CUSTOMS EXCISE & SERVICE TAX APPLELLATE TRIBUNAL
NEW DELHI
PRINCIPAL BENCH,COURT NO. 3

CUSTOMS APPEAL NO. 51975/2023

[Arising out of Order-in-Appeal No. IND-EXCUS-000-APP-53-2022-23 dated 13.12.2022 passed by the Commissioner (Appeals), CGST & CENTRAL Excise, Indore, MP]

HINDUSTAN MOTORS LIMITED
(Power Unit Plant)
Sector III, Sagorekutti
Industria Area, Pithampur
Dist Dhar MP

APPELLANT

Vs.

COMMISSIONER OF CUSTOMS AND CENTRAL GOODS AND SERVICE TAX, EXCISE, UJJAIN, MP

RESPONDENT

Appearance:
Shri Ankur Upadhyay, Advocate for the Appellant
Shri Vishwa Jeet Saharan, Authorised Counsel for the Respondent

CORAM:
HON'BLE Ms.HEMAMBIKA R. PRIYA, MEMBER(TECHNICAL)

Date of Hearing : 24/07/2023
DATE OF DECISION : 25.08.2023

FINAL ORDER No. 51135/2023

PER HEMAMBIKA R PRIYA

This appeal has been filed by M/s. Hindustan Motors Ltd (hereinafter referred to as the Appellant) to assail the Order-in-Appeal dated 13.12.2022 passed by the Commissioner (Appeals), Indore wherein the refund claim of Rs 43,46,830/- has been rejected.

2. The brief facts of the present case are that the appellant had imported component and parts of engine during the impugned period 20.09.2000 to 29.12.2001. They paid the differential customs duty "Under Protest" owing to classification dispute on the imported goods. Subsequently on 23.08.2004, they filed a refund claim for refund of differential custom duty of Rs. 43,46,830/- along with Bills of Entry, TR-6 Challan, C.A Certificate and other relevant documents in original. The Appellants were informed that as their refund claim of Rs.3,00,78,856/- for the earlier period was in dispute, hence this refund claim would be kept in abeyance till the earlier claim is finally disposed. The refund amount for the earlier period was sanctioned on the basis of CESTAT Final Order No. 55734/2017 dated 01.08.2017. Thereafter, the appellant approached the Assistant Commissioner, Central Excise, Division II, Indore again vide letter dated 14.07.2020 for refund of impugned amount of Rs. 43,46,830/- on 15.11.2018. The Appellant also enclosed the copy of refund application filed by them on 23.08.2004 for Rs. 43,46,830/- along with copies of Bill of Entry and copies of TR-6 Challans, Cenvat account etc. The refund of Rs. 43,46,830/- sought vide letter dated 14.07.2020 was rejected. Being aggrieved the appellant is before this Tribunal.

3. Shri Ankur Upadhyay, learned counsel for the appellant submits that the Commissioner (Appeals) has erred in rejecting the appeal on the ground of Bills of Entry were provisionally assessed. It is submitted that the Appellate Authority has rejected the appeal

on the ground which was out of the scope of the show cause notice and the Order-in-Original. The Commissioner (Appeals) should have restricted his order only to the issue involved and did not have the authority to reject the appeal by raising new ground which was not raised in the show cause notice. Thus, the Order-in-appeal is liable to be set aside on this ground alone. In support of his contention, he placed reliance on the following case laws:

1. **JEEVAN DIESELS & ELECTRICALS LTD. VS C.C.E., CUS. & S.T., BENGALURU-III [2017 (353) E.L.T. 78 (KAR.)]**

2. **J.S.E.L. SECURITIES LTD. VS. COMMISSIONER OF C.EX & ST, JAIPUR-I – [2017 (4) GSTL 8 (TRI-DEL)]**

3. **DOW CHEMICALS INTERNATIONAL PVT. LTD. VS. COMMR. OF CUS., KANDLA - 2019 (370) ELT 1302 (Tri- AHMD)]**

4. Shri Vishwa Jeet Saharan, learned Authorised Representative appearing for the department reiterated the findings of Commissioner (Appeals) and place reliance on the decision of Tribunal, Bangalore in the case of **Mineral Enterprises Ltd. vs Commissioner of Customs, Mangalore** reported as **[2022 (2) TMI 680-CESTAT Bangalore].**

5. I have heard the learned Counsel for the appellant and Learned authorised representative. The issue relates to the rejection of refund claim in the impugned order, wherein the appellant has submitted that the same was done on a ground Which was not taken in the show cause notice.

6. I note that the Commissioner (Appeals) in para 9 of the impugned order has stated that the Bill of Entry submitted with the

refund claim is the only document which indicates the payment of the differential duty under protest on account of classification dispute. For the scrutiny of bill of entry so submitted, it was noted that the assessment of import goods was provisionally assessed. He has referred to the guidelines regarding provisional assessment under section 18 of the Customs Act, 1962 wherein it has been stipulated that the provisional assessment is for the subject to final assessment in accordance with the provisions of the act. As the appellant had failed to bring on record the document of final assessment of such provisionally assist bill of entry. Hence, he has rejected the refund claim. This is not tenable. The show cause notice in the instant case sought to reject the refund claim on the grounds that the documents submitted were not original and were photocopies. The original adjudicating authority has rejected the claim purely on the ground that they had not submitted the proof of payment of duty, and other supporting documents such as the bill of entry in original. Therefore, instead of appreciating or examining the grounds on which the original authority had rejected the refund claim, the appellate authority has introduced a new ground for rejection of the refund claim which was not indicated in the show cause notice. This is not acceptable. In this context, I rely on the following decisions wherein it has been held that no new ground not specified in the show cause notice can be raised by the adjudicating authority. In the case of **Senor Metals Pvt Limited Versus Commissioner of Central Excise & ST, Rajkot** [**2023**

(7) TMI 1115 - CESTAT AHMEDABAD], this Tribunal held as follows:

> **"**5.2 It has been the contention *of* the learned Advocate that verification report referred in the order-in-original, in the above-mentioned Para have never been revealed or provided to the appellant. We also find that the basis on which the Adjudicating Authority has confirmed the demand has never been subject matter *of* the *show cause notice* and therefore, we hold that Adjudicating Authority has travelled beyond the *scope of* the *show cause notice* and therefore, violated the principles *of* natural justice by not disclosing the verification report to the appellant, this clearly amounts to an act *of* violation *of* the principles *of* natural justice. In this regard we also take note *of* the Hon'ble Supreme Court decisions in the case *of* Ballarpur Industries Limited (supra) and in the case *of* Toyo Engineering India Limited (supra). However, we take shelter *of* Hon'ble Gujarat High Court decision in the case *of* Kandarp Dilipbhai Dholkia vs. UOI – 2014 (307) ELT 484 (Guj.) and reproduce the relevant portion *of* the judgment as follow:-
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> "5.1 However, from the impugned orders, it appears that so far as rebate/refund claim *of* the petitioners on the inputs/used excisable goods used in manufacturing *of* the final product is denied also on the ground that petitioners have not followed the procedure while claiming rebate/refund under Rule 8, which is required to be followed under Notification No. 21/2004-C.E. (N.T.), dated 6-9-2004. However, on that ground, *show cause notice* was not issued and the rebate claim was not sought to be denied. Under the circumstances, to the aforesaid extent, the impugned orders are beyond the *show cause notice*. Under the circumstances, we are *of* the opinion that impugned orders deserve to be quashed and set aside and the matter is required to be remanded to the First Authority to consider the same in accordance with law and on merits."
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> 6. In view *of* the above, we do not take up the matter on merits and we set-aside the impugned order-in-original for the reasons as stated above and remand the matter to the Adjudicating Authority for de-novo adjudication."

7. Further, in the case of **Commissioner of Customs, Mumbai Vs Toyo Engineering India Limited [2006 (8) TMI 184 - SUPREME COURT], the Apex Court held the following:**

> "16. Learned counsel for the Revenue tried to raise some of the submissions which were not allowed to be raised by the Tribunal before us, as well. We agree with the Tribunal that the revenue could not be allowed to raise these submissions for the first time in the second appeal before the Tribunal. Neither adjudicating authority nor the appellate authority had denied the facility of the project import to the respondent on any of these grounds. These grounds did not find mention in the show cause notice as well. The Department cannot be travel beyond the show cause notice. Even in the grounds of appeals these points have not been taken."

8. In view of the above, I set aside the impugned order, and remand the matter to the original authority to examine the refund claim in the light of the fact that the claim with all the relevant documents in original had been filed with the department on 23.08.2004 by the appellant. Mere observation that the payments cannot be verified, cannot be a ground to deny the claim.

9. The appeal is disposed off accordingly.

(Pronounced in the open court on 25.08.2023)

(HEMAMBIKA R. PRIYA)
MEMBER(TECHNICAL)

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