IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL, WEST ZONAL BENCH AT MUMBAI
COURT NO. II

APPEAL NO. E/47/04 Mum

(Arising out of Order-in-Appeal No. SDK(214) 214/MV/2003 dated 30.09.2003 passed by the Commissioner of Central Excise Customs (Appeal), Mumbai)

For approval and signature:
Honble Shri Rakesh Kumar, Member (Technical)
and
Honble Shri Ashok Jindal, Member (Judicial)

1. Whether Press Reporters may be allowed to see the Order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982? : No

2. Whether it should be released under Rule 27 of the :
CESTAT (Procedure) Rules, 1982 for publication
in any authoritative report or not?

3. Whether Their Lordships wish to see the fair copy of the Order? : Seen

4. Whether Order is to be circulated to the Departmental authorities? : Yes

M/s. Remsons Industries Ltd.
Appellant

Vs

Commissioner of Central Excise,
Respondent
Mumbai V

Appearance

Shri D.H. Nadkarni, Advocate
for Appellant
Shri V.K. Singh, SDR
for Respondents

CORAM:

Shri Rakesh Kumar, Member (Technical)
Shri Ashok Jindal, Member (Judicial)

Date of Hearing : 10.05.2011
Date of Decision : .....

ORDER NO.

Per Ashok Jindal

This appeal is filed against the order of rejection of their refund claim on account of limitation as well as on account of unjust enrichment as contained in Section 11B of the Central Excise Act, 1944.

2. Brief facts of the case are that the appellant are engaged in the manufacture of stranded wires of steel which are intermediate products and the same are used as inputs to manufacture the appellant↕s final product i.e. Auto Control Cables for motor vehicles. The final products are manufactured by the appellant's other factories where the intermediate

products namely stranded wires were cleared on payment of duty and by availing CENVAT credit of duty paid in their other factories where the final product is to be manufactured. The appellant are discharging duty liability as per cost construction of such stranded wires plus notional profit as prescribed under Section 4 of the Central Excise Act, 1944 read with the relevant Valuation Rules. In July 1997, certain customers approached the appellant for the supply of stranded wires as per their required size and specifications which were supplied by the appellant on payment of duty on transaction value. The transaction value on the goods sold to the independent buyers was higher than the price at which the appellant cleared their goods to their other factories. During the course of audit, it was disputed that the valuation of the goods which are captively used by the appellants in their other factories the appellant has under valued the goods at the time of clearance to their other factories/group companies. Therefore, on pointing by the department, the appellant paid a sum of Rs. 1,85,136/- under protest and thereafter the appellant paid a sum of Rs. 7,63,373/- for the period from April, 1995 to March 1999 as differential duty during the course of investigation for which the appellant issued supplementary invoices on their sister unit/group companies. A show-cause notice was issued for adjudication of differential duty while adjudicating, the show-cause notice was dropped and it was held that nothing was payable by the appellant. Moreover, it was held that the supplementary invoices issued by the appellant were void for the purpose of taking MODVAT/ CENVAT credit. The said order was not challenged by either of the party and attained finality. In pursuance of the said adjudication, the appellant filed a refund claim of Rs. 9,48,509/-. While

entertaining the refund claim, a show-cause notice was issued and the same was adjudicated by denial of refund claim which was confirmed by the lower appellate authority as time barred as well as the refund claim is hit by bar of unjust enrichment. Aggrieved by the said order, the appellant are before us.

3. During the course of arguments the learned Advocate for the appellant pleaded that provision to Section 11B of the Central Excise Act, 1944 are not applicable to their case as this provision deals with the claim of refund of duty. He further pleaded that in this case, the appellant has made a deposit under protest during the course of investigation and there was no duty demand was confirmed against the appellant. While adjudicating the show-cause notice, the show-cause notice was dropped when it has been held that no duty was payable by the appellant then the amount paid by the appellant is a deposit / pre-deposit not a duty. The provisions of Section 11AB of the Central Excise Act, 1944 are not attracted to their case. Therefore, the impugned order denying the refund claim as barred by limitation and hit by bar of unjust enrichment is not sustainable. In support of his contention he placed reliance on the decision of the Honble Gujarat High Court in the case of *Commissioner of Customs* vs. *Mahalaxmi Exports*- 2010 (258) ELT 217 (Guj), *ITW India Ltd.* vs. *Commissioner of Central Excise*, Vapi- 2009 (248) ELT 664 (Tri.- Ahmd.), *CCE* Chennai vs. *International Business Forms* 2011 (264) ELT 551 (Tri.- Chennai). He further submitted that although the appellant has made a provisional deposit of duty but the said deposit was not appropriated towards any final demand of duty, therefore, the refund claim is not barred by limitation and relied on in the case of *CCE*

Ahmedabad vs. *Shayona Enterprises* 2008 (230) ELT 378 (Tri.- Ahmd.) and *Commissioner of Central Excise*, Kolkata III vs. *Vegetable Products Ltd.* 2009 (247) ELT 180 (Tri.- Kolkata). He also submitted that the decision in the case of *Sahakari Khand Udyog Mandal Ltd.* vs. *CCE & Customs* 2005 (181) ELT 328 (S.C.) is not applicable to the facts of this case as in that case the claimant has already charged and collected the duty from the customers and the same was transferred to Consumer Welfare Fund which is not in this case. In alternative, he submitted that the amount in dispute although collected from their sister concern/ group companies by way of supplementary invoices but the sister concern/ group companies have not taken the credit of the duty paid against the supplementary invoices raised by the appellant in consequence of the show-cause notice demanding differential duty. In support of this contention he placed on record the certificates issued by the concerned Jurisdictional Officer of Central Excise of their sister unit/ group companies certifying that no credit has been taken on the strength of supplementary invoices. He also produced their annual report for the year 2009-09 duly certified by Chartered Accountant/ Company Secretary wherein the impugned amount has been shown by them as contingent liability which is recoverable from the Government. Therefore, they have not passed on the duty incidence on their buyers hence; bar of unjust enrichment is not applicable to the facts of this case. Hence, sought the impugned order be set aside and the refund claim be allowed.

4. On the other hand the learned DR supported the impugned order and submitted that the appellant themselves have issued supplementary invoices showing the duty element on different price and they

have paid the amount as duty therefore, the provision of Section 11(B) are squarely applicable to their case and in the case of *Sahakari Khand Udyog Mandal Ltd. (supra)* the Honble apex court has held that in case of refund, the provisions of doctrine of unjust enrichment are applicable. He further submitted that in the case of *Pride Foramer* vs. *Commissioner of Customs* (Import), Mumbai 2006 (200) ELT 259 (Tri.-Mum) this Tribunal has held that the burden of amount deposited whether passed on or not, amount deposited pursuant to High Court order while case is pending adjudication- doctrine of unjust enrichment is invocable. He further submitted that in the case of *United Spirits Ltd.* vs. *Commissioner of Customs* (Import), Mumbai 2009 (240) ELT 513 (Bom.) the Honble High Court has held that wherein pursuant to provisional assessment the provisions of unjust enrichment is applicable to refund consequent upon to final assessment. Therefore, the impugned order is sustainable. The appeal filed by the appellant is required to be dismissed.

5. Heard both sides.

6. We have gone through the contentions made by both the sides before us. After considering the submissions, we find that in this case the appellant have deposited the amount under protest on differential value of the goods cleared by them to their sister unit/ group companies. While adjudication, the show-cause notice demanding the differential duty was dropped and it was subsequently held in the order that the supplementary invoices issued by the assessee under Rule 57 AE of Central Excise Rules, 1944 is declared void for the purpose of taking MODVAT/ CENVAT credit. Accordingly, by declaring void the supplementary invoices issued to sister

concern/ group companies of the appellant were restricted not to take credit on the strength of the supplementary invoices. In consequent to that the sister / group companies reversed the credit taken on the strength of these supplementary invoices and a certificate from the Range Officer has been issued certifying that no credit has been passed on the strength of this supplementary invoices. These facts are not disputed in this case. It is contended by the learned DR that the Rule laid down by the Honble High Court in the case of *Sahakari Khand Udyog Mandal Ltd. (supra)* is applicable to this case, we have gone through the facts of the case wherein the facts before the honble apex court where the assessee filed a refund claim on rebate in pursuant to Notification No. 257/76 dated 30th September 1976 and therefore, the assessee could not have claimed Rs. 6,92,779.59 but only claimed Rs. 5,42,342.90. Therefore, we find that in that case the issue before the honble apex court was of refund of duty as per Section 11B of the Central Excise Act, 1944, where the duty was paid and rebate claim of duty was filed which is not in this case. In this case the amount paid by the appellant was not appropriated as duty by the adjudicating authority. In the case of United Spirits Ltd. (supra) the issue before the Honble High Court was that where an amount deposited in pursuant to provisional assessment doctrine of unjust enrichment is applicable to refund consequent upon final assessment. In that case also the amount provisionally deposited was appropriated against as duty on finalisation of the assessment which was subsequently set aside which is not in this case. In fact in this case, the amount deposited by the appellant was never appropriated as duty. Therefore, the facts of United Spirits Ltd. (supra) are distinguishable from the facts of this case. From the

facts of the case of *Pride Foramer (supra)* (which the learned DR relied on) is not coming out that whether the amount deposited is appropriated as duty or not. Moreover, in that case this Tribunal has relied on the decision of *Sahakari Khand Udyog Mandal Ltd.* only on principles of natural justice which is based on equity and in that case the appellant were able to prove that burden of duty has not been passed upon, therefore, the end result the appeal was allowed in favour of the appellant. Therefore, the said decision cannot be applied to this case. In the case of *Mahalaxmi Export (supra)* the Honble High Court has held that since the amount paid by the appellant during the course of investigation was treated as deposit and that finding was not further challenged by the department, principles of unjust enrichment cannot be applied in such a situation. In the case of *Vegetable Products Ltd. (supra)* this Tribunal has clearly held that the adjudicating authority has not appropriated the amount which was with the Revenue therefore, we find no infirmity in the impugned order wherein the Commissioner (Appeals) has held that the present respondent are at liberty to take appropriate steps for refund of amount, under the provisions of Section 11B of the Central Excise Act, 1944 are not applicable. In the case of *Godrej Industries Ltd.* vs. *Commissioner of Customs*, Mumbai- 2007 (213) ELT 259 (Tri.- Mum) this Tribunal has held that the deposits made during pendency of the appeal automatically become refundable to assessee on success of their appeals, provisions of unjust enrichment are not applicable. We find that the above said case laws supports the claim of the appellant, therefore, the provisions of Section 11(B) of Central Excise Act, 1944 are not applicable to the facts of this case as there is no appropriation of the amount deposited by the

appellant as duty. In alternative, we have gone through the records produced by the appellant wherein it has been shown that the duty incidence has not been passed on to their sister concern / group companies by producing relevant certificates from the Range Superintendent and from the balance sheet as the same is shown as receivable from the Government. Therefore, the appellant are able to pass the bar of unjust enrichment, on that ground also their refund claim is maintainable. In result on both the counts i.e on merits and on the ground of unjust enrichment the appellant has been able to make a case. Therefore, the appeal is allowed with consequential relief by setting aside the impugned order.

(Pronounced in Court on ...)

(Ashok Jindal)
Member (Judicial)

(Rakesh Kumar)
Member (Technical)
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