CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH COURT NO.IV

CUSTOMS APPEAL NO. 52292/2021

[Arising out of Order-in-Appeal No. CC(A)/Customs/D- 11/MP/ICD/TKD/1068-69/2020-21 dated 25.11.2020 passed by the Commissioner of Customs (Appeals), New Customs House, New Delhi]

ERICSSON INDIA PRIVATE LIMITED **APPELLANT**

Vs.

COMMISSIONER, CUSTOMS, NEW DELHI (ICD TKD) **RESPONDENT**

WITH

CUSTOMS APPEAL NO. 50001/2022

[Arising out of Order-in-Appeal No. CC(A)/Customs/D- 11/MP/ICD/TKD/1068-69/2020-21 dated 25.11.2020 passed by the Commissioner of Customs (Appeals), New Customs House, New Delhi]

ERICSSON INDIA PRIVATE LIMITED **APPELLANT**

Vs.

COMMISSIONER OF CUSTOMS,
New Customs House, Near IGI Airport, **RESPONDENT**
NEW DELHI

APPEARANCE:

Shri D K Rana, Advocate for the Appellant
Shri Ishwar Charan, Authorised Representative for the Department

CORAM:

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

DATE OF HEARING/ DECISION: April 27, 2022

FINAL ORDER No. 50390-50391 /2022

PER DR.RACHNA GUPTA

Present order disposes of two appeals both of them being arisen out of common Order-in-Appeal. The said Order-in-Appeal has been held that the refund claim was to be applied within the limitation period prescribed under law and since there were Bills of Entry which were still provisionally assessed, the limitation of those bills have to be counted after the final assessment; that the Commissioner (Appeals) has remanded the matter back with respect to the provisionally assessed bills for re-examination. Being aggrieved by this finding, the appellants are before this Tribunal.

2. The admitted facts relevant for the adjudication are that the appellant has paid the duty with respect to the Bills of Entry as detailed below:

C/52292/2021

Details of BoE and Payments

Sl.No.	Bill of Entry No.	Duty Payable (in Rs.)	Duty Paid via Challan No. 52533076 dated 24.11.2014 (IDBI)	Amount Paid via Challan No. 56068419 dated 25.11.2014 (SBI)
Finally Assessed BOE dated 21.11.2014				
1	7461616	3,67,350	3,67,350	3,67,350
2	7461541	3,14,633	3,14,633	3,14,633
3	7451218	66,348	66,348	66,348
4	7451206	2,40,008	2,40,008	2,40,008
5	7451178	2,85,974	2,85,974	2,85,974
6	7436555	2,21,426	2,21,426	2,21,153
Total of Finally Assessed BOE			**14,95,739**	**14,95,466**
Provisionally Assessed BoE dated 21.11.2014				
7	7461606	5,16,473	5,16,473	5,16,473
8	7461263	8,29,310	8,29,310	8,29,310
Total of Provisionally Assessed BOE			**13,45,783**	**13,45,783**

C/50001/2022

Details of BoE and Payments

Sl. No.	Bill of Entry No.	Duty Payable in Rs.	Amount Paid via Challan No. 52533585 dated 24.11.2014 (IDBI)	Duty Paid via Challan No. 56069531 dated 25.11.2014 (SBI)
Finally Assessed BOE dated 20.11.2014				
1	7449508	11,951	11,951	11,951
2	7449462	16,184	16,184	16,184
Total of Finally Assessed BOE			**28,135**	**28,135**
Provisionally Assessed BoE dated 21.11.2014				
3	7462017	5,63,298	5,63,298	5,63,298
4	7462031	1,971	1,971	1,971
5	7462062	22,18,500	22,18,500	22,18,500
Total of Provisionally Assessed BOE			**27,83,769**	**27,83,769**

3. The payment in both these appeals were made on 24.11.2014 through IDBI bank but due to some error in ICES portal, the same was not reflected. Accordingly, the appellant again paid the same amount of duty as mentioned above on the same Bills of Entry as mentioned above on 25.11.2014 through SBI Bank. It is thereafter that the application seeking refund of the double duty paid against the respective BE was filed by the appellant. The said claim of refund has initially been rejected vide the Order-in-Original no.1275/2018 dated 9.7.2018 on the ground of limitation holding that the refund has not been filed within the one year of payment of duty with respect to the BEs which were finally assessed and that the refund claim for the BEs which were still provisionally assessed is premature. The said

findings have been confirmed vide the order under challenge. Being aggrieved the present both the appeals have been filed before this Tribunal.

4. I have heard Shri D K Rana, learned Counsel appearing for the appellant and Shri Ishwar Charan, learned Departmental Representative for the Revenue.

5. It is submitted on behalf of the appellant that there is no denial to the fact that the appellant had paid duty on Bills of Entry under both these appeals, twice. It is submitted that the excise duty paid double is to be refunded to the appellant. Learned Counsel has laid emphasis on the several decisions:

1. **Dexterous Products Pvt Ltd. vs CCE, [2019 (28) GSTL 51 (Tri-Del)];**

2. **CCE vs Motorala India Private Ltd. [2008 (11) STR 555 (Kar)];**

3. **E Infotech vs CESTAT [2018 18 GSTL 410 (Mad)]; and**

4. **Parijat Construction v CCE, [2018 (359) ELT 113 (Bom)]**

Mentioning that any amount paid in excess of duty either under mistake, the said amount cannot be termed as duty and as such rule of time bar shall not be applied to refund thereof and any amount paid in excess, same is liable to be refunded. With respect to the provisionally assessed bills, it is submitted that those have not been finally assessed even till date. The fact still remains is that the duty what was to be paid for the said BEs prior to their finalisation stands paid twice. The double payment is therefore, liable to be refunded. With these submissions, the order under challenge is prayed to be set aside and appeal is prayed to be allowed.

6. Per contra, learned Departmental Representative supported the findings of the order under challenge while relying upon the

said order. Impressing upon no infirmity in the order therein, both the appeals are prayed to be dismissed.

7. After hearing the rival contentions and perusing the record, it is observed and held as follows:-

1. There is no denial to the fact that Bills of Entry in both these appeals (8 BE in Appeals No. 52292/2021 and 5 BE in Appeals No. 50001/2022, the duty as was to be paid at the relevant time has been paid twice, once on 24.11.2014 and another on 25.11.2014. There is no denial to the fact that second payment was made because the payment made on 24.11.2014 was not reflected in ICES portal. The said admitted facts makes it clear that on the same number of BEs duty has been paid twice. As per Constitution of India Article 265, thereof duty cannot be collected beyond what is permissible by the law. Hon'ble Apex Court in the case of **Union of India vs ITC Ltd.** reported as **[1993 8 (iv) SCC Supp. IV SCC 326]** while dealing with the question of refund in excess duty paid as held as follows:

> "8. In *Shri Vallabh Glass Works Ltd.* v. *Union of India*, this Court, while examining the question as to what is the point of time from which the limitation should be deemed to commence observed that relief in respect of payments made beyond the period of three years may not be granted from the date of filing of the petition, taking into consideration the date when the mistake came to be known to the party concerned. **Just as an assessee cannot be permitted to evade payment of rightful tax, the authority which recovers tax without any authority of law cannot be permitted to retain the amount, merely because the tax payer was not aware at that time that the recovery being made was without any authority of law.** In such cases, there is an obligation on the part of the authority to refund the excess tax recovered to the party, subject of course to the statutory provisions dealing with the refund."

2. Commissioner Appeals while holding the applicability of the bar of time to the impugned refund has relied upon the decision of Hon'ble Apex Court in Mafatlal Industries reported as [**1997 89 ELT 246]** para 70 thereof. However, perusal thereof of the said para shows that the facts mentioned therein are not the facts of the present case as is apparent from the facts narrated above. Further as already held by this Bench in the case of **Dexeterous Products Pvt. Ltd.** (supra) that though of the decision of **Mafatlal Industries** was in favour of the department, but the Hon'ble Apex Court in th said case has discussed in length the various situations of the seeking refund. While appreciating the same this Bench has already held that section 11B of Central Excise Act which is para materia to section 27 of the Customs Act (as has been involved in the present case) and the time bar therein is not applicable to the cases similar to the present one. It was held as:-

> "The Section 11 B is applicable only where there is a statutory levy which is either not paid or is short paid. As discussed above, the product of the appellant was exempted under a Notification of the Department. The amount paid by him was therefore not a statutory levy but was made under mistake of law. Hon'ble Apex Court in the case **Mafatlal Industries Ltd. and Others v. Union of India - 1997 (89) E.L.T. 247 (S.C.)** has classified the claim of refund into three groups of categories :
>
> (i) Unconstitutional levy
>
> (ii) Illegal levy
>
> (iii) Mistake of Law
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> In that case, Section 11B of CEA was made applicable on the ground that the petitioner in that case has committed mistake of fact in understanding the Law as he assumed that the transaction for which he has paid tax is covered under law. In the present case, it is not the mistake of fact but the mistake of law that the Notifications extending exemptions to the appellant were not into his notice. Otherwise also, the distinguishing feature for attracting the provisions under Section 11B is that levy should have the colour of validity when it was paid and only consequent upon interpretation of law or adjudication, the levy is liable to be ordered as a refund which is again not the fact for the present case. The levy herein was not valid, in view of appellant's product being an exempted good towards service tax liability on GTA. I am therefore of the opinion that the Adjudicating

Authority below has committed an error while considering the claim as time barred due to non-applicability of Section 11B to the present case."

Hence it is held that relevance of para of this decision and applying the same to present case with distinguish facts is erroneous observation on the part of the Commissioner (Appeals).

3. The issue of excess payment and refund thereof is otherwise no more res intgra.

Hon'ble Bombay High Court in the case of **Parijat Construction.** (supra) has held as follows:

"5. We are of the view that the issue as to whether limitation prescribed under Section 11B of the said Act applies to a refund claimed in respect of service tax paid under a mistake of law is no longer *res integra.* The two decisions of the Division Bench of this Court in *Hindustan Cocoa* (supra) and *Commissioner of Central Excise, Nagpur* v. *M/s. SGR Infratech Ltd.* (supra) are squarely applicable to the facts of the present case.

6. Both decisions have held the limitation prescribed under Section 11B of the said Act to be not applicable to refund claims for service tax paid under a mistake of law. The decision of the Supreme Court in the case of *Collector of C.E., Chandigarh* v. *Doaba Co-Operative Sugar Mills* (supra) relied upon by the Appellate Tribunal has in applying Section 11B, limitation made an exception in case of refund claims where the payment of duty was under a mistake of law. We are of the view that the impugned order is erroneous in that it applies the limitation prescribed under Section 11B of the Act to the present case were admittedly appellant had paid a Service Tax on Commercial or Industrial Construction Service even though such service is not leviable to service tax. We are of the view that the decisions relied upon by the Appellate Tribunal do not support the case of the respondent in rejecting the refund claim on the ground that it was barred by limitation. We are, therefore, of the view that the impugned order is unsustainable.

7. We accordingly allow the present appeals and quash and set aside the impugned order, insofar as it is against the appellant in both appeals. We fully allow refund of Rs. 8,99,962/- preferred by the appellant. We direct that the respondent shall refund the amount of Rs. 8,99,962/- to the appellant within a period of three months. There shall be no order as to costs."

4. Coming to the aspect that the Commissioner (Appeals) has observed that payment which was made on 24.11.2014 was the payment of duty, hence definitely get into the bar of time. It is observed that refund application as was made seeking refund is not for the refund of the amount paid on 24.11.2014. But as submitted by the assessee-appellant in the said application dated 16.11.2015 in both these appeals, that they have paid the double duty payment against the respective Bill of Entry in both the appeals, the prayer is for refund of excess amount paid than the amount of duty of Bes. While submitting before the Bench learned Counsel mentioned that appellant is a big company and double payment did not come to the notice till audit of its records and it is, thereafter, that the impugned application was filed. Since the payment of duty has been made twice, admittedly. Commissioner (Appeals) is held to have taken a wrong notion of the refund of amount paid on 24.11.2014 as duty.

5. The amount paid for the same duty but twice, one of the payment has to be refunded. Otherwise also in terms of section 17 of Limitation Act, whenever there is an application for a relief from the consequences of a mistake, the period of limitation would not begin to run until the plaintiff or applicant has discovered the mistake, or could with reasonable diligence, have discovered it. Since from this angle also, the bar of limitation is held to have wrongly applied against the impugned refund application. The refund application was filed immediately after the mistake of making double payment with respect to same amount of duty was pointed out by appellants audit team. As already held above, the duty was for Bills of Entry which were provisionally assessed, the fact remains is that duty which was to be paid at the relevant time has been paid twice, I am of the opinion that remanding the matter back for reconsideration is not justified. More so for the reason that the Bill of Entry till date have not been finally assessed, whatever payment is already

been made that too twice, one payment thereof cannot be called as duty and is definitely to be refunded to the appellant.

6. In view of these findings the order under challenge is held to be passed on irrelevant presumptions and wrong application of facts and even the legal provision. Commissioner (Appeals) is observed to have failed to follow judicial protocol as there has been enormous decisions of Hon'ble Apex Court, various Courts and of Tribunal holding that excess payment when made by mistake has to be refunded, Department has no authority to retain the same. The gist of **Mafatlal Industries** case also is that once it is established that more than what is payable under the statute has been paid by the tax-payer, the tax-payer automatically gets a right to get back the whole amount. The Authority without parity of law cannot be permitted to retain the amount because the appellant paying the double duty has committed a mistake.

7. With these findings, the order under challenge is hereby set aside. Consequent thereto, both the appeals are allowed with consequential relief.

(DR. RACHNA GUPTA)
MEMBER (JUDICIAL)

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