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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ W.P.(C) 11582/2022

M/S. KRUSH EXIM

.....Petitioner

Through: Ms. Anjali Jha Manish with Ms.
Priyadarshi Manish, Mr. Kartik
Sharma & Mr. Ankur Singh,
Advs.

versus

COMMISSIONER OF CUSTOMS & ORS.Respondents

Through: Mr. Aditya Singla, SSC with
Mr. Raghav Bakshi, Adv. for
R-1, 3, 4 & 5.

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+ W.P.(C) 11584/2022

M/S. SUSHMUNA TRADERS

.....Petitioner

Through: Ms. Anjali Jha Manish with Ms.
Priyadarshi Manish, Mr. Kartik
Sharma & Mr. Ankur Singh,
Advs.

versus

COMMISSIONER OF CUSTOMS (EXPORTS) &
ORS.

.....Respondents

Through: Mr. Aditya Singla, SSC with
Mr. Raghav Bakshi, Adv. for
R-1, 3, 4 & 5.

CORAM:

HON'BLE MR. JUSTICE YASHWANT VARMA

HON'BLE MR. JUSTICE RAVINDER DUDEJA

ORDER

21.08.2024

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1. These two writ petitions have been preferred seeking directions commanding the respondents to release amounts of INR 1,50,00,000/- to the petitioners' consequent to the closure of proceedings initiated



under the **Customs Act, 1962**¹ in terms of the Orders-in-Original dated 22 June 2020 and 28 August 2020, respectively.

2. It is the case of the writ petitioners that the aforesaid deposits were made during the course of investigation which came to be initiated pursuant to a seizure of goods on 06 February 2015 in W.P.(C) 11582/2022 and a similar seizure of goods on 06 February 2015 in case of W.P.(C) 11584/2022. The petitioners allege that although the seizure was wholly arbitrary and unwarranted in the facts which obtained, they were forced to make the payments aforesaid, since various other live shipping bills of export were also awaiting clearance. In both cases, **Show Cause Notices**² came to be issued and ultimately ended in Orders-in-Original being passed as noted hereinabove.

3. Despite the closure of proceedings in favour of the writ petitioners, they were constrained to institute these writ petitions consequent to a failure on the part of the respondents to refund the amounts which had been deposited during the course of investigation.

4. Before us, the factum of the proceedings having ultimately resulted in closure was not disputed by the respondents. It is in the aforesaid context that Ms. Manish, learned counsel appearing for the writ petitioners, contends that the refusal to effect refund is wholly arbitrary and unjust.

5. Undisputedly, the amounts in question were deposited in the course of investigation and pending adjudication. The adjudicatory process has ultimately ended in favour of the assessee. In view of the above, we find no legal justification in the respondents continuing to

¹ Act

² SCNs



retain the amounts which were deposited under protest by the writ petitioners and during the course of investigation.

6. It was in the aforesaid context that learned counsel for the writ petitioner drew our attention to the decision of our Court in **Commissioner of Customs (I & G) V. Ericsson India Private Limited³**. While disposing of that appeal, the Division Bench had held as follows: -

“3. It also appears that Revenue has accepted the said decisions and the view finds support from the decisions of the Bombay High Court in *Nel-co Limited v. UOI*, (2002) 144 ELT 56 and *Suvidhe Ltd. v. UOI*, (1996) 82 ELT 177 (Bom.) and the Supreme Court in *Commissioner of Central Excise, Hyderabad v. ITC Ltd.* - (2005) 179 ELT 15 (S.C.) relating to pre-deposits made for hearing of the appeals. We need not express any opinion on the amended provisions.

4. In the present case, it is obvious that the incidence of duty was not passed on to the consumer or third parties as the imports in question were made during the period 17th February, 1998 to 23rd February, 1998 and the show cause notices were issued on 21st September, 2000 and 13th December, 2002. They related to past imports/transactions. The *ad hoc* payment of Rs. 5 crores was made between the period 24th April, 2000 and 6th December, 2001. The respondent had also filed balance sheet as well as certificate of the Chartered Accountant in support and to discharge burden of proof under Section 28B of the Customs Act, 1962. The Tribunal has recorded that in the said certificate the Chartered Accountant had affirmed that incidence of duty had not been passed on to the customers.

5. Learned Additional Solicitor General submits that as per the order passed by the adjudicating officer as well as the appellate authority, certificate of the Chartered Accountant was not filed. The said observations are factually incorrect because in the grounds of appeal preferred before the first appellate authority the respondent had referred to certificate dated 18th January, 2006 of M/s. Obhrai Kataria and Associates, Chartered Accountants. Along with the certificate they had also filed copy of the balance sheet that tax of Rs. 5 crores had not been passed on to the buyers and, therefore, the principle of unjust enrichment was not applicable. The factual

³ 2013 SCC Online Del 6572



finding of the Tribunal is correct. ”

7. What we seek to emphasize is that deposits made under protest and during the course of investigation as also those which may come to be created pursuant to statutory obligations laid in place cannot partake the character of tax or duty.

8. The fate of deposits made during the course of investigation, under protest and the liability of the respondents to refund was considered in some detail by our Court in **Team HR Services Pvt. Ltd. V. Union of India**⁴ and where it was observed as follows: -

“6. A perusal of the final rejection refund order dated 13th September, 2019 shows that the same also does not dispute that the sum of Rs. 2,38,00,000/- deposited by the petitioner on 27th October, 2006 was under protest and the said order records, (I) that on the petitioner preferring appeal to CESTAT, because the petitioner had already deposited more than 50% of the tax element, though under protest, the condition of pre-deposit was waived; (II) that CESTAT set aside the impugned order dated 3rd October, 2011 only on the question of limitation; (III) that the petitioner had filed the refund claim well within the prescribed time; (IV) that vide Circular dated 16th September, 2014, where the appeal is decided in favour of the assessee, the assessee shall be entitled to refund of the amount deposited along with interest at the prescribed rate from the date of making of the deposit to the date of refund; (V) that the appeal preferred by the petitioner had been decided in favour of the petitioner only on the question of limitation; (VI) that the amount of Rs. 2,38,00,000/- had been deposited by the petitioner, under protest, during the course of audit/investigation and not by way of predeposit pursuant to appeal before the CESTAT - thus the Circular dated 16th September, 2014 was not applicable to the facts, though pre-deposit for filing an appeal is not payment of duty but the deposit by the petitioner of Rs. 2,38,00,000/- was not by way of pre-deposit and the CESTAT had allowed the appeal of the petitioner only on limitation, though not finding the petitioner to be having a case on merit; (VII) that even the High Court in its order dated 24th August, 2018 had not gone into the merits of the case; (VIII) that thus the deposit of Rs. 2,38,00,000/- by the petitioner, though under protest, was made against service tax liability and which liability had not been decided in any of the Court's orders; (IX) that therefore the claim of

⁴ 2020 SCC OnLine Del 2602



refund of the amount of Rs. 2,38,00,000/- was not admissible; (X) that none of the judgments cited by the Counsel for the petitioner dealt with treating the amount deposited by way of tax, though under protest, to be a pre-deposit for refund purpose; and, (XI) that thus, the amount of Rs. 2,38,00,000/- deposited by the petitioner against service tax liability and which liability had not been set aside by CESTAT, was not refundable.

7. The purport of the aforesaid order of the respondents declining refund to the petitioner and which forms the defence of the respondents to this petition, is that since the petitioner had deposited the said amount of Rs. 2,38,00,000/-, even though under protest, before preferring the appeal to CESTAT and not by way of pre-deposit under Section 35F of the Central Excise Act, notwithstanding the appeal of the petitioner against total demand of Rs. 4,66,39,061/-, and in which the said sum of Rs. 2,38,00,000/- had been adjusted, being allowed, the petitioner was not entitled to refund of Rs. 2,38,00,000/-.

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11. Though there is no clarity of the circumstances under which the petitioner deposited the said sum of Rs. 2,38,00,000/- during audit/investigation but the undisputed position remains that the deposit was under protest and against anticipated liability and which liability though fructified by the respondents was set aside by the CESTAT and which order has attained finality. It is not the case of the respondents that the said deposit was voluntary or by way of self-assessment and which has been accepted by the respondents and in which case the respondents could perhaps have argued that the said deposit was voluntary and not refundable, as was the case in *Commissioner of Income Tax, Bhopal v. Shelly Products*, (2003) 5 SCC 461. On the contrary, the assessment done by the respondents and the demand raised in pursuance thereto, of Rs. 4,66,39,061/- and where against Rs. 2,38,00,000/- was adjusted, has been set aside in entirety and as of today there is no assessment which had attained finality assessing the liability of the petitioner to tax of Rs. 2,38,00,000/-. The respondents as State can recover and/or retain as tax only such amounts which are assessed and found due as tax and which assessment has attained finality. The respondents, as State, cannot retain even a single paisa of the assessee, unless has been found due towards tax liability and which is not the case here. At the time when the amount of Rs. 2,38,00,000/- was deposited, there was no assessment and no demand.

12. The respondents are reminded of Article 265 of the Constitution of India prohibiting any tax to be levied or collected except by authority of law. The respondents have also not pleaded a case of the petitioner being not entitled to refund, on the



ground of the petitioner having passed of the liability to another as illustrated in the Nine Judge Bench's judgment of the Supreme Court in *Mafatlal Industries Ltd. v. Union of India*, (1997) 5 SCC 536 = (1997) 89 ELT 247 (S.C.). Allowing the respondents to retain the said amount, would also be in violation of Section 72 of the Contract Act, 1872, obliging a person to whom money has been paid by mistake or under coercion, repay the same. The said provision enshrines the principle of unjust enrichment and restitution and the respondents State, by refusing to refund the sum of Rs. 2,38,00,000/-, are purporting to unduly enrich themselves.”

9. This aspect also arose for consideration of the Court in **Sapphire Intrex Limited vs. Union of India and Others**⁵ and where too the Court was concerned with deposits made under protest and during the course of investigation. While dealing with the aforesaid, the Division Bench pertinently observed as follows: -

“29. In the facts of the present case, we accept that the deposit was made by the petitioner under duress and compelling circumstances. The search operations started at around 3: 45 p.m. on 20.10.2021 and went way beyond the normal business hours, that is, up to 00: 30 a.m. on 21.10.2021. It is not in doubt that a tax payer can voluntarily pay tax prior to issuance of the Show Cause Notice in terms of Section 73(5) of the Act. In terms of Section 73(6) of the Act, in case a person chargeable with tax before service of notice under Section 73(1) or before giving any statement under Section 73(3) of the Act, makes a voluntary payment of tax with interest, the proper Officer is not to serve any notice in respect of tax so paid or any penalty payable under the provisions of the Act or the CGST Rules made thereunder. The provision is clearly for the benefit of the tax payer who voluntarily pays tax prior to issuance of any Show Cause Notice and, thus, absolves himself of any liability to pay the penalty. These provisions do not empower the Department to compel the tax payer to pay any tax.

30. However, if the tax payer, after such payment, turns around and claims that the payment had not been made voluntarily and the circumstances, as mentioned above, also point out towards the same, it must be accepted that the payments were not made voluntarily. The tax payer, in such circumstances, will forfeit the immunity which he is entitled to, in terms of Section 73(6) of the Act from levy of any penalty. The authorities, in such cases, are not precluded from demanding any tax and also the penalty.

⁵ 2023 SCC Online Del 7984



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33. This Court also relied upon the judgment passed by the Gujarat High Court in *Bhumi Associate v. Union of India*, 2021 SCC OnLine Guj 3016, decided on 16.02.2021 and held that the directions issued by the Gujarat High Court had not been followed. The Central Board of Indirect Taxes and Customs ('CBIC'), has also issued directions emphasizing that tax must be collected only after following the due process of law. The relevant extract of the instructions dated 25.05.2022, are set out below:

“3. It is further observed that recovery of taxes not paid or short paid, can be made under the provisions of Section 79 of CGST Act, 2017 only after following due legal process of issuance of notice and subsequent confirmation of demand by issuance of adjudication order. No recovery can be made unless the amount becomes payable in pursuance of an order passed by the adjudicating authority or otherwise becomes payable under the provisions of CGST Act and rules made therein. Therefore, there may not arise any situation where “recovery” of the tax dues has to be made by the tax officer from the taxpayer during the course of search, inspection or investigation, on account of any issue detected during such proceedings. However, the law does not bar the taxpayer from voluntarily making payment of any tax liability ascertained by him or the tax officer in respect of such issues, either during the course of such proceedings or subsequently.

4. Therefore, it is clarified that there may not be any circumstance necessitating ‘recovery’ of tax dues during the course of search or inspection or investigation proceedings.....”.

34. The issue raised is covered by the aforementioned earlier decisions of this Court. Accordingly, we allow the petitioner's claim for refund and direct the respondents to forthwith process the same.”

10. We consequently allow the instant writ petitions and direct the respondents to refund the amounts of INR 1,50,00,000/- forthwith. The aforesaid refund shall be accompanied with statutory interest as payable under the Act till the date of actual disbursement.

11. Insofar as Prayer (c) is concerned and deals with the request of the petitioners for being accorded permission to amend the shipping bills and allow export of goods as well as the grant of detention certificate, those are issues which are left open to be independently pursued.



12. All rights and contentions of respective parties in that respect are kept open.

YASHWANT VARMA, J.

RAVINDER DUDEJA, J.

AUGUST 21, 2024/RW