CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
BANGALORE

REGIONAL BENCH - COURT NO. 1

Appeal(s) Involved:

C/21869/2018-SM

[Arising out of Order-in-Appeal No. COC-CUSTM-000-APP-64-2018-19 dated 10/10/2018 passed by the Commissioner of Customs, Cochin]

Classic Granites
12/576 Modern Bazar, Nallallam P.O
Kozhikode – 673 027
Kerala

Appellant(s)

Versus

Commissioner Of Customs Cochin
Custom House
Cochin – 682 009
Kerala

Respondent(s)

Appearance:

Mr. M Balagopal, Advocate
#A5, HIG Avenue, Gandhi Nagar Road, Kadavanthara
Cochin – 682 020
Kerala

For the Appellant

Mr. Madhupsharan, Asst. Commissioner (AR)

For the Respondent

CORAM:

HON'BLE MR. S.S GARG, JUDICIAL MEMBER

Final Order No. 20389 / 2019

Date of Hearing: 02/05/2019

Date of Decision: 02/05/2019

Per : S.S GARG

The present appeal is directed against the impugned order dated 10.10.2018 passed by the Commissioner of Customs (Appeals) whereby the Commissioner (Appeals) has rejected the appeal of the appellant and upheld the Order-in-Original. Briefly the facts of the present case are that the appellants filed Bill of Entry No. 4729962 and 4729963 both dated 29.03.2016 for the clearance of Polished Porcelain Tiles. The Central Government vide Notification No. 12/2016 Cus. (ADD) dated 29.03.2016 notified Anti-Dumping Duty on Polished Porcelain Tiles. Accordingly the appellant self assessed the Bill of Entry and paid the duties of Customs including Anti-Dumping Duty to the tune of Rs. 13,36,669/- (Rupees Thirteen Lakhs Thirty Six Thousand Six Hundred and Sixty Nine only) and Rs. 7,74,431/- (Rupees Seven Lakhs Seventy Four Thousand Four Hundred and Thirty One only) respectively which was accepted by the Department. Later on it came to the notice of the appellant that Anti-Dumping Duty Notification even though dated 29.03.2016 was not published in the Official Gazette of India on 29.03.2016. In order to verify the date of publication of the Notification in the official Gazette, appellant filed a RTI application and got the reply from the Government of India press that the draft Notification was received in the press only on 29.03.2016 at 11 p.m and was published in the Gazette of India only on 02.04.2016 at 9.11 am. Since the Notification was not in force as on the date of filing of the Bill of Entry, the appellant filed refund application for an amount of Rs. 21,11,100/- (Rupees Twenty One Lakh Eleven Thousand and One Hundred only) being Anti-Dumping Duty paid by mistake. The original authority rejected the application for refund on the ground that the date of Notification appearing in the Gazette is

29.03.2016 and since the appellant has neither challenged the original assessment in the Bill of Entry nor had paid the duty under protest hence not eligible for refund in terms of Circular No. 24/2004 Cus. dated 18.03.2004. Aggrieved by the said order, appellant filed appeal before the Commissioner of Customs (Appeals) Cochin who vide the impugned order has upheld the Order-in-Original on identical lines. Hence the present appeal.

2. Heard both the parties and perused the records.

3. Learned counsel for the appellant submitted that the impugned order is not sustainable in law as the same has been passed without properly appreciating the facts and the law and the binding judicial precedent. He further submitted that there are two issues to be decided in the present appeal viz. the effective date of Notification and secondly whether refund can be claimed without challenging the assessment in cases of self-assessment. As far as first issue is concerned he submitted that as per Section 15 of the Customs Act, 1962 the date for determination of rate of duty and tariff valuation of the imported goods is the date on which a Bill of Entry is presented and in the present case the Bill of Entry was filed on 29.03.2016 hence the date for determination of the duty is 29.03.2016. He further submitted that the Notification No. 29/2016 Cus. ADD 29.03.2016 was published in the official Gazette on 02.04.2016 at 9 a.m as per the reply received by him on RTI application from the Department of Publication and the Government of India Press which is also placed on record. He further submitted that on the date of filing the Bill of Entry, Anti-Dumping Duty

Notification No. 29/2016 dated 29.03.2016 was not in force and therefore the payment/collection of Anti-Dumping Duty in the Bill of Entry is erroneous/by mistake and is liable to be refunded. On this submission, he relied upon the following decisions:

a. *Union of India Vs. Param Industries Ltd. – 2015 (321) E.L.T. 192 (SC)*
b. *Ruchi Soya Industries Vs. Union of India – 2018 (361) E.L.T. 300 (Kar.)*
c. *MD Overseas Vs. Union of India – 2017 (353) E.L.T. 12 (Guj.)*
d. *Union of India Vs. MD Overseas – 2017 (356) E.L.T. A136 (SC)*
e. *Beekey Enterprises Vs. Quarantine Officer – 2008 (228) E.L.T. 182 (Mad.)*

3.1. With regard to whether the refund can be claimed without challenging the assessment, the learned counsel submitted that both the authorities have wrongly relied upon the Circular No. 24/2004 dated 18.03.2004 for rejecting the refund application merely on the ground that the refund application is not maintainable when the assessment order has not been challenged. Learned counsel also submitted that Section 17 and 27 of the Customs Act 1962 has undergone major amendments w.e.f. 08.04.2011 whereby the assessments in the Bill of Entry and Shipping Bill became self-assessment. Prior to the amendment the assessment was done by the Officers of Customs. He further submitted that the case-laws relied upon by both the authorities and the Circular were during the pre-amendment period where the assessment was done by the Departmental Officer, but after the amendment Bill of Entry is being self assessed by the importer and the proper officer is only verifying such self assessment. He further submitted that the importer who has made self assessment cannot file an appeal against his own self assessment. He further submitted that this issue is no more *res integra* and has been settled by various decisions of the Tribunal and the High Court. For this submission he relied upon the following decisions:

a. *Zenith Computers Vs. CC, Goa – 2017 (358) E.L.T. 1125 (Tri.-Mum.)*
b. *Liebherr India Vs. Com. Of Cus. Kolkata – 2017 (358) E.L.T. 656 (Tri.-Kolk.)*
c. *CC (NS-III) JNCH Vs. Physical Research Laboratory – 2017 (357) E.L.T. 475 (Tri.-Mum.)*
d. *Micromax Informatics Ltd. Vs. UOI – 2016 (335) E.L.T. 446 (Del.)*
e. *Alagendran Exports Vs. Com. Of Cus. Chennai – 2014 (313) E.L.T. 72 (Tri.-Chennai)*
f. *Akzo Nobel Coating India Vs. CC, Chennai – 2014 (312) E.L.T. 91 (Tri.-Chennai)*
g. *INA Bearings Vs. Com. Of Cus. Nhava Sheva – 2014 (311) E.L.T. 788 (Tri.-Mum.)*
h. *Ruchi Soya Industries Vs. CC, Mumbai – 2013 (290) E.L.T. 105 (Tri.-Mum.)*
i. *Amal Medical Products Vs. Com. Of Cus. Del. – 2010 (250) E.L.T. 30 (Del.)*
j. *C. Cex Vs. Crest Chemicals – 2009 (244) E.L.T. 361 (Tri.-Mum.)*

4. On the other hand the learned AR defended the impugned order and submitted that refund cannot be claimed without challenging the assessment. In support of this, he relied upon the following decisions:

a. *Rawmin Mining and Industries Pvt. Ltd. Vs. CC (Prev.), Jamnagar – 2018 (12) G.S.T.L. 74 (Tri.-Ahmd.)*
b. *CC, Bangalore Vs. BPL Telecom Ltd. – 2015 (325) E.L.T. 467 (S.C)*

5. After considering the submissions of both the parties and perusal of the material on record, I find that in the present case the appellants have imported the Polished Porcelain Tiles and filed the Bill of Entry on 29.03.2016 and paid the Customs duty and also paid Anti-Dumping Duty of Rs. 21,11,100/- (Rupees Twenty One Lakhs Eleven Thousand and One Hundred only). But later on he realized that he was not liable to pay the ADD because the Notification imposing the Anti-Dumping duty though dated 29.03.2016 when the Bill of Entry were filed but in fact this Notification was published in the Gazette of the Government of India only on 02.04.2016 which means that on the date of import of the goods this Notification was not in force and therefore he has wrongly paid the Anti-Dumping Duty and subsequently filed the refund claim which was rejected on the ground that Anti-Dumping duty Notification was in force on 29.03.2016 and consequently refund was denied on the ground that the appellant has not challenged the assessment made in the Bill of Entry. Further I find that as far as first issue regarding the effective date of Notification of Anti-Dumping duty, appellant has proved on record that the said Notification No. 29/2016 dated 29.03.2016 was not in force on the date when the Bill of Entry was filed and

this is clear from the reply given by the Publication Department of the Central Government on RTI application filed by the appellant confirming that the Notification was published on 02.04.2016 at 9.11 am. Further I find that the case-laws relied upon by the appellant clearly shows that a Notification comes into force only from the date when the said Notification is published in the Official Gazette and in the present case the Anti-Dumping duty Notification was published on 02.04.2016. Therefore, I hold that appellant was not liable to pay Anti-Dumping duty on 29.03.2016 when he filed the Bill of Entry and the said duty paid by him is paid under mistake. As far as rejection of refund on the ground of non challenging the assessment order, I find that after the amendment in Section 17 and 27 of the Customs Act 1962 w.e.f. 08.04.2011, there is no need to challenge the self-assessment made by the importer as there is no assessment order. Self-assessment is made after the amendment and importer cannot challenge his own assessment. This issue is no more res integra and has been settled by various decisions relied upon by the appellant cited supra. In this regard, it is pertinent to refer to the decision of the Delhi High Court in the case of **Micromax Informatics Ltd. Vs. Union of India** wherein the Hon'ble High Court of Delhi has considered the amendment made in Section 27 and also distinguished the decisions of the Supreme Court in the case of **Flock (India) Pvt. Ltd**. and **Priya Blue Industries Ltd.** Hon'ble High Court of Delhi in the case of **Micromax Informatics Ltd**. in Paras 13, 14 and 15 has held as under:

> *"13. As far as the present case is concerned, there was indeed no assessment order as such passed by the customs authorities.*

Although under Section 2(ii) of the Act, the word 'assessment' includes a self-assessment, the clearance of the goods upon filing of the B/E and payment of duty is not per se an 'assessment order' in the context of Section 27(1)(i) as it stood prior to 8th April, 2011, particularly if such duty has not been paid under protest. In any event, after 8th April, 2011, as noticed hereinbefore, as long as customs duty or interest has been paid or borne by a person, a claim for refund made by such person under Section 27(1) of the Act as it now stands, will have to be entertained and an order passed thereon by the authority concerned even where an order of assessment may not have reviewed or modified in appeal.

14. The Assistant Commissioner (Refund), in the present case, appears to have not noticed the decision of this Court in Aman Medical Products Limited (supra) which was rendered in the context of Section 27 of the Act as it stood prior to 8th April, 2011. Further he failed to notice that the said provision has undergone a significant change with effect from 8th April, 2011. The impugned order of the Assistant Commissioner (Refund) rejecting the refund claim of the petitioner on the ground of maintainability was, for the aforementioned reasons, plainly erroneous.

*15. Consequently, the Court sets aside the three impugned orders dated 21st December, 2015 passed by the Assistant Commissioner (Refund) in respect of the refund claims of the petitioner for the months of August, September and Octo*ber, 2014 and restores the said applications to the file of the Assistant Commissioner (Refund) for being dealt with on merits in accordance with law."

6. In view of my discussion above and by following the ratios as laid down in the decision cited supra, I am of the considered view that the impugned order is not sustainable in law and therefore I set aside the same by allowing the appeal of the appellant with consequential relief, if any.

(Operative portion of the Order was pronounced
in Open Court on **02/05/2019**)

(S.S GARG)
JUDICIAL MEMBER

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