

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
MUMBAI**

WEST ZONAL BENCH

Excise Appeal No. 88191 of 2018

(Arising out of Order-in-Appeal No. PVNS/04/APPEALS
THANE/BW/2018-19/3275 dated 13.04.2018 passed by the
Commissioner of GST & Central Excise, Appeals-Thane, Mumbai)

Hindustan Coca Cola Beverages Pvt. Ltd.Appellant
Survey no. 284, at post Kudus,
Taluka – Wada, Dist. Thane

VERSUS

Commissioner of CGST & Central Excise,Respondent
Bhiwandi
12th Floor, Lotus Parel,
Parel East, Mumbai

APPEARANCE:

Shri Jitendra Motwani, Advocate for the appellant
Shri P.K. Acharya, (AR) for the respondent

CORAM:

HON'BLE MR. AJAY SHARMA, MEMBER (JUDICIAL)

FINAL ORDER No: A/87017/2023

DATE OF HEARING : 08.08.2023
DATE OF DECISION : 18.10.2023

Per: AJAY SHARMA

The issue involved herein is whether the authorities below are justified in although granting the refund claim but crediting the same to the Consumer Welfare fund on the ground of unjust enrichment?

2. This appeal has been filed against the Order-in-Appeal dated 13.04.2018 passed by Commissioner (Appeals Thane) GST&CE, Mumbai by which the appeal filed by the appellant, against the adjudication order dated 17.4.2007, was rejected.

3. The facts leading to the filing of the instant appeal are stated in brief as follows. The appellant was engaged in the manufacture of Mineral Water and Aerated Water. The finished goods were packed and sold in glass bottles and crates and during handling some bottles get damage also. The scrap i.e. damaged bottles etc. was disposed off by the appellants. Empty packing material, received in plastic containers and bags were also disposed off by the appellants. Since the department was of the view that the duty was payable on such scrap cleared from the factory therefore as per their direction the appellant started clearing waste and scrap on payment of duty w.e.f. December, 2001 and also paid excise duty on past clearance of waste and scrap upto November, 2001 '*under protest*'. Ultimately the said issue regarding chargeability of the scrap generated during handling was settled by this Tribunal in favour of appellant herein vide order dated 6.6.2003 by observing that duty would not be chargeable as the scrap was a residual material generated during handling and was not the result of any manufacturing activity. After getting the order, the appellant herein filed refund claim for the duty paid by them *under protest*. The refund involved herein is limited to the period February, 2000 to December, 2001 amounting to Rs.6,02,400/-.

Although the adjudicating authority sanctioned the refund however the same was credited to the Consumer Welfare Fund Account on the ground of '*unjust enrichment*'. On appeal filed by the appellant, the Commissioner (A) upheld the order of the adjudicating authority by dismissing the Appeal. On further appeal filed by the appellant, this Tribunal vide order dated 12.4.2016, after making few observations about the manner of passing the appellate order, remanded the matter back to the 1st appellate authority for giving findings on the issue after considering the evidences produced by the appellant including the Chartered Accountant's certificate. The relevant paragraphs of the order No. A/87040/16/SMB dated 12.4.2016 are reproduced hereunder:-

"xxx

xxx

xxx

From the above, it is clear that the appellants, during the period when they started paying duty under protest, have recovered the duty from the clients at the rate at which they had paid to the Revenue. This has been done in such a manner that in the total price has remains the same. The invoice issued by the appellants were worked out in such a manner that while duty was recovered from the buyers the price of the goods remains more or less the same. However, in such circumstances it cannot be said that duty elements has not been passed on to the customers. So long as the invoice shown the duty amount, the same is deemed to have been passed on to the customers. Further, Hon'ble Supreme Court in the case of *CCE, Mumbai Vs. Allied Photographics India Ltd., - 2004 (166) ELT 3 (SC)* has observed as follows:

"18. Before concluding, we may state that uniformity in price before and after the assessment does not lead to the inevitable conclusion that incidence of duty has not been passed on to the buyer as such uniformity may be due to various factors. Hence, even on merits, the respondent has failed to make out a case for refund. Since relevant factors stated above have not been examined by the authorities below, we do not find merit in the contention of the respondent that this Court should not interfere under Article 136 of the Constitution in view of the concurrent finding of fact."

5. In some cases, the customers may be entitled to avail Cenvat Credit and would have done so if possible. Thus, in respect of all the invoices in which at the time of clearance the duty payment has been shown in the invoice, there is no doubt that the burden of duty has been passed on to the customers in such cases. The provisions of unjust enrichment have been rightly involved in such cases.

6. In respect of first category mentioned by the learned Counsel where they have paid the duty under protest for the past period, the facts are slightly different. In that case the appellant had paid the duty for the past period and not issued the excise invoices but had issued only the commercial invoices. In respect of other payment of duty the appellants have claimed that they have not recovered the same from the customers. The appellants have also produced Chartered Accountant's certificate in the Tribunal, the same was not produced before the Commissioner (Appeals). I find that while the impugned order deals with the second situation, it is silent about the first situation.

7. In view of the above, I uphold the impugned order so far as it relates to the refund in respect of clearances made on payment of duty. However, in respect of refund claim on the duty paid for the past clearances, the impugned order is set aside and the matter is remanded to the Commissioner (Appeals) for giving his findings on the issue. Further, since the Chartered Accountants certificate has been produced for the first time in the Tribunal and it was not produced before the Commissioner, the same may be considered along with other evidence.”

4. After remand, the learned Commissioner vide impugned order dated 16.7.2018 while upholding the Adjudicating Order dated 17.4.2007 rejected the appeal filed by the appellant by recording a finding that the Chartered Accountant’s certificate has not established that Excise duty elements have not been included in the value of the commercial invoices but was born by the appellant.

5. I have heard learned counsel for the appellant and learned Authorised Representative for the revenue and perused the case records including the written submissions/synopsis alongwith case laws placed on record by the respective sides. The remand was made to decide the appeal *qua* the duty paid under protest for past clearances only and so far as post December, 2001 period is concerned i.e. clearance made on payment of duty, the appellate order was upheld.

6. The appeal is confined to the refund claim of Rs.6,02,400/- of duty paid under protest. For the period prior

to December, 2001, which also includes the period involved herein, the appellant was clearing the waste and scarp under commercial invoice without mentioning duty amount therein as admittedly they were not paying any duty. When they started paying the duty 'under protest', on the insistence of department, after December, 2001 they started issuing excise invoices at the time of clearance of waste and scarp. The learned Commissioner while passing the impugned order observed the Chartered Accountant's certificate did not mention that the excise duty for the past period have not been included in the commercial invoices and was borne by the appellant themselves but he failed to appreciate that as per common trade practice commercial invoices are issued when no duty is charged and once the duty is charged then excise invoice are to be issued. In this matter for the past period the appellant had paid the duty 'under protest' so naturally only commercial invoices had been issued to their customers and this fact had also been recorded by this Tribunal in its order while remanding the matter to the learned Commissioner. It is settled through decisions that when duty had been paid during investigation at the insistence of the department post clearance of the goods, the provisions of unjust enrichment will not apply. The learned Commissioner had only to see whether the Chartered Accountant's certificate endorses the claim of the appellant that they have not charged the duty from their customers to whom they have already issued commercial invoices. I find that the said certificate explicitly supported the stand of the appellant as it mentioned by stating that '*HCCBL*

has not received any amount over and above the amount mentioned in the respective Commercial invoices issued by them during the period February, 2000 to November 12, 2001.' (November 12, 2000 has been wrongly written in the said certificate whereas in the 1st line it has been correctly mentioned as November 12, 2001)[emphasis supplied]. The said certificate has been concluded by recording as under:-

'In view of the above, we certify that HCCBPL has not recovered the duty amount of Rs.6,02,000/- from their customers.'

7. In my view since the Chartered Accountant's certificate (supra) has certified that the appellant has not recovered the duty amount of Rs.6,02,000/- from their customers, the same is not hit by the bar of *unjust enrichment*. The appellant is therefore entitled for refund claimed and the appeal filed by the appellant is accordingly allowed by setting aside the impugned order.

(Pronounced in open Court on 18.10.2023)

(Ajay Sharma)
Member (Judicial)

//SR