

**2014 (2) ECS (274) (Tri- Ahm.)**

In the Customs, Excise & Service Tax Appellate Tribunal

West Zonal Bench, Ahmedabad

**M/S. INDIAN POTASH LIMITED**

VS.

**CC, KANDLA**

**Date of Hearing: 17.01.2014**

**Date of Decision: 17.02.2014**

Appeal No. C/350/2008, C/13756-13771/2013

[Arising out of: OIA No.134/2008-KDL/Cus/Commr(A)/AHD,  
dt.25.04.2008 Passed by: Commissioner of Customs (Appeals), Kandla]

Appearance:

Shri S. Surinarayanan, Adv.

For the appellant

Dr. J. Nagori, Addl. Commissioner (A.R.)

For the respondent

**CORAM**

Mr. H.K. Thakur, Hon'ble Member (Technical)

*Order No.A/10186-10202/2014, dt.17.02.2014*

**Once an Order of Assessment is passed the duty would be payable as per that order. Unless that order of assessment has been reviewed under Section 28 and/or modified in an Appeal that Order stands. So long as the Order of Assessment stands the duty would be payable as per that Order of Assessment. A refund claim is not an Appeal proceeding. The Officer considering a refund claim cannot sit in Appeal over an assessment made by a competent Officer. The Officer considering the refund claim cannot also review an assessment order...**

**The words "in pursuance of an Order of Assessment" only indicate the party/person who can make a claim for refund. In other words, they enable a person who has paid duty in pursuance of an Order of Assessment to claim refund. These words do not lead to the conclusion that without the Order of Assessment having been modified in Appeal or reviewed a claim for refund can be maintained. (Para 5)**

**There is no evidence brought on record that assessments made on the bills of entry of the appellant were contested by filing appeals before the appropriate appellate authority, or that appellant asked for any appellate order on the assessments made on the bills of entry. (Para 5.1)**

PER: H.K. THAKUR

1. These appeals have been filed by the appellant against Order-in-Appeal No.134/2008-KDL/Cus/Commr(A)/AHD, dt.25.04.2008 passed by Commissioner of Customs (Appeals), Ahmedabad, under which OIO No.23 to 39/KS(DC/REFUND/MP & SEZ/07-08, dt.27.07.2007 was upheld. Adjudicating authority rejected 17 refund claims filed by the appellant, with respect to 17 assessed bills of entry on the ground that the assessments made on the bills of entry were not challenged by the appellant and that unjust enrichment is also involved. Both the adjudicating authority and the first appellate authority relied upon the Apex Court's judgments in the case of CCE Kanpur Vs Flock (India) Pvt.Ltd. [2000 (120) ELT 285 (SC)] and Priya Blue Industries Vs CCP [2004 (172) ELT 145 (SC)].
2. Shri S. Suriyanaranan (Adv.) appearing on behalf of the appellant argued that duty at the first instance was not payable. It was his case that it is not a requirement of law to contest the assessments made with respect to each bill of entry when the same issue has been decided in favour of the trade by the higher judicial forums. He also argued that unjust enrichment is not applicable to their case where MRP is fixed by the Government. He relied upon the following case laws:-
  - i) Oswal Chemicals & Fertilizers Vs CCE Guwahati  
2004 (172) ELT 216 (Tri-Del)
  - ii) CCE Lucknow Vs Oswal Chemicals & Fertilizers Ltd  
2009 (241) ELT 374 (Tri-Del)
  - iii) C.G. Elin Power Systems Ltd Vs CC Mumbai  
2012 (277) ELT 174 (Tri-Mum)
  - iv) Oswal Chemicals & Fertilizers Vs CCE Rajkot  
2007 (218) ELT 598 (Tri-Ahmd)
  - v) Bennet Coleman & Co. Ltd Vs CC Bangalore  
2008 (232) ELT 367 ((Tri-Bang)
  - vi) CC Guntur Vs Sameera Trading Co.  
2011 (264) ELT 578 (Tri-Bang)
  - vii) Eco Valley Farms & Foods Ltd Vs CCE Pune-III  
2013 (290) ELT 49 (Bom.)
  - viii) RBF RIG Corporation Vs CC (Imports) Mumbai  
2011 (264) ELT 486 (SC)
  - ix) Western Coalfields Ltd Vs CCE Kolkata  
2011 (273) ELT 153 (Tri-Del)
  - x) Aman Medical Products Ltd Vs CC Delhi

- 2010 (250) ELT 30 (Del.)
- xi) CCE (Appeals) Bangalore Vs KVR Construction  
2012 (26) STR 195 (Kar.)
- xii) Hind Agro Industries Ltd Vs CC  
2008 (221) ELT 336 (Del.)
- Xiii) Veekay Prints Pvt.Ltd. Vs CC Mumbai-III  
2010 (259) ELT 749 (Tri-Mum)

2.1 It was argued by the appellant that the issue of non-inclusion of bagging charges for packing of fertilizers after import for the earlier period was held to be non-includible in the assessable value as per CESTAT's Order No.A/99/WZB/Ahmedabad/07, dt.21.12.2006 in their own case (Customs Appeal No.1856 of 2003). Appellant filed written submissions and inter alia, relied upon the case law in the case of Kairali Granites Vs CC [2010 (255) ELT 239 (Kar.)] and enclosed a copy of Final Order No.A/428/WZB/AHD/2010, dt.06.05.2010 in Appeal No.C/242/2007 wherein the Division Bench of the Tribunal held in Paragraph 4 therein that if the appellants final product was being controlled under Fertilizer Price Control Order, the principle of unjust enrichment will not apply. Based on the said order, necessary refund has already been granted by the Assistant Commissioner, Jamnagar. In the present case, the findings of the learned Joint Commissioner in the Order-in-Original shows that there is no dispute about MRP prices of fertilizer being fixed by the Government of India. Hence, the question of unjust enrichment does not arise in the light of the binding precedent Order No.A/428/WZB/AHD/2010, dt.06.05.2010 of the Tribunal having attained finality.

3. Dr. J. Nagori, (A.R.) appearing on behalf of the Revenue argued that the assessments made on the bills of entry were not contested by the appellant and thus emphasized that order passed by first appellate authority was correct by placing reliance on Honble Supreme Courts judgments. So far as involvement of unjust enrichment on the duty paid under protest, for the period June 2006 to November 2006, he relied upon the following case-laws to argue that unjust enrichment is attracted in the present proceedings:-
  - i) CCE Jaipur Vs Birla Corporation Ltd  
2007 (208) ELT 481 (SC)
  - ii) CCE & ST Cochin Vs Tecil Chemicals & Hydropower Ltd  
2012 (286) ELT 19 (Kar.)
4. Heard both sides and perused the case-records. In these appeals, following points are required to be decided.

- a) Whether appellant was required to challenge the assessments made on the bills of entry before filing refund of Customs duty paid, when the assessment made on the bill of entry for the earlier period was contested and a favourable order is obtained by the appellant.
  - b) Whether unjust enrichment is attracted in the present case when final price of the goods is fixed by the Government.
5. So far as filing of refund claims without challenging the assessments made of on 17 bills of entry is concerned, it is observed that this issue is no more res-integra. Hon'ble Apex Court in the case of Priya Blue Industries Vs CCP [2004 (172) ELT 145 (SC)] has held in Paras 6 to 8 as following:-
  6. We are unable to accept this submission. Just such a contention has been negated by this Court in Flock (India)s case (supra). Once an Order of Assessment is passed the duty would be payable as per that order. Unless that order of assessment has been reviewed under Section 28 and/or modified in an Appeal that Order stands. So long as the Order of Assessment stands the duty would be payable as per that Order of Assessment. A refund claim is not an Appeal proceeding. The Officer considering a refund claim cannot sit in Appeal over an assessment made by a competent Officer. The Officer considering the refund claim cannot also review an assessment order.
  7. We also see no substance in the contention that provisions for a period of limitation indicates that a refund claim could be filed without filing an Appeal. Even under Rule 11 under the Excise Act the claim for refund had to be filed within a period of six months. It was still held, in Flock (India)'s case (supra), that in the absence of an Appeal having been filed no refund claim could be made.
  8. The words "in pursuance of an Order of Assessment" only indicate the party/person who can make a claim for refund. In other words, they enable a person who has paid duty in pursuance of an Order of Assessment to claim refund. These words do not lead to the conclusion that without the Order of Assessment having been modified in Appeal or reviewed a claim for refund can be maintained.

5.1 In view of the above, there is no evidence brought on record that assessments made on the bills of entry of the appellant were contested by filing appeals before the appropriate appellate authority, or that appellant asked for any appellate order on the assessments made on the bills of entry. The case laws relied upon by the appellant are not applicable in view of the above ratio laid down

by the Apex Court. Accordingly, argument raised on this issue by the appellant is required to be rejected.

6. On the issue of unjust enrichment appellant, inter alia, has relied upon the case of CESTAT Delhi reported as *Oswal Chemicals & Fertilizers Vs CCE Guwahati* [2004 (172) ELT 216 (Tri-Del)] that where final prices are fixed by the Government, then there is no unjust enrichment. In this regard, it is observed that CESTAT Delhi in the case of *Western Coalfield Ltd Vs CCE Kolkata* [2011 (273) ELT 153 (Tri-Del)] has doubted the correctness of its own judgment in the case of *Chemicals & Fertilizers Vs CCE Guwahati* (supra) and held that even if the end product is exempted, then also it cannot be said that element of duty paid on inputs is not included in the case of final product. However, in view of the earlier proceedings, as per Order No.A/428/WZB/AHD/2010, dt.06.05.2010 in Appeal No.C/242/2007, specifically going in favour of the appellant, it has to be held that unjust enrichment is not applicable where maximum prices are controlled under the Fertilizer Price Control Order.
7. However, in view of the observations made in Paragraphs 5 & 5.1 above, appeals filed by the appellants are rejected.