IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
BANGALORE

REGIONAL BENCH – COURT NO. I

Customs Appeal No. 00894 of 2012

(Arising out of Order-in-Appeal No. 241/2011 CUS(B) dated 30.12.2011 passed by the Commissioner of Customs (Appeals), C.R. Building, P.B. No. 5400, Queen's Road, Bangalore – 560 001)

M/s. Sesa Goa Limited **: Appellant**
Sesa Ghor,
29, EDC Complex,
Patto, Panaji – 403 001

VERSUS

The Commissioner of Customs **: Respondent**
New Customs House,
Panambur, Mangalore – 575 010

APPEARANCE:

Shri Mukesh Lodha, Chartered Accountant for the Appellant
Smt. C.V. Savitha, Authorized Representative for the Respondent

CORAM:

HON'BLE MR. P. ANJANI KUMAR, MEMBER (TECHNICAL)
HON'BLE MR. P. DINESHA, MEMBER (JUDICIAL)

FINAL ORDER NO. 20030 / 2022

DATE OF HEARING: 03.01.2022

DATE OF DECISION: 14.02.2022

Per Hon'ble Mr. P. Dinesha

This appeal is filed against the appellate order No. 241/2011 dated 30.12.2011 passed by the Commissioner of Customs (Appeals), Bangalore.

2. Brief facts that are relevant for our consideration are that the appellant is one of the exporters of Iron Ore Fines; that it had entered into agreements with various Chinese traders / manufacturers for supply of Iron Ore Fines to China; that as per the terms of the agreement, they were

to export Iron Ore Fine with Fe content of around 63 to 64% on dry basis; that as per the above, the appellant made exports of Iron Ore Fines under 14 shipping bills during the period from 10.05.2007 to 24.03.2008; that during the period, under the Export-Import Policy (2004-09), export of Iron Ore Fine of Fe content up to 64% was allowed freely; that during the same period, export Duty was also was also levied on Iron Ore and Concentrates of all sorts at Rs.300/- per Metric Tonne (M.T.).; that however, vide Notification No. 62/2007-Cus. dated 03.05.2007, exemption was given to Iron Ore Fines of Fe content of 62% and below, the export Duty on which was pegged at Rs.50/- per M.T.; that as Fe content was the criterion for the purpose of levying Duty and it was not possible to determine the Fe content at the time of export and required provisional assessment awaiting final test report to confirm the Fe content, the appellant's 14 shipping bills were assessed provisionally; that before export of the goods was allowed, samples were drawn by the authorities for the purpose of testing; that for provisional assessments, the appellant was asked to execute PD-cum-test bonds, the finalization of which were to be done only after getting the final results in terms of Section 18 of the Customs Act, 1962 and that the final test results were obtained by the Customs Authorities wherein the Fe content was found much below 62%.

3. It is the case of the appellant that since the final results were never disclosed to it, the appellant obtained the same under RTI and thereafter approached the Assistant Commissioner of Customs, Mangalore, for finalization of the provisional assessment, with a further request for re-assessment of the export Duty in terms of the exemption Notification No. 62/2007 ibid. and to grant them refund of the excess Duty paid by them. The first of such requests for finalizing the provisional assessment in respect of the 14 shipping bills was made by the appellant vide its letter dated 15.05.2009, which was duly

acknowledged by the authority as having received on 27.05.2009, but since there was no response at all from the Customs authorities, the appellant chose to follow with repeated requests. The appellant also requested for rectification under Section 154 of the Customs Act, 1962 on the ground that there was an error since the law, as laid down by the Hon'ble Supreme Court in the case of *Union of India v. Gangadhar Narsingdas Aggarwal* reported in *1997 (89) E.L.T. 19 (S.C.)*, had not been considered.

4. The Deputy Commissioner of Customs, however, vide letter dated 07.05.2010, without bothering to apply the correct position of law and the application of the exemption Notification No. 62/2007-Cus., chose to take a shortcut, to reject the application for rectification/correction, by holding that the shipping bills in question were assessed provisionally after obtaining the PD bonds / Test bonds and subsequently, after receipt of the test results for Fe content from CRCL, Cochin, the said bonds were cancelled. It is surprising that the authority has not considered the decision of the Hon'ble Apex Court supra, which has laid down the guiding principles insofar as the assessment of shipping bills *vis-à-vis* Fe content is concerned.

5. Seriously aggrieved, the appellant filed first appeal urging all legal grounds duly supported by various case-law but, however, the First Appellate Authority vide impugned order rejected the appeal. Hence, the same is assailed here in this appeal before this forum.

6. Heard Shri Mukesh Lodha, Learned Chartered Accountant for the appellant and Smt. C.V. Savitha, Learned Representative for the Revenue.

7. It is very much the settled position of law that not considering a judgement of the jurisdictional High Court makes an order rectifiable and in the case of a judgement of the Hon'ble Apex Court, which is the law of the land and which is binding on all the authorities, non-consideration of

the same may even invite contempt. It is not only that such orders of the lower authorities are rectifiable, but could also be set aside for ignoring such a binding precedent. The order of Deputy Commissioner of Customs dated 07.05.2010 has very conveniently ignored not only the facts and ground realities canvassed by the appellant, but also the very decision of the Hon'ble Supreme Court relied upon by the appellant in the case of *Gangadhar Narsingdas Aggarwal (supra)*, which is the guiding factor insofar as the assessment in the case on hand is concerned. Hence, *prima facie*, the order of the Deputy Commissioner of Customs not only suffers from serious legal infirmities, but is also unsustainable.

8. The appellant has placed reliance on the decision of the Learned Mumbai Bench of the CESTAT in its own case for earlier periods in *Customs Appeal Nos. 759 to 767 of 2009 [Final Order Nos. A/516 to 524/2010 dated 29.09.2010]* wherein an almost similar issue was considered and the Learned Bench after detailed analysis, came to the conclusion that non-consideration of a decision of the Hon'ble Apex Court could be corrected under Section 154 of the Customs Act, 1962. Relevant portion of the order reads as under:

> *"15. In this case the main issue is that whether the provisions of Section 154 of the Customs Act are applicable or not. In fact, it is the duty of the Customs Officer while assessing the Bills of Entry to assess in accordance with law. There is no dispute that when these Bills of Entry was presented before the proper officer for assessment, there was a decision of the apex court in the case of TISCO (supra) wherein it was held that no additional duty of customs (cess) is payable on import of coking coal. It is an admitted fact that while assessments were made in respect of the appeals No. C/759/09 to 764/09 and C/767/09 the proper officer omitted to take note of the decision of the Hon'ble apex court in the case of TISCO (supra). Section 154 of the Customs Act, 1962 deals with the situation where there is a clerical or arithmetical mistakes in any decision or errors arising therein from any accidental slip or omission at the time of assessing the Bill of Entry and same can be corrected by the proper officer. In these appeals, the proper officer failed to take the cognizance of the decision in the case*

of TISCO (supra) while assessing the Bills of Entry which can be termed as accidental slip or omission. As per the law dictionary omission means neglect or failure to perform what the law requires and in this case law requires to assess the Bill of Entry after taking note of the decision of TISCO which was omitted by the proper officer. If for such omissions or errors committed by the proper officer, the same is to be corrected while dealing with refund claims filed by appellant, the same will tantamount to be done under Section 154 of the Customs Act, 1962. That is why the legislature incorporated the Section 154 of the Customs Act into the statute book to rectify such omission or error without challenging the assessment. In the case of Asst. Commr. Income Tax, Rajkot vs. Saurashtra Kutch Stock Exchange Ltd. 2008 (230) ELT 385 (S.C.) the Hon'ble apex court has held that an error apparent would mean an error which strikes on mere looking and does not need long drawn out process of reasoning. In these appeals it is clear from the face of the Bills of Entry that while assessing the Bills of Entry, the decision of TISCO was not considered at all. In the case of Hindustan Lever Ltd. vs. Commissioner of Central Excise, Mumbai 2006 (202) ELT 177 (Tri. LB) the Larger Bench of this Tribunal has held that even if there is a subsequent decision of the apex court on the subject, that is to be followed and in this case the decision of TISCO was already there when the Bills of Entry were assessed. In the case of Union of India vs. Aluminium Industries Ltd. 1996 (83) ELT 41 (Ker.) the Hon'ble Kerala High Court while dealing with the similar circumstances, where at the time of assessment, the correct rate of duty was not applied by the proper officer, later on the same was held by the Hon'ble Kerala High Court as an error arising in assessment on account of omission to apply the correct rate of duty. While dealing with the issue the Hon'ble Kerala High Court has observed as under:-

> *Four types of errors are mentioned in the section for invoking power under it : (1) clerical mistakes (2) arithmetical mistakes (3) errors arising from accidental slips and (4) errors arising from accidental omissions. If any one of the above types of errors has crept in, then the corrective power mentioned in the section can justifiably be used. In this case, the error happened due to the omission to know of the new rates of import duty which has resulted in the assessment made at the first instance. When the error was brought to the notice of the authorities they corrected it and imposed a duty of Rs.11,99,211/- in accordance with the rate applicable to the goods. The principle underlying in Section 154 of the Act is that records relating to customs duty are maintained properly and correctly and that such records should*

> *represent the correct state of affairs. Almost a similar power can be found conferred on the Civil Court by Section 152 of the Code of Civil Procedure. All the four categories of errors enumerated by us above are mentioned in Section 152 CPC also.*

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17. In these appeals also, the proper officer had omitted to apply the decision of Hon'ble apex court in the case of TISCO (supra) at the time of assessment of Bills of Entry and the same ought to have been corrected by re-assessing the Bill of Entry and arrive at a correct liability in the proceeding relating to refund.

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20. From the above discussion, it is clear that in the Appeals No. C/759 to C/767/09 except C/765 and C/766 of 2009, the proper officer had committed the error by omission not to consider the decision of the Hon'ble apex court in the case of TISCO (supra) which amounts to omission or accidental slip while assessing the Bills of Entry and the same is covered under Section 154 of the Customs Act, 1962. Accordingly, the assessments need not to be challenged in these appeals and are to be corrected under Sec.154 ibid while dealing with the refund claim under Section 27 ibid as held by the Hon'ble Punjab & Haryana High Court in the case of Bansal Alloys and Metals Ltd. (supra)."

9.1 *Per contra*, Learned Representative for the Revenue has seriously contended that there was no clerical or arithmetical error in the assessment and therefore, the order of the Deputy Commissioner was correct. She would also submit that the assessment had reached finality, but however, after a lapse of almost two years from the date of the impugned shipping bills, the exporter had requested for rectification and recalculation of the export Duty, by which time the time-limit for filing refund claim under Section 27 or an appeal under Section 128 ibid. had already expired; that therefore, the appellant's rectification application was an afterthought.

9.2 When the appellant filed its first request for finalization of the shipping bills, which was acknowledged as having been received on 27.05.2009, the Revenue assumed a grave silence, which prompted the appellant to make repeated requests vide letters dated 04.10.2009, 10.03.2010 and 24.03.2010. There is also no rebuttal by the Revenue insofar as the contention of the appellant that the final report was not made available to it and had it been communicated, perhaps the appellant would have requested for re-assessment in time. But however, the requirement of law is that a provisional assessment, if treated as such, shall be treated as provisional for all practical purposes. Section 18 of the Customs Act, 1962 lays down the provisional assessment of Duty; sub-section (4) incorporates the refund, if any, to be granted, within three months from the date of assessment of Duty finally and sub-section (5) refers to unjust enrichment, which is not the case here since the Revenue has never alleged about unjust enrichment.

9.3 From the above, it is clear that the statute mandates the passing of the final assessment since a provisional assessment will have to be taken to its logical conclusion, by passing a final assessment order after obtaining necessary information or any report or any other document that the Officer may require, as prescribed under Section 18(1) ibid. It is also for the reason that a provisional assessment is in the nature of an interim order, which is not enforceable. Otherwise, granting of time as in Section 18(4) becomes otiose. Other than this, law does not recognize any deeming fiction to treat a provisional assessment as the final one. Hence, a provisional assessment will always remain as a provisional one.

10. In view of the above discussions and in the light of the order of the Mumbai Bench of the Tribunal (*supra*), we

are of the view that the authorities below have erred in collecting the Duty at Rs.300/- per M.T., which is clearly illegal and in violation of Notification No. 62/2007-Cus. ibid.; and secondly, the order of the Deputy Commissioner of Customs, which is treated as the Order-in-Original is clearly a non-speaking order and the same cannot be sustained. The collection of Duty, therefore, is clearly without the authority of law. Consequently, the impugned order, which has sustained the non-speaking order of the Deputy Commissioner, cannot also be sustained.

11. Consequently, the impugned order is set aside; appeal is allowed by way of remand to the Original Authority with a direction to pass a speaking order, finalizing the assessments. It is also directed that relief as per Notification No. 62/2007-Cus. dated 03.05.2007 be given taking into account the test reports; Needless to reiterate that consequential benefits, if any, be given to the appellant, as per law.

(Order pronounced in the open court on **14.02.2022**)

(P. ANJANI KUMAR)
TECHNICAL MEMBER

(P. DINESHA)
JUDICIAL MEMBER

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