

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

WEST ZONAL BENCH

**CUSTOMS APPEAL NO: 86769 OF 2021
WITH
CUSTOMS APPLICATION NO: 85485 OF 2022
(on behalf of appellant)**

[Arising out of Order-in-Appeal No: PUN-CT-APPII-000-013-2021-22 dated 30th June 2021 passed by the Commissioner of Central Tax (Appeals), Pune – II.]

Amba River Coke Ltd
Dolvi Works, Geetapuram, Dolvi, Raigad - 402107 *... Appellant*

versus

Commissioner of Customs
GST Bhavan, 41/A, Sassoon Road, Pune – 411 001 *...Respondent*

APPEARANCE:
Shri Vipin Jain and Shri Karthik Dedhia, Advocates for the appellant
Shri Ram Kumar, Assistant Commissioner (AR) for the respondent

CORAM:

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

FINAL ORDER NO: 85837/2024

DATE OF HEARING: 20/02/2024
DATE OF DECISION: 19/08/2024

PER: C J MATHEW

Altruism is not a desirable characteristic in the exchequer; indeed,
to the contrary, it is to be eschewed. And that its tax arm at the frontiers is

seemingly sloshing with, unlooked for and unanticipated, ‘milk of human kindness’, at least as far as these proceedings are concerned, gives cause for pause; but then, enrichment of the Consumer Welfare Fund is surer satisfaction than that an assessee should. That is the shadow over this dispute in which duties of customs charged ‘provisionally’ on M/s Amba River Coke Ltd on import of two consignments of ‘iron ore’ of ‘blast furnace pellet feed’ grade was found to have been in excess of that sanctioned by law and, consequent to finalisation of assessment, refunded to them but, upon challenge mounted at the instance of the jurisdictional Commissioner of Customs, was ordered to be returned for parking in the Fund. The sanctioning authority under section 27 of Customs Act, 1962, had, in its wisdom, considered the documentation furnished by the claimant to be satisfactory on all three counts: limitation, merit and unjust enrichment. There is no dispute as to the correctness of the final assessment and it is only about the claim of adequacy of discharge of onus of establishing that the amount so refunded had not ‘unjustly enriched’ them at the cost of their customers presumed by law to have borne the incidence of the excess amount so levied.

2. The bills of entry no. 9424384/24.04.2017 and 9762026/19.05.2017 submitted by appellant for clearance 164773 and 164284 metric tons of ‘iron ore’ were assessed provisionally under section 18 of Customs Act, 1962 to ₹ 22,16,92,257 and ₹ 20,40,54,191 respectively as duties of customs owing to non-sufficiency of documents and pendency

of test report necessary for a final call on valuation given that supplier was 'related' to them. Upon finalization by orders of 14th October 2019 and 9th October 2019 respectively, the excess payment was determined following which claim for refund of ₹ 1,88,39,557, representing differential 'basic customs duty' and 'energy cess', was filed with the competent authority designated in section 27 of Customs Act, 1962 on 11th March 2020 who allowed the same but for ₹ 9,76,159 retained towards interest liability pending on five other consignments. Aggrieved that the documentary evidence with the application did not suffice to overcome the presumption, under section 28D of Customs Act, 1962, of 'having passed on the incidence' of the excess duty collected in the sale of goods manufactured by them, disbursement of the excess to the appellant was challenged before the first appellate authority and the order of Commissioner of Central Tax (Appeals-II), Pune considered the plea therein of non-application of mind in relying solely on certificate of chartered accountant and, that too, referring to 'receivable' as on 31st January 2020 without attesting to provisioning for such in the financial statements of 2017-18 and 2018-19 to direct recovery of amount as erroneously refunded for deposit in the Consumer Welfare Fund.

3. With the sanctioning authority having disposed off the claim in favour of the appellant on merit as well as entitlement, the appeal at the instance of jurisdictional Commissioner of Customs through appellate recourse, instead of executive initiative under section 28 of Customs Act,

1962, limits itself to facts on record and deficiencies in the application; any other perspective, particularly in the light of mechanism in section 28 of Customs Act, 1962, is tantamount to issue of fresh notice at stage of appeals. It was, thus, incumbent upon the reviewing authority to specify the requirements that would pass muster for permitting the assessee to retain the sanctioned refund instead of an 'open-ended' assertion of insufficiency. We take notice that the appeal of Commissioner of Customs, beyond criticizing the evaluation undertaken by the original authority, specifies that the certificate of chartered accountant, relied therein, is bereft of any information about provisioning for 'receivables' prior to 2020 and that sale invoices of assessee should have been scrutinized.

4. Learned Counsel for appellant submitted that the impugned order has been issued on assumptions of section 28C and section 28D of Customs Act, 1962 being applicable when the obvious lack of applicability, arising from captive consumption, should have been all too clear to the adjudicating authority. It was contended by him that provisional assessment was not a cavil of the appellant at the time of clearance and that refund could, in any case, be contemplated only upon finalization and, thus, logically acknowledged in the books of accounts only then. He argued that provisioning at any time was sufficient without having to parallel the course of the dispute and cited various decisions of the Tribunal as well as judgement of the Hon'ble High Court of Bombay

in *Commissioner of Central Excise, Pune-I v. Sandvik Asia Ltd* [2015 (323) ELT 431 (Bom)]. He submitted that, in the absence of challenge to contents of certificate of chartered accountant in the appeal, the first appellate authority had travelled beyond the scope of appeal to pick at the mode adopted by the lower authority and even suggest that documents that were not before him should have been scrutinized by that authority.

5. Learned Authorised Representative refuted the submission of Learned Counsel with the contention that the review was specific on the faultlines in the sanction of refund. He objected to certification of chartered accountant on the ground that it was inadequate and their suggestion of having made provisioning long ago with the counter that appellant could not have, then, been privy to the dispute for such separate treatment from the beginning. He drew attention to the statutory provision relating to prescriptions and documentation.

6. In the decisions relied upon by first appellate authority, the consistent thread of determination has been that the books of accounts should acknowledge the amount as 'receivable' failing which it was to be held that the amount has been charged as expense in computation of profit/loss. The impugned order thereafter goes on to hold that

'9.9 As noted earlier the CA certificate as mentioned in para 10(b) of the order mention that the amount is shown as receivables on 31-01-2020. The said CA certificate does not tell the treatment of the amount in F.Y. 2017-18 to 2019-20. As the refund pertains

to duty paid in the year 2017-18, the adjudicating authority should have asked about the gap in the CA certificate for previous 2 years. It appears that instead of questioning the gap in the CA certificate for previous 2 years the adjudicating authority went on to accept a bald statement made by ARCL in its letter dated 11-05-2020. Such acceptance is not sustainable as discussed above.

9.10 As per above observations of the Hon'ble Court & Hon'ble Tribunal, it can be fairly concluded that the CA certificate is not enough to prove that the duty incidence was not passed on and accordingly, I am not inclined to accept the aforesaid CA certificate.

9.11 There is no evidence that the said amount was reflected in the books of accounts as amounts receivable in the respective F.Y. and that there is no documentary evidence to establish that the duty paid has not been charged to costing of the imported good, whether sold or captively consumed. The goods were imported in the year 2017-18 and unless proved contrary, the presumption under section 28D is attracted. Moreover, the goods sold are to indicate the duty which form part of price of goods sold as per section 28 C. Therefore, the sale invoice of such imported goods are also required to be seen.....In case the burden is not proved otherwise or there is ambiguity then the benefit is not allowable to the claimant as held by the Hon'ble Supreme Court in the case of Dilip Kumar & Co. [2018 (361) ELT 577 (SC)].

10. Therefore I hold that the subject refund claim is hit by the clause of "unjust enrichment".

We take note of three inherent flaws in the impugned order. While the refund sanctioning authority was satisfied that the certificate of chartered accountant sufficed for the purpose of determining that incidence of duty had not been passed on, the first appellate authority

found the same certificate to be deficient for want of such treatment from the year of provisional assessment and has placed on record absence of any other evidence having been submitted for discharge of onus. Consequently, without affording opportunity to the assessee to make good the then revealed gaps, the impugned order has gone on to hold that the assessee had been unjustly enriched. Furthermore, the decisions cited by the first appellate authority do not lead to such conclusion in that those were based on the clear findings of absence of ever having treated the amounts involved as receivables which does not fit the facts of the present dispute. Moreover, in directing recovery for credit in the Fund, the impugned order has not indicated the means to be adopted – while section 28 of Customs Act, 1962 is the explicitly available facility for recovery of erroneously granted refund, it is moot if an appellate authority can step into the shoes of the ‘proper officer’ contemplated therein or supplant the application of mind inherent in such jurisdiction. It is also moot if action under section 142 of Customs Act, 1962 initiated by anyone other than ‘proper officer’ or authority designated therein is valid in law. However, as the last has not been agitated before us, it does not concern this jurisdiction.

7. We do not consider section 28D of Customs Act, 1962 to be relevant for this dispute for the deployment of the expressions, in

*‘28D. Presumption that incidence of duty has been passed on to the buyer. – Every person who has paid the duty on **any goods***

*under this Act shall, unless the contrary is proved by him, be deemed to have passed on the full incidence of such duty to the **buyer of such goods.***’ (emphasis supplied)

leaving no room for doubt that the presumption operates on trading of imported goods, excludes the appellant who utilises imported goods for further manufacture. Likewise, the mandate of section 28C of Customs Act, 1962 does not extend to manufactured goods which are required only to indicate the taxes under the ‘goods and service tax (GST)’ enactments. However, the determination by the Hon’ble Supreme Court in *Union of India v. Solar Pesticides Pvt Ltd [2000 (116) ELT 401 (SC)]* suffices to bring the excess duty paid by the appellant within the requirement of proof that incidence of duty was borne by them. It is only from this authority that the plea of the jurisdictional Commissioner of Customs before the first appellate authority is acknowledged for consideration. It is settled law also, as evident from the several decisions cited in the impugned order, that there is no hard and fast standard or prescription for overcoming the bar on disbursement of refunds to assessee; the competent authority carries out ascertainment and appellate authorities ascertain the conformity of that evaluation in terms of judicial determination that has approved or disapproved a particular case made out by claimant. Nonetheless, it is now generally accepted that provisioning for the claimed amount as ‘receivables’ in the balance sheet is adequate assurance that the amount in question has not been charged on articles that were manufactured from imported

goods. The impugned order is in error too for having invoked the decision in *re Dilip Kumar & Co* which were rendered in the context of availment of exemption and on re-evaluation of the law holding the field till then. Findings rendered on erroneous application of statutory provisions can only fail to find validity within the law.

8. It is virtually impossible to correlate the duty paid on imported goods with sale value of products manufactured therefrom and accounting principles have it that, except when retained as asset in the accounts, expenditures inhere in the price of goods sold. Not unnaturally, such inhering is also not correlatable except on the premise that totality of goods sold is a growing amorphous mass represented by accumulated price realisation. It is equally impossible to assign timelines pertaining to deployment of imported goods in the manufactured products. The present dispute may, in effect, be restated to posit that the case of customs authorities is that imported goods have been used in the year of procurement for manufacture and conversion into sale value in the selfsame year. The impugned order has not disputed the provisioning as 'receivables' in 2019-20 and has accepted the certificate of chartered accountant to that effect. The appeal of Commissioner of Customs did not dispute it either.

9. The statutory provisions do not require that provisioning as 'receivables' is mandatory for overcoming the bar of unjust enrichment.

On the contrary, provisioning and certification by chartered accountant have obtained adjudicatory acceptance through judicial sanction. None of the decisions relied upon in the impugned order have held that provisioning of disputed amount as 'receivables' would have to commence from year of import. There was, thus, no reason for the first appellate authority to posit such restrictive approach merely on a proposal from the appellant-Commissioner. As we have noted *supra*, neither is it practically possible to connect imported goods to any particular sale of finished products nor is there any such injunction hanging over processing of refund claims. All that is to be ensured is that there is some reasonable assurance that disputed duties are not insinuated into price of finished goods. To the extent that incorporation into 'accruals' signifies that assurance, certification of that fact should suffice. The date on which it was done is not irrelevant as, either at the time of import or later with existence as 'imported goods' ceasing to be, inclusion in 'receivables' indicates exclusion from accounting recognition as sale realisation and, consequently, from costing of the product sold. In the present dispute, it just happened that the cause of dispute came up on finalization when it could well have occurred at the stage of clearance or much later in the appellate proceed; the impugned order has not considered the implications of recognition of dispute as the stage appropriate, and acceptable, for inclusion as 'receivables' in the final accounts. After all, we are not considering any specific items

of production here but the accounting treatment which has its own conclusions from which may but infer that ‘incidence of duty’ remained with the appellant.

10. The backbone for discard of the claim is the purported inadequacy of certificate for not attesting to concurrence of provisioning with the period of dispute and that, in the absence of scrutiny of sale invoice, kicks in the presumption of section 28D of Customs Act, 1962 on the back of the decision of the Hon’ble Supreme Court in *re Dilip Kumar & Co.* On our finding that sale invoice considered by the first appellate authority is not liable to be brought into existence at that stage of proceedings and the presumption in law intended for different context, that the decision on strict interpretation of exemption notification has been misconstrued in the impugned order and that certificate has merely to attest transfer to ‘receivables’ as sufficing to cross the bar of ‘unjust enrichment’, the impugned order lacks validity. Accordingly, the order of the original authority stands restored along with setting aside the order of the first appellate authority.

(Order pronounced in the open court on 19/08/2024)

(AJAY SHARMA)
Member (Judicial)

(C J MATHEW)
Member (Technical)