CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
ALLAHABAD

REGIONAL BENCH - COURT No. I

Customs Appeal No.70112 of 2024

(Arising out of Order-in-Appeal No.NOI-CUSTM-000-APPL-155-22-23 dated 17.07.2023 passed by Commissioner (Appeals) CGST, Noida)

M/s Ganpat Rai Shri Ram & Co., ...**Appellant**
(1300A/19, 1st Floor, Sant Nagar,
HUDA Complex, Rohtak, Haryana-124001)

VERSUS

Commissioner of Central Excise &
CGST, Noida ....**Respondent**
(4th Floor, C-232A/2 to C-232A/3, GST Bhawan,
Sector-48, Noida, U.P.-201301)

APPEARANCE:

Shri Sagar Rohatagi, Advocate for the Appellant
Shri Santosh Kumar, Authorized Representative for the Respondent

CORAM: HON'BLE MR. P.K. CHOUDHARY, MEMBER (JUDICIAL)
HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)

FINAL ORDER NO.- 70750/2024

DATE OF HEARING : 12.11.2024
DATE OF DECISION : 12.11.2024

SANJIV SRIVASTAVA:

This appeal is directed against Order-in-Appeal No.NOI-CUSTM-000-APPL-155-22-23 dated 17.07.2023 passed by Commissioner (Appeals) CGST, Noida.

2. By the impugned order Commissioner (Appeals) has held as follows:-

> *"7. I have carefully gone through the facts and records of the case and the submissions made by the appellant in the grounds of appeal. I observe that there is no demand of duty involved in the matter, so no requirement of fulfillment of conditions of pre-deposit in the instant appeal.*

7.1 As per the facts and record of the case, I observe that the appellant had made a request to the deputy Commissioner of Customs, Noida Customs Commissionerate, Noida for seeking of speaking order against the Bills of Entry No.4078208 & 4078219 both dated 20.11.2017 on 13.03.2023 enclosing order dated 02.03.2023 passed by the Hon'ble High Court, Allahabad.

7.2 The Assistant Commissioner of Customs, Appraising Group-3, Noida Customs Commissionerate, Noida vide C.No. VIII(30)Cus/ICD-DD/64/2023/2218 dated 22.03.2023 has made a communication about the speaking order for above said two Bills of Entry vide which it has been stated that having not filed an appeal before the appellate authority against the bills of entry itself within limitation prescribed under Act, the request for issuance of speaking order for these two bills of entry cannot be considered at this stage (after lapse of five years) as the natural recourse was to file an appeal before the Commissioner (Appeals) against the bills of entry itself within limitation period.

8. I find that as per the facts on record the import were made against the Bills of Entry No.4078208 & 4078219 both dated 20.11.2017 and the moot question to be answered in the instant matter is whether, the appellant's request for issuance of a speaking order after expiry of five years of import can be considered as having been made within the statutory time period of appeal.

9. I observe that with a view to address the Instant issue in correct legal perspective it is necessary to first of all examine the provision of Section 17 of the Customs Act, 1962, and the same read as under as follows:-

"17. Assessment of duty.*--(1) An Importer entering any imported goods under section 46, or an exporter entering any export goods under section 50, shall, save as* *otherwise provided in section 85, self-assess the duty, if any, leviable on such goods.*

(2) The proper officer may verify[2] [the entries made under section 46 or section 50 and the self-assessment of goods referred to in sub-section (1)] and for this purpose, examine or test any imported goods or export goods or such part thereof as may be necessary.

[3][Provided that the selection of cases for verification shall primarily be on the basis of risk evaluation through appropriate selection criteria.]

[4][(3) For[5] [the purposes of verification) under sub-section (2), the proper officer may require the importer, exporter or any other person to produce any document or information, whereby the duty leviable on the Imported goods or export goods, as the case may be, can be ascertained and thereupon, the importer, exporter or such other person shall produce such document or furnish such information.]

(4) Where it is found on verification, examination or testing of the goods or otherwise that the self- assessment is not done correctly, the proper officer may, without prejudice to any other action which may be taken under this Act, re-assess the duty levlable on such goods.

*(5) Where any re-assessment done under sub-section (4) is contrary to the self-assessment done by the importer or exporter[6]*** and in cases other than those where the Importer or exporter, as the case may be, confirms his acceptance of the said re-assessment in writing, the proper officer shall pass a speaking order on the re-assessment, within fifteen days from the date of re-assessment of the bill of entry or the shipping bill, as the case may be."*

9.1 I find that both the Bills of Entry were filed on 20.11.2017 for clearance of goods declared as mixed lot of polyester knitted fabric. Bills of Entry were assessed after *enhancing value as per contemporaneous import data of similar Items following Customs valuation (Determination of Value of Imported Goods) Rules, 2007. Goods against both Bills of Entry were cleared for home consumption on enhanced value. Neither any protest letter nor any objection were raised on enhancement of value of import and clearance thereof.*

9.2 I observe that once the assessment has been made by the endorsement in the Bill of Entry then such order on the bill of entry can itself be considered as an assessment order against which the Importer can file appeal within the prescribed time period, if they have any objection.

9.3 In this regard, I also find that the prescribed time period has been explained in Section 128 of the Customs Act, 1962 as follows:-

***"Section 128 of Customs Act, 1962 read as under**:*

(1)Any person aggrieved by any decision or order passed under this Act by an officer of Customs lower in the rank than a 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 provided that the Commissioner (Appeals)may, if he is satisfied that the appellant was prevented by sufficient cause from presenting the appeal within the aforesaid period of sixty days, allow it to be presented within a further period of thirty days."

9.4 Juxtaposition to the above statutory provisions in the Instant matter, the appellant failed to file appeal before the Appellate Authority within the prescribed time period in terms of Section 128 of the Customs Act, 1962 as the same has been filed after 05 years of the assessment order.

9.5 I also observe that the ratio of the judgements cited by the appellant are not relevant to the Instant case as the facts of the instant case can easily be distinguished.

9.6 I also observe that Hon'ble Supreme Court In the case of ITC Limited Vs Commissioner of Central Excise, Kolkata (Refer 2019(368) E.L.T. 216(S.C.) has held that -

"In case any person is aggrieved by any order which would include self- assessment, he has to get the order modified under Section 128 of the Customs Act or any other relevant provisions of the Act."

9.7 In view of the above discussion I find that the order C.No. VIII(30)Cus/ICD-DD/64/2023/2218 dated 22.03.2023 issued in compliance of Writ Tax No.228 of 2023 dated 02.03.2023 by the Hon'ble High Court, Allahabad is just, legal and proper and needs no intervention at this end.

ORDER

In the light of above discussion and findings appeal bearing No.69/CUS/Nolda/APPL/NCUS/2023-24 dated 26.05.2023 filed by M/s Ganpat Ral Shri Ram & Co., 1300A/19, Sant Nagar, HUDA Complex, Rohtak, Haryana-124001 fails to succeed and the Impugned speaking Order Issued under C.No.VIII(30) Cus/ICD-DD/64/20234/2218 dated 22.03.2023 is upheld as just, legal and proper."

2.1 Appellant being aggrieved by the said order have filed this appeal.

3.1 We have heard Shri Sagar Rohatagi learned Advocate appearing on behalf of the Appellant and Shri Santosh Kumar learned Departmental Authorized Representative for the Revenue.

4.1 We have considered the impugned order along with submissions made in appeal during the course of arguments.

4.2 Section 17(5) of the Customs Act, 1962 as during the relevant time read as under:-

"[SECTION 17. Assessment of duty. *— (1) An importer entering any imported goods under section 46, or an exporter entering any export goods under section 50, shall, save as otherwise provided in section 85, self-assess the duty, if any, leviable on such goods.*

> *(2) The proper officer may verify [the entries made under section 46 or section 50 and the self-assessment of goods referred to in sub-section (1)] and for this purpose, examine or test any imported goods or export goods or such part thereof as may be necessary :*
>
> *[**Provided** that the selection of cases for verification shall primarily be on the basis of risk evaluation through appropriate selection criteria.]*
>
> *For [the purposes of verification] under sub-section (2), [(3) the proper officer may require the importer, exporter or any other person to produce any document or information, whereby the duty leviable on the imported goods or export goods, as the case may be, can be ascertained and thereupon, the importer, exporter or such other person shall produce such document or furnish such information.]*
>
> *(4) Where it is found on verification, examination or testing of the goods or otherwise that the self-assessment is not done correctly, the proper officer may, without prejudice to any other action which may be taken under this Act, re-assess the duty leviable on such goods.*
>
> *(5) Where any re-assessment done under sub-section (4) is contrary to the self-assessment *] and in cases other than those where * done by the importer or exporter [* the importer or exporter, as the case may be, confirms his acceptance of the said re-assessment in writing, the proper officer shall pass a speaking order on the re-assessment, within fifteen days from the date of re-assessment of the bill of entry or the shipping bill, as the case may be.*
>
> *[(6) * * *]."*

4.3 In terms of this Section if any self-assessment made by the importer on the bill of entry in any way was altered, it was incumbent and mandatory upon the concerned assessing officer, Assistant Commissioner/ Deputy Commissioner to pass a speaking order in the matter specifying the reason for altering the self-assessment made. There was an exception to the same in case whether the importer had in writing confirmed the acceptance of alteration made. In the present case, we do not find any such acceptance letter on record. Nothing has been stated by the concerned authorities in the letter dated 22.03.2023, rejecting the request made by the appellant for speaking order as per the direction of the High Court. Thus as per this Section a speaking order was a mandatory requirement.

4.4 Against alteration of the self-assessment made importer went to the High Court. Hon'ble High Court has vide dated 02.03.2023 in Writ Tax No.228 of 2023, observed as follows:-

> "***2. Solitary grievance of the petitioner is, speaking order reassessing the custom duty has not been communicated to the petitioner with respect to bills of entry No.4078208 and 4078219, both dated 20.11.2017.***
>
> ***3. On the other hand, learned counsel for the revenue states, at present, it is not clear if the petitioner had obtained clearance of the goods against consent or under protest.***
>
> ***4. In view of the facts noted above, no useful purpose may be served in keeping the present petition pending or calling for a counter affidavit, at this stage.***
>
> ***5. Only this much may be observed, once the petitioner had asked for reasons, appropriate communication ought to have been made to him.***
>
> *6. Accordingly, the present petition is disposed of with the observation, in case the petitioner files a fresh application before respondent no.2 within a period of two weeks from today alongwith a copy of this order seeking speaking order with respect to reassessment of custom duty imposed on the aforesaid two bills of entry, that application may be dealt with and appropriate communication be made to the petitioner within a period of two weeks therefrom."*

4.5 On receipt of this order Appellant vide letter dated 13.03.2023 made a request to the concerned Deputy Commissioner for a speaking order under Section 17(5) of the Customs Act, 1962.

4.6 The said request was denied vide letter dated 22.03.2023 observing as follows:-

"2. Vide abovementioned letter, a request has been made to the Deputy Commissioner of Customs, Group-3 to issue speaking order under Section 17(5) of Customs Act against Bills of Entry No.4078208 & 4078219 both dated 20.11.2017. You have also claimed that the speaking orders against the mentioned Bills of Entry have not been issued despite several requests made by your.

3. From the records, it is evident that both the mentioned Bills of Entry were filed on 20.11.2017 for clearance of goods declared as mixed lot of polyester knitted fabric. Bills of Entry were assessed after enhancing value as per contemporaneous import data of similar items following Customs Valuation (Determination of Value of Imported Goods) Rules, 2007. Goods against both Bills of Entry were cleared for home consumption on enhanced value and no protest letter is on record indicating any objection on enhancement.

4. After a lapse of Four years, letters were sent to this office for issuance of speaking orders for Bills of Entry which were re-assessed to duty four years back after enhancing value as per contemporaneous import data. However, if there was any objection regarding enhanced value, the redressal lied with Appellate Authority i.e. Commissioner (Appeals) as per Section 128 of Customs Act, 1962 during the permissible period for appeal.

Section 128 of Customs Act, 1962 reads as under:-

Any person aggrieved by any decision or order passed under this Act by an officer of customs lower in rank than a 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: Provided that the Commissioner (Appeals) may, if he is satisfied that the appellant was prevented by sufficient cause from presenting the appeal within the aforesaid period of sixty days, allow it to be presented within a further period of thirty days.

5. Once assessment has been made by the endorsement in the Bill of Entry, the bill of entry itself can be treated as an order against which the importer can file appeal.

In this regard, reliance is placed upon Hon'ble Supreme Court's judgement in case of ITC Limited vs. Commissioner of Central Excise, Kolkata (Refer 2019 (368) E.L.T. 216 (S.C.)) wherein Hon'ble Supreme Court has held the following.

In case any person is aggrieved by any order which would include self assessment, he has to get the order modified under Section 128 of the Customs Act or any other relevant provisions of the Act.

6. Having not filed an appeal before the appellate authority against the Bills of Entry itself within limitation prescribed under Act, your request for issuance of speaking order for these two Bills of Entry cannot be considered at this stage (after lapse of five years) as the natural recourse was to file an appeal before the Commissioner (Appeals) against the Bills of Entry itself within limitation period."

4.7 On receipt of this letter Appellant filed an appeal before Commissioner (Appeals) on 26.05.2020. The said appeal has been disposed of by the impugned order.

4.8 Letter dated 22.03.2023 for denying the speaking order reference has been made to the decision of Hon'ble Supreme Court in case of ITC Ltd. vs. Commissioner of Central Excise, Kolkata, [2019 (368) E.L.T. 216 (S.C.)]. On the issue under consideration Hon'ble Supreme Court has in para 33 after taking the note of the above provisions of Section 17 of the Customs Act, 1962 observed as follows:

> ***"33.*** *Under the provisions of Section 17 as amended by Finance Act of 2011, Section 17(1) has provided to self-assess the duty if any leviable on such goods by importer or exporter as the case may be. Self-assessment is an assessment as per the amended definition of Section 2(2).* ***It is further provided that proper officer may verify the self-assessment of such goods, and for this***

purpose, examine or test any imported goods or exported goods or such part thereof as may be necessary. The power to verify self-assessment lies with the proper officer and for that purpose under Section 17(3), he may require the importer, exporter or any other person to produce such document and furnish such information, etc. If the proper officer on verification has found on examination or testing of the goods or as part thereof or otherwise that the self-assessment is not done correctly, the proper officer may, without prejudice to any other action which may be taken under the Act, may proceed to re-assess the duty leviable on such goods. Section 17(5) of the Act as amended provides that where re-assessment done under sub-section 17(4) is contrary to the assessment done by the importer or exporter regarding the matters specified therein, the proper officer has to pass a speaking order on the re-assessment, within 15 days from the date of reassessment of the bill of entry or the shipping bill, as the case may be. *The explanation to amended Section 17 has clarified that import or export before the amendment by Finance Act, 2011 shall be governed by unamended provisions of Section 17.*

43. *As the order of self-assessment is nonetheless an assessment order passed under the Act, obviously it would be appealable by any person aggrieved thereby. The expression 'Any person' is of wider amplitude.* ***The revenue, as well as assessee, can also prefer an appeal aggrieved by an order of assessment. It is not only the order of re-assessment which is appealable but the provisions of Section 128 make appealable any decision or order under the Act including that of self-assessment. The order of self-assessment is an order of assessment as per Section 2(2), as such, it is appealable in case any person is aggrieved by it. There is a specific provision made in Section 17 to pass a reasoned/speaking order in the situation in case on verification, self-assessment is not found to be satisfactory, an order of re-assessment has to be passed under Section 17(4).*** *Section 128 has not provided for an appeal against a speaking order but against "any order" which is of wide amplitude. The reasoning employed by the High Court is that since there is no lis, no speaking order is passed, as such an appeal would not lie, is not sustainable in law, is contrary to what has been held by this Court in Escorts (supra).*

> ***44. The provisions under Section 27 cannot be invoked in the absence of amendment or modification having been made in the bill of entry on the basis of which self-assessment has been made. In other words, the order of self-assessment is required to be followed unless modified before the claim for refund is entertained under Section 27. The refund proceedings are in the nature of execution for refunding amount. It is not assessment or re-assessment proceedings at all. Apart from that, there are other conditions which are to be satisfied for claiming exemption, as provided in the exemption notification. Existence of those exigencies is also to be proved which cannot be adjudicated within the scope of provisions as to refund. While processing a refund application, re-assessment is not permitted nor conditions of exemption can be adjudicated. Re-assessment is permitted only under Section 17(3)(4) and (5) of the amended provisions.*** *Similar was the position prior to the amendment. It will virtually amount to an order of assessment or re-assessment in case the Assistant Commissioner or Deputy Commissioner of Customs while dealing with refund application is permitted to adjudicate upon the entire issue which cannot be done in the ken of the refund provisions under Section 27. In Hero Cycles Ltd. v. Union of India - 2009 (240) E.L.T. 490 (Bom.) though the High Court interfered to direct the entertainment of refund application of the duty paid under the mistake of law. However, it was observed that amendment to the original order of assessment is necessary as the relief for a refund of claim is not available as held by this Court in Priya Blue Industries Ltd. (supra)."*

4.8 Section 17(5) causes a mandatory obligation on the concerned Deputy Commissioner. In case such a speaking order is not issued that automatically implies with alteration of self-assessment cannot be justified and self-assessment made needs to be accepted. The appeal could have been filed by the appellant only on the receipt of the re-assessment order as per Section 17 (5). Letter dated 22.03.2023 is not only in contravention of the said provisions of the Customs Act, 1962 but is also in defiance of the order Hon'ble High Court whereby specific direction to issue a speaking order in terms of said Section was given.

4.9 Taking note of the above we direct that concerned Assistant Commissioner/ Deputy Commissioner should issue a speaking order justifying the enhancement of value on the bill of entry within a month of receipt of this order. In case no such speaking order is issued the bill of entry will be treated as if assessed as per the self assessment made by the appellant.

5.1 Appeal allowed, matter remanded back to the Original Authority for passing a speaking order as per section 17 (5) within a month of receipt of this order.

(Dictated and pronounced in open court)

(P. K. CHOUDHARY)
MEMBER (JUDICIAL)

(SANJIV SRIVASTAVA)
MEMBER (TECHNICAL)

LKS