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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Ahmedabad

Decided On : May-18-2007

Reported in : (2007)(120)ECC105

Judge : M Ravindran

Appellant : Cc

Respondent : Hindalco Inds. Ltd.

Judgement :

1. All these four appeals are directed against the order-in-appeal No.164 to 166/2006-AHD/Cus/Commr(A) dt.29/12/2006 vide which two refund claims of the appellant was rejected and one refund was allowed by the Ld. Commissioner(Appeals). The appellant is in appeal against the rejection of the refund claims in two appeals and Revenue is in appeal against the order which allowed refund appeal of the appellant. Since all the four appeals are arising out of the same order-in--appeal, they are being disposed off by a common order.

The appellant imported copper concentrate from different importers.

Internationally, copper concentrate is traded on the basis of prices ruling at London Metal Exchange (LME). The price of the concentrate is arrived after accounting for the copper, gold and silver contents in the concentrate. The provisional invoice is raised on the basis of load port assays but the final price is determined after the assays conducted at the port of discharge based on the price

prevalent in the LME on a pre-determined date based on the convenant of the contract between the buyer and the seller. At the time of import, the seller issues only a provisional invoice and the goods are provisionally assessed based on such invoice. The system of raising a final invoice by the seller and final assessments of the Bills of Entry based on such final invoices are not in dispute. In all the Bills of Entry, the Adjudicating Authority has accepted the price mentioned in the final invoice and has finally assessed the bills of entry on the basis of such invoices.

1. Appeal No. C/36/07 pertains to Bill of Entry No. F.017/05-06 dt.

15/4/2005 was filed by the appellants and was finally assessed by the Authorities on 1/3/2006 against which a refund claim of Rs. 1,11,187/- has arisen and the appellant filed the refund claim on 6/6/2006.

2. Appeal No. C/105/07 pertains to Bill of Entry No. F.01/05-06 dt.

1/4/2005 was finally assessed on 15/3/2006 and appellant filed refund claim for an amount of Rs. 20,746/- on 21/9/2006.

3. Appeal No. C/107/07 pertains to bill of entry No. F.152/05-06 dt.21/9/2005, which was finally assessed on 4/8/2006 and refund claim of Rs. 10,561/- was filed by the appellant on 21/9/2006.

The Adjudicating Authority rejected all the refund claims filed by the appellant on the ground of unjust enrichment, even though assessment were made under Section 18 of the Customs Act, 1962. On an appeal, the Ld. Commissioner(Appeals) allowed the appeal of the appellant against rejection of refund claim of Rs. 1,11,187/-,; but rejected the appeals in respect of other two bill of entries. Hence this appeal by the appellant as well as by the Revenue.

3. Ld. Advocate appearing on behalf of the appellant submits that as regards rejection of the refund claim of the appellant in respect of the bill of entries assessed prior to the amendment of Section 18 on 14/7/2006, the question of bar of unjust enrichment should not apply.

It is his submission that as regard the rejection of the bill of entry, which was assessed subsequent to the amendment Section 18 of the Customs Act, 2006, it was contented that the Revenue took time to finalise the bill of entry despite the documents having been produced before the authorities and hence the refund claim should be allowed. He submits that the question of unjust enrichment being not applicable to the provisional assessment, has been settled by the Hon'ble Supreme Court in the case of Commissioner of Central Excise, Mumbai-II v.Allied Photographics India Ltd. as reported at . He further submits that the Supreme Court in the case of Commissioner of Central Excise, Chennai v. TVS Suzuki as admitted at has allowed refund on he ground that the finalization of the provisional assessments prior to the date of amendment would be governed by the law as it stood. It is his submission that as regards the appeal against the refund claim of Rs. 1,11,187/- which is allowed by the Commissioner(Appeals), their appeal is directed against no findings on the question of directing the Adjudicating Authority to sanction the refund claim and nothing more than that.

4. The Ld. SDR on the other hand submits that the appeal filed by the Revenue is against the sanctioning of the Refund to the Appellant. It is his submission that the bar of unjust enrichment would apply even to the refund arising out of the provisional assessments getting finalized. He relies upon the decision of the Hon'ble High Court of Judicature at Bombay in the case of Bussa Overseas and Properties Pvt.

Ltd. v. Union of India as reported at 2003(09)LCX0250. It is his submission that this judgment of the Hon'ble High Court has been upheld by the Hon'ble Supreme Court. As regards the appeal filed by the appellant, it is his submission that since the appellants have preferred the refund claim subsequently after the amendment to Section 18, they are governed by the provisions of Section 18 and hence they have to justify their claim regarding the non passing of the incidents of duty. He relies upon the judgment of the Tribunal in the case of C.C., Ahmedabad v. Cymex Time Ltd. in Final Order No.A/309/WZB/Ahmedabad/06 dt. 16/11/2006.

5. Considered the submissions made at length and perused the records.

The issue involved in this case is regarding the sanctioning of the refund claim to the appellant in respect of the amount, which became due to him after the assessment were finalized by the authorities under provisions of Section 18 of the Customs Act, 1962. It is undisputed that the appellants had sought the provisional assessment of the imports made by them and the system of the finalization by the authorities remains undisputed. In order to appreciate the correct provisions of the law, the provisions of Section 18, as it stood prior to amendment on 14/7/2006 were as under: Section 18 Provisional assessment of duty-(1) Notwithstanding anything contained in this Act but without prejudge to the provisions contained in Section 46- a) where the proper officer is satisfied that an importer or exporter is unable to produce any document or furnish any information necessary for the assessment of duty thereon; or b) where the proper officer deems it necessary to subject any imported goods or export goods to any chemical or other test for the purpose of assessment od duty thereon, or c) where the importer or the exporter has produced all the necessary documents and furnished full information for the assessment of duty but the proper officer deems it necessary to make further enquiry for assessing the duty.

the proper officer may direct that the duty leviable on such goods may, pending the production of such documents or furnishing of such information or completion of such test or enquiry, be assessed provisionally if the importer or the exporter, as the case may be, furnishes such security as the proper officer deems fit for the payment of the deficiency, if any, between the duty finally assessed and the duty provisionally assessed.

2. When the duty leviable on such goods is assessed finally in accordance with the provisions of this act, then- a. in the case of goods cleared for home consumption or exportation, the amount paid shall be adjusted against the duty finally assessed and if the amount so paid falls short of, or is in excess of (the duty finally assessed), the imported or the exporter of the goods shall pay the deficiency or be entitled to a refund, as the case may be; b. in the case of warehoused goods, the proper officer may, where the duty finally assessed is in excess of the duty provisionally assessed, require the importer to execute a bond, binding himself in a sum equal to twice the amount of the excess duty.

Subsequently, in the Finance Act, 2006, following sub-sections were inserted w.e.f. 14/7/2006.

3. The importer or exporter shall be liable to pay interest, on any amount payable to the Central Government, consequent to the final assessment order under Sub-section (2), at the rate fixed by the Central Government under Section 28AB from the first day of the month in which the duty is provisionally assessed till the date of payment thereof.

4. Subject to the Sub-section (5), if any refundable amount referred to in Clause (a) of Sub-section 2 is not refunded under that sub-section within three months from the date of assessment of duty finally, there shall be paid an interest on such unrefunded amount at such rate fixed by the Central Government under Section 27A till the date of refund of such amount.

5. The amount of duty refundable under Sub-section 2 and the interest under Sub-section 4, if any, shall instead of being credited to the Fund, be paid to the importer or the exporter, as the case may be, if such amount is relatable to- a) the duty and interest, if any, paid on such duty by the importer or the exporter, as the case may be, if he had not passed on the incidence of such duty and interest, if any, paid on such duty to any other person; b) the duty and interest, if any, paid on such duty on imports made by an individual for his personal use; c) the duty and interest, if any, paid on such duty borne by the buyer, if he had not passed on the incidence of such duty and interest, if any, paid on such duty to any other person; It can be noted prior to 14/7/2006, the requirements of proof of non-passing of the amount of the duty in the case of provisional assessments was incorporated in the Customs Act. The said requirement was inserted on 14/7/2006, i.e. to, say till 14/7/2006 any assessment finalized by the authorities would be governed by the provisions of Section 18, as it is stood during the relevant period and the assessments finalized by the authorities subsequent to 14/7/2006 and any refund claim arising out of such assessments will be governed by the provisions as is from 14/7/2006. This is the law settled by the Hon'ble Supreme Court in the case of Oriental Exports v. Commissioner of Customs, New Delhi as reported at 2006(200)E.L.T.A138. Their lordships while upholding the judgment and the order

of the Tribunal in the case of Oriental Exports v. Commissioner of Customs, New Delhi held as under: The Tribunal, in the impugned order, following its earlier decision, in Needle Industries India Ltd. v. Commissioner of Central Excise has taken the view that the doctrine of unjust enrichment is not applicable to provisional assessment in terms of Section 18 of the Customs Act which is similar to Rule 9B of the Central Excise Rules.CCE, Mumbai v. Allied Photographics India Ltd. inconsistency, doubted the correctness of two decisions rendered by three-Judge Bench of this Court in, i.e. (i) Sinkhai Synthetics and Chemicals (P) Ltd. v. CCE andMafatlal Industries Ltd. v. Union of India .

The three-Judge Bench which considered the correctness of the aforesaid two decisions (of three-Judge Bench) has in CCE, Mumbai-II v. Allied Photographics India Ltd. held that the judgment in Sinkhai Synthetics's case(supra) was per incuriam (para 14 at page 52] and approved the decision in the later case i.e. TVS Suzuki's case(supra). The three-Judge Bench has also taken the same view, as was taken by the Tribunal, to the effect that the doctrine of unjust enrichment is not applicable to the provisional assessment even after the finalization thereof.

The point in issue in the present case is, thus squarely covered by the three-Judge Bench decision in Allied Photographics' case . In view of this, the appeals are dismissed and the order passed by the Tribunal is affirmed. No costs.' 6. It can be noted from the above reproduced judgment of the Hon'ble Supreme Court that the three-Judge Bench of the Hon'ble Supreme Court held that the ratio of the case of Allied Photographics India Ltd.(supra) would squarely apply even to the provisions of Section 18 of the Customs Act, 1962.

7. Coming to the factual matrix of this case, it is seen that the refund claim of Rs. 1,11,187/- and refund claim of Rs. 20,746/- arising out of finalization of bill of entry, which were finalized by the authorities on 1/3/2006 and on 15/3/2006. This would indicate that the amount of the refund claim will be covered by the provisions of Section 18 as they stood prior to amendment of said Section on 14/7/2006. The Hon'ble Supreme Court in the case of CCE, Chennai v. TVS Suzuki Ltd.(supra), held as under: Shri Verma fairly concedes that the proviso introduced in Sub-rule (5) of Rule 9B cannot be said to be retrospective in operation. He, however,

contends that on the date on which the proviso was brought into force, i.e. 25/6/1999 the refund claim was still pending with the departmental authorities and, therefore, it had to be adjudicated in accordance with the law as it became enforceable from 25/6/1999. In our view, this contention cannot be accepted. Merely because the departmental authorities took a long time to process the application for refund, the right of the appellant does not get defeated by the subsequent amendment made in Sub-rule 5 of Rule 9B. The Commissioner of Central Excise and the CEGAT were, therefore, justified in holding that the claim for refund made by the appellant had to be decided according to the law laid down by this Court in Mafatlal Industries Ltd. (supra) and would not be governed by the proviso to Sub-rule 5 of Rule 9B.8. Respectively following the judgments of the Hon'ble Supreme Court in the case of M/s. Oriental Exports(supra) and M/s. TVS Suzuki Ltd. (supra), the refund claims of the appellant which arise due to finalization done prior to the amendment of the Section 18 are to be allowed and I do so. The refund claim of Rs. 1,11,187/- and Rs. 20,746/- are to be allowed to the appellant by the lower authorities forthwith, and the impugned order to that extent is modified.

9. As regards, the refund claim of Rs. 10,564/-, I find that the bill of entry was finally assessed by the lower authorities on 4/8/2006.

Since the assessment of the bill of entry took place subsequent to the amendment to Section 18. The appellant are required to prove there is no unjust enrichment. From the records, which are produced before me, it is seen that the appellants had not produced any kind of evidence before me or the lower authorities as regards the fact that they had not passed on the said amount to the ultimate customers. To my mind, if the appellants are able to produce evidence that they had not passed on this amount to their customers, they may be eligible to claim the refund of the amount from the authorities. In the absence of any evidence, I am not able to come to any conclusion on this issue. Hence, the impugned order, which rejects the claim of Rs. 10,561/- in respect of bill of entry No. F.152/05-06 dt. 21/9/2005 is set aside and issue is remanded back to the lower authorities to consider the evidences that may be produced by the appellant to justify their claim of non-passing of incidences of the duty.

10. Since, I have already held that the refund claim in respect of two bill of entries are allowable to the appellant, the department's appeal is dismissed, as the decisions of Hon'ble Supreme Court are squarely cover the issue in favour of the assessee.

11. Accordingly, the impugned order is set aside and the appeals of the appellants are allowed as indicated in the above paragraph and the appeal filed by the Revenue is dismissed.

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