CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
REGIONAL BENCH AT HYDERABAD
Division Bench
Court – I

Customs Appeal No. 30427 of 2023
(Arising out of Order-in-Appeal No. VIZ-CUSTM-000-APP-262-2023-24 dt.04.08.2023 passed by Principal Commissioner of Central Tax & Customs (Appeals), Guntur)

Bagadiya Brothers Pvt Ltd
Bagadiya Mansion, Ground Floor,
Jawahar Nagar, Raipur – 492 001 **.....Appellant**

VERSUS

Commissioner of Customs,
Visakhapatnam - I
Port Area, Visakhapatnam,
Andhra Pradesh – 530 035 **.....Respondent**

and

Customs Appeal No. 30448 of 2023
(Arising out of Order-in-Appeal No. VIZ-CUSTM-000-APP-262-2023-24 dt.04.08.2023 passed by Principal Commissioner of Central Tax & Customs (Appeals), Guntur)

Commissioner of Customs,
Visakhapatnam - I **.....Appellant**
Port Area, Visakhapatnam,
Andhra Pradesh – 530 035

VERSUS

Bagadiya Brothers Pvt Ltd
Bagadiya Mansion, Ground Floor,
Jawahar Nagar, Raipur – 492 001 **.....Respondent**

Appearance
Shri Hari Radha Krishna, Advocate for the Assessee.
Shri M. Anukathir Surya, AR for the Revenue.

Coram:
HON'BLE MR. ANIL CHOUDHARY, MEMBER (JUDICIAL)
HON'BLE MR. A.K. JYOTISHI, MEMBER (TECHNICAL)

FINAL ORDER No. A/30257-30258/2024

Date of Hearing: 12.03.2024
Date of Decision: 08.04.2024

[Order per: ANIL CHOUDHARY]

The issues in these cross appeals are as follows:

i) In Appeal No. C/30427/2023, the issue is whether grant of interest has been rightly refused on the amount deposited during investigation, which was subsequently found to be refundable and;

ii) In Appeal No. C/30448/2023, filed by Revenue, the issue is whether unjust enrichment is attracted on the principle amount of refund granted, which was deposited during the course of investigation.

As both these appeals arise from common impugned OIA, they are taken up together for hearing and disposal.

2. Heard the parties.

3. The brief facts are that the appellant/assessee exported iron ore fines which are subject to export duty at Rs.300 per MT. However, if the Fe content of the iron ore fines is below 62% they are exempted from export duty in excess of Rs.50 per MT by Notification No. 62/2007-Cus dated 03.05.2007. In other words, if the Fe content is above 62%, export duty has to be paid at Rs.300 per MT and if it is below 62%, it has to be paid at Rs.50 per MT. The exporter filed a shipping bill dated 31.05.2008 claiming the Fe content to be less than 62%. It also enclosed with it a test report from a private testing laboratory viz., Therapeutics Chemical Research Corporation (TCRC) dated 30.05.2008 which indicated the Fe content as 61.03%. The shipping bill was assessed provisionally by the assessing officer, subject to execution of a test bond. The conditions of the bond were that the exporter would abide by the test report of the Central Revenue Control Laboratories (CRCL) and if the Fe content is above 62% it would pay the differential export duty. Samples were drawn and sent for testing to the Central Revenue Control Laboratories, which sent the test report dated 25.07.2008 stating that the Fe content is 61.15% by weight.

4. On receipt of the test report, the assessment of the shipping bill was finalised and the test bond executed by the exporter was cancelled by the assessing officer. Thereafter, before loading iron ore fines into the ship, the exporter had taken another sample and got it tested which showed that the Fe content was 62.38% on dry weight basis. After the goods had left India, the overseas buyer had cancelled the order and the exporter sold the goods to another customer in Hong Kong. At the discharge port, a sample of the iron ore fines was again tested and it was found that the Fe content was 62.11% on dry weight basis.

5. The Directorate of Revenue Intelligence (DRI), Visakhapatnam received intelligence that the appellant/assessee had misdeclared the Fe content in its Shipping Bill, as the test report at the discharge port indicated that the Fe content was 62.11% and accordingly, the appellant/assessee should have paid the export duty at Rs.300 per MT. Based on the intelligence collected and investigation conducted by the DRI, a show cause notice dated 01.07.2011 was issued by the Commissioner of Customs, Visakhapatnam proposing to re-assess

the export duty and recover the differential duty at Rs.250 per MT under the proviso to Section 28(1). It also proposed to recover interest under Section 28AB of the Customs Act, 1962, and to hold that the exported goods were liable for confiscation under Section 113(i) of the Customs Act and impose penalties on the exporter under Section 114(ii)/ 114A of the Customs Act. It further proposed to impose penalty on Shri Agrawal, the Director of the exporter. The SCN also contained a proposal in Para 17(e) that the amount of Rs.1,18,12,250/-, voluntarily paid by the assessee under protest should not be adjusted towards the amount demanded.

6. The said SCN, pursuant to OIO No.09/2011 dt.30.12.2011 and thereafter, in Customs Appeal No. 283/2012, filed by the appellant company with Customs Appeal No. 284/2012, filed by the Director – Mr. Anand Kumar Agarwal, was allowed by this Tribunal vide Final Order No. A/30083-30084/2022 dt.06.09.2022, whereby this Tribunal held as follows:

> *"16. …… In this case, we do not find any collusion or wilful misstatement or suppression of facts or even any duty liability because the entire demand has been made only by applying the test reports which are on dry MT basis instead of test reports on wet MT basis in violation of the law laid down by the Supreme Court in Gangadhar Narsingdas Aggarwal and also contrary to the directions of the Board in Circular No. 04/2012 dt.17.02.2012 and seeking to re-assess the duty contrary to the test report by the CRCL. In view of the above, we find that the impugned order cannot be sustained and needs to be set aside and we do so.*
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> *17.Both appeals are allowed and the impugned order is set aside with consequential relief, if any, to the appellants."*

7. Pursuant to Final Order of this Tribunal, the appellant company filed an application for refund of Rs.1,18,12,250/- along with applicable interest that was deposited during investigation (post export) under protest in the year 2009. The refund claim was adjudicated by the Assistant Commissioner of Customs, who sanctioned the refund of Rs.1,18,12,250/- as refund of pre-deposit under Sec 129E of the Act. Further, he denied the claim of interest in light of the Hon'ble Andhra Pradesh High Court's order dt.29.06.2021 in Customs/Excise Appeal No. 16/2021, in the case of Maithan Ceramics Ltd vs CCT, Visakhapatnam, wherein, it was held that – as the deposit was made prior to amendment made to Sec 129EE in August, 2014, interest shall be allowable as per the pre-amendment provision i.e., for a period commencing after expiry of three months from the date of communication of the order of the appellate authority till the refund of such amount and not from the date of deposit of the said amount till the date of refund. As regards unjust enrichment, it was

observed that as the amount claimed as refund was deposited during investigation (post export), the provision of unjust enrichment is not attracted.

8. Being aggrieved, both the appellant/assessee and Revenue filed appeals before the learned Commissioner (Appeals), where assessee filed the appeal for grant of interest, while the Revenue filed the appeal on the ground that assessing officer failed to examine the applicability of unjust encrichment. The Commissioner (Appeals), vide impugned OIA dt.04.08.2023, was pleased to uphold the rejection of grant of interest agreeing with the Adjudicating Authority. So far the issue of unjust enrichment is concerned, it was observed that the appellant had made the deposit of the amount in question during the stage of investigation/enquiry, which has been appropriated by the Adjudicating Authority upon adjudication. He also observed that Revenue has not brought any evidence on record to establish that the appellant has passed on the incidence of duty to someone else. Therefore, the ground of appeal of Revenue that the Adjudicating Authority did not examine the principle of unjust enrichment is not acceptable. Further, he observed – It is not enough to simply say that the Adjudicating Authority did not examine the principle of unjust enrichment; that the department should have given proof that the assessee has passed on the incidence of duty to someone else. Further observed – there are several rulings, which clearly state that the doctrine of unjust enrichment does not apply to deposits made during investigation.

9. Being aggrieved, both the assessee and Revenue are in cross appeals as aforementioned.

10. We find that the issue in this appeal is squarely covered by the precedent order of this Tribunal (Allahabad Bench) in the case of Parle Agro Ltd [Final Order No. 70180-70181/2021 dt.25.05.2021], wherein also, the amount paid during investigation, subsequently found to be refundable pursuant to adjudication/ appellate order, was held to be amount deposited by way of Revenue deposit. It was further held relying on the ruling of Hon’ble Supreme Court in Sandvik Asia Ltd vs CIT-I, Pune [2006 (196) ELT 257 (SC)], wherein the Hon’ble Court examined the scope of Sec 243 of the Income Tax Act, which provides for interest on delayed refund and also examined Sec 35FF of Central Excise Act, which also provides for interest on delayed refund of amount deposited under Sec 35F (Pre-deposit) and observed that the provisions for grant of interest on delayed refund are pari materia under both the Acts. The Apex Court, taking notice that the assessee/Sandvik Asia Ltd have suffered as

their money was lying locked in litigation, withheld by the department for about 17 years without rhyme or reason, and further taking notice that the Revenue charges much higher rate of interest on the amount payable by the assessee, and whereas, pays interest at much lower rate on the amount refundable to the assessee, further observing that interest is compensatory in nature, was pleased to grant simple interest @9% per annum and failing which, to pay further interest @15% per annum. The Apex Court also observed that the provision of demanding interest on the assessee at a higher rate and paying interest on amount of refund at lower rate is discriminatory and hit by Article 14 of the Constitution of India.

11. Following the said ruling of Hon'ble Supreme Court, the Division Bench of this Tribunal in Parle Agro Ltd (supra) have allowed the interest @12% per annum from the date of deposit (amount paid during investigation) till the date of refund.

12. Similarly, interest @12% was also granted by the Chandigarh Bench of this Tribunal in Riba Textiles Ltd vs CCE & ST, Panchkula [2020-TIOL-932-CESTAT-CHD]. On appeal by Revenue, the said order was confirmed by Hon'ble Punjab & Haryana High Court, dismissing the appeal of Revenue following the ruling of the Apex Court in Sandvik Asia Ltd (supra).

13. Learned Counsel for the appellant/assessee has also relied on the Board Circular No. 984/08/2014-CX dt.16.09.2014, wherein it is provided that any amount paid during investigation has to be considered as a deposit/pre-deposit and the laws relating to pre-deposit would apply to such amounts.

14. The Counsel for appellant/assessee also urged that reliance by the Commissioner (Appeals) on the ruling of Hon'ble Andhra Pradesh High Court in Maithan Ceramics Ltd (supra) is misplaced as in the said ruling, although the Hon'ble High Court had considered the ruling of Apex Court in Sandvik Asia Ltd, it did not follow the same, observing that Maithan Ceramics had deposited duty and penalty after the adjudication as Pre-deposit for Appeal during 2005-06 and at that material point of time, there was no statutory provision in the Customs Act, with regard to interest on refund of such deposit. It was only by Act 18 of 2008, Sec 129EE providing for refund of pre-deposit with interest was introduced into the Customs Act. Thus, as the facts in the matter of Maithan Ceramics Ltd have been found different, which was considered by Hon'ble Andhra Pradesh High Court, the said ruling is not applicable in the facts of the

instant case, particularly, as the deposit was made during the investigation stage in the year 2009 (after introduction of Sec 129EE by Act 18 of 2008). Moreover, the ruling of Hon'ble Supreme Court prevails over the ruling of Hon'ble High Courts. Further, the amounts paid during investigation are to be treated as deposits as held by the Hon'ble Delhi High Court in Team HR Services Pvt Ltd vs UOI [2020 (38) GSTL 457], wherein it has been categorically held that the amount deposited in the course of investigation is not in pursuance of any assessment and therefore, cannot be unjustly retained by the department. It was also held that the amounts deposited under protest at the time of investigation are not collected by the authorities with the sanction of law and therefore, the Government does not acquire any right to retain the said deposit, till the Government is held entitled in law by an authority or Court of law. Further, it was held that the assessee is entitled to interest @6% from the date of deposit till the date of interim order and further @7.5% till such amount is actually refunded to the assessee. Accordingly, learned Counsel for assessee has prayed for grant of interest @12% per annum from the date of deposit till the date of refund, in the interest of justice.

15. So far the appeal of Revenue is concerned, the only grievance is that the issue of unjust enrichment has not been properly examined by the Court below and accordingly, the matter may be remanded for examination on this issue. Under Sec 28D, every person who has paid the duty under this Act shall, unless the contrary is proved by him, be deemed to have passed on the full incidence of such duty to the buyer of such goods. Hence the onus is on the assessee to discharge the burden of unjust enrichment. Reliance is placed on the following Rulings:

a) Maithan Ceramics Ltd vs CCT, Visakhapatnam [2021 (378) ELT 265 (AP)]
b) Welspun Trading Ltd vs UOI [2017 (354) ELT 90 (Guj)]
c) Mafatlal Industries Ltd vs UOI [1997 (89) ELT 247 (SC)]

16. Learned Counsel for the appellant/assessee opposes the appeal of the Revenue stating that categorical finding has been recorded by both the Adjudicating Authority and learned Commissioner (Appeals) that unjust enrichment is not attracted in the facts and circumstances. Further, no material has been placed on record by the Revenue in support of the ground in their appeal. Accordingly, prays for dismissing the appeal of Revenue.

17. Having considered the rival contentions, we find that the issue of grant of interest on refund under the provisions of Sec 129EE of the Customs Act, we hold that as the said amount of Rs.1,18,12,250/- was paid under protest during

investigation stage, the same takes the character of 'Revenue deposit' and as pre-deposit ipso facto as appellant had contested the SCN issued by the Revenue and was finally successful before this Tribunal, vide Final Order No. A/30083-30084/2022 dt.06.09.2022. We also find that Coordinate Bench of this Tribunal at Delhi, in Parle Agro Ltd (supra), under similar facts and circumstances, have granted interest @12% per annum from the date of deposit (1993) till the date of refund, following the ruling of the Apex Court in Sandvik Asia Ltd (supra).

18. We further find that the Hon'ble Madras High Court in the case of CCE, Coimbatore vs Pricol Ltd [2015 (320) ELT 703 (Mad)], wherein, under similar circumstances, amount was deposited under protest at the time of investigation, it was held that any amount that is deposited during pendency of adjudication proceedings or investigation is in the nature of deposit under protest and therefore, the principle of unjust enrichment does not apply. In the present case also, there is absence of fact on record that the appellant/assessee has received any amount from the foreign buyer, in addition to the amount of final invoice, pursuant to export of iron ore. Further, admittedly, the final invoice for export is dated 25.08.2008 and remittance was received before 13.03.2009 as per BERC. The deposit(s) were made in December 2009. Accordingly, we hold that the doctrine of unjust enrichment is not attracted in the facts and circumstances of the instant case, as the appellant- exporter have discharged the onus under Sec 28D of the Act.

19. In view of our aforementioned findings and observations, we allow the appeal of assessee modifying the impugned order, directing to grant interest @6% per annum from the date of deposit till the date of refund. So far the appeal of Revenue is concerned, there being no merits, we dismiss the same.

20. Assessee's appeal allowed and Revenue's appeal dismissed.

(Pronounced in the Open Court on 08.04.2024)

(ANIL CHOUDHARY)
MEMBER (JUDICIAL)

(A.K. JYOTISHI)
MEMBER (TECHNICAL)

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