

**Customs, Excise & Service Tax Appellate Tribunal
West Zonal Bench At Ahmedabad**

REGIONAL BENCH- COURT NO.3

Excise Appeal No.12632 of 2019

(Arising out of OIA-CCESA-SRT-APPEALS-PS-385-2019-20 dated 20/09/2019 passed by Commissioner (Appeals) Commissioner of Central Excise, Customs and Service Tax-SURAT-I)

BAYER VAPI PVT LTD

Plot No. 306/3, 2nd Phase, Gidc Vapi
Vapi, Gujarat

.....Appellant

VERSUS

C.C.E. & S.T.-SURAT-I

New Building...Opp. Gandhi Baug,
Chowk Bazar,
Surat, Gujarat-395001

.....Respondent

APPEARANCE:

Shri S. Suriyanarayanan, Advocate for the Appellant
Shri G. Kirupanandan, Superintendent (AR) for the Respondent

CORAM: HON'BLE MEMBER (JUDICIAL), MR. RAMESH NAIR

Final Order No. A/ 10672 /2022

DATE OF HEARING: 20.05.2022
DATE OF DECISION: 08.06.2022

RAMESH NAIR

01. The issue involved in the present case is that whether the revenue is correct in appropriating the demand of Rs.4,50,572/- towards penalty and interest corresponding to a confirmed demand from the sanctioned rebate claim during the period the demand case was pending before the tribunal.

02. Shri S.Suriyanarayanan, learned counsel appearing on behalf of the appellant submits that in the demand case, the appellant had deposited the entire duty amount and only penalty and interest was left out however, the appellant had preferred an appeal before the CESTAT which was admitted and pending therefore, at that stage the demand could not have been appropriated from the sanctioned rebate claim. He submits that at the relevant time, the appellant was required to pay only 7.5% or 10% as the case may be for filing appeal and remaining amount stand stayed. In the present case, the appellant had paid the entire duty amount therefore, the

remaining amount could not have been recovered from the sanctioned rebate claim. He placed reliance on the following judgments:-

- CCE v/S. ASHIMA DYECOT LTD.-2020 SCC Online CESTAT 3041 : (2013) 288 ELT 244
- ABB Ltd. V/s. CCE- 2016 SCC Online CESTAT 1498
- ASSOCIATED CEMENT COMPANIES LIMITED V/s. CCE- 2017 SCC Online CESTAT 10137

03. Shri G. Kirupanandan, learned Superintendent (AR) appearing on behalf of the revenue reiterates the finding of the impugned order.

04. I have carefully considered the submissions made by both the sides and perused the records. I find that the sanctioning authority appropriated the demand of Rs.4,50,572/-from the sanctioned rebate claim, the said appropriated amount is towards penalty and interest in a demand case whereas, the appellant had deposited the entire duty amount. When the appropriation was done against the demand order, the appeal was pending before the Tribunal. For filing appeal there is a requirement of mandatory pre-deposit of 7.5% or 10% as the case may be in terms of Section 35F of Central Excise Act, 1944 which is reproduced below:-

Section 35F. Deposit of certain percentage of duty demanded or penalty imposed before filing appeal.

The Tribunal or the Commissioner (Appeals), as the case may be, shall not entertain any appeal,-

(i) Under sub-section (1) of Section 35, unless the appellant has deposited seven and a half percent of the duty, in case where duty or duty and penalty are in dispute, or penalty, where such penalty is in dispute, in pursuance of a decision or an order passed by an officer of Central Excise lower in rank than the [Principal Commissioner of Central Excise or Commissioner of Central Excise];

(ii) against the decision or order referred to in clause (a) of sub-section (1) of section 35B, unless the appellant has deposited seven and a half percent of the duty, in case where duty or duty and penalty are in dispute, or penalty, where such penalty is in dispute, in pursuance of the decision or order appealed against;

(iii) against the decision or order referred to in clause (b) of sub-section (1) of section 35B, unless the appellant has deposited ten per cent. of the duty, in case where the duty or duty and penalty are in dispute, or penalty, where such penalty is in dispute, in pursuance of the decision or order appealed against:

PROVIDED that the amount required to be deposited under this section shall not exceed rupees ten crores:

PROVIDER FURTHER that the provisions of this section shall not apply to the stay applications and appeals pending before any appellate authority prior to the commencement of Finance (No.2) Act, 2014.

Explanation:- For the purposes of this section "duty demanded" shall include,-

- (i) amount determined under section 11D;*
- (ii) amount of erroneous Cenvat credit taken;*
- (iii) amount payable under rule 6 of the Cenvat Credit Rules, 2001 or the Cenvat Credit Rules, 2002 or the Cenvat Credit Rules, 2004.*

From the above section 35F, the appellant was required to pay only 10% (7.5% at Commissioner Appellate stage & 2.5% at CESTAT appellate stage). When this appropriation was made on 12.09.14, the appellant not only paid this 7.5% or 10% as the case may be, but have paid the entire duty amount. The appropriation was made towards the penalty and interest only. Regarding recovery of dues when the appeal is pending, the Board has issued a Circular Circular No. 984/8/2014-CX., dated 16-9-2014, relevant para 4 of the circular is reproduced below:-

4. Recovery of the Amounts during the Pendency of Appeal :

4.1 Vide Circular No. 967/1/2013, dated 1st January, 2013, Board has issued detailed instructions with regard to recovery of the amounts due to the Government during the pendency of stay applications or appeals with the appellate authority. This Circular would not apply to cases where appeal is filed after the enactment of the amended Section 35F of the Central Excise Act, 1944 or Section 129E of the Customs Act, 1962.

4.2 No coercive measures for the recovery of balance amount i.e., the amount in excess of 7.5% or 10% deposited in terms of Section 35F of Central Excise Act, 1944 or Section 129E of Customs Act, 1962, shall be taken during the pendency of appeal where the party/assessee shows to the jurisdictional authorities :

(i) proof of payment of stipulated amount as pre-deposit of 7.5%/10%, subject to a limit of Rs. 10 crores, as the case may be; and

(ii) the copy of appeal memo filed with the appellate authority.

4.3 Recovery action, if any, can be initiated only after the disposal of the case by the Commissioner (Appeals)/Tribunal in favour of the Department. For example, if the Tribunal decides a case in favour of the Department, recovery action for the amount over and above the amount deposited under the provisions of Section 35F/129E may be initiated unless the order of the Tribunal is stayed by the High Court/Supreme Court. The recovery, in such cases, would include the interest, at the specified rate, from the date duty became payable, till the date of payment.

From the above circular, it is clear that against the adjudged dues, the appellant, for filing an appeal, is required to pay only 7.5% or 10% as the case may be. On payment of such amount, entire remaining amount stand stayed if this be so, out of the remaining amount no recovery can be made. As stated above, the appellant not only paid 7.5%/10% but the entire duty therefore, in terms of Section 35F read with Board Circular Circular No. 984/8/2014-CX., dated 16-9-2014, the revenue should not have recovered the amount of penalty and interest by way of appropriation from the sanctioned rebate claim. The appellant's demand case got settled under 'SVLDRS-2019', for this reason also, no amount shall be allowed to be appropriated.

05. Accordingly, the impugned order is not sustainable and the same is set aside. Appeal is allowed.

(Pronounced in the open court on 08.06.2022)

(RAMESH NAIR)
MEMBER (JUDICIAL)

Mehul