IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
REGIONAL BENCH, BANGALORE
COURT NO. I

C/CROSS/24151/2014 in
Appeal Nos. C/3292/2012-SM C/3292/2012-SM

Arising out of Order-in-Appeal No. 167/2012, Dated; 28.09.2012
Passed by

Date of Hearing: 23.10.2019
Date of Decision: 23.10.2019

M/s HINDUSTAN COLAS LTD
POL TERMICAL, VILLAGE BALA, VIA KATIPALLA
MANGALORE-575030

Vs

COMMISSIONER OF CUSTOMS
MANGALORE-CUS, NEW CUSTOMS HOUSE PANAMBUR
MANGALORE-575010 KARNATAKA

Appellant Rep by: Mrs Sandhya, Adv.
Respondent Rep by: Mr Gopa Kumar, Jt. Commissioner (AR)

CORAM: S S Garg, Member (J)

Cus - Appellants have set up a Joint Venture company in which HPCL and Colas SA, France were partners holding equal shares in appellant company - they obtained know-how from Colas SA, France and also imported capital goods from them - since the matter was referred to SVB Mumbai Custom House, the imports were made provisional and appellant deposited 1% revenue and paid duty provisionally - the valuation of imported capital goods were ultimately decided by the Tribunal vide Final Order dated 20.6.2006 in favour of the appellant and the said order attained finality as the department did not file any appeal against the order of the Tribunal - the appellants filed refund of the revenue deposit and duty deposited by them at the time of importation - the original authority rejected the refund claim as being hit by the principles of unjust enrichment, non-production of original copies of bill entry as well as TR-6 challans evidencing payment of duty, CA certificate not indicating the treatment of excess duty in their books of account etc. - on appeal, the Commissioner (Appeals) rejected the appeal, therefore, importer is before the CESTAT.

Held: Refund has been rejected firstly on the ground that it is hit by principles of unjust enrichment - this ground of rejection is based on the decision of the Tribunal in the case of MRPL which has been reversed by the Karnataka High Court - **2015-TIOL-675-HC-KAR-CUS** - further, this issue is no more *res integra* and has been settled by various High Courts and Tribunal wherein it has been held that prior to the amendment dated 13.7.2006 in section 18 of the Customs Act, 1962, principles of unjust enrichment is not applicable because the said principle has been incorporated only with effect from 13.7.2006 and has been held by the High Court to be prospective and not retrospective

- in view of the decision of the Karnataka High Court as well as the Gujarat High Court - **2008-TIOL-477-HC-AHM-CUS**, the principles of unjust enrichment is not applicable in the present case and denial of refund on this ground is not sustainable in law - further, non-filing of the original document is also not a valid ground for rejection of the refund because the appellant has given justification for non-filing the original document and has also submitted that it is not required under law to file the original document in view of the decision in the case of Sambhav Enterprises - moreover, they have also filed an affidavit and bond in support of their claim and it is also not disputed that the appellant have paid excess custom duty of Rs.11.17 lakhs - in view of the above, the impugned order is not sustainable in law and, therefore, the same is set aside by allowing the appeal : CESTAT [para 5]

Appeal allowed

Case laws cited:

MRPL vs. CC reported in 2011 (274) ELT 120 (Tri.-Bang.)... Para 2

Commissioner of Customs vs. Hindalco Industries Ltd - 2008-TIOL-477-HC-AHM-CUS... Para 3

Commissioner of Customs, Kandla vs. Hindustan Zinc Ltd. - 2009-TIOL-484-CESTAT-AHM-LB... Para 3

Jindal Stainless Ltd. vs. Commissioner of Customs, Visakhapatnam: 2016 (343) ELT 613 (Tri.-Bang.)... Para 3

Commissioner of Customs vs. Indian Oil Corporation - 2012-TIOL-52-HC-DEL-CUS... Para 3

Commissioner of Customs (Export), Chennai vs. Sayonara Exports Pvt. Ltd. - 2015-TIOL-740-HC-MAD-CUS... Para 3

Commissioner of Customs, Chennai vs. Venkateswara Hospitals: 2015 (323) ELT 359 (Mad.)... Para 3

N. K. Overseas vs. Commissioner of Customs, Ahmedabad: - 2014-TIOL-765-CESTAT-AHM... Para 3.1

Indian Oil Corporation Ltd. vs. Commissioner of Central Excise, Vadodara: - 2014-TIOL-1303-CESTAT-AHM... Para 3.1

M. Jugraj & Co. vs. Commissioner of Customs (Imports), Mumbai: - 2013-TIOL-2571-CESTAT-MUM... Para 3.1

Commissioner of Central Excise, Vadodara-II vs. Panasonic Battery India Co. Ltd - 2013-TIOL-1367-CESTAT-AHM-LB... Para 3.1

Commissioner of Central Excise, Mumbai vs. CEAT Ltd. - 2018-TIOL-976-HC-MUM-CX... Para 3.1

Commissioner of Central Excise, Visakhapatnam vs. M/s. Essar Steels Ltd.: 2017-VIL-125-CESTAT-HYD-CU... Para 3.1

Commissioner of Central Excise, Vadodara-II vs. Panasonic Battery India Co. Ltd - 2013-TIOL-1367-CESTAT-AHM-LB... Para 3.1

MRPL vs. CCE: - 2015-TIOL-675-HC-KAR-CUS... Para 3.2

FINAL ORDER NO. 20880/2019

Per: S S Garg:

The present appeal is directed against the impugned order dated 28.9.2012 passed by the Commissioner (A) whereby the Commissioner (A) has rejected the appeal of the appellant and upheld the Order-in-Original.

2. Briefly the facts of the present case are that the appellants are engaged in making of Bitumen Emulsion which are used for construction of roads. They have set up a Joint Venture company in which HPCL and Colas SA, France were partners holding equal shares in appellant company. The appellants have the plant in various states including their first plant in Vashi Mumbai. They obtained know-how from Colas SA, France and also imported capital goods from them. The import of capital goods was referred to the SVB on the ground that the imports are from related persons and the appellants have paid license fee for the know-how. Since the matter was referred to SVB Mumbai Custom House, the imports were made provisional and appellant deposited 1% revenue and paid duty provisionally. The valuation of imported capital goods were ultimately decided by the Hon'ble Tribunal vide Final Order dated 20.6.2006 in favour of the appellant and the said order attained finality as the department did not file any appeal against the order of the Tribunal. The appellants filed refund of the revenue deposit and duty deposited by them at the time of importation. The original authority after following due process rejected the refund claim being hit by the principles of unjust enrichment. Both the authorities have relied upon the decision of the Tribunal in the case of *MRPL vs. CC reported in 2011 (274) ELT 120 (Tri.-Bang.)*. The other ground for rejection of the refund is non-production of original copies of bill of entry as well as TR-6 challans evidencing payment of duty and another ground on which the refund was rejected was that the Chartered Accountant certificate does not indicate the treatment of excess duty in their books of accounts in 2004. On appeal before the Commissioner (A), the Commissioner (A) rejected the appeal of the appellant. Hence, the present appeal.

3. Learned counsel for the appellant submitted that the impugned order is contrary to the binding judicial precedent. She further submitted that in the present case the assessment was provisional in terms of Section 18 prior to 13.7.2006. She further submitted that at the time of finalizing the assessment itself, the revenue deposited by the appellant ought to have been refunded suo motto, in accordance with Section 18(2)(a). However, it was not done and therefore, the appellant filed a refund application. She also submitted that during the relevant period, Section 18 did not contain provision related to unjust enrichment and therefore the refund cannot be rejected under Section 18 on the ground of unjust enrichment. She further submitted that Section 18 of the Customs Act incorporated the principles of unjust enrichment only with effect from amendment of 13.7.2006 and therefore, the principle will not be applicable for the goods imported prior to that date whereas in the present case, the goods were imported vide Bill of Entry dated 8.11.2004 and the law as it stood at the

time of filing of Bill of Entry is alone applicable to the assessment of Bill of Entry. Consequently, the principle of unjust enrichment is not applicable in the present case. For this submission, she relied upon the following decisions:

*- Commissioner of Customs vs. Hindalco Industries Ltd.: 2008 (231) ELT 36 (Guj.) = **2008-TIOL-477-HC-AHM-CUS***

*- Commissioner of Customs, Kandla vs. Hindustan Zinc Ltd.: 2009 (235) ELT 629 (Tri.-LB) = **2009-TIOL-484-CESTAT-AHM-LB***

- Jindal Stainless Ltd. vs. Commissioner of Customs, Visakhapatnam: 2016 (343) ELT 613 (Tri.-Bang.)

*- Commissioner of Customs vs. Indian Oil Corporation : 2012 (282) ELT 368 (Del.) = **2012-TIOL-52-HC-DEL-CUS***

*- Commissioner of Customs (Export), Chennai vs. Sayonara Exports Pvt. Ltd.: 2015 (321) ELT 583 (Mad.) = **2015-TIOL-740-HC-MAD-CUS***

- Commissioner of Customs, Chennai vs. Venkateswara Hospitals: 2015 (323) ELT 359 (Mad.)

3.1 She also submitted that the period of provisional assessment is relevant for determining the applicability of the provision of Section 18 and the law as it stood at the time of filing of Bill of Entry alone is applicable for the assessment of the said Bill of Entry. For this submission, she relied upon the following decisions:

*- N. K. Overseas vs. Commissioner of Customs, Ahmedabad: 2015 (317) ELT 356 (Tri.-Ahmd.) = **2014-TIOL-765-CESTAT-AHM***

*- Indian Oil Corporation Ltd. vs. Commissioner of Central Excise, Vadodara: 2015 (315) ELT 49 (Tri.-Ahmd.) = **2014-TIOL-1303-CESTAT-AHM***

*- M. Jugraj & Co. vs. Commissioner of Customs (Imports), Mumbai: 2014 (300) ELT 273 (Tri.-Mum.) = **2013-TIOL-2571-CESTAT-MUM***

*- Commissioner of Central Excise, Vadodara-II vs. Panasonic Battery India Co. Ltd.: 2014 (303) ELT 231 (Tri.-LB) = **2013-TIOL-1367-CESTAT-AHM-LB***

*- Commissioner of Central Excise, Mumbai vs. CEAT Ltd. : 2018 (361) ELT 420 (Bom.) = **2018-TIOL-976-HC-MUM-CX***

- Commissioner of Central Excise, Visakhapatnam vs. M/s. Essar Steels Ltd.: 2017-VIL-125-CESTAT-HYD-CU

*- Commissioner of Central Excise, Vadodara-II vs. Panasonic Battery India Co. Ltd.: 2014 (303) ELT 231 (Tri.-LB) = **2013-TIOL-1367-CESTAT-AHM-LB***

3.2 She further submitted that both the authorities rejected the refund claim by relying the decision in the case of MRPL vs. CCE cited supra and the said decision of the Tribunal has been reversed by the Karnataka High Court in the case of *MRPL vs. CCE: 2015 (323) ELT 484 (Kar.) = **2015-TIOL-675-HC-KAR-CUS***. She also submitted that refund of excess duty paid cannot be denied on the ground of non-submission of

original document. Appellant in fact have appended photocopies of the relevant TR-6 challan and Bill of Entry along with refund application and they have also attached the Chartered Accountant certificate certifying that Rs.11,17,320/- is shown as receivables under "Loans, advances and receivables" as on 31.3.2011. The appellant have also filed a affidavit of the declaration of indemnity for lost/misplaced challan. She relied upon following decisions to show that non-production of the original documents cannot be the basis for rejection of the refund claim.

- *Sambhav Enterprises vs. CC, Cochin: 2011 (265) ELT 113 (Tri.-Bang.)*

- *CC vs. Shree Simandar Enterprises: 2012 (283) ELT 369 (Ker.)*

4. On the other hand, the learned AR reiterated the findings of the impugned order.

5. After considering the submissions of both the parties and perusal of the material on record, I find that the refund has been rejected firstly on the ground that it is hit by principles of unjust enrichment. This ground of rejection is based on the decision of the Tribunal in the case of MRPL cited supra which has been reversed by the Karnataka High Court in the decision of MRPL cited supra. Further, I find that this issue is no more res integra and has been settled by various High Courts and Tribunal cited supra wherein it has been held that prior to the amendment dated 13.7.2006 in Section 18 of the Customs Act, 1962 principles of unjust enrichment is not applicable because the said principle has been incorporated only with effect from 13.7.2006 and has been held by the High Court to be prospective and not retrospective. In view of the decision of the Karnataka High Court as well as the Gujarat High Court, I hold that principle of unjust enrichment is not applicable in the present case and denial of refund on this ground is not sustainable in law. Further, non-filing of the original document is also not a valid ground for rejection of the refund because the appellant has given justification for non-filing the original document and has also submitted that it is not required under law to file the original document in view of the decision in the case of Sambhav Enterprises cited supra. Moreover, they have also filed an affidavit and the bond in support of their claim and moreover, it is not disputed that the appellant have paid excess custom duty of Rs.11,17,320/-. In view of my discussion above, I am of the considered opinion that the impugned order is not sustainable in law and therefore, I set aside the same by allowing the appeal of the appellant with consequential relief, if any.

(Operative portion of the Order was pronounced in Open Court on 23.10.2019)