(2021) 06 CESTAT CK 0035

In the Customs, Excise And Service Tax Appellate Tribunal

Case No : Customs Appeal No. 1061 Of 2006

National Organic Chemical Industries Ltd — APPELLANT

Vs

Commissioner Of Customs (Import) — RESPONDENT

Date of Decision : 18-06-2021

Acts Referred:

Customs Act, 1962 — Section 27, 129E, 129E(2), 131
Central Excise Act, 1944 — Section 11B, 35F

Citation : (2021) 06 CESTAT CK 0035

Hon'ble Judges : Ajay Sharma, J;C.J. Mathew, Technical Member

Bench : Division Bench

Advocate : D B Shroff, Mihir Mehta, Mohit Rawal, Trupti Chavan

Final Decision : Allowed

Judgement

1. Impugning order-in-appeal no. 212/2006/MCH/DC/GrVA/06 dated 20th June 2006 of Commissioner of Customs (Appeals), Mumbaiâ?"I, the

appellant, M/s National Organic Chemical Industries Ltd, seeks approval of the proposition that discharge of duty liability in full and on their own

volition, as a prelude to seeking recourse to appellate jurisdiction, is no different from compliance with order of an appellate authority to pay the whole,

or some part thereof, on disposal of plea of hardship that stands in the way of seeking such remedy. We hasten to add that this dispute had its genesis

before 6th August 2014 when Finance Act, 2014 substituted the discretion conferred on the Tribunal, and Commissioner (Appeals), by section 129E of

Customs Act, 1962 to waive, fully or partially, deposit of the disputed amount with mandatory pre-deposit.

2. A brief narration of the background may assist in setting forth the scope of the proceedings before us. The appellant, upon import of capital goods

for their chemical plant vide bills of entry no. 013298/30.06.1987 and no. 006051/16.07.1987, had been subjected to recovery proceedings for wrongful

claim of concessional rate of duty and, in addition to differential duty of Rs.82,62,000 and penalty of Rs.10,00,000, was also required to pay fine of

Rs.40,00,000 for redemption of the goods held liable confiscation by Collector of Customs, Mumbai in order dated 2nd July 1987 against which appeal,

filed on 23rd September 1987, was decided in favour of the importer by order dated 29th October 1998 upholding their claims.

3. On the filing of claim for refund of duty, fine and penalty, as consequential relief, on 24th November 1999, the latter two were sanctioned on 27th

July 2001 and a notice of intention to credit Rs. 82.62,000, paid towards duty, in the Consumer Welfare Fund, as envisaged by section 27 of Customs

Act, 1962,was issued on the ground that the onus of establishing that the incidence of duty had been borne by them, without having been passed on to

any other person, had not been discharged. The refund, though sanctioned as amount not receivable in the Consolidated Fund of India, was directed to

be credited to the Consumer Welfare Fund by the Deputy Commissioner of Customs in order dated 6th January 2006. Their appeal for release of

sanctioned amount to them was dismissed by the order impugned here.

4. Learned Senior Counsel, Mr DB Shroff, submits that the sanctioning authority, as well as the first appellate authority, had placed an erroneous

construction on the payment effected by the appellant. According to him, the order of Collector of Customs charging them with differential duty and

confiscation of goods would have entailed setback of their business plan had they opted to await the culmination of the appellate process which may

well have had to travel to the highest court and a conscious decision was taken to comply with the order even as they pursued appellate remedies. He

submits that the withholding of consequential relief, and to persist in indirectly saddling them with the burden after judicial intervention had frustrated

the attempt under aegis of the law, was sought to be justified by obfuscating the legal reality with a distorted perspective of the facts. Elaborating on

this vein, Mr Shroff pointed out that, had they opted to await filing of appeal and disposal of attendant application for waiver of pre-deposit, the facts

may well have remained unchanged except that the goods would have been made available to them after a further lapse of time. The disclination of the appellant to resort to the futile has, in his view, been perversely construed to deny them consequential relief.

5. Referring to the provisions of section 129E of Customs Act, 1962, he argues that, unless otherwise ordered by the appellate authority, the entirety of

duty, fine and penalty in dispute was to be deposited for an appeal to be taken up for disposal and that, instead of pleading for waiver that would,

justifiably, have been refused, their prompt fulfillment of the pre-requisites should not be held against them. He placed reliance on the decision of the

Honâ??ble High Court of Gujarat in Commissioner of Customs (Preventive) v. Ghaziabad Ship Breakers Ltd [2010 (259) ELT 522 (Guj)].

6. It was also submitted by Learned Senior Counsel that the appellant had furnished all the details of capitalisation, their pricing systems and the

exclusion of depreciation from direct cost duly certified by an independent chartered accountant as evidence of having borne the incidence of duty

before the first appellate authority who chose to disregard their alternative submission on eligibility. Reliance is also placed on the decision of the

Honâ??ble High Court of Bombay in Commissioner of Central Excise, Pune-I v. Sandvik Asia Ltd [2015 (323) ELT 431 (Bom)].

7. Learned Authorized Representative was vehement in contesting the submissions and, with reference to their claim that the incidence of duty had

been borne by the appellant, pointed out that the balance sheet was significantly derelict in recording the disputed amount as pending refund claim. She

further contended that, in accord with the observations of the Honâ??ble Supreme Court in Mafatlal Industries Ltd v. Union of India [1997 (89) ELT

247 (SC)], any claim for refund within the provisions of Customs Act, 1962, when eligible for sanction, was required to be tested for â??unjust

enrichmentâ?? before disbursement. Citing the decision of the Honâ??ble Supreme Court in State of Uttar Pradesh v. VAM Organic Chemicals

Limited [(2006) 10 SCC 324], it was argued that compliance with the touchstone of â??unjust enrichmentâ?? must accompany every refund claim.

Reliance is also placed on the decision of the Honâ??ble Supreme Court in Union of India v. Jain Spinners Ltd [1992 (61) ELT 321 (SC)] which

distinguished the deposit of disputed amount with courts from payment to the government and in Sahakari Khand Udyog Mandal Ltd v. Commissioner

of Central Excise & Customs [2005 (181) ELT 328 (SC)] which placed emphasis on the non-refundability being based on equity which was liable to be invoked even without statutory sanction. The decision of the Honâ??ble High Court of Gujarat in Ruchi Soya Industries Ltd v. Union of India

[2016 (336) ELT 423 (Guj)] on similar lines was also cited.

8. It was also contended by her that the certificate of the Chartered Accountant was not acceptable as, during the proceedings before the original

authority, the appellant herein had pleaded their inability to submit any supporting evidence and that the plea before the first appellate authority

appeared to be mere afterthought. Referring to the decision of the Honâ??ble Supreme Court in Commissioner of Central Excise, Chennai-III v.

Grasim Industries [2015 (318) ELT 594 (SC)], it was argued that duty paid on capital goods was, to no lesser extent, subject to the test of â??unjust

enrichmentâ?? in deciding upon destination of refund.

9. The submissions and supporting citations, purporting to defend the stand of the lower authorities, pertain to the several situations in which the test of

â??unjust enrichmentâ?? had been judicially determined as a pre-requisite for release of sanctioned refund to applicants though it was on the

foundation that, in the absence of an order from the Tribunal directing pre-deposit of amount disputed in the appeal, the claim for refund of duty

deposited by the appellant herein cannot escape the unrelenting reach of â??unjust enrichmentâ?? that plea for consequential relief had been refused.

Hence, in disposal of the primary submission of the appellant, we do not need to concern ourselves with the case laws submitted by Learned

Authorized Representative; indeed, the citation of the decision of the Honâ??ble Supreme Court in re Grasim Industries Ltd, even though there was

no plea on behalf of the appellant that duty paid on capital goods is outside the ambit of â??unjust enrichmentâ??, is one of such. Here we must also

stipulate that, as held by the Honâ??ble Supreme Court in re Mafatlal Industries Ltd, in every statutory determination of eligibility for refund, by the

proper officer under section 27 of Customs Act, 1962, the test of â??unjust enrichmentâ?? should be applied with reference to the facts peculiar to

each such claim.

10. That pre-deposit is to be excluded from the test of â??unjust enrichmentâ??, and for obvious reasons, is common ground as is evident from

circular no. 984/8/2014-CX dated 16th September 2014 of Central Board of Excise & Customs stating categorically that this is not tantamount to payment of duty and that

â??5.2â?¦â?¦ Hence, refund of pre-deposit need not be subjected to the process of refund of duty under Section 11B of the Central Excise

Act, 1944 or Section 27 of the Customs Act, 1962â?¦.â??

The entire dispute commencing with the notice to discard the claim for concessional rate of duty on the goods imported in June/July 1987 and

culminating in the endorsement of the declaration in the bills of entry by the Tribunal in October 1998 occurred before the provisions of section 129E

of Customs Act, 1962 was amended on 6th August 2014 to substitute the discretion of the appellate authority to determine the extent of waiver of pre-

deposit with mandatory predeposit. Indeed, when the appellant knocked on the doors of the Tribunal for quashing the demand for differential duty and

other detriments ordered by the adjudicating Collector of Customs, the bar of â?? unjust enrichmentâ?? in indirect tax matters was, as yet, unknown to

the tax administration as well as the Tribunal and only in the peripheral vision of the constitutional courts with the conceptual simplicity, moral

soundness and ethical desirability of the doctrine tugging at the heartstrings. It was after the statutory recognition accorded by amendment of section

27 of Customs Act, 1962, with effect from 20th September 1991 by the Central Excise and Customs Laws (Amendment) Act, 1991, that the

authoritative exposition of the doctrine by the Honâ??ble Supreme Court in re Mafatlal Industries Ltd as interdict on access to the refund of taxes

collected without authority of law offered the wider understanding, and acceptance, that it now has. It would be safe to hazard a guess that the

appellant herein may well have secured their claim with a nominal exertion for waiver, and, thus, ousted the possibility of denial put forth now by the

lower authorities, had they been prescient of the alteration that was to occur four years thence even as their appeal lay undisposed; that obeisance to

superfluity would have been but a small price to pay for the elapse of two more decades before their claim was taken up for judicial determination.

11. That the appellant had not, at any stage, accepted the denial of eligibility to the concessional rate of duty is not in doubt; the notice was objected to

and the adjudication appealed against. There is also no doubt that the deposit of differential duty, accompanied by remitting of adjudicated fine and

penalty, did not occur at the prenotice stage for it to be deemed as tentative acceptance of intended revision of assessment. Central to the present

dispute is the desideratum for submitting themselves to appellate jurisdiction, viz.,

â??129-E Deposit, pending appeal, of (duty and interest) demanded or penalty levied - Where in any appeal under this Chapter, the

decision or order appealed against relates to any duty and interest demanded in respect of goods which are not under the control of

customs authorities or any penalty levied under this Act, the person desirous of appealing against such decision of order shall, pending the

appeal, deposit with the proper officer the duty and interest demanded or the penalty levied:

Provided that where in any particular case, the Commissioner (Appeals), or the Appellate Tribunal is of opinion that the deposit of duty and

interest demanded duty or penalty levied would cause undue hardship to such person, the Commissioner (Appeals) or, as the case may be,

the Appellate Tribunal may dispense with such deposit subject to such conditions as he or it may deem fit to impose so as to safeguard the

interests of revenue:

xxxxxâ??

in Customs Act, 1962.

12. There can be no two opinions that the law, as it stood then, prescribed the deposit of the disputed amount as pre-condition for submitting to the

jurisdiction of the Tribunal. It is also unambiguously clear that this requirement could be whittled down only on specific direction of the Tribunal upon

consideration of plea of hardship and subject to terms and conditions for safeguarding revenue. Safeguarding the interest of revenue, and, not

unnaturally, considering that empowered authority did, in the present dispute, re-determine the duty liability and imposed penalty, is the underlying

intent of this prescription. Sans hardship, there was no scope for a lesser alternative to be wheedled from the Tribunal; having complied with the

statutory pre-requisite, the appellant would have been commercially derelict in not securing possession of the goods by exercising the option of

redemption. If the proposition of the lower authorities is to be accepted, remittance of duty would be â??pre-depositâ?? only for those who could

satisfy the Tribunal that such payment caused undue hardship or who were prepared to perjure themselves with claims that may not have withstood

the scrutiny of the Tribunal. The attempt to persuade us that this absurdity has been legislatively intended does not evoke resonance from us. It would

not be wrong to posit that â??predepositâ?? is contingent not upon orders of the Tribunal but on carrying disputes to the Tribunal.

13. It is consistent with this provision that, while an aggrieved person may have the right impugn the order causing grievance, the sanctity of the order

remains unimpaired unless stayed by the appellate authority. The purpose of the proviso in section 129E of Customs Act, 1962 is to forestall initiation

of recovery proceedings during the pendency of appeal and for â??pre-depositâ?? to be restricted as designating only those that are in compliance

with such conditions, as may be prescribed for grant of stay, would that inconsistent with the intent. This has been articulated by a Larger Bench of

the Tribunal in Haldiram India Pvt Ltd v. Commissioner of Central Excise, Delhi [2014 (309) ELT 81 (Tri-LB)] thus

â??6.â?¦â?¦ As a consequence of the amendment (substitution) of Section 35F w.e.f. 6-8-2014 the earlier requirement under provision (of

having to deposit the entirety of the adjudicated liability subject of waiver, either wholly or pro tanto of the pre-deposit by the Tribunal on

exercise of discretion) was repealed and a fixed pre-deposit regime came into existence.â?¦â??

on considering the legal position before and after the mandatory predeposit was legislated.

14. In appeal of Revenue against order of the Commissioner of Central Excise (Appeals) directing the refund of duties of central excise paid, under

protest by debit of â??personal ledger accountâ?? upon adjudication, before filing of appeal, the Tribunal, in Commissioner of Central Excise, Nasik v.

Siemens Ltd [2004 (173) ELT 41 (Tri-Mumbai)], had held that

â??3â?¦â?¦ The payment therefore has been made for no protest but has been made to enable the appellant to file an appeal in

Commissioner Appeal. The reliance of the ld. advocate for the application on Section 35F of the Central Excise Act stipulating the person

desirous of appealing against such decision or order shall, pending the appeal, deposit with the adjudicating authority the duty demanded

or the penalty levied as a force to conclude that payments were made in the nature of deposit to enable this appeal and are not payments of

duty.â?¦ When we find that the refunds are return of deposit made under Section 35 F of the Central Excise Act & are required to be

returned as per the order of the Board vide F No. 275/37/2K-CX 8A, 2-1-2002, with filing of a refund application.â??

15. We also take note that the Honâ??ble High Court of Gujarat has, in, re Ghaziabad Ship Breakers Ltd, observed that

â??6. On a plain reading of Section 129E of the Act, it is apparent that the same provides that a person desirous of appealing against an

order relating to any duty or interest demanded in respect of goods which are not under the control of the customs authorities or any

penalty levied under the Act, is required to deposit the duty and interest demanded or penalty levied with the proper officer. Under the

section such amount has to be paid by such person on his own and does not require any order to be passed before making such deposit.

Deposit of the said amount is a pre-condition for entertaining the appeal. What is important to note is that the amount to be deposited before

the appeal can be entertained on merits is nothing else but the amount of duty and/or interest, or penalty demanded in consequence of an

order-in original. In principle the deposit is of duty or interest or penalty. The term â??pre-depositâ? is conveniently used to denote

payment for entertaining the appeal. It is only a mode of payment prescribed by legislature with an intention to protect interest of Revenue.

7. However, if the person desirous of preferring appeal seeks waiver of the pre-deposit on the ground of undue hardship as contemplated

under sub-section (2) of Section 129E, he is required to file an application seeking dispensation of such deposit, in which case he is

required to make the pre-deposit in terms of the order that may be passed by the Commissioner (Appeals) or the Appellate Tribunal. Thus,

the contention that it is only the payment made pursuant to any order of any appellate authority or judicial forum under Section 129 E or

section 131 of the Act would fall within the ambit of predeposit under the said provision is fallacious and contrary to the provisions of the

section itself and as such does not merit acceptanceâ??

16. In view of the specific provision of section 129E of Customs Act, 1962, as

elaborated by us, and the several decisions cited supra, the position

adopted in the impugned order that the original authority was, in discarding the claim of the appellant that the payment of differential duty was pre-

deposit, is not incorrect cannot be affirmed by us as legal and proper. Consequently, the competent authorities are directed to ensure compliance with

circular no. 984/8/2014-CX dated 16th September 2014 of Central Board of Excise & Customs for disposal of the refund without fail and without

delay. Appeal is allowed.

(Pronounced in Open Court on 18/06/2021)

