CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH – COURT NO. 3

Customs Appeal No. 51677 of 2022
With
Customs Stay Application No. 50424 of 2022

(Arising out of Order-in-Appeal No. CC(A)Cus/D-I/Import/NCH/4228/2021-22 dated 21.03.2022 passed by the Commissioner of Customs (Appeals), New Delhi)

Principal Commissioner of Customs **Appellant**
ACC (Import) Commissionerate,
New Custom House,
New Delhi-110037.

VERSUS

M/s Telecare Network (India) Pvt. Ltd. **Respondent**
RZ-340A, Gali No. 11D, Kailashpuri Extension,
Palam, South Delhi-110045.

Appearance

Shri C. Dhanesekaran, Special Counsel – for the Appellant

Shri Kishore Kunal, Shri Manish Rastogi and Ms. Runjhun Pare, Advocates – for the Respondent

CORAM:

HON'BLE MR. P.V. SUBBA RAO, MEMBER (TECHNICAL)
HON'BLE MS. BINU TAMTA, MEMBER (JUDICIAL)

DATE OF HEARING : 14/03/2023
DATE OF DECISION : 24/03/2023

Final Order No. 50390/2023

P.V. Subba Rao:

Revenue filed this appeal to assail the order in appeal dated 21.03.2022 passed by the Commissioner of Customs (Appeals), New Customs House, New Delhi[1] whereby he upheld the order in

1 impugned order

original dated 14.01.2018 passed by the Assistant Commissioner sanctioning refund to the respondent.

2. The brief facts of the case are that the respondent is a Private Limited Company which imports and sells mobile phones in India. The goods which are imported into India are chargeable to basic customs duty levied under Section 12 of the Customs Act, 1962 and additional duty of customs levied under Section 3 of the Customs Tariff Act, 1975. The additional duty of customs is levied at rates applicable to similar goods manufactured in India as per the Central Excise Tariff. If there is any exemption notification under the central excise such notification also applies to the additional duty of customs. Notification No. 12/2012-CE dated 17.03.2012 as amended exempts mobile sets from excise duty in excess of 1% *ad valorem* subject to the condition that no Cenvat credit was availed on the inputs used in the manufacture of such goods. The respondent's claim of the exemption notification was denied by the appellant on the ground that the exemption notification will not apply to imported goods. The respondent paid the duty under protest. Later, the Supreme Court held in the case of **SRF Limited Vs. Commissioner of Customs** [2] that the exemption notification will apply to additional duty of customs on imported goods also.

3. Thereupon, the respondent filed a refund claim on 24.06.2016 seeking refund of the excess additional duty of customs paid during the period 26.03.2015 to 22.06.2015 under 103 bills of entry. This application for refund was initially rejected by the

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2 2015 (318) ELT 607 (SC)

Assistant Commissioner by order in original dated 07.03.2017. Aggrieved by the rejection, the respondent filed a writ petition before the Hon'ble High Court of Delhi which was decided on 06.08.2018 in favour of the respondent. Paragraphs 12 and 13 of this order are reproduced below:

> "12. There is no dispute about the applicability of *SRF Ltd. (supra);* indeed the Revenue's refrain during the hearing was that the amounts *could not be refunded* because the claims were time-barred and that the petitioner has an alternative remedy. This Court is of opinion that the plea of alternative remedy – an unoriginal and frequently used stereotypical defence by public bodies – in such cases at least dodges the crux of any dispute, i.e. the liability of the concerned public body or agency *on merits*. *Sans* any dispute with respect to facts, this Court finds it entirely unpersuasive, since Article 144 of the Constitution, compels all authorities to give effect to the law declared by the Supreme Court (as in this case, the *SRF Limited* judgment). The other plea which the Customs had relied on, to defeat the petitioner's refund application was Section 27 (3) which confines refunds to the situations contemplated in Section 27 (2), notwithstanding any judgment, order or decree of the court. This Court is at a loss to observe the relevance of that reasoning, given that *SRF Limited (supra)* had ruled *in principle* that import implied a deemed manufacture, without any corresponding obligation on the part of the importer to have availed CENVAT credit. As such, the amount claimed was not duty and could not have been recovered by the Customs authorities in the first instance, given the declaration of law in *SRF Limited (supra).* Therefore, they cannot now seek shelter under Section 27 (3) to resist a legitimate refund claim.
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> 14. The impugned order is hereby quashed. The refund application moved by the petitioner shall be decided on its merits, within ten weeks, in accordance with law. The writ petition is disposed of."

4. Thereafter, the respondent approached the Assistant Commissioner seeking refund of the excess additional duty of customs paid. The Assistant Commissioner, by order dated 14.11.2015, sanctioned the refund. Revenue filed an appeal before the Commissioner (Appeals) who, by the impugned order, upheld the order in original of the Assistant Commissioner and rejected Revenue's appeal.

5. Aggrieved, Revenue has filed this appeal praying that the impugned order may be set aside along with the order in original

dated 14.11.2018 passed by the Assistant Commissioner. Two grounds have been raised in this appeal as follows:

(i) Limitation

(ii) Unjust enrichment.

6. It is asserted in the appeal that the refund was hit by limitation of one year as prescribed under Section 27(2) of the Customs Act as additional duty of customs was paid between 26.03.2015 to 22.06.2015 while refund application was filed on 24.06.2016. In other words, the application was filed beyond the period of one year and, therefore, was time-barred and should not have been sanctioned.

7. It has also been asserted that the Commissioner (Appeals) erred in holding that the refund claim does not attract the condition of unjust enrichment as the refund claimed is not duty as the importer themselves had filed application under Section 27 indicating the amount paid as duty. Reliance was also placed on the judgment of the Supreme Court in the case of **ITC Limited Vs. Commissioner of Central Excise, Kolkatta-IV**[3] to assert that the duty paid as a result of the self-assessment cannot be refunded unless the self-assessment has been assailed before the Commissioner (Appeals).

8. Learned Special Counsel for the Revenue Shri C. Dhansekaran, vehemently argued the above two aspects and submitted that the Delhi High Court's order was not correct as it was contrary to the judgement of the Constitutional Bench of the

[3] 2019 (368) ELT 216 (SC)

Supreme Court in **Mafatlal Industries Ltd. Vs. Union of India**[4]**.** According to the learned Special counsel since the Delhi High Court's order was not correct, Assistant Commissioner erred in following the High Court's order and sanctioning the refund and the Commissioner (Appeals) erred in upholding such sanction of refund.

9. Learned counsel for the respondent submits that the impugned order is correct and proper and calls for no interference at all. He submits that the Revenue had relied upon the judgement of **Mafatlal Industries Limited** before the Delhi High Court as recorded in para 8 of the judgement and after considering all the submissions made by the Revenue, Delhi High Court held that the amount claimed was not duty and should not have been recovered by the Customs authorities in the first instance given the declaration of law in **SRF Limited** and, therefore, the Revenue cannot resist a legitimate refund claim. He submits that if the Revenue is aggrieved by the judgement of the High Court of Delhi the proper forum to agitate is before the Supreme Court. The Assistant Commissioner being a lower quasi-judicial authority was bound to follow the judgement. He also submits that the judgement of the Delhi High Court is likewise binding on the Commissioner (Appeals) and this Tribunal. Regarding the specific grounds in the appeal of limitation and unjust enrichment, he submits that Revenue had taken up the issue of time bar before the Delhi High Court as recorded in para 9 of the judgment and after considering the submissions of Delhi High Court has held that the

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[4] 1997 (89) ELT 247 (SC)

time bar would not apply in this case. Therefore, there is no force in the submission regarding limitation.

10. As regards the question of unjust enrichment, learned counsel points out that the respondent had submitted self declaration along with a certificate from M/s Naveen Associates, Chartered Accountant dated 18.01.2017 certifying that the amount so deposited in excess by the respondent was not passed on to the consumers or to anyone else. The respondent also submitted a copy of the balance sheet for financial year 2015-16 wherein under assets is a head "customs duty refund receivable". These facts were recorded in paragraph 10 of the order which reads as follows:

> "10. Further w.r.t. the clause of unjust enrichment, I find that the party has submitted a self-declaration and a CA certificate from M/s Naveen Associates, M No. 541412 dated 18.01.2017 certifying that the amount, so deposited in excess, has not been passed on to the consumers or anyone. The party has also submitted a copy of the audited balance sheet for FY 2015-16, wherein the party has showed the amount as *Assets* under the head *Custom Duty Refund Receivable*. Hence the party has overcome the statutory obligation of unjust enrichment by not passing on the burden of the excess amount paid."

11. Before the Commissioner (Appeals), Revenue had contested the Chartered Accountant's certificate on the ground that M/s Naveen Associates who issued the certificate were not the statutory auditors of respondent which is recorded in paragraph 4 of the order as follows:

> "4. **Response of the Respondent**:- The Respondent was served a copy of the appeal filed by the Department for submitting their response. The Respondent submitted response as under :-
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> 4.1 The ground of limitation u/s 27 of the Customs Act, 1961 and Unjust Enrichment is conclusively decided by the Hon'ble High Court of Delhi in W.P. No. 7853/2017 vide its order dated 06 Aug. 2018 and there is no stay on the operation of the said decision of the Hon'ble High Court of Delhi. The issue of limitation and

> Unjust Enrichment under the present appeal, in fact tantamount to contemptuous act. Even this Appellate Authority has no jurisdiction to sit in appeal against the Judgment dated 06 Aug. 2018 of the Hon'ble High Court of Delhi."

12. Learned counsel submits that this submission was incorrect inasmuch as M/s Naveen Associates were their statutory auditors during the relevant period. Even otherwise, there is no requirement that the Chartered Accountant's certificate has to be issued by any particular Chartered Accountant under the law. All that is required to be proved is that the burden of duty has not been passed on to another person and the respondent has fulfilled this obligation. He, therefore, prays that the appeal may be dismissed.

13. We have considered the submissions made by both sides and perused the records.

14. It is undisputed that the issue was decided by the Hon'ble High Court of Delhi in its judgement dated 06.08.2018 and the matter was remanded to the original authority to decide the refund on merits. It is also evident from the judgment that the question of limitation was asserted by the Revenue before the High Court and it was not accepted. Therefore, there was no error on the part of either the Assistant Commissioner or the Commissioner (Appeals) in sanctioning the refund without considering the limitation as both authorities were bound by the order of the Delhi High Court.

15. As far as the question of unjust enrichment is concerned, we have perused the Chartered Accountant's certificate issued by M/s Naveen Associates who were, as per respondent, their statutory auditors during the relevant period. The balance sheet as on

31.03.2016 mentions under current assets 'other current assets' Rs. 325,398,612. There is a reference to note No. 14 against this entry which gives the breakup of "other current assets". These included "customs duty refund receivable of Rs. 198,598,816"

16. When goods are manufactured or imported land sold there are two ways of treating the cost of the goods - either take the cost of the goods plus all taxes as the cost of the goods and then fix the sale price or take the cost of the goods and taxes but exclude such taxes and duties which are disputed and then decide the sale price. In the first case, the amount incurred as duty will be added to the cost of the goods which will be evident from the balance sheet. In the latter case, the amount paid as duty will not be added to the cost of the goods but it will be treated as "receivable from the Government" This is the latter case. In such a case, the cost of the duty has, evidently, not been passed on to the buyers. By examining what treatment was given to the disputed amount of duty or tax in the accounts, it can easily be verified whether it was passed on, either directly or indirectly, to the customers. In this case it has not been so passed. Learned special counsel for the Revenue vehemently argued that the Chartered Accountant's certificate cannot be relied upon. However, on a query from the Bench, he could not produce any document whatsoever to either establish the fact that duty has been passed on by the respondent or to show that the Chartered Accountant certificate's was incorrect. We, therefore, find no force in this submission of the learned special counsel.

17. To sum up, Revenue is aggrieved by the impugned order on two grounds:

(i) That the refund was time-barred.

(ii) That it was hit by unjust enrichment.

18. The first issue was already decided by the High Court and the Assistant Commissioner and Commissioner (Appeals) were bound to have followed the order of the High Court as they did. We are surprised as to how Revenue has filed this appeal faulting Commissioner (Appeals) and Assistant Commissioner for following judicial discipline and obeying the orders of the Delhi High Court and asserting that they should have defied the Delhi High Court's order. As far as the unjust enrichment is concerned, from the Chartered Accountant's certificate it is evident that the duty was not passed on and it was treated by the respondent as a receivable. Revenue has not produced even a shred of evidence either to establish that the Chartered Accountant's certificate was wrong or to establish that the duty was indeed passed on to the buyers. Learned special counsel also asserted that M/s Naveen Associates were not the statutory auditors of the respondent. Learned counsel for the respondent asserts that they were their statutory auditors during the relevant period. In the absence of any evidence by the Revenue on this count, the submission by the respondent that during the relevant period, M/s Naveen Associates were their Chartered Accountants must be accepted. Even otherwise, there is no requirement in law that a certificate must be issued only by the statutory auditors. So long as the certificate is issued by a

Chartered Accountant and it is consistent with the accounts such as Balance Sheet and Profit and Loss statement, the certificate deserves to be accepted.

19. In view of the above, we find that the appeal filed by the Revenue deserves to be dismissed.

20. The appeal is dismissed with consequential relief, if any to the respondent. Stay application also stands disposed of.

(Order Pronounced on 24/03/2023)

(P.V. SUBBA RAO)
MEMBER (TECHNICAL)

(BINU TAMTA)
MEMBER (JUDICIAL)

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