

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,
WEST ZONAL BENCH : AHMEDABAD**

REGIONAL BENCH - COURT NO. 3

CUSTOMS Appeal No. 10360 of 2023-DB

[Arising out of OIA-MUN-CUSTM-000-APP-16-23-24 dated 11/04/2023 passed by Commissioner of CUSTOMS (Appeals)-Ahmedabad]

K S Enterprises

73 Naryan Rao Koli Marg, Masij Buder West,
Mumbai, Maharashtra - 400003

.... Appellant

VERSUS

Commissioner of Customs, Mundra

Office Of The Principle Commissionerate Of Customs,
Port User Buld. Custom House Mundra, Mundra,
Kutch, Gujarat- 370421

.... Respondent

APPEARANCE :

Shri Hardik Modh, Advocate for the Appellant
Shri Himanshu P Shrimali, Superintendent (AR) for the Respondent

**CORAM: HON'BLE MR. RAMESH NAIR, MEMBER (JUDICIAL)
HON'BLE MR. C.L. MAHAR, MEMBER (TECHNICAL)**

DATE OF HEARING : 27.06.2023

DATE OF DECISION: 06.07.2023

FINAL ORDER NO. 11447/2023

RAMESH NAIR :

This appeal is filed against Order-in-Appeal No. OIA-MUN-CUSTM-000-APP-16-23-24 dated 11/04/2023 passed by Commissioner of Customs (Appeals), Ahmedabad whereby the learned Commissioner (Appeals) has dismissed the appeal on the ground that appeal was filed before him against a communication by the assessing officer seeking clarification from the importer during the course of assessment of bills of entry filed by the appellant and that the assessment is still pending. The said communication does not convey any decision and is not an order. The learned Commissioner contended that as per Section 128 of the Customs Act, 1962 the appeal before Commissioner (Appeals) lies only against any decision or order under this Act. That, communication submitted by the appellant

before him cannot be construed any decision or any order. Hence, he held that the appeal against the said communication is not maintainable and the Commissioner (Appeals) has not decided the matter on merits. This order of the learned Commissioner (Appeals) is challenged by the appellant by filing the present appeal.

2. Shri Hardik Modh, learned Counsel appearing on behalf of the appellant submits that even though it is a communication from the assessing officer but the same is conclusive decision for denial of exemption Notification No. 19/2015-Cus dated 01.04.2015 issued under DFIA Scheme. It is his submission that the assessing officer during the process of assessment clearly concluded that the appellant cannot be extended the benefit of exemption from payment of basic Customs duty and it was also directed that the bills of entry may be assessed on merit. He submits that with this clear decision by the assessing officer, the appellant was denied the benefit of exemption therefore the said decision is clearly challengeable by filing appeal before the Commissioner (Appeals). Therefore, appeal is clearly maintainable before the Commissioner (Appeals). He placed reliance on the following decisions :-

- (a) Sterlite Optical Technologies vs. Commissioner of Customs (Export) - 2008 (226) ELT 69 (Tri-Mumbai)
- (b) Kiran Pondychem Limited vs. Commissioner of Customs, CHENNAI - 2006 (203) ELT 588 (Tri-Chennai)
- (c) Final Order No. A/11365/2020 dated 08.12.2020 passed by CESTAT (AHD) in the case of VKC Nuts Pvt. Limited vs. Commissioner of Customs, Jamnagar (Preventive).

(d) Shah Nanji Nagsi Exports Pvt. Limited. vs. Union of India in writ petition No. 8268 of 2107 vide order dated 29.03.2019 by the Hon'ble Bombay High Court (Nagpur Bench)

(e) The Hon'ble Tripura High Court vide its Order & Judgement dated 07.11.2022 in the case of Shri Subhankar Bhowmik vs. UOI Hon'ble CESTAT (Ahmedabad)

(f) Unibourne Food Ingredients LLP vs. Commissioner of Customs, Mundra -2022 (381) ELT 810 (Tri- Ahd)

(g) Pace Ventures Pvt. Limited vs. Commissioner of Customs, Ahmedabad vide Final Order No. 1/11615/2019 dated 30.08.2019 by Hon'ble CESTAT (Ahmedabad)

(h) Unibourne Food Ingredients LLP vs. Commr. Of Cus., Hyderabad - 2018 (364) ELT 254 (Tri. Hyd.)

(i) Shree Chamunda Enterprises vs. Addl. Dire. General, Mumbai ADJ - 2021 (376) ELT 670 (Tri. Mumbai)

(j) Raj Chakraborty Productions vs. Commr. of CGST, Kolkata (South) - 2019 (25) GSTL 286 (Tri. Kolkata)

(k) Order dated 30.05.2016 passed by Hon'ble CESTAT, Ahmedabad in the case of Indian Chemical Corporation vs. C.C. Mundra

3. Shri Himanshu P Shrimali, learned Superintendent (AR) appearing on behalf of the Revenue reiterates the findings of the impugned order.

4. We have carefully considered the submissions made by both the sides and perused the record. For the ease of reference, the decision as claimed by the appellant during the pendency of bills of entry for assessment is reproduced below:-

ANNEXURE:
(9)

Bills Of Entry Pending For Reply

Bill Of Entry No.	Bills Of Entry Date(MM/DD/YY)	Location	Query No.	Query Raised	Query Raised Date(MM/DD/YY)
4965904	3/9/23	INMUN1	1	YOUR CLAIM OF DUTY EXEMPTION UNDER NOTIFICATION NO. 19/2015-CUS DATED 01.04.2015 FOR IMPORT OF LITHIUM ION CELL AGAINST DESCRIPTION OF "AUTOMOTIVE BATTERY" MENTIONED IN TRANSFERABLE DFIA NOS. 3011001800 DATED 22.02.2022, 30110001172 DATED 07.02.2022, 3011001775 DATED 11.02.2022 & 3011001785 DATED 15.02.2022 AGAINST EXPORT OF AGRICULTURE TRACTORS. THE IMPORTED GOODS LITHIUM ION CELL IS NOT MENTIONED IN THE DFIA AGAINST DESCRIPTION OF AUTOMOTIVE BATTERY.. YOU HAVE NOT SHOWN WETHER LITHIUM ION CELL IS ACTUALLY USED IN EXPORT GOODS AS MANDATED UNDER PARA4.12(I) AND 4.12 (II) OF FTP. THE MATERIAL PERMITTED TO BE IMPORTED SHALL BE OF SPECIFIC NAMES/DESCRIPTION OR QUANTITY RESPECTIVELY AS THE MATERIAL USED IN EXPORT OF RESULTANT PRODUCT. FURTHER ITC(HS) NUMBER MENTIONED IN THE IS 85076000 DIFFERS FROM ITC(HS) NUMBER MENTIONED IN THE DFIA AGAINST AUTOMOTIVE BATTERY WHICH IS 85071000. YOUR CLAIM FOR BCD EXEMPITON UNDER THE SAID TRANSFERABLE DFIA CANNOT BE EXTENDED, THE SAID BE MAY BE ASSESSED ON MERIT. Query Raised By : 10XXXXXX Group: 5A	3/10/23

From the reading of the above, in the column 'query raised', it is clear that by giving reasoning the authority under group 'A' of Customs clearly concluded that the appellant's claim for basic customs duty exemption under the said notification DFIA cannot be extended and it was also directed that the bills of entry may be assessed on merits. As per this decision of the assessing officer, the appellant have no option but to forego exemption notification under DFIA scheme for assessment of bills of entry. If the

contention of the Commissioner (Appeals) is accepted then in such a case, it shall be prejudicial to the appellant for the reason that as per the decision taken while raising the query, the bills of entry shall invariably be assessed by denying the exemption and the appellant shall be forced to pay duty and thereafter the appellant shall be forced to file appeal before the Commissioner (Appeals). This entire exercise will prejudice the interest of the appellant which is not an intention of the law. If the issue on merit about the availability of exemption claimed by the appellant is decided before the assessment of bills of entry particularly when the assessing officer has expressed his clear view about the denial of exemption notification, to challenge such denial of exemption benefit, the only remedy available under the law is filing of appeal before the Commissioner (Appeals). By this means only the ends of justice can be met.

5. We find that to claim the exemption the appellant has no remedy except to file appeal before Commissioner (Appeals). As per the contention of the learned Commissioner (Appeals) this is only a communication and it is not worthy to appeal. Even though it is a communication but decision of denial of exemption has been taken by the assessing officer. After this decision the appellant would not have claimed the exemption therefore the only remedy lies against the said decision is an appeal before Commissioner (Appeals). For the ease of reference, the appeal provisions before the Commissioner (Appeals) as per Section 128 (1) is reproduced below:-

“Appeals to [Commissioner (Appeals)]. SECTION 128. — (1) Any person aggrieved by any decision or order passed under this Act by an officer of customs lower in rank than a Principal Commissioner of Customs or Commissioner of Customs may appeal to the Commissioner (Appeals) within sixty days from the date of the communication to him of such decision or order”

From the above Section 128(1), it is unambiguously clear that the assessee can file appeal against any decision or order by which he is aggrieved with. The legislators consciously used the word 'decision' in addition to 'order' to meet out the situation as exists in the present case. In the present case, since the decision for denial of exemption has been taken by the assessing officer, it is that decision which can be challenged by way of appeal before the Commissioner (Appeals). As the appellant have no remedy to claim the exemption therefore, in our considered view, the decision for denial of exemption under DFIA scheme is challengeable by way of appeal before the Commissioner (Appeals). As per the observation of the assessing officer, mentioned in the column 'query raised' in query memo, it is not a case where the assessing officer sought some clarification before denial of exemption. The assessing officer has out-rightly denied the exemption therefore it is not merely a query but the decision of the assessing officer denying the exemption to the appellant. Therefore, contention of the learned Commissioner (Appeals) cannot be accepted.

6. Identical issue has been considered in various judgments cited by the appellant which are reproduced below:-

(a) In the case of Shree Chamunda Enterprises vs. Addl. Dir. General, Mumbai-AD), the bench considering the maintainability of appeal against a communication given the following decision:-

"2.3 Arguing for the Revenue Learned Authorized Representative submits that the communication is an internal record made by the adjudicating authority during the course of hearing and cannot be considered as an order against which the appeal is maintainable before this Tribunal. Further it is also not forthcoming whether this communication was ever issued to the appellant at any time. Since this communication is not an order of the adjudicating authority referred to in Section 129A of the Customs Act, 1962, the appeal is not maintainable and needs to be dismissed.

3.1 We have considered the entire records of the matter and the arguments made during the course of hearing by both the sides.

3.2 Section 129A(1)(a) of the Customs Act, 1962 reads as follows :

Appeals to the Appellate “**SECTION 129A. Tribunal.** Any person aggrieved by any of the - (1) following orders may appeal to the Appellate Tribunal against such order -

(a) a decision or order passed by the Principal Commissioner of Customs or Commissioner of Customs as an adjudicating authority;”

3.3 Undoubtedly in the present case the ADG, Adjudication, DRI, Mumbai, was acting as adjudicating authority, and has made this record of personal hearing as adjudicating authority. Also by stating “*As regards request for testing, it was informed to them that the same was considered and found to be not acceptable, in view of the fact of the case and evidences placed before the adjudicating authority.*”, he has made a determination and have rejected the request for testing of the consignment made by the appellant. Any such determination during the course of adjudication by the adjudicating authority is an order passed by the passed by the adjudicating authority and is within the purview of Section 129A(1)(a) against which the appeal lies to this Tribunal.”

(b) A similar issue has been considered about the maintainability of the appeal against communication denying conversion of shipping bills against appellant in the case of Sterlite Optical Technologies (supra) wherein the Tribunal has taken following view:-

5.1 One of the main objections of the department was that the order was not passed by the Commissioner as an adjudicating authority. This question has already been answered by the Division Bench of this forum in the matter of *Kiran Pandy Chems Ltd. v. Commissioner of Customs, Chennai* [[2006 \(203\) E.L.T. 588](#) (Tri. - Chennai)]. Further one cannot lose sight of the legal position that denial of natural justice, apparent on the face of an order or a communication cannot be taken up by the authority who denied it. The right to agitate is left to the aggrieved and cannot be thrust upon him to his disadvantage.

5.2 Another objection of the department was that the order was not passed by the Commissioner as adjudicating authority. This argument flatly falls when the definition for the adjudicating authority as given in Section 2(1) reads as “adjudicating authority” means any authority competent to pass any order or decision under this Act, but does not include the Board, [Commissioner (Appeals)] or Appellate Tribunal; It appears that the Revenue is struck with its ill-found theory of only such orders involving confiscation and levy of penalty could be considered to have been passed in the capacity of adjudicating authority.

5.3 Yet another objection of the Revenue was that the impugned order was not covered by the provisions of Section 129A to be taken up by the Tribunal as an appellate authority. It is strange that after numerous orders have been passed by the various Benches of the Tribunal over a period of number of years on the question of conversion of shipping bills from one scheme to another, the same old question is raked up in a naive manner. The issue is not covered by Chapter X of the Customs Act, 1962 and hence this Tribunal rightfully has the jurisdiction to hear any appeal on the subject.”

(c) Similar issue was also considered by Chennai bench of this Tribunal in the case of Kiran Pondychem Limited (supra) and passed the following order:-

“3. We have given careful consideration to the submissions. The grievance of the appellants is against refusal of conversion of “Free” Shipping Bills to “Advance Licence” Shipping Bills (“DEEC” Shipping Bills). The request for such conversion was made to the Commissioner of Customs, but its result was unfavourable. A further representation was made to the Commissioner and its outcome was communicated by the Assistant Commissioner of Customs (Exports) in the Commissioner’s office. The AC’s letter says that the appropriate authority did not consider the request for conversion of “free” SBs to “DEEC” SBs. It indicates that Board’s Circular No. 4/2004 dated 16-1-2004 prohibited such conversion. The appellants’ grievance is essentially against the Commissioner’s stand as communicated to them. What was communicated to the party was the Commissioner’s decision not to permit conversion of the Shipping Bills and the same affected the party adversely. Hence we overrule Id. SDR’s objection as to maintainability of the appeal.”

7. The other decisions cited by the learned Commissioner (Appeals) also support the case of the appellant. Accordingly, we have no hesitation to hold that decision taken by the assessing authority is clearly a challengeable decision before the Commissioner (Appeals). However, since the learned Commissioner (Appeals) has not given any findings on merit the matter needs reconsideration by the learned Commissioner (Appeals) on merit without going into maintainability of the appeal before him as held by us above. In this regard the relevant Section 128A is reproduced below:-

“Procedure in appeal. SECTION 128A. — (1) The Commissioner (Appeals) shall give an opportunity to the appellant to be heard if he so desires.

(2) The Commissioner (Appeals) may, at the hearing of an appeal, allow the appellant to go into any ground of appeal not specified in the grounds of appeal, if the Commissioner (Appeals) is satisfied that the omission of that ground from the grounds of appeal was not wilful or unreasonable.

(3) The Commissioner (Appeals) shall, after making such further inquiry as may be necessary, pass such order, as he thinks [just and proper, —

(a) confirming, modifying or annulling the decision or order appealed against; or”

8. In view of above provisions, the Commissioner (Appeals) has power to decide the appeal on the grounds of appeal made by the appellant and if at

all it is required to satisfy himself with other details or documents he may call for the same from the appellant as well as from the department to come to the conclusion about the merit of the case. Accordingly, in the facts of the present case learned Commissioner (Appeals) shall decide the appeal on merit by following the principles of natural justice. Therefore, the impugned order is set-aside and the appeal is allowed by way of remand to the Commissioner (Appeals). Since this matter relates to the live consignment and two rounds of appeal are over, one before Commissioner (Appeals) and second before this Tribunal, it is in the interest of justice that learned Commissioner (Appeals) shall pass a fresh order on merit within a period of four weeks from the date of this order. Appeal is allowed by way of remand to the Commissioner (Appeals) in the above terms.

(Pronounced in the open court on 06.07.2023)

(Ramesh Nair)
Member (Judicial)

(C L Mahar)
Member (Technical)

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