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

REGIONAL BENCH : COURT NO. 3

Custom Appeal No. 10672 of 2024-DB

[Arising out of Order-in-Appeal No AHD-CUSTM-000-APP-159-24-25 dated 16.07.2024 passed by Commissioner of Customs (Appeals) - Ahmedabad]

Classic Marbles Company Pvt Ltd **Appellant**

Survey No. 130/2 Village Athal, Silvasa
Dadara and Nagar Haveli ,
Diu-296230

VERSUS

COMMISSIONER OF CUSTOMS-AHMEDABAD **Respondent**

Office Of The Pr. Commissioner Of Custom,
1st Floor, Custom House, Opposite Old High Court,
Navrangpura, Ahmedabad- 380009

Appearance:
Present for the Appellant : Shri Ajay Jain, Advocate
Present for the Respondent: Shri Prashant Tripathi, Superintendent (AR)

CORAM:
HON'BLE MR. C. L. MAHAR, MEMBER (TECHNICAL)
HON'BLE Dr. AJAYA KRISHNA VISHVESHA, MEMBER (JUDICIAL)

Final Order No. 10076/2025

DATE OF HEARING: **08.01.2025**
DATE OF DECISION:**30.01.2025**

Dr. AJAYA KRISHNA VISHVESHA

This appeal is directed against the Order-In-Appeal No. AHD-CUSTM-000-APP-159-24-25 dated 16.07.2024 passed by the Commissioner (Appeals) through which he set aside the order passed by the Adjudicating Authority and allowed the Appeal by remanding the matter back to the Adjudicating Officer for passing fresh order. The said officer has been directed to examine the available facts, documents, submissions again and issue a speaking order afresh following principles of natural justice and legal provisions.

1. The appellant is *inter allia* engaged in the import of polished marble slabs and rough marble slabs falling under tariff item Nos. 2515 1220 and

6802 2190 of the Customs Tariff Act, 1975. During the period in dispute, the appellant had imported the goods classified under the aforesaid tariff items and cleared them under 33 bills of entry and paid Social Welfare Charge (SWS) to the tune of Rs. 55,79,044/- on the said goods.

1.1. The goods classified under the tariff item No. 2515 1220 and 6802 2190 of the Customs Tariff Act, 1975 became exempt from the payment of SWS in terms of amendment to Notification No. 11/2018-CUS dated 02.02.2018 vide Notification No. 09/2020-Cus dated 02.02.2020 (Exemption Notification). According to the appellant he had inadvertently paid SWS on the imported goods. Therefore, he filed an application dated 24.06.2023 under Section 149 and Section 154 of the Customs Act, 1962 seeking amendment in the Bills of Entry. The Adjudicating Authority vide Order-In-Original dated 19th September, 2023 rejected the application for amendment on the following grounds :-

(a) No amendment to the Bill of Entry was permitted after the imported goods had been cleared for home consumption.

(b) Not claiming of the exemption benefit was not due to any clerical error or decision taken by the Department as required under Section 154 of the Act.

(c) Suo motu reassessment of Bill of Entry could not be entertained in the absence of an appellate order in terms of the Standing Order No. 06/2022 dated 4th July, 2022 issued by the Commissioner of Customs, NS-III- JNCH (Standing Order).

1.2. Aggrieved by the Order-In-Original dated 19th September, 2023, the appellant preferred an appeal before the Commissioner (Appeals) wherein the appellant urged that the appeal be decided on merits. The Commissioner through his Order dated 16.07.2024 allowed the appeal and set aside the impugned order passed by the Adjudicating Authority and remanded the matter to the said officer for passing fresh order after taking submissions made by the appellant in the appeal. Feeling aggrieved from the impugned order passed by the Commissioner (Appeal) dated 16.07.2024 the present appeal has been filed before this Tribunal.

2. The learned Counsel for the appellant contended that the power to remand the case to the Adjudicating Authority, vested with the Commissioner (Appeals) in terms of Section 128A (3) (b), is a discretionary power to be exercised in alternative to the other powers enumerated therein. The conscious use of the word "or" makes the intent of the legislature clear that the Commissioner (Appeals) does have the power to hear the case on merits and accordingly confirm, modify or annul decision or order appealed against, even in case where principles of natural justice have not been followed at the first instance.

2.1. The learned Counsel for the appellant also argued that the exemption from the payment of SWS in terms of the exemption notification is absolute exemption and the Adjudicating Authority ought to have extended the benefit, although the appellant had inadvertently omitted to claim the same. Therefore, when the Adjudicating Authority had passed the Order-In-Original rejecting the request for amendment of Bills of Entry on erroneous interpretation of law and had further opted not to revert the Memorandum with his comments when the Appeal Memorandum was sent to him by the Commissioner (Appeals), the Commissioner (Appeals) ought to have decided the case on merits.

2.2. The learned Counsel for the appellant also argued that for the same period i.e. F.Y. 2020-21 and in respect of imports made at Nhava Sheva, Commissioner (Appeals), Customs Nhava Sheva (JNCH) vide Order-In-Appeal dated 10.01.2024, permitted the reassessment of the Bills of Entry filed therein in terms of Section 149 of the Customs Act, 1962 pursuant to which the Jurisdictional Officer had sanctioned the refund amounting to Rs. 1,83,72,062/- .

2.3. The learned Counsel for the appellant cited **ITC Limited Vs. CCE-Kolkata-IV** 2019 (368) ELT 216 (SC) in which Hon'ble Supreme Court has held that in order to claim refund, the assessee has to get the order including self assessment modified under Section 128 of the Act or under other relevant provisions of the Act.

2.4. The learned Counsel for the appellant also cited **Sony India Private Limited Vs. Union of India** [2022 (379) ELT 588] in which Hon'ble Telangana High Court has held that Section 149 is an additional remedy available to the person who seeks amendment of the Bill of Entry and therefore, the stand that only reassessment under Section 128 is the remedy available to the person and Section 149 cannot be invoked, is not tenable.

2.5. The learned Counsel for the appellant also cited **Dimension Data India Private Limited** [2021 (376) ELT 192 (Bom.)] which was affirmed by Hon'ble Supreme Court vide order dated 08.11.2021 in 2022 (379) ELT A39 (S.C.) in which Hon'ble Bombay High Court has held that apart from Section 128 of the Act, the Bill of Entry (or Shipping Bill) can also be amended or modified under the provisions of Section 149 or Section 154 of the Act. Such amendments/ modifications may be carried out after out of charge has been given (or LEO has been granted) and may alter the initial assessment made.

3. The learned Authorized Representative has on the other hand vehemently argued that the Order-In-Appeal dated 16.07.2024 has been passed in accordance with the provisions of Customs Act and there is no need to interfere in the impugned order and the appeal should be dismissed.

3.1. We have heard the learned Counsel for the appellant and the learned AR and perused the record.

4. We have gone through the impugned order dated 16.07.2024. In para 7.1 to 7.4 of the impugned order the Commissioner (Appeals) Customs (Ahmedabad) has recorded as follows : -

"7.1. It is observed that appellant have contended that impugned communication has been passed in blatant violation of principles of natural justice, as it was onerous duty of the respondent to have provided an opportunity of personal hearing and not to discard the application filed by them at threshold, without giving the physical audience to them. It has been further contended that the respondent has narrowed down his views by means of passing ex-parte order without giving opportunity of personal hearing.

7.2. On perusal of the impugned communication, it is observed that before taking adverse decision and rejecting the request of amendment of Bills of Entry filed by the appellant no opportunity was granted to the appellant by raising any query or granting personal hearing to effectively represent their case. It is settled position of law that before passing an adverse order, a reasonable opportunity of presenting one's case shall be provided. It is relevant here to refer to the observations of Hon'ble High Court of Madras in case of ***A. M. Ahmad & Co.*** *[2013 (288) ELT 497 (Mad.)] wherein Hon'ble High Court has held that "it is now well settled law that even administrative orders which affects the rights of party can be passed only by following the principles of natural justice".*

7.3. In view of the above I am of the considered view that the impugned communication has been passed in violation of the principles of natural justice and hence, the matter needs to be remanded to the said officer. Further, as the impugned communication was passed without raising any query or granting personal hearing to represent their case, the grounds raised in the present Appeal Memorandum have been raised for the first time before the Appellate Authority and the said officer had no occasion to consider the same. Moreover, the appeal memorandum was sent to the said officer for his comments on the grounds raised by the appellant in the Appeal Memorandum but there has been no response. Therefore, the matter needs to be remanded back to the said officer on these grounds as well.

7.4. In view of the above, I find remitting case for passing fresh order after considering the submission of appellant in the present appeal memorandum becomes sine qua non to meet the ends of justice. Accordingly, the case is required to be remanded back in terms *of sub Section (3) of Section 128 A of the Customs Act, 1962 for passing fresh order by following the principles of natural justice."*

In view of the above observations, the learned Commissioner (Appeals) set aside the impugned order and allowed the appeal by way of remand to the said officer for passing fresh order after taking the submissions made by the appellant in the appeal on record.

4.1. We have gone through the provisions of Section 128A of Customs Act, 1962 which is as follows:-

"128A. Procedure in appeal.

(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

(b) referring the matter back to the adjudicating authority with directions for fresh adjudication or decision, as the case may be, in the following cases, namely: -

(i) where an order or decision has been passed without following the principles of natural justice; or

(ii) where no order or decision has been passed after re-assessment under Section 17; or

(iii) where an order of refund under Section 27 has been issued by crediting the amount to Fund without recording any finding on the evidence produced by the applicant."

4.2. We are of the view that the impugned order has been passed in accordance with the provisions of Section 128A (3) of the Customs Act, 1962 and no illegality or irregularity has been committed by the Commissioner (Appeals) in passing the impugned order as the Order-In-Original was passed by the Adjudicating Authority without following the principles of natural justice. The Commissioner (Appeals) was duty bound under Section 128A (3) of the Customs Act to refer the matter back to the Adjudicating Authority, with direction for fresh adjudication.

4.3. It is also pertinent to note here that in the whole memorandum of appeal, nowhere it has been mentioned by the appellant that any illegality or irregularity or mistake has been committed by the Commissioner (Appeal) in passing the impugned order. The learned Counsel for the appellant has vehemently argued that the Order-In-Original passed by the Adjudicating Authority in which reliance was placed on the Standing Order No. 6/2022 dated 04.07.2022 but such action was manifestly arbitrary, illegal and baseless in as much as the Adjudicating Authority had ignored the fact that the standing order in para 4 had excluded certain category of Bills of Entry including Bills of Entry where the importer is invoking Section 149 or Section 154 of the Customs Act. In this context we are of the view that in this appeal the order dated 19.09.2023 is not under challenge. This appeal is directed against the order of Commissioner (Appeals) dated 16.07.2024 which seems to be proper and in accordance with law.

4.4. We are of the view that the Commissioner (Appeals) has exercised his discretion in accordance with the relevant provisions of Customs Act and no interference is required in the impugned order. Therefore, in view of the entire above discussion, we hold that in fact there is no merit in the Appeal and same is liable to be dismissed and impugned order is liable to be confirmed.

5. The appeal is dismissed consequently.

(Pronounced in the open court on **30.01.2025** *)*

(C. L. MAHAR)
MEMBER (TECHNICAL)

(Dr. AJAYA KRISHNA VISHVESHA)
MEMBER (JUDICIAL)

Arpita