IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
SOUTH ZONAL BENCH AT CHENNAI

Application No.: C/Misc/40481/2018 for C/ROA/40280/2018
Appeal No.: C/00373/2008

(Arising out of Order-in-Appeal No. 09/2008 dated 28.08.2008 passed by the Commissioner of Customs & Central Excise (Appeals), Tiruchirappalli)

M/s. Interfit India Ltd. : Appellant

Vs.

Commissioner of Customs & Central Excise, Tiruchirappalli : Respondent

Appearance:-

Shri. M. Rajendran, Advocate
for the Appellant

Shri. A. Cletus, ADC (AR)
for the Respondent

CORAM:

Hon'ble Hon'ble Ms. Sulekha Beevi C.S., Member (Judicial)
Hon'ble Shri Madhu Mohan Damodhar, Member (Technical)

Date of Hearing:**29.06.2018**

Date of Pronouncement:25.07.2018

Final Order No. 42120 / 2018

Per Bench,

The above miscellaneous application has been filed by the appellant for amending ROA application filed by them seeking to restore the appeal.

1. The above appeal was disposed on 11.10.2017 for non-prosecution and on monetary limits. Thereafter, the appellant filed an ROA application No. 41207/2017 for restoring the appeal. The same was also dismissed on 19.12.2017 for non-prosecution. Thereafter, the present ROA application has been filed for restoration of the application that has been dismissed for default.

2. The Ld. Counsel Shri. M. Rajendran appearing for the appellant submitted that the appellant did not receive any hearing notice from the Registry and, therefore, neither the appellant nor the counsel could appear and argue the matter. This resulted in non-appearance of the counsel on 19.12.2017 when the ROA was posted for hearing. He prayed that a lenient view may be taken in the matter as it was not due to any wilful default on the part of the appellant or the counsel.

3. The Ld. AR, Shri. A. Cletus appearing on behalf of the Department, opposed the application. He submitted that the appeal had come up for hearing on several dates and adjourned on request of appellant. Thereafter on 11.10.2018, the appeal was dismissed for non-prosecution and on monetary limits as the amount involved is

only Rs. 98, 560/-. He, therefore, argued that there is no sufficient ground for restoring the appeal.

4. After hearing the submissions made by both the sides and also taking into consideration the arguments of the Ld. Counsel that neither the appellant nor the counsel had received any notice with regard to the hearing notice of the ROA application, we are of the considered opinion that the appellant deserves a chance to contest the case on merits. Hence, the **ROA application is allowed** and the appeal is restored to file.

5. On the very same day, both sides were heard on merits of the case also.

6. The Ld. Counsel appearing for appellant submitted that the appellant had filed Bills of Entry dt. 13.07.2006, 17.07.2006 and 19.07.2006 for the clearance of import consignments utilizing licence under Notification No. 53/2003 dt. 01.04.2003. The appellant had to pay Special Additional Duty (SAD) at the rate of 4% and these were paid by debiting from the DFCE scrips. Department was of the opinion that the said amount of Rs. 98,560/- which is the Special Additional Duty, has to be paid in cash and cannot be paid by debiting the DFCE scrips. Hence, Show Cause Notice dt. 05.12.2006

was issued demanding SAD of Rs. 98.560/-. After due process of law, the Original Authority confirmed the duty demand along with applicable interest. In appeal, the Commissioner (Appeals) upheld the same. Hence, the appellants have filed the present appeal.

7.1 He submitted that the adjudicating authority failed to appreciate the scope of Notification No. 53/2003-Cus. dt. 01.04.2003 and ought to have considered that only in cases where assessment was complete, the question of invoking Section 28(1) of the Customs Act, 1962 would arise for recovery of short payment of duty. The Hon'ble Supreme court in ***Priya Blue Industries Ltd. Vs. Commissioner – 2004 (172) E.L.T. 145 (S.C.)*** has held that once a Bill of Entry was assessed, the only remedy to disturb the assessment would be to file an appeal. The Department, after assessment, has not filed an appeal and, therefore, the demand issued under Section 28(1) alleging short payment of duty cannot sustain.

7.2 It is also argued by him that there is, in effect, no short payment of duty as the duty was paid by debiting in DFCE scrip. The appellant instead of paying the duty in cash, has paid it through debiting the DFCE scrip. Only the method of collecting the SAD is erroneous and for this reason, there cannot be an allegation of short payment of duty. The appellant, having paid the duty by debiting in DFCE scrips, if asked to pay again, would be double payment of duty. He, therefore, prayed to set aside the duty demand.

8. The Ld. AR Shri. A. Cletus submitted that as per Notification 53/2003, only the basic Customs Duty and CVD could be debited from DFCE scrips. The 4% SAD cannot be debited in scrips and the appellant ought to have paid it in cash. Instead, the appellant has paid the duty by debiting in the scrips. The said payment is, in effect, non-payment of duty and therefore, the demand raised under Section 28(1) is legal and proper. The appellant is liable to pay the short paid duty.

9.1 Both sides have argued on merits with regard to the issue of payment of SAD as per Notification 53/2003. The appellant cannot seek payment of SAD by debiting in the scrips. Instead, the same ought to have been paid in cash. The basic Custom Duty and CVD could be paid by debiting in the DFCE scrips. The allegation of the Department is that since the appellants have not paid it by cash, there is short payment of duty. We are not able to accept this contention of the Department fully. Once the duty has been paid by debiting in the same, the appellant has suffered duty. Only the manner of payment of duty is not in accordance with law. If the appellant had been put to notice while debiting in the DFCE scrips, he would have opted to pay the SAD by cash itself. Instead, after a period of almost four months, the Show Cause Notice has been issued alleging short payment of duty.

9.2 In the peculiar facts of the case, we are of the considered opinion that there is only error in the manner of payment of duty. For this reason, the appellant cannot be called upon to pay duty for the second time. Taking into consideration the peculiar facts as well as the amount involved, we are of the considered opinion that the demand cannot sustain and requires to be set aside, which we hereby do. The impugned order is set aside.

10. Miscellaneous Application for restoration of ROA is allowed. The appeal is allowed with consequential reliefs, if any.

(Pronounced in open court on **25.07.2018**)

(Madhu Mohan Damodhar)
Member (Technical)

(Sulekha Beevi C.S.)
Member (Judicial)

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