**IN THE HIGH COURT OF JUDICATURE AT CALCUTTA**

**SPECIAL JURISDICTION (CUSTOMS)**

**ORIGINAL SIDE**

RESERVED ON: 15.01.2024
DELIVERED ON:25.01.2024

**CORAM:**

**THE HON'BLE MR. CHIEF JUSTICE T.S. SIVAGNANAM**

**AND**

**THE HON'BLE MR. JUSTICE HIRANMAY BHATTACHARYYA**

**CUSTA NO. 29 OF 2023**
**(GA NO. 02 OF 2023)**

**COMMISSIONER OF CUSTOMS (PORT), KOLKATA**

**VERSUS**

**M/S. DREDGING CORPORATION OF INDIA LIMITED**

**Appearance:-**
**Mr. K.K. Maiti, Learned Senior Standing Counsel.**
**Mr. Tapan Bhanja, Adv.**

**.....For the Appellant.**

**Dr. Samir Chakraborty, Sr. Adv.**
**Mr. Abhijit Biswas, Adv.**
**Mr. B. Sengupta, Adv.**

**.....For the Respondent.**

**_JUDGMENT_**

***(Judgment of the Court was delivered by T.S. Sivagnanam, CJ.)***

1. There is a delay in filing the appeal, delay having been properly explained, delay is condoned and the application is allowed.

2. This appeal filed by the revenue under Section 130 of the Customs Act, 1962 (the Act) is directed against the order dated 03.05.2023 passed by the Customs Excise and Service Tax, Appellate Tribunal, Eastern Zonal Bench, Kolkata (tribunal) in Customs Appeal No. 75868 of 2015. The revenue has raised the following substantial questions of law for consideration:-

   *(i) Whether the Learned Tribunal has properly appreciated the provision of Section 28D of the Customs Act, 1962?*
   *(ii) Whether the Learned Tribunal before upholding the order of the Commissioner (Appeals) is required to verify the contents of provision of Section 28D of the Customs Act, 1962?*

3. We have heard Mr. K.K. Maiti, learned Senior Standing Counsel for the department assisted by Mr. Tapan Bhanja learned advocate and Dr. Samir Chakraborty, learned Senior Advocate assisted by Mr. Abhijit Biswas and Mr. B. Sengupta learned advocates for the respondent.

4. The respondent assessee is a Government of India undertaking which entered into a contract with Kolkata Port Trust for dredging work at Balari Bar Reach at river Hooghly and for transporting the material dredged and disposing the same in the designated disposal area. For the purpose of the said contract, the assessee purchased one cutter suction dredger with accessories and spares from a Dutch firm. The three bills of entries were filed on 28.01.1991,

29.01.1991 and 01.02.1991 which was assessed provisionally on payment of duty and against execution of bond as the customs authorities entertained doubt as to whether spares along with the dredger and two subsequent consignments and others were eligible for assessment at the rate applicable to dredger under Accessories (Conditions) Rules, 1963 read with Notification No. 133/87-Cus. During the course of the adjudication, the assessee contended that spares which have come along with the dredger covered under the Bills of entry dated 28.01.1991 for which no separate invoice has been raised by the supplier should be assessed at the rate applicable to the dredger and the extra duty paid by them during provisional assessment should be refunded to them as the two conditions mentioned in the Accessories Rules and Notification No. 133 of 1987 has been fulfilled by them. The adjudicating authority rejected such contention raised by the assessee and confirmed that the demand of duty in respect of spares and accessories and denied benefit of Notification No. 133/87-Cus. The appeal filed by the assessee against the said order of adjudication was dismissed by the Commissioner Appeals. Aggrieved by the same, the assessee filed the appeal before the tribunal. The tribunal by order dated 13.09.2001 accepted the case of the assessee and in doing so relied upon the decision of the Coordinate Bench of the tribunal in the case of ***Boskalis Dredging India Private Limited Versus Commissioner of Customs, Bhubaneshwar*** dated 06.11.1997 thereby holding that the accessories and spares, pipelines etc. forms an indispensable part of the main vessel. It is thereafter the assessee filed a claim for refund of Rs. 11,32,81,147/-. When the

refund application was taken up for consideration it was alleged that the application was not filed within the period of six months from the date of finalization of provisional assessment made by the Assistant Collector dated 24.08.1992 and therefore the same is time barred. Further it was held that the assessee failed to establish by documentary evidence that they did not pass on incidence of duty to any other person in terms of Section 27 read with Section 28C and 28D of the Act. The assessee contended that the order of the tribunal is dated 13.09.2001 and the refund claimed was filed on 03.11.2001 and the same is within the time limit.

5. Further it was contended that the bar of unjust enrichment is not applicable if the claim arises on finalization of provisional assessment and in this regard, Section 18 of the Act was referred to. The assessee also relied upon the decision of the Hon'ble Supreme Court in ***Mafatlal Industries Versus Union of India*** [1]. The adjudicating authority by order dated 21.03.2003 rejected the claim for refund on the grounds of limitation as well as on the ground of passing on full incidence of duty claimed by the assessee to other persons. Aggrieved by such order, appeal was preferred before the Commissioner of Customs (Appeals).

6. By order dated 17.09.2003, the Commissioner of Customs (Appeals) held that he does not have jurisdiction to pass any order and directed the assessee to pursue the matter before the Commissioner of Customs (Port). The Commissioner of Customs (Port) directed the matter to be considered and

[1] (1997) 89 ELT 247 (SC)

accordingly the adjudicating authority took up the matter and called upon the assessee to produce the documents to show that the incidence of duty has not been passed on to any other person. After hearing the assessee, by order dated 16.01.2004, the adjudicating authority sanctioned the refund under Section 27(2) of the Act but ordered the same to be credited in the Consumer Welfare Fund. Aggrieved by such order, the assessee preferred appeal before the Commissioner of Customs (Appeals), Kolkata, who by order dated 28.06.2004 set aside the order passed by the adjudicating authority and remanded the matter for de novo consideration.

7. The adjudicating authority once again took up the matter and by order dated 28.12.2004 sanctioned refund but once again directed the amount to be credited to the Consumer Welfare Fund. Aggrieved by such order, the assessee preferred appeal before the Commissioner of Customs (Appeals).By order dated 07.04.2005, the Commissioner of Customs (Appeals) directed the adjudicating authority to pass a reasoned order on the basis of the legal provisions and the observations made in the said order. The adjudicating authority took up the matter for consideration noted that the order passed by the Commissioner of Customs (Appeals) has been accepted by the Commissioner of Customs (Port) on 08.06.2005, however, once again while sanctioning the refund directed the amount to be credited in the Consumer Welfare Fund. Aggrieved by such order, the assessee filed the appeal before Commissioner of Customs (Appeals). The appeal was allowed and the order of the adjudicating authority was set aside and the matter was remanded to the authority for fresh consideration and to

initiate action as per the instruction given in the order dated 23.03.2005. This order was put to challenge before the tribunal by the assessee. The tribunal by order dated 05.11.2012 set aside the order passed by the Commissioner (Appeals) and directed the case to be decided afresh after giving an opportunity to the assessee. The Commissioner of Appeals by order dated 30.06.2015 set aside the order passed by the Assistant Commissioner crediting the refund to the Consumer Welfare Fund and directed the refund to be paid to the assessee in full. Aggrieved by such order, the revenue preferred appeal before the tribunal which was dismissed by the impugned order.

8. From the above facts, it is seen that the claim for refund was sanctioned by the authority, however, the amount was credited to the Consumer Welfare Fund on the ground that the assessee has not established that the duty has not been passed on to any third person. The appellate authority while allowing the appeal filed by the assessee has elaborately considered the factual position and rightly noted that the admissibility of the refund to the assessee has been settled by the tribunal way back in the year 2001 and the only issue to be decided is whether there is any question of unjust enrichment in the matter. The appellate authority also noted that the matter has been dragging on close to 25 years at the relevant time, (2015). After noting Section 28D of the Act, the appellate authority found that the sanctioning authority has belatedly attempted to include the generation and sale of scraps and the higher contract price in order to justify inclusion under the clause of unjust enrichment but has failed to produce any evidence in support of this contention.

9. Further it was held that no evidence has been adduced or discussed to hold that the scrap is being generated and sold which has been produced directly from the imported goods. Furthermore, the vessel and its equipment are still in use. With regard to the higher contract price entered into for the service of dredging, the appellate authority opined that it could be due to various factors such as inflation, higher operating and fuel costs salaries etc. That apart, it was noted that no evidence has been produced to show that the increase is in any way linked with the incidence of duty being passed on to the consumers, who are service receivers not the buyer of the goods. It was reiterated that the vessel is still in use and has not been sold. The appellate authority took note of the certificate issued by the Chartered Accountant dated 11.06.2015 wherein the Chartered Accountant again certified that all the goods brought under the cover of the three Bills of entries are still in use by the Dredging Corporation of India. The Director (Operations and Technical) of the assessee vide a letter dated 11.06.2015 certified that the vessel is in operation and has not been sold. Therefore, the appellate authority held that when the goods are still in use the question of passing the burden of duty does not arise and the question of unjust enrichment will not be applicable.

10. While on this issue, it will be beneficial to refer to the decision in the case of ***Commissioner of Central Excise, Chennai – I Versus Superintending Engineer, TNEB*** [2] wherein the Hon'ble Division Bench after taking note of the findings of the Hon'ble Supreme Court in paragraph 99 of the judgment in

[2] 2014 (300) ELT 45 (Mad)

***Mafatlal Industries*** held that there was no unjust enrichment even as regards the Government undertakings and following the same it was held that unjust enrichment is not applicable as far as the state undertakings are concerned. The decision in the ***Commissioner of Central Excise, Bangalore-II Versus Karnataka State Agro Corn Products Limited*** [3] was distinguished as in the said case, it was shown that the duty had been passed to the consumer and the duty has been made over to the Central Government.

11. The learned Standing Counsel appearing for the appellant placed reliance on the decision in ***Western Coalfields Limited Versus CESTAT, New Delhi*** [4] and submitted that the decision in the case of ***Karnataka State Agro Corn Products Limited*** was distinguished. As could be seen from the paragraph 9 of the judgment in the ***Eastern Coalfields,*** the decision was distinguished by taking note of the peculiar factual position. However the case on hand is factually a better and a stronger case as the orders regarding the validity of the application for refund has become final as it has been conclusively held that the application for refund is not barred by limitation.

12. The second aspect is that the entitlement for refund has also attained finality not once but on three occasions and the said finding has been affirmed by the tribunal. Thus, the only issue which was left open for adjudication was whether there was an unjust enrichment. As noted above, the matter has been dragged on from the year 1991 onwards when the goods were imported and till now the department does not propose to allow the matter to attain finality. The

[3] 2006 (202) ELT 47 (Kar)
[4] 2013 (288) ELT 203 (Bom)

learned tribunal after taking note of the factual position has conclusively held that the bar of unjust enrichment would not apply as the vessel in question is still in use and has not been sold or disposed of. Furthermore, the certificate issued by the Chartered Accountant was also taken note of which was not shown to be factually incorrect by the department.

13. The learned advocate for the appellant/department placed reliance on the decision of the Hon'ble Supreme Court in ***Sahakari Khand Udyog Mandal Limited Versus Commissioner of Central Excise and Customs*** [5] which lays down the principle under what circumstances the relief for refund can be sustained and it has been held that it has to be shown that the claimant has paid the amount for which relief has sought for and he has not passed on the burden on the consumer and if such relief is not granted he would suffer loss.

14. The learned senior standing counsel placed reliance on the decision of the Hon'ble Supreme Court in ***Western Coalfields Limited Versus Commissioner of Central Excise, Trichy/Madurai*** [6]**.** This decision was relied on for the purpose of showing that the application for refund was barred by time. The department is estopped from raising such an issue as the said issue had attained finality and confirmed by the tribunal over which no appeal has been preferred. Therefore, the learned tribunal was right in affirming the order passed by the Commissioner of Customs (Appeals), Kolkata dated 30.06.2018.

[5] 2005 (181) ELT 328 (SC)
[6] 2019 (365) ELT 849 (SC)

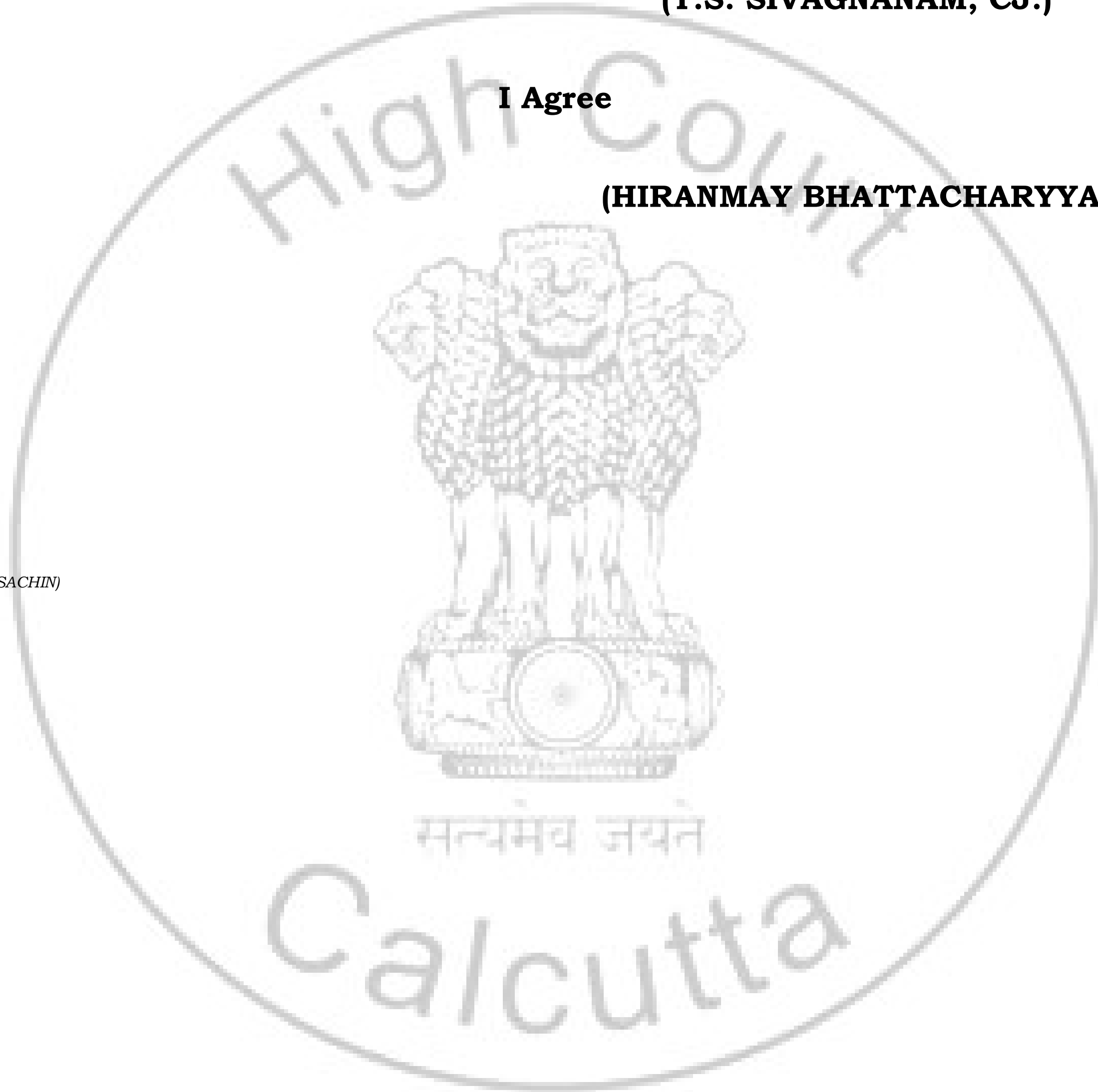
High Court Calcutta

15. For all the above reasons, the appeal is dismissed and the substantial questions of law are answered against the appellant revenue.

**(T.S. SIVAGNANAM, CJ.)**

**I Agree**

**(HIRANMAY BHATTACHARYYA, J.)**




*(P.A – SACHIN)*