as 'receivable' and this is sufficient evidence that the incidence of duty has not been passed on."*

4.3 As the issue has been considered by the revenue authorities for the past and previous period in the appellant own case on the *identical issue and allowed in favour of the appellant and the orders have been accepted by the same principles should be adopted in the present case in view of the decisions as follows:*

i. Birla Corporation Ltd. [2005 (186) E.L.T. 266 (S.C.)]

ii. Jain Vanguard Polybutlene Ltd [2010 (256) E.L.T. 523 (Bom.)]

iii. Sunbel Alloys Co. Of India Ltd [2015 (316) E.L.T. 353 (Bom.)]

4.4 In case of Nahar Spinning and Weaving Mills Ltd. [2009 (247) ELT 708 (T-Del)] following has been observed:

> *5. On perusal of the Adjudication order we find that the original authority sanctioned the refund claim holding that "provisional assessment for the period in question was finalized on the basis of price prevailing at depot on the day the goods were cleared from the factory. The price prevailing at depot has been lower than the price at which duty was paid by the appellant. The buyer at depot paid the duty on this lower price. Thus the excess duty paid by the appellants at the time of removal of the goods from the factory has not been recovered from the buyer. Hence, incidence of duty has not been borne by the appellants only." The Commissioner (Appeals) set aside the adjudication order, holding that the appellants failed to prove that the duty burden has not been passed on to other persons. It has been observed that the goods cleared from the factory and the goods sold from depot on a particular day are different. We are unable to accept the finding of the Commissioner (Appeals). We agree with the finding of original authority.*
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> *6. The original authority rightly held that depot price is relevant for the purpose of assessment. It is proved that the price at depot was lower than the factory gate price. So, there is no reason to look into as to what price goods were sold subsequently. In this connection we reproduce the relevant portion of the decision of the Tribunal in the case of Carborandum Universal Ltd. (supra) :-*
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> *"5. On a very careful consideration of the issue, we find that when the goods are stock transferred from the factory, to the depot, duty is to be paid in terms of Section 4(b) read with Valuation Rules. The time of removal in respect of goods removed from the place of removal shall be deemed to be the time at which such goods are cleared from the factory. When the coated abrasives are removed from the factory to the depot, duty*

> *liability has to be discharged and in terms of law value to be adopted is the price discount is given to the prevailing in the depot at the time of clearance from the factory. In terms of the declaration made by the respondents, it is seen that normally 17.5% discount is given to the dealers in respect of the goods purchased from the depot. Moreover at the time stock transfer from the factory to the depot, the appellants would not be knowing that a particular item would be sold to an industrial consumer. Further, the percentage of sales to industrial consumer from the depot is very meagre only 0.5%. However, as rightly observed by the Commissioner (Appeals) once the goods are cleared from the factory to the depot on payment of duty on the basis of a price prevailing at the depot, at the time of removal from the factory there is no need to chase the goods and to see at what price the same are actually sold. Therefore, he has rightly set aside the orders of the lower authority demanding duty. We do not find any reason to interfere with the orders of the Commissioner. Therefore, we dismiss Revenue's appeals and uphold the Orders-in-Appeal. The appeals and cross-objections are disposed of in the above terms."*
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> *7. The decisions cited by the learned D.R. for applicability of unjust enrichment are not relevant in this case, as the appellants fulfilled the conditions of unjust enrichment by showing that the depot price prevailing at the relevant time.*

4.5 The appellants submitted that at the time of verification of the sales invoices raised ex C & F Depot for finalization of provisional assessments, it has been verified by the verifying officer the sales invoices raised ex C & F depots do not show the duty element separately. In case of N G Thakkar 2012-TIOL280-HC-MUM-CX following has been held:

> *9. The claim of the assessee that the upward revision in the prices of the compounded asafoetida cleared during the relevant period was not on account of the inclusion of the central excise duty element but on account of increase in the price of the raw materials used in the production of compounded asafoetida has been verified by the Commissioner of Central Excise (Appeals). The same is evident from the comparative chart set out in para 15 of the order passed by the Commissioner of Central Excise (Appeals). It is not in dispute that the auditors of the assessee have certified that the sale price as recorded in the commercial invoices does not include the central excise duty element. The revenue has not found any fault in that certificate issued by the auditors.*
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> *10. The Apex Court in the case of Commissioner of Customs, New Delhi V/s. Orgnanan (India) Ltd. reported in 2008 (231) E.L.T. 201 (S.C.) has inter alia held thus :-*

> *"....It is an admitted position that the burden to prove that the customs duty was not passed on to the customers is on the assessee. The Member (Technical) and the third Member on the basis of the following facts:-*
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> *(i) in the invoices, it was clearly mentioned that the sale price did not include the customs duty.*
>
> *(ii) that there was no change in price post-levying of the duty. Assessee had filed its price list and the customs duty was imposed thereafter. The goods were sold to the customers at the same price which was stated in the price list.*
>
> *(iii) That there was an auditor's certificate certifying that assessee had not passed on the customs duty to the customers.*
>
> *We came to the conclusion that the assessee had not passed on the burden of the customs duty to its customers. This finding is a finding of fact based on evidence which does not call for any interference. "*
>
> *11. In the present case, the decisions of the lower appellate authorities that the duty element has not been passed on to the customers is based on verification of the evidence adduced by the assessee."*

4.6 Following the above decision and the fact that issue has been decided by the revenue authorities themselves in similar circumstances in the appellant own case we do not find any merits in the impugned order.'

in final order no. 85808/2023 in *re Savita Oil Technologies Pvt Ltd*.

7. In view of settled law as set out *supra*, we find no merit in the impugned order which is set aside to allow the appeal.

(Order pronounced in the open court on 30/11/2023)

(AJAY SHARMA)
Member (Judicial)

(C J MATHEW)
Member (Technical)

**/as*