(2021) 07 CESTAT CK 0012

In the Customs, Excise And Service Tax Appellate Tribunal

Case No : Excise Appeal No. 40325, 40326, 40327, 40328 Of 2020

M/s. Johnson Lifts Private Limited APPELLANT

Vs

Commissioner Of G.S.T. And Central Excise RESPONDENT

Date of Decision : 08-07-2021

Acts Referred:
Central Excise Rules, 2002 — Rule 7

Citation : (2021) 07 CESTAT CK 0012

Hon'ble Judges : P. Dinesha, J

Bench : Single Bench

Advocate : D. Naveena, T. Usha Devi

Final Decision : Allowed

Judgement

1. The common issue in all the above appeals relates to refund and hence, the same are considered together for the sake of convenience.

2. Based on the appellantâ??s request, provisional assessment was made as per Rule 7 of the Central Excise Rules, 2002, which thereafter were

finalized vide Orders-in-Original dated 22.01.2019 and 25.06.2019, consequent upon which the appellant filed refund claims of Duty and interest on the

ground that the same represented the excess amount of Duty and interest paid for the periods 2004-05 and 2005-06, April 2008 to March 2009, April

2009 to March 2010 and 2012-13 to 2015-16.

3. The Adjudicating Authority vide Orders-in-Original dated 27.09.2019 while partly sanctioning the refund, directs the same to be credited to

Consumer Welfare Fund on the ground that the appellant had not proved that the incidence of Duty had not been passed on to the customers. The

First Appellate Authority having dismissed the appellantâ??s first appeal vide impugned Orders-in-Appeal No. 34,35,36,37/2020 (CTA-II) dated

27.04.2020, the present appeals have been filed before this forum.

4.1 Ms. D. Naveena, Learned Advocate appearing for the assessee-appellant, made the following submissions:

(i) The Adjudicating Authority relied solely on the report of the Jurisdictional Range Officer (hereinafter referred to as â??JROâ??) dated

26.08.2019, copy of which was not furnished to the appellant;

(ii) The refund claimed was not collected from the/ passed on to the customers of the appellant either by invoices or by debit notes;

(iii) That the expenditure booked which was not shown as â??receivablesâ?? was a fresh ground not raised by the First Appellate Authority and

hence, the Commissioner (Appeals) has clearly travelled beyond the scope of the Orders-in-Original;

(iv) There is a Chartered Accountant Certificate issued by the qualified Chartered Accountant to the effect that no incidence of interest was passed

on to the customers of the appellant;

(v)The appellant had also filed a letter dated 14.08.2019 wherein also the appellant had categorically submitted as having not passed on the Duty

element to its customers, etc.

4.2 She also placed sample copies of the tax invoices raised on the customers and also relied on the following decisions:

(a) M/s. Sterlite Industries India Ltd. v. Commr. of C.Ex., Aurangabad [2005 (182) E.L.T. 355 (Tri. â?" Mum.)];

(b) M/s. Himat Singka Seide Ltd. v. Commissioner [2005 (191) E.L.T. 885 (Tribunal)];

(c) M/s. Dhariwal Industries Ltd. v. Commissioner [2005 (189) E.L.T. 425 (Tribunal)];

(d) Commissioner v. M/s. Dhariwal Industries Ltd. [2014 (303) E.L.T. 496 (Guj.)];

(e) Commissioner v. M/s. Dhariwal Industries Ltd. [2015 (319) E.L.T. A118 (S.C.)];

(f) Commissioner v. M/s. Sandvik Asia Ltd. [2015 (323) E.L.T. 431 (Bom.)];

(g) M/s. Heinz India Pvt. Ltd. v. Commr. of C.Ex., Lucknow [2017 (355) E.L.T. 438 (Tri. â?" All.)]

5.1 Ms. T. Usha Devi, Learned Departmental Representative appearing for the Revenue, submitted that the appellant primarily has not proved that the Duty element has not been passed on to its customers. She would also contend that the very fact that the Excise Duty is shown as expenditure

would mean that the same has been passed on to the customers since the same has not been shown as receivables in the subsequent year. She would

also reiterate the reasons given in the impugned Orders-in-Appeal for justifying the denial.

5.2 She relied on the following judgements :

(a) C.C.E. v. M/s. Addison and Company Ltd. [2017-TIOL192-SC-CX-LB];

(b) M/s. Hindustan Petroleum Coprn. Ltd. v. Commr. of Cus. (Imports), Mumbai [2015 (328) E.L.T. 490 (Tri. â?" Mum.)];

6. I have considered the rival contentions and gone through the documents placed on record as well as various decisions/orders relied upon by both the

parties.

7. There are two things: (1) Certificate of the Chartered Accountant though taken note of, has not been deliberated upon by the Officers nor have

they deliberated upon the undertaking letter dated 14.08.2019 filed by the appellant; and (2) the letter dated 26.08.2019 of the JRO relied upon by the

Adjudicating Authority wherein he has claimed to have examined the invoices â?" most of which noticed to have passed on the incidence of Duty to

customers â?" gives an impression that either he has not examined all the invoices, or that only some of the invoices indicate the passing on of Duty.

Most importantly, none of the authorities, or even the JRO, has expressed any doubt or suspicion as to the veracity of either the certificate of the

Chartered Accountant or the letter dated 14.08.2019 of the assessee or as to their contents.

8. The sole reliance placed on the JROâ??s report by the Adjudicating Authority, unfortunately, has not been put across for rebuttal, which is also an

undisputed fact and the same has been used to draw a presumption against the appellant which, according to me, is a serious flaw not only of the

procedure, but also of the principles of natural justice.

9. Further, from one of the letters of the appellant, the appellant might have waived the issuance of Show Cause Notice, but certainly not their Right to

the documents that may be used against them. The judgement of the Honâ??ble Supreme Court relied upon by the Adjudicating Authority in the case

of M/s. Sahakari Khand Udyog Mandal Ltd. v. C.C.E. & Cus. reported in 2005

(181) E.L.T. 328 (S.C.), a paragraph of which has been extracted in

the Order-in-Original, clearly indicates that the Honâ??ble Court had ruled that the doctrine of unjust enrichment could be invoked to deny benefit to

which a person is not otherwise entitled, which by itself forms a separate category and the same is not applicable in rem. This is not the case here.

The Adjudicating Authority has in fact sanctioned refund which means, the Revenue did not dispute that the appellant is â??otherwise entitledâ?? for

the refund.

10. The minimum/initial burden of proof, according to me, stands discharged by the appellant upon production of documents in their support and its

own undertaking. In the absence of any findings to the contrary, the onus shifts to the Revenue and the Revenue has miserably failed to discharge its

onus. Therefore, the presumption as to the preponderance of probabilities is heavily stacked against the Revenue. Law has prescribed Accounting

Standards that is required to be followed consistently. Books of Accounts are therefore to be maintained accordingly and, of course, following a

consistent method of accounting. Expenditure is generally an outgo and some of such expenditure may be in the nature of payments which may result

in partial or full refund/recovery due to various reasons. Some of such expenditure is also towards Duty payment, the refund of which is highly

uncertain and no assessee would take chances in this regard. So, while expenditure for other payments may be receivable, the same may not be the

case with Duty payment, but that alone cannot decide an issue. The refund here, in this case, is claimed for a few years only and just by referring to

one yearâ??s Books of Account, it cannot be concluded that the expenditure having not been carried forward, the same is not considered as a

receivable. In any case, nothing turns in so far as taxation is concerned on a mere accounting treatment. Moreover, this is not the basic doubt in the

mind of the Adjudicating Authority who perhaps had the privilege of looking into the Books of Accounts during the course of adjudication proceedings

and therefore, the view expressed by the First Appellate Authority is without any basis and the same cannot be sustained.

11. In view of the above, I am of the clear opinion that the impugned Orders cannot be sustained as being opposed to the principles of natural justice

and consequently, the matter requires re-adjudication. Accordingly, the findings in the impugned order are set aside and the matter is remanded back

to the file of the Adjudicating Authority who shall furnish the copies of (1) report of the JRO dated 26.08.2019 and (2) invoices relied upon by the JRO

while preparing his report, which are relied upon by him, for the effective rebuttal of the appellant, who shall then consider all such contentions,

documents and case-laws that may be relied upon by the appellant and then pass a fresh order in accordance with law. All the contentions of the

appellant are left open.

12. The appeals are allowed by way of remand.

(Order pronounced in the open court on 08.07.2021)