CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
MUMBAI

WEST ZONAL BENCH, MUMBAI

Excise Appeal No. 86866 of 2018

(Arising out of Order-in-Appeal No. NSK/EXCUS/000/APPL/187/17-18 dated 08.02.2018 passed by the Commissioner of Central Excise & GST (Appeals), Nashik.)

M/s Agasti SSK Ltd. .....Appellant
Post – Agasti Nagar, Tal.-
Akole, District- Ahmednagar,
Maharashtra – 422 601

VERSUS

Commissioner of Central Excise & Service Tax, Nashik .....Respondent
Kendriya Rajaswa Bhawan,
Old Agra Road, Gadkari Chowk,
Nasik, Maharashtra – 422 002

APPERANCE:

Shri S.K. Srinath, Chartered Accountant for the Appellant
Ms. Anuradha S. Parab, Assistant Commissioner, Authorised Representative for the Respondent

CORAM:

HON'BLE DR. SUVENDU KUMAR PATI, MEMBER (JUDICIAL)

FINAL ORDER NO. A/85035 / 2022

Date of Hearing: 12.11.2021
Date of Decision: 21.01.2022

Refusal to credit the amount of refund to the account of the appellant and crediting the same to the consumer welfare fund in terms of the Section 11B of the Central Excise Act, 1944 by the refund sanctioning authority namely Assistant Commissioner of

Central Excise & Customs, Sinnar Division vide his order dated 30.11.2016 that has been confirmed by the Commissioner of CGST (Appeals) Nashik, while rejecting the appeal preferred by the appellant, is assailed in this order.

2. Brief background of this case is that CENVAT credit taken against manufacture of bagasse and press mud during sugar manufacturing process but was reversed at the instance of the Deptt was held to be admissible by the Commissioner (Appeals) in his order dated 06.10.2015, consequent upon which refund application was filed for refund of CENVAT credit reversed and the above noted consequence ensued.

3. Learned Counsel for the appellant Mr. S.K. Srinath, during the course of argument, pointed out that such refusal of crediting the amount to the appellant's account arose as the refund sanctioning authority and Commissioner (Appeals) disregarded the Charted Accountant's Certificates and observed that once amount is shown in the books of account as expenditure, the same is deemed to have been passed to the customers for which no refund can be granted to the appellant. Besides the case laws relied upon by the appellant in its appeal memo and written submissions, learned Counsel for the appellant also placed his reliance on the following judgments in support of passing the test of unjust enrichment and the following case laws in support of acceptance of Chartered Accountant certificate as a piece of evidence.

(i) Union of India Vs. Solar Pesticide Pvt. Ltd. – [2000 (116) ELT 401 (SC)]

(ii) Commissioner of Central Excise, Mumbai –II Vs. Allied Photographics India Ltd. – [2004 (166) ELT 3 (S.C.)]

(iii) Hindustan Petroleum Corporation Ltd. Vs. Commissioner of Central Excise and Customs – [2015 (317) ELT 379 (Tri.- Mumbai)]

(iv) Sahakari Khand Udyog Mandal Ltd. Vs. Commissioner of Central Excise & Customs – [2005 (181) ELT 328 (SC)]

(v) JCT Limited Vs. Commissioner of Central Excise, Chandigarh – II - [2004 (163) ELT 467 (Tri.- Del.)]

(vi) Gail India Ltd. Vs. Commissioner of Central Excise Gwalior - [2011 (264) ELT 393]

(vii) Shoppers Stop Ltd. Vs. Commissioner of Customs, Chennai – [2018 (8) GST 47]

(viii) Commissioner of Customs (Export), Chennai Vs. BPL Ltd. [2010 (259) ELT 526]

(ix) JCT Ltd. Vs. Commissioner of Central Excise, Chandigarh-II – [2004 (163) ELT 467]

3. Per contra, in response to such submissions, learned Authorised Representative for the respondent-department Ms. Anuradha S. Parab, in citing judicial decisions in the case of *Union of India Vs. Solar Pesticide Pvt. Ltd.* reported in *2000 (116) ELT 401 (SC)* concerning Chartered Accountant certificate as well as on booking the duty paid under expenses category of Profit & Loss Account along with decisions of this Tribunal passed in the case of *HPCL Vs. Commissioner of Central Excise, Mumbai-II reported in 2015 (317) ELT 379 (Tri.-Mumbai)* and *M/s. Valson Dyeing Bleaching & Printing Works Vs. Commissioner of Central Excise, Mumbai-II reported in 2016-TIOL-1521-CESTAT-MUM,* argued that when refund amount due is not shown as claims receivable, the same is to be

treated as expenditure and the momentt it is shown as expenditure in the Profit & Loss Account, the incidence of duty is passed on to the customers, for which interference by the Tribunal in the order passed by the Commissioner (Appeals) is uncalled for.

4. I have heard from both sides and perused the case record as well as judgments cited by both the parties. In some of the judgments it can be noticed that the facts covering the accounting rules are mis-represented by the parties during submissions, for which observations that unless the amount is shown as receivable and shown in the books of account as expenditure, the incidence of duty is said to have been passed on to the consumers/customers are accepted as the true rule of accounting procedure and those cannot be treated as *ratio discindendi* to be followed as judicial precedent and not even an *obiter dictum* in view of misrepresentation of facts and rules of accounting. For example in the instant case, when CENVAT credit was reversed by the appellant at the instance of the respondent-department and an adjudication order confirmed the same, no accounting procedure would allow it tobe posted in the books of account namely Profit & Loss Account as amount receivable since it was not certain about the fate of appeal against the adjudication order, at the relevant point of time. However by showing the same as expenditure does not automatically pass on the burden on to the customer, unless there is a specific revision of price of the future product or recovery of the credit reversed against past sale from the customers. There are several ways by which a

company can minimise its loss without revising the price. For example, as has been observed by this Tribunal in the case of *M/s Pandurang SSK Ltd. Vs. CCT, Pune-II [2018 (12) TMI 1169 CESTAT-Mumbai]* and in the case of *Ring Plus Aqua Ltd. Vs. Commissioner of Central Excise & Customs, Nasik* reported in *2019 (370) ELT 1364 (Tri.-Mumbai)*, it is not invariably true that when amount is shown as expenditure or any expenditure is required to be made, the same has to be absorbed in costing of final product unless there is a proof that pricing of the final product has specifically been increased on that score, since there are various mechanisms available before the manufacture to absorb the cost -say by way of reducing profit margin of its sale, overhead expenditure of the company etc.

5. As has been observed in the case of *Union of India Vs. Solar Pesticide Pvt. Ltd.* (*supra*) by the Hon'ble Supreme Court, on which reliance is placed by both the parties, there could be some indirect means to recover the duty but it was said in the context of adding the duty paid on the raw materials in the price of finished goods. However, in the case of the Appellant, they have produced two Chartered Accountant certificates dated 11.04.2016 and dated nil (that was filed on 07.06.2016) with categorical observation that the claimant had not passed on the duty incidence to their customers and has born the same itself. One of those Chartered Accountant certificates also indicates that they had not noticed any debit note or supplementary invoices raised between 2008 and 2016 by the appellant to recover excise duty amount and/or interest from the

customers for sale of the goods in question. It is not understood as to why such Chartered Accountant certificates, which is considered as a certificate of Statutory Auditor, had been thrown out by the Commissioner (Appeals) as unbelievable and not accepted as a piece of documentary evidence though it is in the footing of an Expert Opinion under Section 45 of the Indian Evidence Act so as to outweigh the perception that all expenditure of a company are recovered from the customers, in which event no loss making company would ever exist on earth, though he trusted the unconfirmed data of the internet available in different websites like Wikipedia.org, investopedia.com etc to analyse and elaborate the concept of "tax incidence". Hence the order.

ORDER

5. The appeal is allowed and the order passed by the Commissioner of Central Excise & GST (Appeals), Nashik vide Order-in-Appeal No. NSK/EXCUS/000/APPL/187/17-18 dated 08.02.2018 is here by set aside. Appellant is entitled to the refund of reversible CENVAT credit account that was credited to the consumer welfare fund. Respondent-department is directed to refund the same with applicable interest to the appellant within 3 months from receipt of this order.

(Order pronounced in the open court on 21.01.2022)

(Dr. Suvendu Kumar Pati)
Member (Judicial)

Prasad