CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, MUMBAI

REGIONAL BENCH - COURT NO. I

Excise Appeal No. 85483 of 2020

(Arising out of Order-in-Appeal No. NA/GST/A-III/MUM/224/2019-20 dated 29.11.2019 passed by the Commissioner (Appeals-III), CGST & Central Excise, Mumbai.)

M/s Goldwin Medicare Ltd. .... **Appellant**
90, Dewan & Sons Udyog Nagar,
Palghar (W), District Palghar- 401 404.

Versus

The Assistant Commissioner of Central Excise, Palghar .... **Respondent**
CGST & Central Excise, Palghar
Division-III, Mahavir Chamber,
Kacheri Road, Palghar- 400 051.

Appearance:

Shri Shri Pankaj Pai, Consultant for the Appellant

Shri P.K. Acharya, Authorized Representative for the Respondent

CORAM:

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

FINAL ORDER NO. A/85049/2024

Date of Hearing: 30.10.2023
Date of Decision: 31.01.2024

Per: M.M. PARTHIBAN

This appeal has been filed by M/s Goldwin Medicare Limited, Palghar (herein after, referred to as 'the appellants'), assailing Order-in-Appeal No. NA/GST/A-III/MUM/224/2019-20 dated 29.11.2019 (herein after, referred to as 'the impugned order') passed by the Commissioner (Appeals-III), CGST & Central Excise, Mumbai.

2.1. Briefly stated, the facts of the case are that the appellants herein is engaged in the manufacture of excisable goods viz., 'surgical dressing' falling under Chapter 30 of the Schedule to the

Central Excise Tariff Act, 1985. The appellants initially filed refund claim for Rs. 29,30,174.60/- on 06.08.2007 on the ground that they had wrongly paid the Central Excise Duty on Retail Sale Price (Maximum Retail Price- MRP) basis during the period of January and February, 2007. The said refund claim was forwarded to the jurisdictional Range Superintendent for verification of such a refund claim and upon receipt of their report dated 24.09.2007, stating that the claimant of the refund i.e., appellants, had not submitted upon request the detailed information for such verification of the excess Excise duty payment. Accordingly, the refund claim filed by the appellants were returned to them on 04.10.2007 as the same is incomplete, owing to the reason that it was not accompanied with supporting documents.

2.2 Subsequently, the appellants resubmitted the refund claim on 10.03.2008 and the same was verified by the jurisdictional Range Superintendent and vide their letters dated 28.3.2008 & 03.04.2008, it was reported that the appellants had paid Central Excise duty on their own volition without any specific instruction from the Department, even though the products manufactured and cleared is classifiable under tariff item 3005 1000, 9018 3100, 5602 1000 which were not covered under the MRP based scheme of assessment during the relevant time. It was also reported that the assessable value of the products shown in the statement appended to the refund claim and the details of the product that were shown in ER.3 monthly Returns for January, 2007 and February, 2007 were unable to be correlated, and it was not possible to correlate and to identify the exact amount of excise duty payment made in respect of the clearances during the disputed period. Accordingly, show cause notice dated 17.04.2008 was issued for rejection of the refund claimed by the appellants on account of delay in filing it and on the grounds of unjust enrichment providing opportunity for the appellants to submit documents in evidence of their claim for refund. The appellants while submitting their reply dated 16.05.2008 before original authority i.e., the Assistant Commissioner, had also raised the contention that they had issued invoice for sale of goods with higher amount of excise duty on MRP basis during the disputed period, but did not collect the same from their customers as they had raised credit/debit notes, supporting such stand along with Chartered Accountant's Certificate. This issue had been initially examined by the original authority and he had observed that from the bank statement of the appellants and the letters given by their customers, it was not forthcoming that the amount adjusted was against the excise duty charged by the appellants on higher basis on account of MRP based valuation. In an illustrative cases examined by the original authority on the basis of letters of the customer M/s Rupashree Healthcare P Ltd., dated 31.07.2007, M/s Galaxy Medicate dated 04.07.2007, he stated that on the contrary it appeared that the appellants had already collected the excise duty charged on the invoice. There was no evidence in respect of non-availment of such higher amount as Cenvat Credit or its reversal thereof in Cenvat account of customers. Hence the original authority concluded that excess/higher Excise duty paid by the appellants was actually borne by their customers. On the above basis, the Assistant Commissioner, Central Excise, Palghar Division, Thane-II had rejected the Refund Claim filed by the appellants by issue of an Order-in-Original No. 156/2008-09 dated 09.06.2008. Feeling aggrieved of the said Original order, the appellants had filed an appeal before the Commissioner (Appeals), Central Excise, Mumbai Zone-I, who by upholding the order of the original authority had rejected the appeal filed by the appellants vide Order-in-Appeal No. SB/65/Th-II/10 dated 25.03.2010. Having been aggrieved with the above order of the Commissioner (Appeals), the appellants had filed an appeal before the Tribunal and the matter was decided by issue of Final Order No. A/89213/17/SMA dated 21.07.2017, by remanding the matter to the original authority to pass a fresh order. The relevant paragraph of the said order is extracted below:

> *"5. I find that as regard the time bar, since refund was admittedly filed first-time within the stipulated time as prescribed under Section 11 B. Subsequent re-submission of refund claim cannot be taken as filing of refund claim first time. The judgements relied upon by the Ld. Counsel support their claim. I hold that the refund is not time bar. As regards the unjust enrichment, though the appellant have submitted C.A. certificate, affidavit of the director, copies of credit note and the ledger of the buyers, but as per findings of both lower authorities, it is observed that they have not properly verified these documents. Even though excise duty was charged initially in the invoice but when subsequently credit notes were issued, the amount of credit*

note stand credited into account of buyer, accordingly incidence of such amount said to have been passed on to the buyer of the goods. However, the actual position whether treatment of said credit note is given to the account of the buyer and whether the transaction was correctly adjusted can only be seen from the buyer's ledger which has not been properly verified by the lower authorities. ***Accordingly as regard the unjust enrichment, the adjudicating authority must verify all these documents and if it is established that effect of the credit note has been given in the buyer's account*** *and even though initially amount was collected but subsequently it was returned by giving effect of credit note, incidence of excess paid duty cannot be said to have passed on. As per my above discussion, impugned order is set aside, matter is remanded to the original adjudicating authority to pass a fresh order by considering above observations. Appeal is allowed by way of remand."*

(Emphasis supplied)

2.3 On the basis of the above directions of the Tribunal, the Original adjudicating authority while deciding the issue afresh in *de novo* proceedings, had given personal hearing opportunity to the appellants on 14.06.2008 and had also taken on record the written reply of the appellants vide letter dated 10.04.2008. However, in view of the specific directives of the Tribunal, the Original authority had *inter-alia* sought the details of buyer's ledgers (separate for each buyer) , covering the invoices issued to them during the months of January 2007 and February 2007 and subsequent credit notes issued in this regard along with other requisite documents. The reply of the appellants dated 04.10.2008, since did not provide a specific details, the original authority had sought the requisite details from the appellants again on 03.12.2008. Upon further reminder letters issued by the original authority on 08.02.2019 and 19.02.2019, the appellants had by their letter dated 01.03.2019 submitted a written reply. The original authority had taken into account all the written submissions given by the appellants and again had given a personal hearing to them on 02.05.2019, before the issue of Order-in-Original No.04/19-20 dated 29.05.2019. In the said order, the Original authority had sanctioned the refund amount of Rs.29,30,174/- under Section 11(B)(2) of the Central Excise Act, 1944; however the said amount was credited to the Consumer Welfare Fund in terms of proviso (d) to Section 11(B)(2) ibid, as he had concluded that the appellant had passed on the incidence of higher duty to the buyer of the goods. Being aggrieved of the above order, the appellants had filed an appeal before the Commissioner (Appeals), who vide impugned order dated 29.11.2019 had decided the case by upholding the order of the original authority dated 29.05.2019, and disposed of the appeal of the appellants. Having been aggrieved with the impugned order of the Commissioner (Appeals) dated 29.11.2019, the appellants have filed this appeal before the Tribunal.

3. Heard both sides and perused the records of the case. I have also considered the additional written submissions given in the form of paper books by learned Advocate for the appellants as well as Authorised Representative for the Revenue.

4. Brief issues for consideration in the present case before me are the following:

> (i) whether the appellants assessee is eligible for their claim of refund of Central Excise duty paid by them at a higher amount during January 2007 and February 2007 under Section 11B of the Central Excise Act, 1962, and
>
> (ii) whether the refund of duty, if eligible, is payable to the appellants instead of being credited to the Consumer Welfare Fund in terms of Section 11B ibid.

5. In order to examine the above issues on the basis of the legal provisions of the law and on the basis of the factual evidences, I would like to peruse the provisions of Section 11 B ibid, which is extracted below:

> ***"Section 11B. Claim for refund of duty and interest, if any, paid on such duty** . -*
>
> *(1) Any person claiming refund of any [1][duty of excise and interest, if any, paid on such duty] may make an application for refund of such [2][duty and interest, if any, paid on such duty] to the Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise before the expiry of one year from the relevant date in such form and manner as may be prescribed and the application shall be accompanied by such documentary or other evidence (including the documents referred to in section 12A) as the applicant may furnish to establish that the amount of [1][duty of excise and interest, if any, paid on such duty] in relation to which such refund is claimed was collected from, or paid by, him and the incidence of such [2][duty and*

interest, if any, paid on such duty] had not been passed on by him to any other person :

***Provided** that where an application for refund has been made before the commencement of the Central Excises and Customs Laws (Amendment) Act, 1991, such application shall be deemed to have been made under this sub-section as amended by the said Act and the same shall be dealt with in accordance with the provisions of sub-section (2) substituted by that Act :*

***Provided** further that the limitation of one year shall not apply where any [2][duty and interest, if any, paid on such duty] has been paid under protest.*

(2) If, on receipt of any such application, the Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise is satisfied that the whole or any part of the [1][duty of excise and interest, if any, paid on such duty] paid by the applicant is refundable, he may make an order accordingly and the amount so determined shall be credited to the Fund :
***Provided** that the amount of [1][duty of excise and interest, if any, paid on such duty] as determined by the Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise under the foregoing provisions sub-section shall, instead of being credited to the Fund, be paid to the applicant, if such amount is relatable to -*

(a) rebate of duty of excise on excisable goods exported out of India or on excisable materials used in the manufacture of goods which are exported out of India;

(b) unspent advance deposits lying in balance in the applicant's account current maintained with the Principal Commissioner of Central Excise or Commissioner of Central Excise;

(c) refund of credit of duty paid on excisable goods used as inputs in accordance with the rules made, or any notification issued, under this Act;

(d) the [1][duty of excise and interest, if any, paid on such duty] paid by the manufacturer, if he had not passed on the incidence of such [2][duty and interest, if any, paid on such duty] to any other person;

(e) the [1][duty of excise and interest, if any, paid on such duty] borne by the buyer, if he had not passed on the incidence of such [2][duty and interest, if any, paid on such duty] to any other person;

(f) the [1][duty of excise and interest, if any, paid on such duty] borne by any other such class of applicants as the Central Government may, by notification in the Official Gazette, specify :

***Provided** further that no notification under clause (f) of the first proviso shall be issued unless in the opinion of the Central*

Government the incidence of [2][duty and interest, if any, paid on such duty] has not been passed on by the persons concerned to any other person.

(3) Notwithstanding anything to the contrary contained in any judgment, decree, order or direction of the Appellate Tribunal or any Court or in any other provision of this Act or the rules made thereunder or any other law for the time being in force, no refund shall be made except as provided in sub-section (2).

(4) Every notification under clause (f) of the first proviso to sub-section (2) shall be laid before each House of Parliament, if it is sitting, as soon as may be after the issue of the notification, and, if it is not sitting, within seven days of its re-assembly, and the Central Government shall seek the approval of Parliament to the notification by a resolution moved within a period of fifteen days beginning with the day on which the notification is so laid before the House of the People and if Parliament makes any modification in the notification or directs that the notification should cease to have effect, the notification shall thereafter have effect only in such modified form or be of no effect, as the case may be, but without prejudice to the validity of anything previously done thereunder.

(5) For the removal of doubts, it is hereby declared that any notification issued under clause (f) of the first proviso to sub-section (2), including any such notification approved or modified under sub-section (4), may be rescinded by the Central Government at any time by notification in the Official Gazette.

***Explanation.** - For the purposes of this section, -*

(A) "refund" includes rebate of duty of excise on excisable goods exported out of India or on excisable materials used in the manufacture of goods which are exported out of India;

(B) "relevant date" means, -

(a) in the case of goods exported out of India where a refund of excise duty paid is available in respect of the goods themselves or, as the case may be, the excisable materials used in the manufacture of such goods, -
(i) if the goods are exported by sea or air, the date on which the ship or the aircraft in which such goods are loaded, leaves India, or

(ii) if the goods are exported by land, the date on which such goods pass the frontier, or

(iii) if the goods are exported by post, the date of despatch of goods by the Post Office concerned to a place outside India;

(b) in the case of goods returned for being remade, refined, reconditioned, or subjected to any other similar process, in any

factory, the date of entry into the factory for the purposes aforesaid;

(c) in the case of goods to which banderols are required to be affixed if removed for home consumption but not so required when exported outside India, if returned to a factory after having been removed from such factory for export out of India, the date of entry into the factory;

(d) in a case where a manufacturer is required to pay a sum, for a certain period, on the basis of the rate fixed by the Central Government by notification in the Official Gazette in full discharge of his liability for the duty leviable on his production of certain goods, if after the manufacturer has made the payment on the basis of such rate for any period but before the expiry of that period such rate is reduced, the date of such reduction;

(e) in the case of a person, other than the manufacturer, the date of purchase of the goods by such person;

(ea) in the case of goods which are exempt from payment of duty by a special order issued under sub-section (2) of section 5A, the date of issue of such order;

(eb) in case where duty of excise is paid provisionally under this Act or the rules made thereunder, the date of adjustment of duty after the final assessment thereof;

[3]*[(ec) in case where the duty becomes refundable as a consequence of judgment, decree, order or direction of appellate authority, Appellate Tribunal or any court, the date of such judgment, decree, order or direction;]*

(f) in any other case, the date of payment of duty."

6. From the plain reading of above legal provisions, it transpires that in order to determine whether the claim for refund is eligible to be refunded to him, a person has to submit to the jurisdictional authority within the prescribed period, an application for refund in the form and manner prescribed thereof, providing the documents to establish that the refund amount which is claimed was collected from him or paid by him, and the incidence of such duty had not been passed on by him to any other person. The amendments made in the said legal provisions, one given only for completeness, as these came into effect subsequent to the disputed period and thus do not have any impact and are not relevant to the present case in hand.

1. Substituted for the words "duty of excise", by Finance Act, 2008 w.e.f. 10.5.2008.
2. Substituted for the words "duty", by Finance Act, 2008 w.e.f. 10.5.2008.
3. Inserted by Finance Act, 2007 w.e.f. 11.5.2007.

7.1. In the present case, the issue of submission of refund application within the prescribed time, had already been decided by this Tribunal vide Final Order No. A/89213/17/SMA dated 21.07.2017 in the first round of litigation by holding that the submission of refund application by the appellants is not time barred. This issue is also not in dispute, as the application for refund submitted by the appellants has been taken up for consideration by the Authorities below, while examining the case on merits.

7.2 Further, I find that Notification No. 2/2006-C.E. (N.T.), dated 1-3-2006, as amended, issued in exercise of the powers conferred by sub-section (1) and sub-section (2) of section 4A of the Central Excise Act, 1944 (1 of 1944) provide for the list of goods on which the payment of central excise duty has been prescribed on the basis of Retail Sale Price (MRP) along with allowable deduction towards abatement provided as the percentage of retail sale price in a Table annexed to the said notification. On perusal of the list of goods covered under the Retail Sale Price (MRP) based levy of Central Excise duty, as listed in the Table annexed to the said Notification, I find that the goods classifiable under tariff item 3005 1000, 9018 3100, 5602 1000 being manufactured and cleared by the appellants are not at all covered therein. In other words, as per the legal provisions, payment of central excise duty in respect of the goods manufactured by the appellants as above, are required to be paid at the prescribed rate of excise duty, only on the assessable value and not on the basis of the MRP/Retail Sale Price less abatement. Thus payment of duty on the basis of MRP/Retail Sale Price less abatement for two months by the appellants, is not required and the same being higher, in the present case, than the duty payable as per law, the differential higher amount paid in excess is refundable. I also find that this issue has also been settled during the adjudication of the case in *de novo* proceedings after detailed examination of the various documents submitted by the appellants. The only issue that remained in dispute, is whether the amount of refund is payable to the appellants or is it payable to the Consumer Welfare Fund.

8.1 The sub-section (2) to Section 11B ibid clearly provide that in case any duty paid by the applicant appellants is determined as refundable, the competent authority may make an order accordingly and the amount so determined shall be credited to the Consumer Welfare Fund established under Section 12C ibid. The exception to the above is only in respect of specific cases as detailed in the clause (a) to (f) of sub-section (2) to Section 11B ibid. From the facts of the case, it is clear that this is not the case of rebate of duty of excise on excisable goods exported out of the country, unspent advance deposits lying in the applicant's account current, refund of credit of duty paid on excisable goods used as inputs or specified class of persons who had borne the incidence of duty as notified by Government and thus not covered under clauses (a), (b), (c) and (f). The authorities below have also examined the facts of the case and determined that the present case does not fall under the category of duty paid by the manufacturer appellants, who had not passed on the incidence of such high amount of duty to any other person. In fact, providing certain illustrative cases, the original authority had mentioned in his order that few buyers had in turn had paid higher amount of excise duty and duly borne the incidence of such higher excise duty, and there is no record to state that they had not taken Cenvat credit of the same, thus proving no possibility of coverage under clause (e). Thus on facts, the authorities below had come to the conclusion that the present case does not get covered under the clause (d). The relevant paragraphs of the impugned order providing such factual examination of the case and the conclusion as above are extracted below:

> *"12.1 From the above-referred observation of the Hon'ble Tribunal, it is crystal clear that in order to decide the issue of unjust enrichment, the Tribunal has observed that since in the instant case excise duty was charged initially in the invoice, but when subsequently credit notes were issued, the amount of credit note stand credited into account of buyer, accordingly incidence of such amount said to have been passed on to the buyer of the goods. However, the actual position whether treatment of said credit note is given to the account of the buyer and whether the transaction was correctly adjusted can only be seen from the buyers' ledger, which has not been properly verified.*
>
> *12.2 In this context I find that in the instant case / matter, the Tribunal has categorically / specifically observed that in order to*

decide the applicability or otherwise of the unjust enrichment doctrine, verification of the buyers' ledger is only the solution.

12.3 In this regard I find that even after remand of the case to the original adjudicating authority with specific observations / directions to verify buyers ledgers, the appellants have failed to submit these documents (buyers ledgers') to the AA / RSA, in-spite of repeated specific requests / reminders made by the AA from time to time.

xx xx xx xx xx

12.3.3 In this regard I also find that the Deptt./AA has requested the appellant to provide "Customers individual ledger accounts" covering the period i.e. invoices issued during the months of January-2007 and February-2007 and subsequent credit/Debit notes issued in this regards, so as to ascertain facts about accounting of Invoices / Credit Notes / Debit notes and receipt of payments from such individual customers. These documents would have also highlighted the facts about recovery/non-recovery of Central Excise duty from individual customers; however the appellant has not furnished these ledgers; hence, in absence of these ledgers it is not possible to ascertain if the effect of such credit notes was given in the books of accounts or otherwise; because the other documents such as P&L Account and the Balance Sheet do not indicate that the incidence of such duty was borne by the appellant either by expensing out the same in P&L Account or by indicating the same as "Receivable Asset" in the Balance Sheet;

12.3.4 In this context it is noticed that in response to the AA's (Appellate Authority's) request / reminder dated 03/12/2018 (even followed-up vide letters dated 08/02/2019 & 19/02/2019) to provide these requisite documents ("Customers individual ledger accounts"), the appellant, in his compliance vide his letter dated 01/03/2019 (submitted on 06/03/2019), has stated / informed as under:

> *"that the relevant copies of Buyers Ledgers (separate for each buyer). covering the relevant invoices were already submitted when the refund claim was initially filed by us along with the Credit notes and Debit notes for the said period. The copy of letter dated 06.08.2007 for submission of refund claim and letter dated 10.03.2008 duly acknowledged, is enclosed herewith as (EXHIBIT-A-1 and A-2)."*

However, I find that these two letters (dated 06.08.2007 & 10.03.2008) do not reflect / depict anything with regard to submission of these requisite ledgers by the appellants.

12.3.5 In this regard, it has also been observed that in spite of repeated reminders right from the date of filing of the claim till the date of present proceedings, the appellant has avoided / ignored to provide documentary evidence to prove non-availment of Cenvat Credit by the recipient of said goods. As discussed above I find that the initially the burden of Central Excise duty was passed on by the appellant to their customers by way of *issue of invoices and there is every likelihood that the recipient of goods has availed Cenvat credit in his books of accounts for payment of Central Excise duty on his final products (if used as raw material for manufacture of excisable goods), or has expensed out the portion of such duty in his books of accounts (in case the customer is non-excisable or a trader). In either case I find that the burden of such excise duty automatically gets transferred to final customers. I therefore find that in absence of any direct and tangible proof evidencing to the contrary, one is unable to accept appellant's contention that the burden of proof was borne by him and not transferred to the actual consumer."*

Thus, I find that there is no case made out by the appellants in their appeal to claim for refund of higher excise duty and that it is liable to be refunded to them. I also find that on the contrary the impugned order has clearly laid down with evidence as to why the refundable amount is payable to the Consumer Welfare Fund. Further, I also find that despite a number of opportunities being given to the appellants for producing relevant documents for proving the element of unjust enrichment angle, particularly that the incidence of higher amount of excise duty having not been passed on by evidencing relevant credit notes for having credited respective amounts in the buyer's account, the same was not produced before the authorities below even at the time of *de novo* proceedings.

8.2 On the issue of sanction of refund and unjust enrichment in respect of Central Excise/Customs duties, the Hon'ble Supreme Court of India had laid down the overarching principles to be followed in the case of *Mafatlal Industries Limited Vs. Union of India* reported in 1997 (89) E.L.T. 247 (S.C.) in Civil Appeal No. 3255 of 1984 and others, by holding that all claims in respect of refunds of Central Excise and Customs duties except where the levy is held to be unconstitutional, is to be preferred and adjudicated upon under Section 11B of the Central Excise Act, 1944 or under Section 27 of the Customs Act, 1962; and subject to claimant applicant establishing that burden of duty has not been passed on to third party. In the present case, on examination of the legal aspects and facts of the case, it is clear that this is not the case of unconstitutional levy, but payment of higher amount of excise duty on its own volition by the appellants, for which they claimed the refund of such higher amount. It is also not the case of the appellants that they were required to pay or had paid such higher duty under protest. Thus, any refund of excise duty is required to be examined for all aspects of Section 11B ibid and in case of such refund being eligible to be paid, then in the absence of the proof of the burden of duty being not passed on to any other person, such refund is required to be credited to the Consumer Welfare Fund.

8.3. I also find that issue of initial payment of higher amount of duty in the invoices issued by a person claiming refund and later by issue of debit/credit notes, such higher amount of duty being claimed to have not actually been passed on to the customer, or without the customer having been required to pay the higher amount on the account of such invoices indicating higher amount of duty, and thus may become eligible to claim refund, had been decided in the case of *Jyoti Limited Vs. Commissioner of Central Excise, Vadodara-I-* 2008 (232) E.L.T. 832 (Tri.-Ahmd.) by the Tribunal as follows:

> *"The appellants are engaged in the manufacture of switch-gear and other products falling under Chapter 85 of CETA, 1985. There are two appeals on similar issue and therefore both are taken together for disposal.*
>
> *2. In first case, the appellant had cleared the spares along with 11 KV switchgears of Rs. 6,70,675/-. In the second case, the appellants had cleared the insulation valued at Rs. 3,16,275.42.*
>
> *3. In the first case, the appellants subsequently noticed after issue of invoice that the actual value of spares agreed to at the time of entering into contract was only Rs. 1 lakh whereas while preparing invoice, there was a clerical error and invoice came to be prepared of Rs. 6,70,675/- for spares resulting in excess payment of duty to the extent of Rs. 94,384/- which they claimed as refund. In second case also, the actual assessable value was Rs. 8,871.67 whereas they had charged Rs. 3,16,275.42 which resulted in excess payment of Central Excise duty of Rs. 49,184.61 which was claimed as refund.*
>
> *4. The lower authorities have rejected the refund claims on the ground that the appellant had issued credit note for the differential value of the spares and insulation and in view of the Larger Bench decision of the Tribunal in Grasim Industries case 2003 (153) E.L.T. 694, once credit note is issued unjust enrichment is attracted and appellants are not entitled to refund.*
>
> *5. Heard both sides. Shri J.C. Patel, learned Advocate on behalf of the appellant submits that the department has taken a restricted view in holding that just because the credit note has been issued, refund is not admissible. He relies on several decisions of the Tribunal as detailed below, the High Court and in one case by Supreme Court, wherein it was held that when the buyer had not at all paid the invoice amount, issue of credit note would not affect the refund claim and unjust enrichment would not apply.*
>
> *xx xx xx xx xx*

7. I find that from the records of the case and the arguments advanced by the learned Advocate show clearly that there was a clerical error while preparing invoice and making payment of Central Excise duty to the department. It is also quite clear that the ***invoiced amount in excess was never received by the appellant and accordingly the duty amount claimed as refund had also not been passed on to the buyer at any stage of transaction.*** *Lower authorities have simply rejected the refund claim only on the ground that credit note has been issued. Further, I also find that at no stage, there is an observation that the amount was originally received and subsequently paid back to the supplier by way of issue of credit note. Needless to say that department will be at liberty to re-open the issue in case the appellant claim that they had never received the excess amount invoice towards spares and insulation turns out to be false.*

8. In view of the above discussion, both appeals are allowed with consequential relief."

(Emphasis Supplied)

From the factual details of the case decided by the Tribunal in the case of *Jyoti Limited (supra)*, and the facts of the present case before me, I find that this is not the case where the appellants have not received the higher amount of excise duty from their customers or have they demonstrated with evidences to the effect that such higher amount of the excise duty was returned back to the customer. In view of the facts of the present case being not similar to the above decided case by the Tribunal, I find that the ratio of such order is not applicable to the case before me.

8.4 Further, the appellants' claim is that there is no requirement for showing the amount of refund continuously for years as 'receivable' in the books of account on the basis of judgement of the Hon'ble High Court of Bombay in the case of *Commissioner of Central Excise, Pune-I Vs. Sandvik Asia Ltd.,* reported in 2015 (323) E.L.T. 431 (Bom.). I find that the said judgement of the Hon'ble High Court of Bombay is not relevant to the present case, as the facts are entirely different and thus the same ratio is not applicable to the present case. The relevant paragraphs of the above said judgement is extracted and given below for ease of reference:

"This Appeal of the Revenue challenges the order dated 4th December 2013 passed by the Customs, Excise and Service Tax Appellate Tribunal, West Zonal Bench, Mumbai [2014 (303) E.L.T. 138 (Tribunal)].

2. By the said order, the Revenue's Appeal has been dismissed. The Revenue was in appeal against the order of the Commissioner (Appeals). He held that the request of the Assessee/Respondent

> *for refund is not hit by the bar of unjust enrichment. That bar or that principle will have no application since the Assessee had paid the amount at the time of hearing of stay application. It was a pre-condition imposed by the competent Court/Authority for grant of stay pending disposal of the main proceeding. Therefore, Section 11B of the Central Excise Act 1944 is not attracted to such a case.*
>
> *xx xx xx xx xx*
>
> *5. Repeatedly the Hon'ble Supreme Court has clarified that section 11B, which deals with the claims of refund of duty, will not apply to a case where the amount in question was deposited in compliance with the interim order. If the amount is directed to be deposited not towards duty liability but as a condition for grant of interim relief or interim stay, then this question of unjust enrichment would not arise at all."*

The present case does not deal with payment of duty as a pre-condition for grant of stay, and thus I find that the above judgement is not at all relevant to the present case in hand before me.

9. In view of the foregoing detailed discussions, analysis and findings recorded in the above paragraphs, I am of the considered view that the appeal filed by the appellants claiming for refund of higher excise duty paid by them instead of being credited to the Consumer Welfare Fund does not have any merits and is thus liable to be dismissed.

10. Therefore, I am of the considered view that the impugned order dated 29.11.2019 passed by the learned Commissioner of CGST and Central Excise (Appeals-III), Mumbai is sustainable, both on legal basis and on the facts of the case, and thus does not require any interference.

11. In the result, the appeal filed by the appellants is dismissed.

(Order pronounced in open court on 31.01.2024)

(M.M. Parthiban)
Member (Technical)

Sinha