FAX : 0532-2400149 REGISTERED / AD

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
38,MG Marg Civil Lines,Old Red Building,Allahabad-211001

Dated: 10/06/2016

To

Appellant as per address in table below

Respondent as per address in table below

Final Order No. C/A/70255/2016-CU[DB] dated 01/06/2016

I am directed to transmit herewith a certified copy of order passed by the Tribunal under section 129-A(4) of the **Customs Act, 1962.**

Asstt. Registrar

Application	Appeal	Name and Address of Appellant
1	C/701/2010	**MYCO ELECTRICALS PVT LTD** PLOT NO 18, UDYOG KENDRA, INDUSTRIAL AREA, GREATER NOIDA,GAUTAM BUDH NAGAR U.P.
		Name and Address of Respondent
2		C.C. & C.E. & S.T.-Noida C-56/42...SECTOR 62, NOIDA,UTTAR PRADESH-201307

Copy To

3Advocate(s) / Consultant(s):

S. D. Gaur
SB-108, SHASTRI NAGAR,
GHAZIABAD,UTTAR PRADESH

5 Bar Association, CESTAT, ALLAHABAD

6 Director Publications, Customs, Excise, I.P. Estate, Delhi

7 M/s Centax Publications Pvt. Ltd., 1512-B, Bhishm Pitamah Marg, New Delhi-3

8 Company Law Institute of India Pvt. Ltd., No.2 (old no.36), Vaithyaram Street, T. Nagar, Chennai-17

9 Taxmann Allied Service Pvt. Ltd., 59/32, New Rohtak Road, New Delhi-110005
10 Easy Service Tax Online Dot Com Pvt. Ltd., 407A, Jscon Mall, Satellite Road, Ahmedabad-15
11 LAWCRUX Advisors Pvt. Ltd., LAW House, 1-8, Sector-10, Faridabad 121003 (Haryana)
12 TaxIndiaOnline.com Pvt. Ltd., 2nd Floor, Vasant Arcade, Vasant Kunj, New Delhi - 110070
13 Mark Professional Services Pvt. Ltd., 108, Everest Block, Aditya Enclave, Hyderabad -- 38
14 The ICFAI society, 52, Nagarjuna Hill,Punjagutta Hyderabad.-500082
15 M/S Knowledge Processing Pvt. ltd.(taxmanagementindia.com),FF-19,1st Floor,Cross River Mall,CBD Ground,Near Karkardooma Court,Delhi-110032
16 C.D.R. 17 Office Copy 18 Guard File

Asstt. Registrar

IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL, REGIONAL BENCH : ALLAHABAD

Cus. Appeal No.701/10

Arising out of O/A No.299-Cus/APPL/Noida/10 dated 24.09.2010 passed by Commr. of Central Excise & Customs, Noida.

For approval and signature:

HON'BLE MR. ANIL CHOUDHARY, MEMBER (JUDICIAL)
HON'BLE MR. ANIL G. SHAKKARWAR, MEMBER (TECHNICAL)

1.	Whether Press Reporters may be allowed to see the Order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982?	: No
2.	Whether it should be released under Rule 27 of the CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not?	: Yes
3.	Whether His Lordship wishes to see the fair copy of the Order?	: Seen
4.	Whether Order is to be circulated to the Departmental Authorities?	: Yes

M/s Myco Electrical Pvt. Ltd. ...APPELLANT(S)

VERSUS

Commissioner of Central Excise & Customs, Noida RESPONDENT (S)

APPEARANCE

None for the Appellant (s)
Shri D. K. Deb, Asstt.Commr. (D.R.) for the Department

CORAM:

HON'BLE MR. ANIL CHOUDHARY, MEMBER (JUDICIAL)
HON'BLE MR. ANIL G. SHAKKARWAR, MEMBER (TECHNICAL)

DATE OF HEARING & PRONOUNCEMENT : 01. 06. 2016

Final ORDER NO. 70255/2016

Per Mr. Anil Choudhary :

The only issue which arises in this appeal, is whether an assessee, who is entitled for concessional rate of duty, pays higher duty by inadvertence, is not entitled to grant of refund of the excess duty paid unless he had filed an appeal against the order, by which he had deposited the duty on filing of the Bill of Entry.

2. Brief facts of the case are that the appellant-importer filed Bill of Entry on 31.05.2006 for clearance of polyethelene under Chapter heading 3901.1090 attracting duty @ 12.5% + 2% + 1% (Basic) plus 16% + 2% + 1% (CVD) plus 4% (SAD) claiming benefit of Notification 13/2006, Sl.No.17 and the same was assessed in the group under second check basis as per the import documents and exemption notification applicable as on the date of filing of the said Bill of Entry. The appellant paid duty as applicable on 31.05.2006 amounting to Rs.3,10,954/- and the goods were released for home consumption accordingly. However, subsequently on realizing that the appellants are entitled to benefit of Notification No.21/2002 Sl.No.477 (ii) and have paid 12.5% BCD, instead of 5% as applicable on the goods imported at ICD, Dadri, They applied for refund in the prescribed form on 07.08.2006 claiming refund of Rs.78,334/- paid as excess duty claiming benefit of Notification No.21/2002. The Asstt.Commissioner was pleased to reject the claim following the Board's Circular No.24/2004, which provides that an importer is required to go in for appeal against the assessment of the Bill of Entry before filing refund claim in the matters related to assessment. It was further observed

that the goods imported by the appellants at ICD, Dadri, are covered under Notification 21/2002, Sl.No.477 (ii). It was further observed that the Bill of Entry cannot be re-assessed or amended after release of the goods.

3. Being aggrieved, the appellant preferred an appeal before the ld.Commissioner (Appeals), who has pleased to reject the same relying on the rulings of the Hon'ble Supreme Court in the cases of Collector of Central Excise, Kanpur Vs. Flock (India) Pvt. Ltd. : 2000 (120) ELT 285 (SC) & Priya Blue Industries Ltd. Vs. Commr. of Customs (Preventive) : 2004 (172) ELT 145 (S.C.).

4. Being aggrieved, the appellant is before this Tribunal.

5. The appellants have filed written submissions and pray a decision on merit.

6. Heard the ld.A.R. for Revenue and perused the records.

7. We find that the issue in this appeal is squarely covered by the ruling of the Hon'ble Delhi High Court in the case of Aman Medical Products Ltd. Vs. Commissioner of Customs, Delhi : 2010 (250) ELT 30 (Del.), wherein it has been held as follows :

> "4. If therefore we refer to language of Section 27, it is more than clear that the duty which is paid is not necessarily pursuant to an order of assessment but can also be 'borne by him'. Clauses (i) and (ii) of sub-section (1) of Section 27 are clearly in the alternative as the expression 'or' is found in between clauses (i) and (ii). The object of Section 27(i)(ii) is to cover those classes of case

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where the duty is paid by a person without an order of assessment, i.e. in a case like the present where the assessee pays the duty in ignorance of a notification which allows him payment of concessional rate of duty merely after filing a Bill of Entry. In fact, such a case is the present case in which there is no assessment order for being challenged in the appeal which is passed under Section 27(1)(i) of the Act because there is no contest or *lis* and hence no adversarial assessment order.

5. The Tribunal has referred to the cases of *CCE, Kanpur v. Flock (India) Pvt. Ltd.* [2000 (120) E.L.T. 285] and *Priya Blue Industries Ltd. v. Commissioner of Customs (Preventive)*, 2004 (172) E.L.T. 145 (S.C.). In both these cases, referred to by the Tribunal there was an assessment order which was passed and consequently it was held that where an adjudicating authority passed an order which is appealable and the party did not chose to exercise the statutory right of appeal, it is not open to the party to question the correctness of the order of the adjudicating authority subsequently by filing a claim for refund on the ground that adjudicating authority had committed an error in passing his order. These judgments will therefore not apply when there is no assessment order on dispute/contest, like as is in the facts of the present case.

6. We, therefore, answer the question framed by holding that the refund claim of the appellant was maintainable under Section 27 of the Customs Act and the non-filing of the appeal against the assessed bill of entry does not deprive the appellant to file its claim for refund under Section 27 of the Customs Act, 1962 and which claim will fall under clause (ii) of sub-section (1) of Section 27.

> **7.** We accordingly set aside the impugned order dated 3-4-2008 of the CESTAT [2008 (228) E.L.T. 593 (Tri.-Del.)] and uphold the order of the Commissioner of Customs (Appeals) dated 28-1-2005 and remand of the matter to the original authority viz Deputy Commissioner of Customs (Refund) to examine the merits of the matter in accordance with law after providing due opportunity to the appellant."

We agree with the findings of the Hon'ble Delhi High Court in the case cited (supra) and accordingly, we allow the appeal by way of remand upholding that the appellant is entitled to refund claim under ~~Rule~~ Section 27 of the Customs Act, 1962 as it provides for claim of refund by any person, who has borne the duty. We further hold that the refund claim was made within the limitation period of six months. We remand the matter to the adjudicating authority for the limited purposes of examining the issue of unjust-enrichment.

8. Thus, with the aforesaid observations, the appeal is allowed by way of remand.

(Pronounced in the open Court)

-Sd-	-Sd-
(ANIL G. SHAKKARWAR)	**(A.CHOUDHARY)**
MEMBER (TECHNICAL)	**MEMBER (JUDICIAL)**

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प्रमाणित प्रति / Certified True Copy

9.5.6

सहायक रजिस्ट्रार / Asstt. Registrar
सीमाशुल्क, उत्पाद शुल्क एवं सेवा कर अपील अधिकरण / (C.E.S.T.A.T.)
38, एम. जी. मार्ग, इलाहाबाद-211001
38, M. G. MARG, ALLAHABAD 211001