CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
SOUTH ZONAL BENCH
CHENNAI

Appeal No.C/40009/2016

[Arising out of Order-in-Appeal C.Cus.II No.747 / 2015 dt. 30.08.2015 passed by Commissioner of Customs (Appeals-II), Chennai]

Elastrex Polymers Pvt.Ltd.	Appellant
Versus	
Commissioner of Customs, Chennai	Respondent

Appearance :

Shri T.M. Subramanian, Advocate
For the Appellant

Shri B. Balamurugan, AC (AR)
For the Respondent

CORAM :

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

Date of hearing / decision : 25.10.2018

FINAL ORDER No. 42995 / 2018

Per Bench

The facts of the case are that appellants had filed Bill of Entry dt. 13.03.2014 for clearance of goods declared as "EVA ESi8002" and the same was assessed to duty under CTH 39013000 with Basic Customs Duty @ 7.5% and CVD @ 12% with applicable other duties. Subsequently, it was noticed by the appellants that they were entitled to Nil rate of Basic Customs Duty for the said goods vide Notification No.54/2013 dt. 31.12.2013. Accordingly, appellants filed a refund claim for Rs.1,86,787/- which was rejected by the original authority vide order dt. 18.3.2015 on the grounds that appellants had not challenged the assessment and that unless original order is challenged or modified, the claim for refund does not arise. In appeal, Commissioner (Appeals) vide impugned order dt. 30.08.2015 has addressed the appellant's submissions that the Bill of Entry was assessed extending Notification No.152/2009-Cus. dt. 31.12.2009 which was not in force at the time of assessment. Lower appellate authority however took the view that the notification in force, namely No.54/2013-Cus. dt. 31.12.2013 is meant for import from Republic of Korea under PTA between India and Korea Rules, 2009; that Bill of Entry was assessed by extending Notification No.12/2012 Sl.No.231 which is a general exemption and not under Notification No.152/2009-Cus. as stated by the appellant. Lower appellate authority was of the opinion that the Notification No.54/2013-Cus. claimed by the appellant is a conditional one and the verification of Country of Origin (COO) has to be done physically with respect to the goods; however as the goods have been cleared, the compliance of condition of notification cannot be verified at this stage. Based on these grounds, lower appellate authority upheld the order of original authority. Hence this appeal.

2. Today when the matter came up for hearing, on behalf of the appellants, Ld. Advocate Shri T.M. Subramanian made oral and written submissions which can be broadly summarized as under :

(i) Challenge to assessment is not required in the context of amendment to Section 27 (1) of the Customs Act, 1962 made in April 2011. The details are as under :-

Section 27 (1) prior to amendment to Customs Act, 1962 in April 2011	Section 27 (1) AFTER amendment of Customs Act, 1962.
Section 27 : Claim for refund of duty : (1) Any person claiming refund of any duty and interest, if any, paid on such duty : (i) paid by him in pursuance of an order of assessment; or (ii) borne by him may make an application for refund of such duty and interest, if any, paid on such duty to the Assistant Commissioner of Customs or Deputy Commissioner of Customs………	Section 27: Claim for refund of duty : (1) Any person claiming refund of any duty and interest, if any, paid on such duty : (i) paid by him; or (ii) borne by him may make an application for refund of such duty and interest, if any, paid on such duty to the Assistant Commissioner of Customs or Deputy Commissioner of Customs………

The Order-in-Original rejecting the refund claim has relied on the case law of *Priya Blue Industries Vs CC (Prev.)* [2004 (172) ELT 145 (SC)] which was decided on 17.9.2004; i.e. before Section 27 was amended. In the said case, there was no assessment order as duty was paid under protest which implies there was a dispute. In the appellant's case, there is no dispute and duty was paid under mistake. By processing the refund claim, there is no review of an adjudication order, as no dispute was adjudicated at the time of payment of duty. In this connection, reliance is placed on the following case laws :-

(1) 2014 (313) ELT 72 (Tri. Chennai) – Algendran Exports Pvt. Ltd. Vs. CC, Chennai

(2) 2017(352)ELT 245 (Tri. Bang. DB) BEL Ltd. Vs. CC, Bangalore

(3) 2010(250) ELT 30 (Del) Aman Medical Products Ltd. Vs. CC, Delhi.

(4) Chapter 14 of CBEC Customs Manual – It does not stipulate the condition that assessment is to be challenged before refund claim is filed. CBEC circulars are binding on the Revenue.

(ii) Customs duty was paid after availing concessional basic duty of 7.5% under exemption notification No.12/2012 instead of availing full exemption of basis duty under Notification No.54/2013 available for the import in question under Bill of Entry No.4887143 dt.13.3.2014. This is clerical error and can be rectified by the Department under Section 154 of the Customs Act, 1962. In this connection, reliance is placed on case law 2011 (271) ELT 394 (Tri.Del.) – *CC Faridabad Vs. Maharani Paints*. Further, change in the notification number, which is a legal question, can be raised at the appeal stage as held in the case of following case laws"-

(1) 1993 (67) ELT 599 (Tri-Delhi DB) Simla Agencies Vs. CC

(2) 1987 (30) (ELT) 963 TRI. Delhi) Food Corporation Vs. CC, Bombay.

(3) 1983 (13) ELT 1566 (SC) Dunlop India and Madras Rubber Factory Vs. Union of India & Others)

(iii) The Country of Origin Certificate was submitted at the time of customs clearance of the consignment. This Certificate is in the prescribed format issued by the Korean Chamber of Commerce. The said certificate copy is at page 133 of the Appeal Memorandum. The country of origin is noted in the Bill of Entry. The Appellant has been clearing goods with full exemption of basic duty for such imports from Korea with same type of Country of Origin Certificate.

3. On the other hand, on behalf of the department, Ld. A.R Shri B. Balamurugan supports the impugned order and reiterated the view taken by the lower appellate authority that verification has to be done physically with respect to the goods.

4.1 Heard both sides and have gone through the facts.

4.2 We find merit in the argument of the Ld. Advocate that the ratio laid down in *Priya Blue Industries* (supra) will not apply to the amended provisions of Section 27 (1) of the Customs Act, 1962. The case laws submitted by Ld. Advocate also support his arguments. In the event, we are of the considered opinion that in appellants need not have challenged the assessment to enable them to file the refund claim.

4.3 A perusal of the Certificate of Origin filed by the appellants in page 133 of the appeal book clearly certifies that the goods were produced in the Republic of Korea and they comply with the origin requirements specified for these goods in the Korea - India Comprehensive Economic Partnership Agreement. It is also noticed that the said Country of Origin has been issued on 24.02.2014 by the Director, Korea Chamber of Commerce & Industry. Further the goods have been loaded at Inchon Port as per Bill of Lading dt. 20.02.2014.

4.4 Viewed in this context, we find it proper in the interests of justice to remand the matter back to the original authority to re-examine the issue only from the aspect of whether documents and certificates submitted by the appellants are adequate to satisfy that the imported goods were indeed originating from the Republic of Korea and therefore qualifying for exemption benefit under Notification No.54/2013-Cus. If this aspect is satisfied from the documents the said authority shall thereafter decide the refund claim as per provisions of Section 27 of the Customs Act, 1962.

Appeal allowed by remand on above terms.

(operative part of the order pronounced in court)

(Madhu Mohan Damodhar)	**(Sulekha Beevi, C.S)**
Member (Technical)	**Member (Judicial)**

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