CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
CHANDIGARH
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REGIONAL BENCH – COURT NO. 1

Excise Appeal No. 2929 Of 2009

[Arising out of OIA No. 230-231/MA/GGN/2009 dated 31.08.2009 passed by the Commissioner (Appeals) of Central Excise-Delhi-III]

Carrier Air Conditioning and Refrigeration Ltd. : Appellant (s)
Kherki Daula Post, Narsinghpur, Grugaon-122001

Vs

Commissioner of Central Excise, Delhi-III : Respondent (s)
Vanijya Nikunj, Udyog Vihar, Phase-V Gurgaon

APPEARANCE:
Ms. Krati Singh, Advocate for the Appellant
Shri Manoj Nayyar, Ms. Geetika, Authorised Representatives for the Respondent

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Excise Appeal No. 2930 Of 2009

[Arising out of OIA No. 230-231/MA/GGN/2009 dated 31.08.2009 passed by the Commissioner (Appeals) of Central Excise-Delhi-III]

Carrier Air Conditioning and Refrigeration Ltd. : Appellant (s)
Kherki Daula Post, Narsinghpur, Grugaon-122001

Vs

Commissioner of Central Excise, Delhi-III : Respondent (s)
Vanijya Nikunj, Udyog Vihar, Phase-V Gurgaon

APPEARANCE:
Ms. Krati Singh, Advocate for the Appellant
Shri Manoj Nayyar, Ms. Geetika, Authorised Representatives for the Respondent

CORAM : HON'BLE Mr. S. S. GARG, MEMBER (JUDICIAL)
HON'BLE Mr. P. ANJANI KUMAR, MEMBER (TECHNICAL)

ORDER No. A/60098-60099/2023

Date of Hearing:28.02.2023

Date of Decision:18.04.2023

Per : S. S. GARG
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These two appeals are directed against the impugned order dated 31.08.2009 passed by the Commissioner (Appeals) of Central Excise-Delhi-III whereby both the appeals of the appellant were dismissed by passing the common impugned order. Since the issue involved in both the appeals is identical and the impugned order is common, therefore, we take up both the appeals together for the purpose of discussion and disposal. The details of both the appeals are given herein below in tabular form:-

Appeal No.	E/2929/2009	E/2930/2009
Period of dispute	May to December, 2006	January to July, 2007
Refund Amount	Rs. 7,01,241/-	6,11,387/-
OIA	230- 231/MA/GGN/2009 dated 31.08.2009	230-231/MA/GGN/2009 dated 31.08.2009

2. Briefly stated the facts of the present case are that the appellant are engaged in the manufacture of excisable goods i.e. Air Conditioners, Chillers and parts thereof. They were paying central excise duty on their products, cleared to their depots on stock transfer basis under Section 4 of the Central Excise Act, 1944. They filed refund claim for Rs. 7,01,241/- and 6,11,387/- vide application dated 09.02.2017 and 10.09.2007.

(i) After following due process, the Assistant Commissioner sanctioned both the refunds in favour of the appellant vide order-in-original dated 18.12.2007 and 14.01.2008 respectively and allowed re-credit of these amounts in the cenvat credit account of the appellant.

(ii) Aggrieved by the said order, the department filed appeals against the order of the adjudicating authority before the Ld. Commissioner (Appeals) and the same were allowed by the Ld. Commissioner (Appeals) vide order-in-appeal dated 26.08.2008.

(iii) Thereafter, the appellant filed appeals before this Tribunal against the order of the Ld. Commissioner (Appeals) and this Tribunal vide its order dated 14.01.2009 remanded the matter back to the Ld. Commissioner (Appeals) to re-examine the corroborative evidence which has given rise to chartered accountants certificate and to satisfy himself that the claim made by the appellant was not to unjustify enrich himself. The Tribunal reduced the litigation to a narrow compass of examining evidence to test the unjust enrichment only.

(iv) Pursuant to the order of the Tribunal, the Ld. Commissioner (Appeals) allowed the Revenue's appeal vide impugned order dated 31.08.2009.

(v) Aggrieved by the said order dated 31.08.2009, the appellant filed appeals before the Tribunal and the Tribunal vide order dated 02.08.2017 dismissed the appeals of the appellant.

(vi) Aggrieved by the said order of the Tribunal, the appellant filed appeals before the Hon'ble Punjab and Haryana High and the Hon'ble High Court vide order dated 15.01.2020 set-aside the Tribunal's order dated 02.08.2017 only on the factual error that there was no verification report examining the issue of unjust enrichment, as was observed in the order of the Tribunal.

(vii) Thereafter, the matter was remanded back to the Tribunal by the Hon'ble High Court for deciding the issue afresh in accordance with law.

3. Heard both the parties and perused the case records.

4. Ld. Counsel appearing on behalf of the appellant submitted that the appellant has discharged duty at a higher value while clearing the goods from the factory to depots whereas ultimately such goods have been sold to the customers at a lower price and accordingly, the lower authorities have rightly held that the appellant is entitled to the refund of said duty paid in excess. She further submits that the Ld. Commissioner (Appeals) vide impugned order dated 31.08.2009 has wrongly held that the appellant has not been able to establish that the higher duty paid by them has not been recovered from their buyers. She further submitted that once the fact of duty paid is not disputed by the department, then there can be no question of unjust enrichment because the question of refund of excess duty paid will arise only when the value at which the goods are transferred from the factory to the depots is higher than the value at which such goods are sold from the depots to the customers. She further submitted that the findings returned by the Ld. Commissioner (Appeals) is contrary to the judgement of the Tribunal in the case of ***Nahar Spg. & Wvg. Mills Ltd. vs. Commissioner of C.Ex., Bhopal 2009 (247) ELT 708 (Tri.-Del.)*** wherein after considering the submissions of the department that the appellants failed to co-relate the goods cleared from the factory and removal from the depot and therefore, have failed to establish that the incidence of duty has not been passed to any further person. Further, she also relied upon the following judgements:-

- ***WEP Peripherals Ltd. v. CCE 2007 (213) ELT 18 (Tri.-Bang.)***

- ***CCE, Chennai v. Carborandum Universal Ltd. 2008 (224) ELT 290 (Tri.-Bang.)***
- ***CCE v. GIS Cotton Mill Ltd. 2006 (197) ELT 370 (Tri.-Kolkata)***
- ***SD Fine Chem Ltd. v. CCE 2015 (324) ELT 181 (Tri.-Ahmd.)***

She further argued that the department has not produced any contrary evidence to upset the conclusion in the Chartered Accountant certificates which is produced on record as well as the verification report (referred to in the Original Order granting the refund). Hence, it was not open to the department to question the issue of unjust enrichment in the absence of any contrary evidence. For this submission, she relied on the following decisions;-

Ispat Industries Ltd. v. CCE, Nagpur 2014 (307) ELT 744 (Tri.-Mumbai)

- ***CCE v. Kandhari Beverages Ltd. 2008 (223) ELT 147 (P&H)***
- ***Transformers & Electricals Kerala Ltd. v. Commissioner of Customs 2005 (188) ELT 60 (Tri.-Bang.)***
- ***CCE v. Shetia Auto Video (Pvt.) Ltd. 2003 (161) ELT 452 (Tri.-Mum.)***

She further submitted that for the previous period, the appellant has been granted refund of the excess duty paid. The appellant had placed on record the following orders passed by the adjudicating authority granting the refund for the previous period:-

- Order in Original No. 172/CE/2004 dated 27.08.2004
- Order in Original No. 14/CE/2005-06 dated 21.04.2005

- Order in Original No. 153/R/2004-05 dated 02.02.2006
- Order in Original No. 57/R/2005-06 dated 10.08.2006

She also submitted that these orders granting refunds have attained finality. She further argued that the department cannot take contrary stand in proceedings on the same issue for the same assessee. In this regard, the appellant relied upon the following decisions;-

- ***Alufit India Pvt. Ltd. vs. Commissioner of Customs, 2022 (4) TMI 1258 - CESTAT Bangalore***
- ***J.B. Construction vs. CCE, 2022 (5) TMI 425 - CESTAT Mumbai***
- ***A Infrastructure Ltd. vs. Commissioner, CGST, 2021 (9) TMI 141 - CESTAT New Delhi***
- ***SRF Ltd. vs. Commissioner, CE&ST, 2021 (8) TMI 696 - CESTAT New Delhi***

The Ld. Counsel further submitted that the Tribunal vide its order dated 20.01.2009 remanded the matter to Commissioner (Appeals) to examine the evidence placed on record by the appellant with regard to the facts of unjust enrichment only whereas the Ld. Commissioner (Appeals) has gone beyond the remand order to hold that Rule 7 of the Valuation Rules has not been followed. She also submitted that the Ld. Commissioner (Appeals) did not examine the voluminous evidences nor did he call for a report from the range regarding the issue of unjust enrichment and has only analysed the annexures to the certificate for holding that Rule 7 of Valuation Rules have not been followed. In this regard, she relied upon the following judgements:-

- ***Commissioner of Customs v. Kushalchand& Co. 2015 (325) ELT 813 (SC)***

- ***Commissioner of Customs (Import) v. Kodak India Ltd. 2015 (320) ELT 779 (Bom.)***

5. On the other hand, the Ld. DR reiterated the findings in the impugned order and submitted that the appellant has only been able to prove that they have paid more duty then the duty they ought to have paid in terms of Rule 7 of Central Excise Valuation Rules, 2000 but they have not been able to establish that the higher duty paid by them for which refund has been sought, has not been recovered from their buyers. She further submitted that the chartered accountant certificates produced by the appellant do not support the case of the appellant because the doctrine of unjust enrichment requires that the person who applies for refund has to prove beyond doubt that the duty paid/borne by him has not been passed on to the ultimate buyer. She also submitted that in the remand order, the Hon'ble High Court has not directed the Tribunal to decide the case on merit. She relied upon the following judgements as cited in support of his submission:-

- ***Hindustan Petroleum Corpn. Ltd. vs. Commr. Of Customs (Imports), Mumbai 2015 (328) ELT 490 (Tri.-Mumbai)***
- ***Commr. Of C.Ex. Aurangabad vs. Toyota Kirloskar Motors ltd. 2010 (256) ELT 216 (Kar.)***
- ***Commissioner of Customs (I), Mumbai vs. BE Office Automation Pvt. Ltd. 2016 (334) ELT 158 (Tri.-Mumbai)***
- ***JCT Limited vs. Commissioner of Central Excise, Chandigarh-II 2004 (163) ELT 467 (Tri.-Del.)***
- ***Gail India ltd. vs. Commr. Of C. Ex. Gwalior 2011 (264) ELT 393 (Tri.-Del.)***

- ***MRF Ltd. vs. Commr. Of Central Excise, Chennai 2002 (149) ELT 801 (Tri.-Chennai)***
- ***Shoppers Stop Ltd. vs. Commissioner of Customs (Export) Chennai 2018 (8) GSTL 47 (Mad.)***
- ***Tvs Electronics Ltd. vs. Commissioner of Central Excise, Chennai 2012 (286) ELT 258 (Tri.- Chennai)***

Subsequently, the Ld. DR also filed additional submissions whereby she has submitted that no refund claim is maintainable unless the order of assessment or self assessment is modified in accordance with law and for this issue, she relied upon the following decisions:-

- **ITC Ltd. vs. CCE Kolkata 2019 (368) ELT 216 (S.C.) larger bench-dated 18.09.2019**
- **Viavi Solutions India Pvt. Ltd. vs. CCE-Gurgaon-I vide Interim Order No. 111/2021 dated 08.10.2021**
- **MRF vs. CCE, Madras reported in 1997 (92) ELT 309 (S.C.0**
- **Maurya Udyog Ltd. vs. CCE-2007 (207) ELT 31 (P & H)**

She also submitted that there is no estoppel in tax matters and for this submission, she relied upon the following judgements:-

- **Plasmac Machine Mfg. Co. Pvt. Ltd. vs. Collector of Central Excise – 1991 (51) ELT 161 (S.C.)**
- **Nowranglal Agarwala vs. State of Orissa (AIR 1965 Ori. 44)**
- **Continental Exporters vs. Commissioner of Customs, Bangalore – 2018 (364) ELT 109 (Tri.-Bang.)**
- **C.K. Gangadharan vs. Commissioner of Income Tax, Cochin 2008 (228) ELT 497 (S.C.)**

6. In reply to the additional submissions, the Ld. Counsel for the appellant submitted that the question of maintainability of refund claim cannot be raised at this stage of the proceedings in the light of the fact that this Tribunal vide order dated 14.01.2009 remanded the matter to Ld. Commissioner (Appeals) to examine the evidence placed on record by the appellant with regard to the facts of unjust enrichment only. This very question was considered by the Hon'ble Bombay High Court in the case of ***Commissioner of Customs (import) vs. Kodak India ltd. 2015 (320) ELT 779 (Bom.)*** wherein the Hon'ble Bombay High Court held that as the issue was restricted to the aspect of unjust enrichment by way of the remand order, the question of maintainability of refund claim cannot be looked into. Regarding the issue of no estoppel in tax matters, the department has submitted that the facts that the refunds of previous period have already been granted to the appellant does not mean that the department cannot take contrary stand in the present case. The ld. Counsel distinguished the authorities relied upon by the department on this issue by submitting that the facts in those cases were different from the facts involved in the present appeals.

7. We have considered the rival submissions made by both the parties and we have also considered the various decisions relied upon by both the parties in support of their submissions. We find that admittedly the appellant has paid duty at a higher value while clearing the goods from the factory to the depots and the said goods were sold to the customers at a lower price and the original authorities after verification of all the documents have found that the appellant entitled to refund of the excess duty paid by them but the Ld. Commissioner vide the impugned order has accepted the appeal of the department

by holding that the appellant has failed to prove that the higher duty paid by them has not been recovered from their buyer.

8. We also find that the identical issue was examined by the Tribunal in the case of ***Nahar Spg. & Wvg. Mills Ltd.*** cited (supra) wherein after considering the submissions of the department that the appellant failed to co-relate the goods cleared from the factory and removal from the depot and therefore, failed to establish that the question of duty has not been passed to any other person, it was held as under:-

> *"4. After hearing both the sides and on perusal of the records we find that there is no dispute that the appellants opted provisional assessment for selling of the goods from depot. Rule 7 of Central Excise (Valuation) Rules, 2000 provides that where the excisable goods were not sold by the assessee at the time and place of removal but were transferred to depot, from where the excisable goods to be sold after their clearance from the factory, the value shall be the normal transaction value of such goods sold from such other place at or about the same time and, where such goods are not sold at or about the same time nearest time of removal of goods under assessment. Thus, if goods are cleared from factory today to a depot, the duty would be payable on the price prevailing at the depot today. The expression "such goods" in Rule 7 is significant. For the purpose of assessment, the clearance of goods from factory to depot would deemed to be "such goods" from depot. In view of that for the purpose of unjust enrichment, price of such goods prevailing at depot to be adopted.*
>
> *5. On perusal of the Adjudication order we find that the original authority sanctioned the refund claim holding that "provisional assessment for the period in question was finalized on the basis of price prevailing at depot on the day the goods were cleared from the factory. The price prevailing at depot has been lower than the price at which duty was paid by the appellant. The buyer at depot paid the duty on this lower price. Thus the excess duty paid by the appellants at the time of removal of the goods from the factory has not been recovered from the buyer. Hence, incidence of duty has not been borne by the appellants only." The Commissioner (Appeals) set aside the adjudication order, holding that the appellants failed to prove that the duty burden has not been passed on to other persons. It has been observed that the goods cleared from the factory and the goods sold from depot on a particular day are different. We are unable to accept the finding of the Commissioner (Appeals). We agree with the finding of original authority.*
>
> *6. The original authority rightly held that depot price is relevant for the purpose of assessment. It is proved that the price at depot was lower than the factory gate price. So, there is no reason to look into as to what price goods were sold subsequently. In this connection*

we reproduce the relevant portion of the decision of the Tribunal in the case of Carborandum Universal Ltd. (supra) :-

"5. On a very careful consideration of the issue, we find that when the goods are stock transferred from the factory, to the depot, duty is to be paid in terms of Section 4(b) read with Valuation Rules. The time of removal in respect of goods removed from the place of removal shall be deemed to be the time at which such goods are cleared from the factory. When the coated abrasives are removed from the factory to the depot, duty liability has to be discharged and in terms of law value to be adopted is the price discount is given to the prevailing in the depot at the time of clearance from the factory. In terms of the declaration made by the respondents, it is seen that normally 17.5% discount is given to the dealers in respect of the goods purchased from the depot. Moreover at the time stock transfer from the factory to the depot, the appellants would not be knowing that a particular item would be sold to an industrial consumer. Further, the percentage of sales to industrial consumer from the depot is very meagre only 0.5%. However, as rightly observed by the Commissioner (Appeals) once the goods are cleared from the factory to the depot on payment of duty on the basis of a price prevailing at the depot, at the time of removal from the factory there is no need to chase the goods and to see at what price the same are actually sold. Therefore, he has rightly set aside the orders of the lower authority demanding duty. We do not find any reason to interfere with the orders of the Commissioner. Therefore, we dismiss Revenue's appeals and uphold the Orders-in-Appeal. The appeals and cross-objections are disposed of in the above terms."

7. The decisions cited by the learned D.R. for applicability of unjust enrichment are not relevant in this case, as the appellants fulfilled the conditions of unjust enrichment by showing that the depot price prevailing at the relevant time. "

9. We also find that once it is established that the goods were sold from the depot to the customers at a lower price as is the case in the present case then it is clear that the higher duty has not been collected by the appellant and hence there is no unjust enrichment. This issue has also been considered in the cases relied upon by the appellant cited (supra).

10. Further, we find that the Ld. Commissioner (Appeals) has not given any credence to the certificates issued by the chartered accountant wherein the chartered accountant has stated that they have verified the entire books of accounts which reveal that the excess duty at the time of clearance, which was actually paid has not

been passed on to the customers. The Ld. Commissioner (Appeals) also did not give any credence to the verification report which is referred in the original order granting refund and before the Hon'ble High Court also, the counsel appearing for the revenue has admitted that the Tribunal in their decision dated 02.08.2017 has wrongly recorded that there was no verification report examining the issue of unjust enrichment. The original authority while granting the refund has verified all the documents as recorded by them in the order-in-original granting the refund and in the absence of any contrary evidence, the department cannot possibly say that the bar of unjust enrichment has not been passed by the appellant. The decisions relied upon by the appellant in the case of ***Ispat Industries Ltd. (supra)*** clearly holding that once there is a sufficient evidence to prove that the excess duty paid by the assessee has not been passed on to the ultimate buyer, the doctrine of bar of unjust enrichment will not be applicable.

11. Further, we find that the Ld. Commissioner (Appeals) has travelled beyond the remand order passed by the Tribunal. In remand order, the Ld. Commissioner was only to consider the issue of unjust enrichment whereas the Ld. Commissioner has gone beyond the remand order to hold that Rule 7 of the Central ExciseValuation Rules, 2000 has not been followed.

12. As per the findings of the Hon'ble Bombay High Court in the case of ***Commissioner of Customs (Import) vs. Kodak India Ltd. cited (supra)*** the lower authorities cannot travel beyond the remand order passed by the higher authorities.

13. Further, we also find that in the appellant's own case for the previous period, the appellants have been granted the refund of

excess duty paid and four orders-in-originals are placed on record and the said orders have attained finality, therefore, raising the issue in the present case is also not sustainable in law as held by various decisions cited (supra) wherein consistently the Tribunal has held that the department cannot take contrary stand in proceedings on the same issue with the same assessee.

14. We also find that the judgements relied upon by the Ld. DR for the Revenue are not applicable in the facts and circumstances of this case and they are distinguishable on facts.

15. In view of our discussion above, we are of the considered opinion that the impugned order is not sustainable in law and hence we set-aside the impugned order by allowing the appeals filed by the appellant with consequential relief, if any.

(Pronounced on 18.04.2023)

(S. S. GARG)
MEMBER (JUDICIAL)

(P. ANJANI KUMAR)
MEMBER (TECHNICAL)

G.Y.