CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, WEST ZONAL BENCH : AHMEDABAD

REGIONAL BENCH - COURT NO. 3

EXCISE Appeal No. 12706 of 2018-SM

[Arising out of Order-in-Original/Appeal No CCESA-SRT-APPEAL-PS-122-2018-19 dated 25.06.2018 passed by Commissioner (Appeals) Commissioner of Central Excise, Customs and Service Tax-SURAT-I

Anchor Electricals Private Limited .... **Appellant**
Unit-iv Survey No 41/3
Behind Silver Industrial Estate, Bhimpore, Nani Daman
DAMAN, GUJARAT-392210

VERSUS

Commissioner of Central Excise & ST, Daman .... **Respondent**
3rd Floor, Adarsh Dham Building, Vapi-Daman Road,
Vapi, Opp.Vapi Town Police Station, Gujarat-396191

APPEARANCE :

None for the Appellant
Shri R P Parekh, Superintendent (AR) for the Respondent

CORAM: HON'BLE MR. RAMESH NAIR, MEMBER (JUDICIAL)

DATE OF HEARING / DECISION : 17.05.2022

FINAL ORDER NO. A/10527 / 2022

RAMESH NAIR :

When the matter was called none appeared on behalf of the appellant despite notices given on several dates therefore the appeal is taken up for disposal.

2. Shri R P Parekh, learned Superintendent (Authorised Representative) appearing on behalf of the Revenue submits that the refund claim is rejected on the ground that the assessee have not opted for provisional assessment in respect of clearances made from their factory to depot and subsequent sales on lower price as compared to the price for goods cleared from the factory. He submits that since appellant have not opted for provisional

assessment, lower authority have rightly rejected the refund claim. He placed reliance on the following judgments:-

(a) Greaves Cotton Limited vs. CCE, Chennai – 2017 (7) GSTL 350 (Tri. Chennai)

(b) Finolex Cables Limited vs. CCE, Pune-1 – 2011 (207) ELT 81 (Tri. Mumbai)

(c) Mauria Udyog Limited vs. CCE – 2007 (207) ELT 31 (P&H)

(d) Mauria Udyog Limited vs. Commissioner – 2008 (221) ELT A120 (SC)

(e) Munjal Auto Industries vs. CCE, Vadodara – 2014 (307) ELT 577 (Tri. Ahmd.)

(f) MRF Limited vs. CCE, Madras – 1997 (92) ELT 309 (SC)

3. On careful consideration of the submissions made by learned Authorised Representative and perusal of the record, I find that there is no dispute about the fact that appellant have paid duty on the higher price when cleared the goods from their factory to depot and subsequently the goods were sold at lower transaction value. Therefore, the differential duty paid in excess arose for which the appellant have filed refund claim. Both the lower authorities rejected the refund claim only on the ground that appellant have not opted for provisional assessment. However, there is no dispute on the fact that appellant have paid duty in excess as per Section 4 of Central Excise Act, 1944 and Rules made thereunder. Merely because the appellant have not followed the provisional assessment, the refund cannot be denied as the Revenue cannot retain any amount which is not due as per law. This issue has been considered by this Tribunal in various judgments which are as under:-

(a) KJV Alloys Conductors P. Ltd vs. CCE, Hyderabad – 2012 (275) ELT 90 (Tri. Bang.)

"3. The ld. Counsel for the appellants submitted that the appellants authority has set aside the order of the original adjudicating authority only on the ground that there was no provisional assessment and Rule 7 of Central Excise Rules, 2002 (CER) was not followed and refund should not have been granted. Ld. Counsel relied upon the

decisions in the case of C.C.E., Hyderabad v. Premier Explosives Ltd. [2008 (226) E.L.T. 729 (Tri. - Bang.)], ECE Industries Ltd. v. C.C.E., Hyderabad [2009 (237) E.L.T. 428 (Tri. - Bang.)] and C.C.E., Mangalore v. Keltech Energies Ltd. [2008 (232) E.L.T. 306 (Tri. - Chennai)] to submit that even when there was no provisional assessment if there is a downward revision of prices, refund is allowable provided claim has been filed within the time limit. On the other hand, ld. SDR relied upon the decision of the Hon'ble High Court of Bombay in the case of Maharashtra Cylinders Pvt. Ltd. v. CESTAT, Mumbai [2010 (259) E.L.T. 369 (Bom.)] to submit that when assessment is not provisional if the duty has been paid on the basis of self-assessment, there cannot be any refund claim without challenging the self-assessment. He relied upon para - 8 of the decision of the Hon'ble High Court of Bombay to submit that even a self-assessment is required to be challenged.

4. I have considered the submissions made by both sides. I find that the decisions cited by the ld. Counsel are squarely applicable to the facts of this case, especially Premier Explosives Ltd. decision. Para 9 of this decision is reproduced below for better appreciation.

> "9. On a very careful consideration of the issue, we find that in terms of the agreement between the respondents and the buyers, the price is subject to variation. In other words, the price was provisional and the goods were cleared on payment of duty. Later the price was revised and in fact it was lowered. In view of this fact the respondent was required to discharge only less duty liability. The refund claim was actually filed within the time limit. Therefore, whether the assessment is provisional or not is not at all relevant in this case, because when the refund claim has been filed within the time limit even if the assessment is final, one has to examine the refund claim. It is reiterated that the question of the assessment being final or provisional is not relevant to a case where the refund claim has been filed within the time limit. All the case laws cited by the learned Advocate are very relevant. When there is price variation clause in the agreement when the price increases the respondent normally discharges the differential duty due to the government. The same treatment has to be meted out to the respondent in terms of the various decisions of this Tribunal and the other Tribunal. The MRF decision of the Supreme Court has already been distinguished by the Tribunal in the case of Keltch Energies case and also in the case of Utkal Polyweave Indus. by the Calcutta Tribunal. We do not find any merit in the Revenue's appeal. The impugned order is legal and proper. Therefore, we dismiss the appeal of Revenue."

(b) CC & CCE, Hyderabad-III vs. Premier Explosives Ltd. - 2008 (226) E.L.T. 729 (Tri. - Bang.)

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(c) Indian LPG Cylinders vs. CCE, Meerut-I -2007 (207) ELT 442 (Tri. Del.)

"13. In Excise Appeal No. 5177/04 of the appellant Tirupati LPG Industries Limited, the claim of refund of Rs. 55,778.42 was made by the application dated 21-2-2002 in respect of the cylinders supplied during the period from 28-4-2001 to 19-5-2001. Therefore, the claim for the said entire period made on 21-2-2002 was within the prescribed period of limitation of one year and it cannot be rejected simply on the ground that there was no provisional assessment. Even in cases where there has been no provisional assessment before final assessment, it culminated in a refund. Refund application may lie in a variety of other cases where authority finds that excise duty is not payable under the law. Ordinarily, tax which is not payable would be tax refundable which will be in tune with the Constitutional provisions of Article 265 which provides that no tax shall be levied or collected except by the authority of law. Therefore, any tax collected without the authority of law would prima facie be refundable. The topic of refund, therefore, falls on a much larger canvass than mere cases where provisional assessment was done before final assessment which final assessment resulted in a refund order. Therefore, the refund applications of this appellant raising claim which was not time barred, were required to be considered in the context of the price variation clause. The price variation clause would have been relevant in the context of provisional assessment if it were resorted to, will not cease to be relevant for considering the application for refund in cases where no provisional assessment was made before the final assessment. Therefore, even where no provisional assessment made before final assessment, the application claiming refund can be made on the ground of existence of price variation clause before removal of excisable goods took place. In these cases, terms and conditions of supply of LPG cylinders which was contained in the purchase order issued by the oil companies clearly contemplated variation in the price of cylinders and showed that until price was fixed, supplies were to be made on the basis of the provisional assessment. There is no dispute over the fact that the prices at which the excisable goods were supplied under these contracts to the oil companies, were provisional and they came to revise later giving rise to the refund claim. According to this appellant, (Tirupati LPG Industries Limited) whose claim was made within the period of limitation, the oil companies had issued debit notes for making deduction in the future bills. It appears from the record that both the authorities below have not properly taken into consideration the material which had a bearing on the question whether duty which was recovered on the basis of the provisional price was actually, to the extent of excess amount, deducted by the oil companies from future bills. This ought to have been examined because, there is a communication of the oil companies on the record that such excess amounts were to be adjusted. It would, therefore, be necessary for the Adjudicating Authority to consider the matter afresh in these two appeals of Tirupati LPG Industries Limited (Excise Appeal Nos. 5177 and 5178/2004) in respect of the claim for refund which relates to the period which is within the period of limitation prescribed under Section 11B. In appeal No. E/5177/04, since the entire claim for refund was within the prescribed period of limitation, that will have to be so considered, while in appeal No. E/5178/04 only claim from 21-2-2001 to 15-3-2001 which was made within one year by the application dated 21-2-2002 will have to be reconsidered, since the rest of the claim of Rs. 32,574.45 was rightly held to be time barred.**"**

(d) Rajasthan Electronics & Instruments Limited vs. CCE, Jaipur – 2006 (200) ELT 324 (Tri. Del.)

"5. The refund has arisen because of the following price variation clause in the contract between the parties.

> "PRICE FALL CLAUSE
>
> *(i) In case delivery schedule is already over, pending supplies against previous order are accented at such lower rates, if any, as are received in subsequent tender as against charging liquidated damages on old rates, if it is so economical and the tendered agrees to it, if they are not agreeable, supply shall not be taken and order for balance supply shall be cancelled as per provision of the purchase order.*
>
> *(ii) (a) When delivery schedule is not covered if any, previous successful tenderer has also participated in a new tender enquiry, and accepted the lower rate as received in the subsequent tender, then pending supply against previous order shall be taken at the lower rate as received in the subsequent tender.*

(b) If the supplier has not participated or participated but he is not agreeable to supply the balance quantity at lower rate received in the subsequent tender, the balance supply against previous order shall not taken and order in resepect thereof shall be cancelled without any financial liability on either side."

It is clear from the above that supplies can continue on a regular basis even after the validity period of a price agreement and the mechanism provided is that continued supply over and above the finalized contract will be at the price subsequently approved. In the present case, refund claim has arisen because the appellant originally paid duty at the price of Rs. 743.11 (contract prevalent at the time of removal when supply was made) but price was approved at a reduced price of Rs. 672.94. To a case like this, the decision of the Tribunal in the case of *Grasim Industries* has no application. Instead, the appellant's claim remains covered by the decision of this Tribunal in the case of *Universal Cylinders Ltd.* - 2004 (178) E.L.T. 898. In that case also, the price at the time of removal of the goods from the factory was provisional between the parties in view of price variation clause. Subsequently, when the price was finalized, it was at a certain lower amount. The Tribunal held that a refund claim in such a case is acceptable in terms of Section 11B.

6. It is also not necessary that in all cases of price uncertainty, provisional assessment should be resorted to. Assessee can also resort to refund claim. Nor does provisional assessment help. The bar of unjust enrichment covers provisional assessment also. The only relevant question is whether the refund claim is in relation to a tax payment which remains passed on. Whether the original assessment was provisional or final is wholly irrelevant as excess payment of duty can take place under both types of assessments. In the present case, there is no dispute that the excess payment of duty was not passed on to the buyer.

7. In the result, the appeal is allowed after setting aside the impugned order. Revenue shall refund the excess paid duty to the assessee appellant at the earliest."

(e) CCE, Cochin vs. Telk Limited – 2005 (182) ELT 462 (Tri. Bang.)

> **"2.** On a careful consideration, we find that the Commissioner has examined the issue on all aspects of the matter. The findings entered into by the Commissioner is legal and proper. As the assessee were clearing transformers to their customers as per terms of contract which contain price variation clause subsequent to the clearance of the goods and payment of duty, the customers reduce the price of the transformers in accordance with the terms of the contracts. Therefore, the assessee claimed refund of the excess duty paid. The claim was pertaining to all those invoices which were within time period as laid down in Section 11B of the Act. The finding recorded by the Commissioner that there was no need to resort to provisional assessment as revenue also has claimed higher duty in terms of the price variation clause whenever price has increased is a correct finding. There is no merit in these appeals and the same are rejected.**"**

4. In view of the above judgments, it is settled that even though the assessee has not opted for provisional assessment but the duty was paid in excess admittedly the assessee's claim of refund within stipulated time of one year, the refund is admissible. The refund cannot be rejected only on the ground that assessee has not opted for provisional assessment. Accordingly, I do not agree with the contention made by the lower authorities in the impugned order. Accordingly, the impugned order is set-aside and the appeal is allowed.

(Dictated and pronounced in the open court)

(Ramesh Nair)
Member (Judicial)

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