IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

CENTRAL EXCISE APPEAL No. 29 of 2014

ALONG WITH

CENTRAL EXCISE APPEAL No. 33 of 2014

CEAT Limited .. **Appellant**.

Vs

The Commissioner of Central Excise
& Customs, Nashik .. **Respondent.**

Mr V. Sreedharan, Senior Counsel a/with Mr Prakash Shah and Mr Jas Sanghavi i/by PDS Legal for the Appellant.
Mr Pradeep S. Jetly a/with Mr Jitendra B. Mishra for the Respondent.

CORAM : S.C. DHARMADHIKARI &
N.W. SAMBRE, JJ.
DATE : 04th FEBRUARY, 2015.

P.C.

1) These two appeals by the assessee are directed against the order passed by the Customs, Excise and Service Tax Appellate Tribunal, West Zonal, Bench at Mumbai dated 13th June, 2013.

2) The Commissioner of Central Excise and Customs, Nashik was in

appeal before the Tribunal. He was aggrieved and dissatisfied with the two orders, one styled as an order in appeal dated 29th April, 2004 and the other styled as order-in-original of the Assistant Commissioner dated 27th May, 2003.

3) The issue before the Tribunal and raised in the Revenue's memo of appeal was whether the Commissioner (Appeals) was right in confirming the order-in-original dated 27th May, 2003. Insofar as two issues, firstly, whether the principle of unjust enrichment would apply in the event an assessment made is provisionally and on final assessment the duty liability being determined and later on meaning thereby if the assessment made is provisional and the duty amount is yet to be finalized and the liability crystallized, whether this principle can be applied or invoked in the event the final assessment is made subsequently. Insofar as that principle is concerned, the Tribunal held that section 11B was amended with effect from 1st August, 1998. The provisions of unjust enrichment are, thus, applicable in respect of a refund claim arising out of the finalization of the assessment. The Tribunal concluded that the Hon'ble Supreme Court in the case of Commissioner of Central Excise Mumbai II Vs. Allied Photographics

India Ltd reported in **2004 (166) ELT 3** settled the issue. Further, and insofar as the second issue, namely, whether that principle can be invoked and applied in the facts and circumstances of the assessee's case, the Tribunal, according to Mr Shreedharn, learned Senior Counsel appearing for the appellant in support of this appeal, has failed to render any finding, leave alone conclusion. The Tribunal has failed to advert to the allegations in a notice to show cause issued by the Revenue. The Tribunal has also not adverted to the findings and conclusions in the order-in-original nor it has expressed any opinion on the correctness of the order passed by the Commissioner (Appeals). Thus, the facts have not been referred to at all nor the legal submissions and the conclusions thereon by the lower authority.

4) On the other hand, Mr Jetly would submit that the principle of unjust enrichment is applicable and which has been the only issue raised. Now, a fault cannot be found with the Tribunal's order. Hence, this appeal does not raise any substantial question of law but deserves to be dismissed.

5) On perusal of the Tribunal's order and impugned in this appeal, we are of the opinion that it deserves to be admitted. It is

admitted on the following substantial questions of law:-

> (a) Whether in the facts and circumstances of the case, the provisions of unjust enrichment are applicable in the present case?
>
> (b) Whether in the facts and circumstances of the case the Appellate Tribunal is correct in applying the decision of the Hon'ble Supreme Court of India in CCE Vs. Allied Photographics – 2004 (166) ELT 3 (SC)?

6) With the consent of the learned Advocates for both sides, we are disposing of this appeal finally.

7) In the present case, the assessee/appellant before us claimed that it had removed the final products for being taken to the depots located all over the country. The final products manufactured by the appellant and as described in paragraph 5.1 of the memo of appeal were cleared from the factory to the depot on payment of excise duty. However, the excise duty was termed as provisional and arising out of a provisional assessment. Later on, the final assessment was taken up by the competent official of the Department and the duty liability determined. The assessee came to the conclusion that once the final

assessment has confirmed the figure of the tax liability, then, having cleared the goods from the factory to the depot on provisional assessment and on payment of duty there arises a refund claim and to the tune of Rs.73,42,235/-. That is the excess duty paid on clearance of goods on provisional assessment during the financial year 1999-2000. That is how they addressed a communication on 27th December, 2000 (Annexure 'D') to the Superintendent of Central Excise and Customs, Nashik-1.

8) Subsequently, an application for refund dated 18th April, 2001 was filed with the competent authority. The Assistant Commissioner earlier communicated that the refund claim is premature. Later on, he passed an order on 5th April, 2002 finalizing the assessment and informing thus to the assessee.

9) Therefore, the assessee reiterated their claim for refund in the above sum by their letter dated 13th February, 2002.

10) This was scrutinized by the Assistant Commissioner and initially he was reluctant to consider it and called upon the assessee to show cause why it should not be rejected. The asseesee gave an explanation and subsequently appeared for a personal hearing before the Assistant

Commissioner. The Assistant Commissioner passed the order-in-original and sanctioning this refund claim. In sanctioning it, he rendered a finding essentially on facts that the principle of unjust enrichment will not be attracted. He, therefore, sanctioned the refund claim. The Department thought that this view of the Assistant Commissioner is prejudicial to the interest of the revenue and, therefore, the competent authority directed the Deputy Commissioner to file an appeal. The appeal lay in this case to the Appellate Commissioner, namely, Commissioner (Appeals). Therefore, a appeal in the requisite form was filed by the Revenue and the assessee filed cross-objections. The Commissioner decided this appeal by his order passed on 29th April, 2004. The Appeal was rejected.

11) That is how the aggrieved Revenue carried the matter to the CESTAT. Though before the CESTAT several contentions were raised and based on the factual findings in the order-in-original and that of the appellate order of the Commissioner (Appeals), we find substance in the complaint of Mr Shreedharan that none of them have been referred to either in extenso or even briefly. There is no reference at all made to the arguments of the parties on facts. Given that the principle

of unjust enrichment is attracted and when the final assessment is made, still, applicability of that principle on facts is a matter which had to be determined by the Tribunal. The legal issue having been settled and as conceded before us in the judgment of the Hon'ble Supreme Court in the case of Allied Photographics (supra) whether on facts the said principle can be applied or not was required to be dealt with by the Tribunal. It was its duty as a last fact finding authority to have considered the backdrop in which the refund claim was made, the documents placed in support thereof, the arguments canvassed on facts before the Assistant Commissioner and the Commissioner (Appeals) and the relevant findings on factual aspect in their orders. None of this has been referred, leave alone considered. If it was duty of the Tribunal to have referred to it, dealt with the issue on facts and after noting the rival contentions, then, it has clearly failed to perform it. The failure of the Tribunal to perform this duty and mandated by law itself is a substantial question and which can be safely termed as one of law and arising from the Tribunal's order.

12) In the above circumstances, the order passed by the Tribunal is quashed and set aside. The appeal of the Revenue filed before it is

restored and for fresh consideration on merits and in accordance with law. The Tribunal should now hear both sides extensively on the correctness of the findings rendered in the order-in-original and order in appeal. The Tribunal shall thereafter render a fresh decision. The appeals are allowed in these terms and with no order as to costs. We clarify that our order does not mean any endorsement of the conclusions either in the order-in-original or in the order of the Commissioner (Appeals). All contentions of both sides in relation thereto are kept open.

(N.W. SAMBRE, J.) **(S.C. DHARMADHIKARI,J)**