

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

WEST ZONAL BENCH

EXCISE APPEAL NO: 87179 OF 2013

[Arising out of Order-in-Appeal No: BR/09/M-V/2013 dated 21st February 2013
passed by the Commissioner of Central Excise (Appeals), Mumbai Zone – I.]

Bhor Industries Ltd

Tanna House Annex, 11-A ND Parekh Marg
Mumbai - 400039

... Appellant

versus

Commissioner of Central Excise

Mumbai – V

Utpad Shulk Bhavan, Bandra-Kurla Complex
Mumbai - 400050

...Respondent

APPEARANCE:

Shri Mahesh Raichandani, 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: 87205/2023

DATE OF HEARING:

11/07/2023

DATE OF DECISION:

06/12/2023

PER: C J MATHEW

This appeal of M/s Bhor Industries Ltd is before us for the third
time, though, substantively, it is the second occasion as the order of

remand no. A/589/12/EB/C-II dated 7th June 2012 was solely on the ground that opportunity had not been accorded to the appellant by the first appellate authority for being heard and accordingly it was directed

‘6. As noted above, only one opportunity was granted and the appellant asked for adjournment. In view of this, we find merit in the contention of the appellant that the impugned order is passed in violation of the principles of natural justice, therefore the impugned order is set aside and the matter is remanded to the Commissioner (Appeals) to decide afresh in accordance with the direction given in the earlier remand order dated 20.07.2005. The appeal is disposed of by way of remand.’

In disposing off the appeal of M/s Bhor Industries Ltd against order¹ of Commissioner of Central Excise (Appeals), Mumbai, the Tribunal had held that

‘The appellants herein are aggrieved by the rejection of their claims of refund of duty of Rs. 17,77,763.93 and Rs. 60,04,411.01 on the ground that the lower appellate authority wrongly proceeded on the basis that duty burden has been passed on to their customers and for which reason he has not at all considered the Chartered Accountant’s certificate produced by them before the authorities below to substantiate their stand that they duty element has not been passed on to their customers. The text of memorandum of appeal before the Commissioner (Appeals) against the adjudication order establishes that there was no sale or buyer to pass on the

¹ [order-in-appeal no. ZBN/49/M-V/98 dated 8th February 1999]

incidence of duty by the appellants to their customers. This is being so, and since the appellants have also submitted the Customs Act, 1962's Certificate, which has not been looked into by the Commissioner (Appeal), we set aside the impugned order and remand the case of the appellants for considering the case on merit in the light of the CA certificate, to the Commissioner (Appeals), who shall pass fresh order after extending reasonable opportunity of being heard to the assessee. The appeal is thus allowed by way of remand.'

2. Thus, the issue for consideration now before us is the adherence of the impugned order² of Commissioner of Central Excise (Appeals), Mumbai Zone – I with the terms of remand which required the first appellate authority to examine the certificate issued by Chartered Accountant as also the factum of 'no sale' having occurred for enquiring into the shifting of the incidence of duty in particular.

3. Considering the nature of the appeal before us, it would be appropriate to examine the background of the issue itself. It all started with the filing of claim for refund, of ₹ 17,77,763.93 that was claimed to have been discharged as duties of central excise during the period from 1st March 1970 to 31st December 1975 and ₹ 60,04,411.01 for the period from 1st January 1980 to 31st December 1982, following the resolution of dispute on excisability of 'PVC films/sheets' deployed captively by the appellant which attained finality in order of the

² [order-in-appeal no. BR/09/M-V/2013 dated 21st February 2013]

Hon'ble Supreme Court in *Bhor Industries Ltd v. Collector of Central Excise* [1989 (40) ELT 280 (SC)]. Show cause notices came to be issued to the appellant proposing rejection of the said refund applications and the confirmation thereto by the Assistant Collector of Central Excise, upon challenge before the first appellate authority, came to be remanded to the original authority *vide* order dated 30th January 1992 for issue of speaking order. The consequential order with the same outcome, having been upheld by the first appellate authority, came up before the Tribunal as narrated *supra*. The claim for refund insofar as the earlier period is concerned was rejected on the ground that duty had not been paid 'under protest' and, therefore, did not merit consideration in claims preferred in 1989. Furthermore, insofar as both the claims are concerned, it was also held that the bar of 'unjust enrichment', mandated under section 11B of Central Excise Act, 1944, had not been overcome. It would, thus appear that the lower authorities have categorized the claims into three parts. The first for the period up to 20th November 1975, amounting to ₹ 16,81,671.79, which was held to be beyond the period of dispute covered by the decision of the Hon'ble Supreme Court; for the period remaining thereafter, till December 1975, that the appellant had not registered 'protest' in terms of rule 233B of Central Excise Rules, 1944 and that the whole of it, including the period from 1980-82 covered by the mandate of ineligibility, owing to 'unjust enrichment' in section 11B

of Central Excise Act, 1944.

4. We have heard Learned Counsel for the appellant and Learned Authorised Representative at length.

5. Learned Counsel for the appellant placed reliance upon the decision of the Hon'ble Supreme Court in *re Bhor Industries Ltd* to establish that duty liability had not arisen at all, and, therefore, question of 'under protest' should not have been an issue owing to absence of a formal mechanism for such payment. Furthermore, reliance was placed on the decision of the Hon'ble High Court of Calcutta in *Commissioner of Central Excise, Kolkata-III v. Alliance Udyog Ltd* [2011 (266) ELT 171 (Cal.)] holding that

'6. We find that the aforesaid Section 12B was substituted by the Amending Act 40 of 1991 with effect from 20th November, 1991 and thus, the said provision has no application to the claim of refund made earlier.

7. After going through the order passed by the Tribunal, we find that the Tribunal on consideration of the materials on record arrived at the conclusion that the assessee had sufficiently shown that the prices of the final product remained the same irrespective of the fact whether duty was being paid by them on the tapes or not and held that the Commissioner (Appeals) without considering any evidence as regards the aspect of unjust enrichment passed the order in favour of the Revenue. It appears from the assessment order that the assessee had produced materials showing the price of the different types of sacks party-wise for two periods, one

from November 20, 1986 to March 31, 1987 and the other from April 1, 1987 to September 15, 1987 indicating that the assessee did not add any amount even up to September 15, 1987. In other words, the price of the articles remained the same even after the period in question pointing out that nothing was added to the price although the assessee was asked to pay duty for the period which they initially paid on demand.

8. We, therefore, find that the point now sought to be urged before us by Mr. Roychowdhury by taking aid of Section 12B of the Act on the basis of onus is even not tenable as sufficient materials were placed by the assessee in support of their claim that there was no unjust enrichment and those statements have not been found to be false or unreliable.'

6. It was further pointed that the decision of the Hon'ble High Court of Bombay in *Commissioner of Central Excise, Mumbai – III v. CEAT Ltd* [2018 (361) ELT 420 (Bom)] had held that

'16. In view of the settled position of law, it is clear that the entitlement to refund and finalization of the provisional assessment under Rule 9B of the Central Excise Rules, 1944 is independent from the provisions of refund under Section 11B of the Central Excise Act, 1944. Even if the amendment made by the notification 45/99 with effect from 25-6-1999, is noted, only the procedure established under sub-section (2) of Section 11B of the Central Excise Act has been made applicable to the refund arising out of the finalization of the provisional assessment under Rule 9B of the Central Excise Rules, 1944. The procedure regarding unjust enrichment of finalization of provisional assessment will be applicable to the provisional assessment made after 1999 and not before

that date as the proviso to Rule 9B in the form of sub-rule (5) did not have a retrospective effect. The doctrine of unjust enrichment therefore would not be attracted to the refunds pertaining to the finalization of the provisional assessment for the period prior to 1999 and sub-rule (5) to Rule 9B of the Central Excise Rules, 1944 will not operate retrospectively. The proviso to Rule 9B(5) would be made applicable only with effect from 25-6-1999 and therefore the principle of unjust enrichment cannot be made applicable to the refunds arising out of finalization of the provisional assessments pertaining to the period prior to 25-6-1999 even if the assessments are finalized after 25-6-1999.'

7. According to Learned Counsel for the appellant, the decision of the Hon'ble Supreme Court on excisability was not limited to the period after the filing of classification list in 1975. Furthermore, it is the contention that the Tribunal had, in its remand order, authorized the lower authorities to consider the special circumstances in which the goods have been captively consumed, viz., absence of sale, in which the provisions of law for establishing that incidence of duty had not been shifted was not required to be evidenced.

8. We find from the impugned order that the issue of limitation has been dealt with in terms of rule 233B of Central Excise Rules, 1944 which came into force only from 11th May 1981. Consequently, and in the absence of any mechanism prescribing for 'protest', the presumption in the adjudication order of failure to 'protest' is not tenable. The appellant claims that 'protest' had been filed with the

department by mail, 'under certificate of posting'; that has not been denied. In this context, the finding of the first appellate authority that

'(7) Without prejudice, duty was required to be paid as; assessed by the proper officer-in~the -application in AR1 Form in respect of unit functioning under physical control or on the basis of Classification list approved by the proper officer. The question of protest would come when there is any difference between the claim of the assessee and that of the proper officer. In such case appellate remedy is available to the assessee. if the proper officer had acted against the claim of the assessee. If the assessee, does not exercise such appellate remedy then it is deemed that the assessee had accepted the contention of the proper officer even though he may or may agree with the contention of the proper officer. In such case payment of duty under protest does not arise. Merely stating that duty is paid under protest does not become or can be considered as duty is paid under protest. There has to be any ground for payment of duty under protest and the same should be backed with lawful action initiated by the assessee as provided in the law viz: by filing appeal with the proper appellate authority. Else, it becomes final and the term 'duty is paid under protest' does not have any meaning. In the present case there is no dispute that neither approval of any Classification list on the basis of which duty was paid by the appellant or the assessment order passed by the proper officer or any order passed by the proper officer regarding payment of duty by the appellant was pending before any authority. The same was also not subject matter before the Hon'ble Supreme Court in the order passed by the Hon'ble Supreme' Court referred above. Under such a circumstances the issue for the period prior to the filing of Classification list No. XIV/75 on 20.11.1975 claiming that the product to be

non-excisable as they are not marketable: which was approved by the Jurisdictional Assistant Commissioner conditionally on 09.12.1975 does not arise. Further, the dispute about excisability arose only after the Classification list No. XIV/75 was filed on 20.1.1.1975. It is this classification list that was the subject matter in appeal in Supreme Court. The issue prior to this period has attained finality and cannot be agitated after the matter was decided by Hon'ble Supreme Court. On this ground alone the refund claim for Rs. 17.77,763.93 for the period 01.03.1970 to 31.12.1975 is liable for rejection and the same has been correctly rejected as time barred.'

does not appear to be consistent with the provisions of law. The first appellate authority has taken upon itself to infer that, with certain eventualities not occurring, presumption of 'not paid duty under protest' was to be operated as default. We find from the decision of the Hon'ble Supreme Court, in *re Bhor Industries Ltd*, that classification list came to be filed for the first time in November 1975. At the same time, in the same judgment, it has been noted that the classification list had been approved by the competent authority in December 1977 before which, in a separate dispute, the first appellate authority in order of June 1974 had held the goods not liable to excise duty. In these circumstances, the impugned order should have ascertained the context in which the appellant had, despite favourable rulings, been required to pay 'duties' for the period prior to December 1975. It was also necessary for the lower authorities to ascertain the discharge of duty liability insofar as the impugned goods are

concerned for the period prior to filing of classification list which apparently appears to have been done for the first time in November 1975 and, that too, approved conditionally.

9. The first appellate authority appears to have decided the applicability of 'unjust enrichment' on the basis of statutory presumption and the decision of the Tribunal in *Jyoti Structures Ltd v. Commissioner of Customs & Central Excise, Aurangabad 2003 (156) ELT 853 (Tri. - Mumbai)*].

10. Learned Authorised Representative had placed reliance upon the decision of the Hon'ble Supreme Court in *Sahakari Khand Udyog Mandal Ltd v. Commissioner of Central Excise & Customs [2005 (181) ELT 328 (SC)]* and in *Union of India v. Solar Pesticide Pvt Ltd [2000 (116) ELT 401 (SC)]* both of which have applied principles set out in the decision of the Hon'ble Supreme Court in *Mafatlal Industries Ltd v. Union of India [1997 (89) ELT 247 (SC)]*. The Tribunal had, in its substantive remand, directed that certificate of Chartered Accountant on the absorption of disputed duty liability be taken into consideration. It would also appear that the Tribunal was cognizant of the decision of the Hon'ble Supreme Court in *Union of India v. Solar Pesticide Pvt Ltd [2000 (116) ELT 401 (SC)]* and its implication when issuing the direction to the first appellate authority. It was, therefore, incumbent upon the Commissioner of Central Excise

(Appeals) to ascertain the factual position relating to the said duties claimed to have been discharged by the appellant which had not been undertaken in the impugned order.

11. In these circumstances, and notwithstanding the lapse of time since the dispute on excisability was taken up and concluded and its appearance before the the Tribunal for the third time, we are constrained to direct a fresh decision after taking the submission on facts, as well as certificate of the Chartered Accountant, into account. To enable this, we set aside the impugned order and remand the matter back to the first appellate authority on the terms and conditions directed by the Tribunal formerly and subject to the law as judicially determined.

(Order pronounced in the open court on 06/12/2023)

(AJAY SHARMA)
Member (Judicial)

(C J MATHEW)
Member (Technical)