CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI.
PRINCIPAL BENCH - COURT NO.III

Excise Appeal No.50329 of 2021

[Arising out of Order-in-Appeal No.BHO-EXCUS-001-APP-057-20-21 DATED 29.09.2020 passed by the Commissioner (Appeals), CGST & Central Excise, Bhopal (M.P.)]

Executive Engineer (Workshop) M.P. Power Transmission Co. Ltd., **Appellant**
Sehore ,
Madhya Pradesh-466 001.

VERSUS

Commissioner (Appeals) Central Excise Customs & CGST, Bhopal-I, **Respondent**
48, Administrative Area, Arera Hills,
Hoshangabad Road,
Madhya Pradesh-462 011.

APPEARANCE:

Ms.Reena Khair and Ms. Vrinda Bagaria, Advocates for the appellant.
Shri S.K. Ray , Authorised Representative for the respondent.

CORAM:

HON'BLE MS. BINU TAMTA, MEMBER (JUDICIAL)
HON'BLE MR. P.V. SUBBA RAO, MEMBER (TECHNICAL)

FINAL ORDER NO. 50066 /2025

DATE OF HEARING: 07.01.2025
DATE OF DECISION: 17.01.2025

BINU TAMTA:

1. The present case has a chequered history of litigation involving a refund claim filed on 18.07.1988 and the present appeal is the third round of litigation before this Tribunal. The

present impugned order[1] has once again rejected the refund claim as being time barred.

2. The Madhya Pradesh Electricity Board[2] is a statutory body created by the Government of Madhya Pradesh under Section 5(1) of the Electricity (Supply) Act, 1948 for generation, transmission and distribution of electrical energy. For the purposes of transmission of Electricity Aluminium conductors i.e. wires are used and to support those wires and also to maintain sufficient safe ground clearance, high towers are erected by reverting, bolting, welding of angle iron, plates, channels, rods, iron patti, etc. MPEP is a single legal entity having various workshops across the State at Bhilai, Jabalpur and Sehore (present case pertains to Sehore).

3. On the introduction of the [Residuary Clause in 1975] as Tariff Item No.68, the Central Excise Department vide their letter dated 13.11.1976 compelled the MPEB to take central excise registration in respect of the activity of fabrication of transmission towers and pay the excise duty thereon. Though the appellant disputed that the provisions of the Central Excise Act were not applicable as the process did not amount to

[1] Order-in-Appeal No.BHO-EXCUS-001-APP-057-20-21 dated 29.09.2020
[2] (MPEB)

manufacture, however, they, obtained L-4 licence 'under protest'. The endorsement of 'under protest' was made on the gate passes and other documents, during the entire period since the date they had been paying the duty. The clearances were made on the basis of provisional assessment, which were finalised on 29.03.1988.

4. The issue whether fabrication of transmission towers amounts to manufacture was finally settled by the decision of the Tribunal in **M/s.S.A.E.(India) Ltd. Vs.CCE** [3] holding that the fabrication and erection of structure steels does not fall within the definition of manufacture and, is, therefore, not leviable to excise duty. In view thereof, the appellant filed the claim for refund of the amount deposited during the period 01.01.1977 to 31.03.1989 on 18.07.1988.

5. The Asstt. Commissioner, Central Excise, Bhopal rejected the refund claim on 11.09.1990 holding that the activity undertaken by the appellant amounts to manufacture. In the appeal filed, the Collector (Appeals) held that fabrication of towers does not amount to manufacture and, therefore, partly allowed the claim for the period 20.07.1988 to 31.03.1989 and for the previous period i.e. 01.01.1977 to 19.07.1988, the claim was rejected on the ground that no documentary evidence was

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[3] 1988 (36) ELT 613.

produced to show that the duty was paid 'under protest' and, therefore, the claim was time barred. In sofar as the remarks 'under protest' on the gate pass, the same was found to be not sufficient in compliance of the provisions of Rule 233B of the Central Excise Rules. The appeal filed before the Tribunal was dismissed on the ground of delay and the same was restored pursuant to the order of the Supreme Court dated 16.11.1995.

6. In the second round of litigation before this Tribunal, the Tribunal passed the Final Order dated 16.07.2019 taking note of the decision of the Supreme Court in the case of the appellant itself titled as **"M.P. Electricity Board Vs. CCE, Raipur"** [4] as it prima facie seems to cover the issue in the present case also and, therefore, remanded the matter to the Adjudicating Authority to decide the issue of limitation in light thereof.

7. In view of the Order of the Tribunal, the appellant made an application dated 22.10.2019 for reconsidering the earlier refund claim filed in the year 1988. The Department, however, issued the show cause notice dated 23.12.2019 calling upon them to submit the documentary proof that the duty was paid 'under protest' during the period 01.01.1977 to 19.02.1988 in support that the claim is not barred by limitation. The appellant filed a detailed reply to the show cause notice on 7.1.2020 clarifying

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[4] 1997(94) ELT 445 (SC)

that the claim is not barred, however, vide Order dated 10.02.2020, the refund claim was rejected by the Adjudicating Authority as being hit by the provisions of Section 11B(1) prescribing the time limit for making the refund claim and also on the ground on unjust enrichment. Surprisingly, the Adjudicating Authority rejected the entire refund claim for the period 01.01.1977 to 31.03.1989 including the refund of Rs.16,45,000/- for the period 20.07.1988 to 31.03.1989, which was already paid vide order dated 01.02.2018. The appellant challenged the said order and the Commissioner (Appeals) vide impugned order has rejected the refund claim distinguishing the earlier case of the appellant decided by the Supreme Court on the ground that the appellant has not produced any documentary proof regarding lodging of protest. Hence the present appeal has been filed before this Tribunal.

8. Heard Ms. Reena Khair and Ms. Vrinda Bagaria, learned counsels for the appellant and Shri S.K. Ray, learned Authorised Representative for the Respondent.

9. Learned Counsel for the appellant has challenged the impugned order firstly on the ground that the same has been passed in violation of the remand order of this Tribunal dated 16.07.2019 holding that the decision of the Supreme Court in **M.P. Electricity Board (supra)** is not applicable in the absence

of the documentary evidence. The submission of the learned counsel was that during the entire period of dispute, the appellant has endorsed the gate passes and other documents as 'under protest' and, therefore, to say that the procedure of Rule 233B had not been complied with is untenable. According to the learned counsel, MPEB is a single entity incorporating all the divisions and workshops and, therefore, once the decision was taken in respect of the Bhilai workshop, the same was followed in respect of all the workshops including Sehore. In support thereof, the learned counsel has relied on the decision of the Tribunal in **Tamil Nadu Electricity Board Vs. Commissioner of Central Excise, Trichy [5].** The next submission of the learned counsel is that prior to the introduction of Rule 233B, no procedure was prescribed for payment of duty 'under protest' and, therefore, Rule 233B is not applicable for the period 1.7.1977 to 31.05.1981. On the principle that the procedure under Rule 233B is only directory, the learned Counsel submitted that the endorsement 'under protest' on the gate passes, etc. was sufficient compliance. Reliance was also placed on the decision in **M/s. Vamsadhara Paper Mills Ltd. Vs. CCE & C, Visakhapattnam [6], M/s. Advani Oerlikon Ltd. Vs. CCE [7] and**

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[5] 2008 (227) ELT 170 (T-Chennai)
[6] 2009(237) ELT 517 (T-Bang.)
[7] 1993 (63) ELT 695 (Tribunal)

Commissioner of Central Excise, Chennai Vs. ITC Ltd. [8]. Lastly, the submission is that the bar of limitation is not applicable as the amount collected as duty is without the authority of law. As the activity of fabrication of transmission towers was held to be not manufacture, the duty paid is without any authority of law and, therefore, the same is in the nature of deposit to which the bar of limitation is not applicable.

11. Learned Authorised Representative for the respondent reiterated the findings of the authorities below. Referring to the provisions of Section 11B of the Act, he submitted that the refund claim must be filed within six months from the relevant date as prescribed and the said limitation applies unless the duty is paid 'under protest' by adhering to the procedural requirements. For the period prior to 1.6.1981 when no procedure requirements were prescribed, the refund claims filed on 4.8.1989 for the period 1.7.1977 to 21.05.1981 were time barred. For the period post 1.6.1981 when Rule 233B introduced a mandatory procedure for making the payment under protest, the appellant failed to submit the valid protest despite making payments during 1.6.1981 to 19.7.1988. The learned Authorised Representative

[8] 2005 (185) ELT 114 (Mad.)

relied on the decision of this Tribunal in **Shree Shyam Filaments Vs. CCE, Jaipur** [9].

12. The undisputed fact is that the appellant was not registered with the Central Excise Authorities as the activity of fabrication of transmission towers carried out by them did not amount to manufacture and was therefore, not leviable to excise duty. However, pursuant to a letter by the Excise Department, they were constrained to obtain the L-4 licence and pay the duty on provisional basis 'under protest' as per the endorsement on gate passes and other documents. We are also conscious of the fact that the issue whether the activity undertaken by the appellant amounts to manufacture was under dispute and was decided by the Tribunal in **M/s. SAE India Ltd.** (supra) and other line of decisions. We are of the considered view that any amount, which the Department collects from the assessee is not necessarily excise duty unless and until the same is relatable to 'manufacture'. In the present case, the appellant has always been of the firm stand that the activity carried out by them does not amount to manufacture and hence, they were not liable to pay the excise duty, however, only at the instance of the Department and to further avoid the rigorous consequences, the amount was deposited on provisional basis. The observations of the Apex

[9] 2002(148) ELT 434

Court in **Sandvik Asia Ltd. Vs. Commissioner of Income Tax-I, Pune** [10] are relevant in this regard. In the present controversy, which reads as under – "When the claims of the authority are found to be unsustainable or erroneous by the Courts it follows that the authority has acted wrongfully in the sense of not in accordance with law and compensation to the party deprived must follow." Reference is invited to the decision of the Tribunal in **Parle Agro Pvt. Ltd versus Commissioner, CGST, Noida**[11] dealing with a situation where the deposit is made during investigation or pursuant to an interim order, observed that provisions of Section 11 B of the Excise Act would not be applicable, for the reason that the appellant was not claiming a refund of duty but was claiming refund of the revenue deposit.

13. The amount collected by way of Central excise duty was illegal as the activity itself did not involve any manufacture and the same cannot be allowed to be retained by the Government. On the principle that tax can be collected only by authority of law, the observations of the Tribunal in the case of **CC Vs. Polyglass Acrylic**[12] that when Central excise duty is collected illegally the same cannot be retained by the Government supports the case of

[10] 2006 (196) ELT 257 (SC)
[11] 2022(380)ELT 219(Tri. Del)
[12] 2011(274) ELT 419

the appellant. Such is the mandate of Article 265 of the Constitution of India.

14. Once it is held that the Government is not entitled to retain the amount deposited by the appellant, the next issue is regarding the time limit for reversing the said amount to the assessee. The Madras High Court in **Natraj & Venkat Associate versus** [13] **ACST** and the Punjab and Haryana High Court in **Indian Oil Corporation versus CCE** [14] held that once the tax was not payable at all, time limit does not apply for filing the refund of the said amount. These decisions rendered by the High Court are binding on us and we, therefore, hold that the refund claim filed by the appellant cannot be rejected on the ground of limitation for the simple reason that it is the Excise Department, who constrained them to get registered and pay the excise duty despite the stand taken by the appellant that the activity undertaken by them does not amount to manufacture and which stands affirmed by the Tribunal. It is relevant to take note of the observations of the Delhi High Court in **Team HR Services Pvt. Ltd.** [15] that such deposits under protest, to ease the rigors, which the tax Authorities otherwise are entitled to impose, are not unknown and judicial notice has been taken thereof. In other

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[13] 2010(249) ELT 337
[14] 2010 (256) ELT 232
[15] 2020(38) GSTL 457

words, the Government cannot be allowed to retain the amount deposited by the appellant as it was collected under mistake of law.

15. Having arrived at the above conclusion, although it is not necessary for us to examine whether the duty was paid ‘under protest’, however, since all throughout the issue has been based thereon we would like to consider it. Before adverting to the compliance of paying the duty under protest, we need to appreciate that appellant being a statutory body follows uniform practice in its working and as submitted by the learned counsel for the appellant that since decision was taken with respect to Raipur unit to pay the duty on provisional basis under protest, the same was followed in respect of the other units, Sehore being the one in the present case. There is no reason to doubt the said submissions knowing the prevalent practice in the Government organisations. Moreover, the learned counsel has taken us through the various gate passes with the endorsement of ‘under protest’ which leads no manner of doubt that the duty was paid by the appellant ‘under protest’ and consequently, the prescribed time limit under section 11B will not apply.

16. The other issue that 'under protest' was not made in the prescribed format, is irrelevant. It is a settled principle that on mere procedural technicalities, the relief cannot be denied, which otherwise is available to a party. For the period prior to the introduction of Rule 233B (01.06.1981), there was no specific provision prescribing any specific mode of endorsing 'under protest' and, therefore, the appellant cannot be non-suited for not making proper endorsement. With the introduction of Rule 233B, procedure to be followed in cases with duties paid under protest was provided. In considering the said contention of the Department, we would like to refer to the decisions where the Apex Court has held that Rule 233B of the Central Excise Rules should not be construed in a technical manner as it does not prescribe any particular form of protest, **India Cements Ltd versus C.C.Ex.**[16] and **Indian Pistons Ltd versus C & Central Excise** [17] of the Tribunal. Following the said decisions of the Apex Court, the Madras High Court in **C.C.Ex. Chennai versus ITC Ltd.** [18] held that the meaning of the words 'under protest' must not be taken in a narrow and pedantic manner. The Tribunal in **Advani Oerlikon Ltd versus Collector Central Excise** [19], found the protest endorsement made on the

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[16] 1989 (41) ELT 358 (SC)
[17] 1990 (46)ELT3(SC)
[18] 2005 (185) ELT 114
[19] 1993 (63) ELT 695

gate passes, though such endorsements were not simultaneously made in the RT-12 returns, as adequate form of protest relying on the earlier decision of the Tribunal in **Andhra Cement Co. Ltd v Collector** [20]. Lastly, we would refer to the decision in **Vamsadhara Paper Mills Ltd versus CCE & C, Visakhapatnam** [21], where the Tribunal categorically held that the procedure prescribed under Rule 233B is only directory in nature and not mandatory and therefore protest endorsed on the PLA is also a protest for the purpose of paying duty. Before concluding, we would like to refer to the decision in the case of the appellant, titled as **M/s Ex. Engr. Workshop Division MP Electricity Board vs. C.C.E, Raipur** [22], which substantiates the plea of unjust enrichment taken by the appellant with respect to their Raipur unit. The Apex Court taking into consideration the correspondence between the Excise Department and the appellant rejected the objection of the Department that 'under protest' was only with reference to the taking of L-4 license and was held to be construed to mean that protest was lodged against obtaining the license as well as against the liability to payment of excise duty. The Tribunal, while remanding the case vide its order dated 16.07.2019 rightly observed that the case is *prima facie* covered by the decision of the Supreme Court in **M.P.**

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[20] 1986(26) ELT 553.
[21] 2009 (237) ELT 517,
[22] 1997(94) ELT 445(SC),

Electricity Board (supra) and, therefore, the Adjudicating Authority should decide the same in light thereof. We are of the view that the Adjudicating Authority has wrongly distinguished the decision of the Apex Court in the case of the appellant and had not applied the same in deciding the issue of limitation in view of 'under protest' endorsement made on gate passes.

17. In view of the law having been settled, the refund claim cannot be rejected for non-compliance with the provisions of Rule 233B. The endorsement 'under protest' on the gate passes by the appellant is sufficient to say that the appellant paid the duty 'under protest' and hence, cannot be denied the refund of the amount illegally collected by the Department. We are guided by the observations of the Division Bench of the Delhi High Court in **Indglonal Investment & Finance Ltd versus Income Tax Officer**, [23] holding that refund provisions should be interpreted in a reasonable and practical manner and when warranted, liberally in favour of the assessee.

18. The decision cited by the Revenue in the case of **Shyam Filaments Vs. Commissioner C. Ex., Jaipur, (supra)** is distinguishable as there was no endorsement at all to indicate

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[23] 2012 (343) ITR 44

that the duty was paid under protest and the letters relied on by the assessee merely conveyed their point of view. Hence the said decision has no application.

19. Since we have held that the appellant is entitled to refund claim, we are also inclined to direct that the refund shall be paid along with interest. The Apex Court in **Sandvik Asia Ltd. versus Commissioner of Income Tax –I,Pune**[24] with reference to the provisions of the Income Tax Act has observed that in view of the express provisions of the Act the assessee is entitled to compensation by way of interest on the delay in the payment of amounts lawfully due to the appellant which were wrongly withheld by the Department for an inordinate long period. The Act itself recognised in principle, the liability of the Department to pay interest where the amount deposited by the assessee is unduly retained. The consistent practice of this Tribunal has been to grant interest at the rate of 12% in matters relating to refund of amount deposited during investigation and adjudication. The Tribunal in **Parle Agro Pvt Ltd** observing that there is no provision in the Excise Act, which deals with the refund of revenue deposit and so rate of interest has not been prescribed when revenue deposit is required to be refunded, considered the various notifications issued under the provisions of Section 11 AA,

[24] 2006 (196) ELT 257 (SC)

11 BB and 11 DD of the Act providing the interest rate from 6% to 15% and accordingly increased the rate of interest from 6% to 12% per annum. Following the said decision, the grant of interest at 12% per annum on the refund amount is appropriate.

20. We, therefore hold that:

i). duty was collected by the Department under mistake of law for which no time limit applies and, therefore, the refund claim on the ground of delay has been wrongly rejected.
ii). the endorsement on the gate passes, 'under protest' is sufficient to indicate that the appellant has paid the duty 'under protest' and hence, the refund claim cannot be rejected as time barred.
iii)retention of the amount which is in the nature of revenue deposit would be wholly unjustified being violative of Article 265 of the Constitution.
iv)the appellant is entitled to the refund claim along with interest @ 12% per annum from the date of refund claim was rejected.

21. Having arrived at the above conclusion, the impugned order is set aside and the Department is directed to release the refund along with interest to the appellant. The appeal is, accordingly allowed with consequential benefit.

[Order pronounced on 17th January, 2025]

(BINU TAMTA)
Member (Judicial)

(P.V. SUBBA RAO)
Member (Technical)

Ckp.