CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL

NEW DELHI

PRINCIPAL BENCH

Excise Appeal No. 50499 of 2019 [SM]

[Arising out of Order-in-Appeal No.BHO-EXCUS-002-APP-308-18-19 dated 28.08.2018 passed by the Commissioner (Appeals), Central GST, Central Excise and Customs, Raipur]

M/s.Vandana Global Ltd. **...Appellant**
Phase II,
Siltara Industrial Area,
Raipur (C.G.)

VERSUS

Commissioner **...Respondent**
Central GST, Central Excise and Customs,
GST Bhawan,
Tikrapara, Dhamtari Road,
Raipur (C.G.)

APPEARANCE:

Ms. Surabhi Sinha, Advocate for the Appellant
Mr.Ravi Kapoor, Authorized Representative for the Respondent

Coram: HON'BLE MRS. RACHNA GUPTA, MEMBER (JUDICIAL)

DATE OFHEARING: 21.12.2021
PRONOUNCED ON : 16.02.2022

FINAL ORDER No. 50142/2022

RACHNA GUPTA

The present appeal has been filed to assail the Order -in-Appeal No.002-308-18-19 of 28.08.2018. The facts relevant for the purpose are as follows:-

2. The appellant had filed a refund claim for Rs.8,72,425/- on 20th February, 2018 pursuant to the order of this Tribunal

bearing No.A/56765-66/2017-SM dated 31.08.2017. The said order was passed setting aside the Order-in-Appeal No.419-15-16 dated 17.03.2016 vide which the demand of Show Cause Notice dated 27.06.2016 for an amount of Rs.23,57,058/- and Rs.2,81,886/- was confirmed. The said demand was initially confirmed by Original Adjudicating Authority vide Order No.60/2015 dated 23.06.2015 along with the order of appropriation of amount of Rs. 2,81,885/– under Rule 14 of Cenvat Credit Rules 2004 read with Section 11 A of Central Excise Act, 1944. The interest was also ordered to be recovered and the penalty was also proposed. However, when the refund pursuant to the aforesaid final order of CESTAT was filed by the appellant, the same was sanctioned for the amount of pre-deposit to the extent of Rs.5,90,053/- alongwith the refund of Rs.2,81,886/-. Since the refund claim of appellant for Rs.8,72,425/- was sanctioned only for an amount of Rs.6,64,357/- after recovering the arrears amounting to Rs.2,43,608/- that the order of original adjudicating authority was challenged by the appellant before Commissioner (A) who also vide the order under challenge had rejected the appeal. Being aggrieved the appellant is before this Tribunal.

3. I have heard Ms. Surabhi Sinha, ld. Counsel for the appellant and Mr. Ravi Kapoor, ld. Departmental Representative for the Revenue.

4. It is submitted on behalf of the appellant that the appellant had already made a deposit of Rs.7.5% at the time of filing the appeal before Commissioner (Appeals). Subsequently, when appeal before CESTAT was filed, according to Circular No. 984/8/2014 -CX dated 16.09.2014, the appellant had paid the amount equal to 10% of duty. Thus, a total amount of 17.5 % of duty was deposited by the appellant. It is submitted that Delhi High Court vide its decision dated 31.05.2018 in the case of **Santani Sales Organization vs. CESTAT, New Delhi reported in 2018 (13) GSTL 144 (Del.)** has held that the 10% of duty amount is not in addition to the pre-deposit before Commissioner (Appeals) at the rate of 7.5% of the duty. It has been held that a total 10% has to be deposited. Hence, it was 2.5% of the duty which was to be deposited by the appellant while filing the appeal before CESTAT. But because of the Circular No.984, though it was amended vide Circular No.1/5/2015 dated 05.07.2018 after the aforesaid decision of Delhi High Court, the pre-deposit made by the appellants becomes 17.5%. It is emphasized that once the appellant is entitled for the refund thereof pursuant to the setting aside of the demand against him by this Tribunal vide the aforementioned final order, the appellant was entitled for refund of entire amount to the extent of 17.5 % of the duty and penalty, but the refund has been sanctioned only to the extent of 10% of the amount of duty and penalty. Therefore, the order of Commissioner (Appeals) is prayed to be set aside. The order is also challenged for the

reason that the Central Excise Act do not empower the adjudicating authority to adjust the sanctioned amount of refund towards the amount due to the Department. Ld. Counsel while relying upon the decision of High Court of Karnataka in the case of **CCE, Bangalore vs. Stella Rubber Works (Unit-2) reported in 2012 (275) ELT 404 (Karnataka)** has prayed for the order of adjustment also be set aside. Appeal is accordingly, prayed to be allowed.

5. Per-contra, ld. D.R. has mentioned that Circular No.984 of 16.09.2014 was based upon the judgment reported as **2014 (307) ELT 47** which demanded 10% amount of duty and penalty to mandatorily be a pre-deposit over and above the mandatory pre-deposit of 7.5% of duty and penalties, at the time of making appeal before CESTAT. Hence, there is no infirmity in the order under challenge. Appeal is prayed to be dismissed.

6. After hearing the parties, following are held to be the issues to be adjudicated herein:

(i) Whether the amount of mandatory deposit at the time of filing appeal before CESTAT is 10% of duty and penalties or just 2.5% of duties and penalties added to the pre-deposit of 7.5% thereof already made before Commissioner (Appeals).

(ii) Whether the sanctioning authority can order adjustment/set off the amount of refund against the arrears towards assessee.

Issue No.-(i)

The appellant had paid the amount of pre-deposit at the rate of 10% of duty and penalty while filing appeal before the CESTAT over and above the 7.5% thereof as was paid while filling appeal before Commissioner (Appeals) against Order-in-Original No.115/Refund/AC/RD-I/2017 dated 10.04.2018 pursuant to the Show Cause Notice dated 27.06.2013 in terms of Circular No. 984/8/2014 dated 16.09.2014. As observed from the discussion and the decisions placed on record, it is apparent that said Circular stands superseded vide Circular No.1/5/2015 dated 05.07.2018. The said change has been made in terms of a decision of Hon'ble Delhi High Court in the case of **Santani Sales Organization (Supra)**. It has been held therein as follows:

> ***24.*** *Accordingly, we would allow the present writ petition and set aside the order and direction of the Tribunal that the petitioner must deposit additional 10% of the duty and penalty in dispute for the second appeal to be heard and adjudicated. We would also quash the circular dated 27th April, 2017 issued by the Tribunal. It is directed that the petitioner and others on filing second appeal before the Tribunal are required to deposit 10% of the amount of duty/penalty as confirmed by the first appellate authority inclusive of 7.5% pre-deposit made for the first appeal. 10% would*

not be in addition to and over and above 7.5% of pre-deposit made for the first appeal. However, contention that Section 35F of the C.E. Act does not apply to service tax appeals and therefore no pre-deposit is required to be made is rejected. In the facts of the case there would be no order as to costs.

7. In view of the said decision, the first point of adjudication stands decided in the terms that the amount at the rate of 10% of duty and penalties as has to be deposited by the assessee for the appeals before CESTAT shall include the amount of pre-deposit before Commissioner (Appeals). Thus, the aforesaid 10% shall include the 7.5% of the amount of duty and / or penalty involved as was already deposited at the time of first appeal being preferred before Commissioner (Appeals). Hence, at the time of second appeal before Tribunal it shall only be 2.5% of the amount of duty & or penalty that is to be deposited as amount of pre-deposit. However, the fact of the present case is that since the Circular of 2018 was not applicable at the time when the appeal before CESTAT was filed by the appellant in the year 2016-17 and as per the then prevalent provisions the appellant was supposed to deposit 10% of duty and penalty amount without including the amount of pre-deposit made by him before Commissioner (Appeals), that the appellant made a pre-deposit of 17.5%, accordingly.

8. The said deposit qualifies to be called as pre-deposit under Section 35 F of Central Excise Act. The Larger Bench of

this Tribunal also, at the relevant time, vide an **Interim Order No. 39/2017 dated 20th April, 2017 reported as 2017 (349) ELT 477 (Tribunal - Larger Bench)** had held that under Section 35F of Central Excise Act, 1944 and under Section 129E of Customs Act, 1962 the assessee is required to make separate pre-deposit of 10% of amount of duty confirmed / penalty imposed for preferring a second appeal to Tribunal against the order of Commissioner (Appeals). Keeping in view the said prevalent situation at the time when the appellant herein made a pre-deposit of 17.5%, his refund claim pursuant to setting aside of the demand/ penalty has to be sanctioned with the interest at the said deposit @ 17.5 % of duty and penalty deposited instead of sanctioning the refund of mere 10% of duty and penalty.

9. In view of the above discussion, as far as, first point of adjudication is concerned, the Adjudicating Authority below is held to have committed an error while not sanctioning the refund claim of entire amount of pre-deposit i.e. @ 17.5% of duty and /or penalty involved, that too, along with the interest.

Issue No.-(ii)

With respect to the second point of adjudication, it is observed that recovery of sums due to the Government is dealt with under section 11 of Central Excise Act, 1944. The said section has undergone an amendment in the year 2013. It is necessary to have a look on pre-amendment and post

amendment section 11 of Central Excise Act. The pre-amendment section reads as follows:-

"**11. Recovery of sums due to Government. -** In respect of duty and any other sums of any kind payable to the Central Government under any of the provisions of this Act or of the rules made thereunder, the officer empowered by the Central Board of Excise and Customs constituted under the Central Boards of Revenue Act, 1963 (54 of 1963) to levy such duty or require the payment of such sums may deduct the amount so payable from any money owing to the person from whom such sums may be recoverable or due which may be in his hands or under his disposal or control, or may recover the amount by attachment and sale of excisable goods belonging to such person; and if the amount payable is not so recovered he may prepare a certificate signed by him specifying the amount due from the person liable to pay the same and send it to the Collector of the district in which such person resides or conducts his business and the said Collector, on receipt of such certificate, shall proceed to recover from the said person the amount specified therein as if it were an arrear of land revenue :

Provided that where the person (hereinafter referred to as predecessor) from whom the duty or any other sums of any kind, as specified in this section, is recoverable or due, transfers or otherwise disposes of his business or trade in whole or in part, or effects any change in the ownership thereof, in consequence of which he is succeeded in such business or trade by any other person, all excisable goods, materials, preparations, plants, machineries, vessels, utensils, implements and articles in the custody or possession of the person so succeeding may also be attached and sold by such officer empowered by the Central Board of Excise and Customs, after obtaining written approval from the Commissioner of Central Excise, for the purposes of recovering such duty or other sums recoverable or due from such predecessor at the time of such transfer or otherwise disposal or change."

The amendment of Section 11 reads as follows:-

80. Amendment of section 11 *- Section 11 of the Central Excise Act shall be renumbered as sub-section (1) thereof, and in sub-section (1) as so renumbered, -*

(a) for the portion beginning with the words "may deduct" and ending with the words "or may recover the amount", the following shall be substituted, namely:-

"may deduct or require any other Central Excise Officer or a proper officer referred to in section 142 of the Customs Act, 1962 (52 of 1962) to deduct the amount so payable from any money owing to the person from whom such sums may be recoverable or due which may be in his hands or under his disposal or control or may be in the hands or under disposal or control of such other officer, or may recover the amount";

(b) after sub-section (1) as so renumbered, the following sub-section shall be inserted, namely :-

"(2)(i) The Central Excise Officer may, by a notice in writing, require any other person from whom money is due to such person, or may become due to such person, or who holds or may subsequently hold money for or on account of such person, to pay to the credit of the Central Government either forthwith upon the money becoming due or being held, or at or within the time specified in the notice, not being before the money becomes due or is held, so much of the money as is sufficient to pay the amount due from such person or the whole of the money when it is equal to or less than that amount;

(ii) every person to whom a notice is issued under this sub-section shall be bound to comply with such notice, and in particular, where any such notice is issued to a post office, banking company or an insurer, it shall not be necessary to produce any pass book, deposit receipt, policy or any other document for the purpose of any entry, endorsement or the like being made before payment is made, notwithstanding any rule, practice or requirement to the contrary.

(iii) in a case where the person to whom a notice under this sub-section has been issued, fails to make the payment in pursuance thereof to the Central Government, he shall be deemed to be a person from whom duty and any other sums of any kind payable to the Central Government under any of the provisions of this Act or the rules made thereunder have become due, in respect of the amount specified in the notice and all the consequences under this Act shall follow."

10. The Order under challenge has been passed after the amendment in section 11. Hence, the post amendment provision is to be followed. Perusal of the said provision makes it clear that the adjudicating Authority has no power to order adjustment as there no more remains the specific provision authorizing him to adjust any sanctioned amount/ refund towards any other amount due to the Revenue. Section 11 existing as on date is rather in the nature of garnishee proceedings. The said provision does not contemplate

adjustment of monies due to assessee towards the amount due to the Revenue. There exist no other provision in the Act which enables the Revenue to adjust the amounts due to them as against the amounts due by them to the assessee. The Hon'ble High Court of Karnataka in the case of **Commissioner of Central Excise, Bangalore vs. Stella Rubber Works (Unit-II) (supra)** has held that once the Adjudicating Authority holds assessee entitled to refund of the amounts which he had paid to the Department, in the absence of specific provision authorizing the Revenue adjusting the said amount due towards them, it shall be improper for them to make such adjustment. It was held that like without authority the Revenue cannot levy any duty on the assessee. Similarly, without authority of law they cannot adjust the amounts which are ultimately due to the assessee even when the amounts are due by the assessee to the Department. The Department can proceed against the assessee to recover the amounts due to them under the provisions of the Act but the refund to which assessee is entitled has to be sanctioned and disbursed in his favour. The said decision has been followed by CESTAT, Mumbai in the case of **Commissioner of Central Excise, Mumbai vs. Johnson & Johnson Ltd. reported in 2016 (335) ELT 163** after perusing section 11 it was held in this case as follows:-

"I find that the finding recorded by the first appellate authority is correct and in consonance with the law laid down by Hon'ble High Court of Karnataka in the case of Stella Rubber Works (supra). With respect I reproduce the ratio which is in

Para 4. I also find that this Bench in the case of Mars International followed Para 4 of the judgment of Hon'ble High Court, in which it has been held as under : -

> *"4. The learned counsel appearing for the revenue contended that by virtue of Section 11 of the Central Excise Act, 1944, the revenue was empowered to adjust the amounts due to the revenue by way of interest out of the amount due by the Department to the assessee by way of rebate. Therefore, the Tribunal committed a serious error in interfering with the said order of adjustment and therefore he submits that the impugned order requires to be interfered with. Section 11 of the Act would deal with the recovery of sums due to the Government reads as under : -*
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> *..... ....*
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> *A perusal of the aforesaid provision makes it very clear that if any duty or other sums due to the Central Government under the Act and recovery of certain amounts, if any person owing money to the assessee, the revenue may proceed against such person and recover the duty and other sums due to the Government. It is in the nature of garnishee proceedings. The said provision does not contemplate adjustment of monies due to the assessee towards the amount due to the revenue. Therefore reliance placed on the said provision does not help the revenue. Apart from the said provision, the learned counsel was not able to point out any other provision which enables the revenue to adjust the amounts due to them as against the amounts due by them to the assessee. In fact reliance is placed on the Judgments of CESTAT which gives an impression that adjustment is permissible. Such adjustment is not based on any statutory provision. When once the adjudicating the authority has held that the assessee is entitled to refund of the amounts which he had paid to the Department, in the absence of a specific provision authorising the revenue adjusting the said amount towards due to them, it is improper for them to make such adjustment. In this view of the matter, there is no question of invoking equitable considerations. As without authority they cannot levy any duty on the assessee and without authority of the law they also cannot adjust the amounts which are ultimately due to the assessee when the amounts are due by the assessee to the Department. After making refund of the amount, which is due, it is*

open to the revenue to proceed against the assessee to recover the amounts under the provisions of the Act. Therefore, the Tribunal committed no illegality in setting aside the said adjustment. We do not see any infirmity in the said order passed by the Tribunal which calls for interference. Accordingly the appeal is dismissed."

11. In view of the above said discussion, the point No.2 of adjudication also stands decided as against the Department and in favour of the assessee. Accordingly, I hold that the adjudicating authorities below have committed an error while ordering adjustment of the amount of Rs.2,43,608/- from the sanctioned refund of Rs.8,72,425/-. The amount disbursed of Rs.6,64,357/- is therefore held to be a short disbursement.

12. Pursuant to the conclusions for both the point of adjudications in favour of assessee for the reasons discussed above, the order under challenge is hereby set aside. Consequent thereto, the appeal stands allowed.

[Pronounced in the open Court on **16.02.2022**]

(RACHNA GUPTA)
MEMBER (JUDICIAL)

Anita