

CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
SZB, CHENNAI

COURT : Division Bench III

EXCISE APPEAL No. 95/2012

(Arising out of Order-in-Appeal No. 184/2011 (P) dated 02.11.2011 passed by the Commissioner of Central Excise (Appeals) Chennai).

Commissioner of GST & Central Excise
Puducherry Commissionerate
No.1 Gobert Avenue,
Puducherry-605 001.

Appellant

Vs.

M/s. Deepak Cables India Ltd.,
No. 13, Whirl Pool Road,
Thirvandarkoil Village,
Mannadipet Commune,
Puducherry-605 102.

Respondent

WITH

EXCISE APPEAL No. 42825/2014

(Arising out of Order-in-Appeal No. 14/2014 (P) (D) dated 08.04.2014 passed by the Commissioner of Central Excise (Appeals) Chennai).

M/s. Deepak Cables India Ltd.,
No. 13, Whirl Pool Road,
Thirvandarkoil Village,
Mannadipet Commune,
Puducherry-605 102.

Appellant

Vs.

Commissioner of GST & Central Excise
Puducherry Commissionerate
No.1 Gobert Avenue,
Puducherry-605 001.

Respondent

APPEARANCE

For the appellant/respondent : Ms. Sridevi Taritla, ADC, Authorized Representative

For the respondent/appellant : Shri M. Karthikeyan, Advocate

CORAM

Hon'ble MS. SULEKHA BEEVI C.S., MEMBER JUDICIAL
Hon'ble Shri VASA SESHAGIRI RAO, MEMBER TECHNICAL

Date of Hearing: **15.02.2023**

Date of Pronouncement: **20.02.2023**

FINAL ORDER No. 40056-40057/2023**Order : Per Hon'ble Suleka Beevi C.S.**

The issue involved in both these appeals being the same, they were heard together and are disposed by this common order. The parties are referred to as 'assessee' and 'department' for the sake of convenience.

2.1 The brief facts are that the assessee is engaged in the manufacture of ACSR Conductors. They had filed a refund claim on 26.10.2009 for Rs. 60,10,076/- towards downward price revision based on the negative supplementary invoices raised to M/s. Power Grid Corporation India Limited (M/s. PGCL in short). The refund claim was returned to the assessee for defects and the same was resubmitted along with a Chartered Accountant Certificate. A Show Cause Notice dated 11.02.2010 was issued to the assessee proposing to reject the refund claim, on the ground of unjust enrichment. After due process of law, the original authority vide Order-in-Original No. 17/2010 dated 22.06.2010 rejected the refund claim. The relevant paragraph of the Order-in-Original rejecting the refund reads as under:-

“5.7 Further, I observe from careful scrutiny of the documents that the supplies started with effect from 23.11.2008 by the

assessee. As per 'letter of award' i.e. Purchase order, the clauses at 5.1.2 and 5.6; 90% of the reworks price of the conductor shall be paid on presentation of invoices and the payments shall be released directly within 30 days of receipt of invoices. Such being the case for receipt of payments in respect of said supplies, it is to be ascertained beyond doubt as to how the assessee could produce a letter given by M/s. Power Grid Corporation of India Ltd., that they have not reimbursed to the assessee the portion attributable to the excise duty elements of the negative price variation. Otherwise the assessee will be issuing "Credit Notes" after receipt of the claim in which case it would amount to contravention of provisions of Section 11 B of Central Excise Act, 1944 (Unjust enrichment clause). As such the claim appears to be not free from doubt."

2.2 Against this order, the assessee approached the Commissioner (Appeals). After analysing the issue, the Commissioner (Appeals) allowed the appeal of the assessee holding that the assessee is eligible for refund. The observation made by the Commissioner (Appeals) is as under:-

"6.3 As stated supra for the refund amount pertaining to the year 2008-2009 the appellant had produced a Chartered Accountant certificate dated 05.11.09 stating that under the head of Indirect Expenses in their Profit & Loss Account and for the refund relating to the year 2009-2010, the appellant has claimed the balance amount is shown as amount receivable from the government in their account. Since the above cited case law is applicable to the facts of the case in hand, I uphold the above claim of the appellant.

7. In view of the above discussions and plethora of decisions by various courts on the similar issue, I hold that the appellant is entitled to refund claimed by them. Hence, I set aside the input Order-in-Original and allow the appeal.

2.3 Aggrieved by the above order of sanction of refund, the department then has filed the appeal No. E/95/2012.

2.4 The assessee had filed another refund claim for refund of Rs.11,86,500/- dated 12.01.2012 for the period from

01.01.2011 to 12.01.2012. This claim was also filed for the refund of excess duty paid towards the downward price revision based on the negative supplementary invoices raised to M/s.PGCL. The assessee also furnished a Chartered Accountant Certificate. A Show Cause Notice was issued proposing to reject the refund claim. After due process of law, the original authority sanctioned the refund claim, wherein it was observed that the claim is not hit by doctrine of unjust enrichment. The relevant paragraph reads as under:-

“An appeal has been filed by the department against the above O-in-A with Cestat. However, the above referred O-in-A passed by the Commissioner (Appeals) is not covered by any stay orders. As per para 5.3 of CBEC’s Central Excise manual, in cases where refund arises due to order of Commissioner (Appeals) and decision is taken to contest them before Cestat, in such cases, appeal/stay application should be filed expeditiously well before the expiry of the stipulated period of three months. However, no refund/rebate claim should be withheld on the ground that an appeal has been filed against the order giving the relief, unless stay order has been obtained. As the principle of judicial discipline requires that the order of the higher authorities be followed unreservedly by the subordinate authorities. I am bound by the above said O-in-A of the Commissioner (Appeals), Chennai. Hence, I am following the ratio of the above judgement. In the instant case, the applicants have produced a letter dated 11.05.2012 from their customer namely PGCL to the effect that excise duty was not reimbursed due to negative price variation in respect of supplies made against contract agreement C34101-L175-3/CA/2873 dated 19.02.2009. Further, they have also produced T.B for the year 2010-11 and 2011-12 and the refund claimed has been shown under E.D. recoverable a/c in their financial accounts in as much as the applicants have produced relevant documentary evidences. I am satisfied that duty incidence now claimed refund, was not passed on to their customer. The issue involved in this refund claim is of identical in nature. I, therefore, hold that the refund claim is not hit by unjust enrichment.”

{emphasis supplied}

2.5 Aggrieved by sanction of refund as above, the department filed an appeal before the Commissioner (Appeals). Vide O-in-A No. 14/2014 dated 08.04.2014, the Commissioner (Appeals)

allowed the appeal filed by the department and set aside the sanction of refund both on merits as well as on the ground of unjust enrichment. The above appeal No. E/42825/2014 is filed by the assessee against the said order by which the Commissioner (Appeals) set aside the sanction of refund claim.

3.1 The learned Counsel Shri M. Karthikeyan appeared and argued on behalf of the assessee. The learned Counsel explained that they are engaged in the manufacture of ACSR conductors and cleared the same to M/s. PGCL on payment of appropriate excise duty. The negotiated price is adopted for the purpose of payment of duty. As the products in question are aluminium and steel based, the prices vary according to the market fluctuation on a regular basis. At the time of clearance, as the actual market price of aluminium is not ascertainable, it was agreed between the buyer and the assessee to subsequently revise the price based on the actual market price prevalent at the time of clearance of the impugned goods. Consequently, the prices were revised at regular intervals, the actual price was worked out and the payments were released for each and every invoice. In cases, when the prices adopted by the assessee was lower, then the assessee would pay the differential duty along with interest and raise a supplementary invoice on PGCL, who would then release such payments after receipt of the said supplementary invoices. The learned Counsel also pointed out that as per the agreement between the parties, the contract price is exclusive of taxes and duties and such taxes/duties are reimbursable by the buyer at the applicable rates at the time of

dispatch. PGCL did not release the excess duty paid by the assessee at the time of initial clearance, thereby rendering the assessee to bear the cost of the excess duty paid on account of price reduction.

3.2 Consequent to the excess duty paid by the assessee they filed a refund claim which is the genesis of both these appeals.

3.3 The details of supplies made by them, the details of excise invoices, commercial invoices raised for the supplies, the details of payment not received against each invoices etc., were calculated and submitted along with refund claims. The worksheet for the calculation of duty paid would show that the amount claimed as refund has not been realised by the assessee from PGCL. The letter of award (LOA) and other contractual clause would clearly show that price is subject to the fluctuating market prices. So also, from the financial statements, the assessee had established that the excess duty paid by them had been shown as "debit" in their loan and advances account. Further, they produced the Chartered Accountant Certificate. The assessee had thus established that the burden of duty was not passed on to its customer. However, the department had denied the refund with respect to an amount of Rs. 60,10,076/- on the ground of doctrine of unjust enrichment. The refund claim in regard to Rs. 11,86,500/- has been rejected by the Commissioner (Appeals) both on merits as well as on the ground of unjust enrichment.

3.4 The learned Counsel drew our attention to paragraph 6 of the O-in-O dated 30.07.2012 to argue that the adjudicating authority had categorically observed that the assessee had paid excess duty based on the contract value at the time of supplies made to PGCL and subsequently based on the value of materials prevailing at the time of supply. The price was lesser in some cases. Wherever there was lesser price, they raised supplementary invoices with negative value to give effect to price revision. Such documents would clearly establish that the assessee has not realized the excess duty which is claimed as refund, from their buyer, M/s. PGCL. The show cause notice dated 04.04.2012 issued in respect of refund claim for Rs.11,86,500/-. It was further urged that in SCN dated 04.04.2012 in respect of refund of Rs.11,86,500/- the only allegation is that the claim of refund is hit by the bar of unjust enrichment. Though the adjudicating authority sanctioned the refund observing that the assessee has not collected the duty from M/s. PGCL, the Commissioner (Appeals) has set aside the sanctioned refund on merits also, which is totally erroneous.

3.5 The appellant has also produced a certificate issued by M/s. PGCL along with the Chartered Accountant Certificate. This certificate issued by M/s. PGCL would show that M/s. PGCL has not reimbursed to the assessee the amount of excess duty on negative price variation. The learned Counsel argued that the assessee has sufficiently proved that they have shouldered the burden of excess duty. The department ought to have sanctioned the refund.

3.6 The learned counsel relied on the decision in the case of *M/s. EPE Process Filters & Accumulators Pvt. Ltd. Vs. CCE & ST, Hyderabad* reported in 2017 (352)ELT 398 (Tri.-Hyd.), to argue that when the assessee has not collected the excess duty, it cannot be held that the refund is hit by unjust enrichment. The decision in the case of *Commissioner of CCE & ST, Hyderabad-IV Vs. Victory Transformers and Switchgears Ltd.* reported in 2017 (358) ELT 354 (Tri.-Hyd.) was relied to argue that when there is a price variation clause resulting in excess payment of duty, the assessee is eligible for refund, on the basis of Chartered Accountant Certificate which proves that the incidence of duty has not been passed on. The decision in the case of *CCE, Tirupati Vs. Kunool Cylinders Pvt. Ltd.* reported in 2007 (219) ELT 473 (Tri.-Bang.), was also relied. He prayed that the appeal filed by the assessee may be allowed and the appeal filed by the department be dismissed.

4.1 The learned AR Ms. Sridevi Taritla supported the findings recorded in the order impugned in the appeal No. E/42825/2014 and grounds raised in appeal No. E/95/2012. It is submitted that the supplies to M/s. PGCL started with effect from 23.11.2008, as per the letter of award. As per clause 4.2 of this LOA, the contract price is exclusive of taxes and duties which have to be reimbursed by PGCL at the applicable rate at the time of dispatch. Clause 5.1.2 and 5.6 stipulates that 90% of the revised price of the conductor shall be paid on transaction of invoices and all the payment shall be released directly upon

presentation of the invoices. This being so, it is impossible to say that M/s. PGCL has not reimbursed the duty. The certificate issued by M/s. PGCL cannot be accepted. The Commissioner (Appeals) in O-in-O dated 02.11.2011 has erroneously concluded that as per the certificate issued by the Chartered Accountant, the amount of duty paid was kept as receivables from the Government in the books of account of the assessee and hence the bar of unjust enrichment has been satisfied.

4.2 The Chartered Accountant Certificate cannot be the basis to hold that the incidence of duty has not been passed on. Learned AR prayed that the appeal filed by the department may be allowed and the appeal filed by the assessee may be dismissed.

5. Heard both sides.

6.1 The issue is whether the refund claim filed by the assessee for an amount of Rs. 11,86,500/- as well as Rs. 60,10,026/- is hit by the principle of doctrine of unjust enrichment? It requires to be mentioned that the show cause notices in regard to both the refund claims have proposed to deny the refund raising the issue of unjust enrichment only. However, the Commissioner (Appeals) vide O-in-A dated 14/2014 dated 08.04.2014 has set aside the sanction of refund both on merits as well as on the issue of unjust enrichment.

6.2 Be that as it may, it is brought out from the facts that the contract entered with PGCL for supply of goods has a price

variation clause. For the purpose of calculation of variation, the said clause has devised a formula based on which each and every supply made by the assessee was worked out and final payment was made to PGCL. The assessee then pays the differential duty by raising supplementary invoices wherever there was price increase. In case there is a downward price revision, they raise negative supplementary invoices and 100% negative bill value in order to adjust the excess amount billed. As per the contract, adjustment of price and payment would be made at least once in a month. When the assessee issues a negative invoice for downward price revision, the excess payment initially made by M/s. PGCL would stand adjusted against the final amount payable by M/s. PGCL. Thus, the excess payment was borne by the assessee. The assessee has furnished the supplementary invoices for the downward price variation with regard to both refund claims. It is not disputed that there has been excess payment of duty due to the downward price revision.

6.3 The case of the department is that the assessee has collected the excess duty from M/s. PGCL. Assessee has furnished a certificate issued by M/s. PGCL to show that M/s.PGCL has not reimbursed the amount to the assessee. They have also furnished a Chartered Accountant Certificates along with both refund claims to prove that the said amount was shown as receivables under the head 'Loan and Advances" in their financial statement. In the case of *CCE, Coimbatore Vs. Flow Tech Power* reported in 2006 (202) ELT 404 (Mad.), the

Hon'ble High Court of Madras had held that when the assessee has submitted the Chartered Accountant certificate to prove that the duty has not been passed on to their customers, the refund is not hit by unjust enrichment. The relevant portion of the order is as follows:-

“3. We heard the learned counsel in length. There was a factual finding by the authorities below that the duty had been paid under protest and the question of time bar would not arise. Hence, the argument that the petitioner paid the duty without protest is rejected. In respect of unjust enrichment, the facts reveal that the price was a composite one fixed by the Ministry of Agriculture. The factual position is that the duty had been absorbed by the assessee and it was submitted that the Chartered Accountant's Certificate dated 8-7-2002 and the profit and loss account, also confirm that the duty paid on the impugned goods had been absorbed by the assessee and had been shown as expenditure in profit and loss account and had not been passed on to the customer.

4. In the foregoing conclusions, we find no error in the order passed by the Customs, Excise and Service Tax Appellate Tribunal and requires no interference. Hence, no substantial questions of law arise for consideration of this Court. Accordingly, the Civil Miscellaneous Appeal is dismissed. No costs.”

6.4 In the case of *CCE, Mangalore Vs. Keltech Energies Ltd.* reported in 2008 (232_ ELT 306 (Tri.-Chen.), the Tribunal observed as under:-

“ The respondents had supplied their products to two customers during the period from April to July 2001 on payment of duty on the assessable value determined on the basis of a certain price agreed between the appellants and the buyers under agreements valid for a previous period. It appears, long-drawn negotiations were going on between the appellants and their buyers for revision of price under intimation to the Department. When agreement was reached for a lower price, retrospective effect was given to it and consequently, for the aforesaid period, the appellants became liable to repay the differential price along with differential duty to the buyers. They did this by way of credit notes. Subsequently, they filed refund claim with the Department for the excess duty paid by them at the time of original clearance of the goods. These refund claims were rejected by the original authority but allowed by the first appellate authority. Hence the present appeal of the Revenue.

2. After hearing both sides and considering their submissions, I note that the appellant objects to the refund on the ground of unjust enrichment. It is submitted that, once the goods were cleared on payment of appropriate duty, refund of such duty cannot be claimed after issuing credit notes to the buyer. The lower appellate authority has relied on the Tribunal's decision in *Indian Aluminium Cables Ltd. v.*

Collector - 1997 (95) E.L.T. 386 (Tribunal), wherein it had been held that, if price was revised upwards or downwards in terms of price escalation clause in the contract between the assessee, and his buyer, the Department or the assessee, as the case may be, was not precluded from demanding the differential duty or seeking its refund, as the case may be. The same view has been taken by the Tribunal's South Zonal Bench (Bangalore) in F.No. 266/2005 dated 3-2-2006 in Appeal No. E/227/2003 [2006 (196) E.L.T. 282 (Tribunal) = 2007 (8) S.T.R. 434 (Tribunal)]. The view taken by the West Zonal Bench (Mumbai) of the Tribunal in the same party's case was also to the same effect. The appeal filed by the Department against the decision of West Zonal Bench was dismissed by the Bombay High Court as per judgment dated 31-8-2007 in Appeal Nos. 3, 14 and 21/2007. In the impugned order, the learned Commissioner (Appeals) has rendered correct decision on the issue.

3. In the result both the appeals of the Revenue are dismissed."

6.5 In the case CCE, Tirupathi Vs. Kruool Cylinders Pvt. Ltd. reported in 2007 (219) ELT 473 Tri.-Bang.), it was observed as under:-

"5. We have gone through the records of the case carefully. There are many decisions of the Tribunal holding that when there is price escalation, the assessment would be deemed provisional and the refund claim would not be hit by time bar. This Bench itself in the following cases has allowed the appeals of the assessee for refund of the amount on account of downward revision of the prices :-

(a) CCE, Hyderabad v. R. M. Cylinders (P) Ltd. & M/s Hyderabad Cylinders (P) Ltd. [Final Order No 1933 & 1934/2005 dated 22-11-2005, 2006 (198) E.L.T. 45 (T)].

(b) M/s Nagarjuna Constructions Co. Ltd. v. CCE, Hyderabad [Final Order No. 324 & 325/2006 dated 15-2-2006, 2006 (199) E.L.T. 155 (T)]

The various case laws cited by the appellants are relevant. It is pertinent to note that when there is upward revision, the Respondent has to pay the differential duty to the Government. As regards the question of unjust enrichment, the Commissioner (Appeals) has clearly given a finding that even though the Respondents pay high duty, the actual bill is settled only on the correct price finalized. In other words, when there is downward revision of prices, the Respondents collect only the appropriate duty from the oil companies and not the higher duty which they had paid to the Government. This clearly indicates that there is no unjust enrichment. In these circumstances, rejection of refund claim on account of time bar and unjust enrichment cannot be sustained. There is no merit in the Revenue's appeals. Hence the same are rejected.

6.6 The Tribunal in the case of M/s. EPE Process Filters & Accumulators Pvt. Ltd. Vs. CCE & ST, Hyderabad reported in 2017 (352) ELT 398 (Tri.-Hyd.), it was observed as under:-

8. Under Section 12B of Central Excise Act, 1944 when the invoice is raised including the excise duty a presumption is raised that the incidence of duty is passed on. But this presumption is a rebuttable one. When the invoice was mistakenly raised including the duty and when excise duty was not collected, there is no question of the burden of duty being passed on. The decision relied by the department in the case of *M/s. Addison and Company Ltd.*, pertains to the case wherein the refund was sought for the excess duty paid by the assessee on account of discounts given to buyers. In facts of those cases before the Hon'ble Apex Court, the assessee was periodically passing on the turnover discount to their dealer by way of credit note issued to them and then filed refund claim for the Excise duty element on the discounts. In the case before me, refund is not claimed of the duty element on discount. The appellant paid excise duty wrongly, and the same though included in invoice has not been collected from BHEL. The entry was made debiting the excise duty without actually collecting the excise duty. Therefore the facts are distinguishable from the case of *M/s. Addison & Company Ltd.*, [2016 (339) E.L.T. 177 (S.C.)]. BHEL has categorically stated that they have not paid the excise duty raised in the invoice which establishes that the duty burden has not been passed on. From the above discussions, I hold that the refund is not hit by unjust enrichment. In the result, I hold that the appellant is eligible for the refund. The impugned order directing the sanctioned refund to be credited to the Consumer Welfare Fund is set aside. Appeal is allowed with consequential reliefs, if any.

6.7 From the above discussions, we are able to hold that the refund is not hit by unjust enrichment. The assessee is eligible for refund on merits as well having satisfied the test of unjust enrichment.

7. In the result, appeal No. E/42825/2014 filed by the assessee is allowed. The appeal No. E/95/2012 filed by the department is dismissed.

(Order pronounced in the Open Court on **20.02.2023**)

(SULEKHA BEEVI C.S.)
MEMBER JUDICIAL

(VASA SESHAGIRI RAO)
MEMBER TECHNICAL