IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
CHENNAI

REGIONAL BENCH – COURT NO. I

Customs Appeal No. 41713 of 2013

(Arising out of Order-in-Appeal No. 28/2013 dated 30.04.2013 passed by the Commissioner of Customs & Central Excise (Appeals), No. 1, Williams Road, Cantonment, Tiruchirappalli – 620 001)

The Commissioner of Customs **: Appellant**
Custom House, New Harbour Estate,
Tuticorin – 628 004

VERSUS

M/s. Tamil Nadu Generation & Distribution Corporation Limited **: Respondent**
2nd Floor, NPKRR Maaligai,
No. 144, Anna Salai,
Chennai – 600 002

APPEARANCE:

Shri S. Balakumar, Assistant Commissioner for the Appellant

Shri R.R. Padmanabhan, Consultant for the Respondent

CORAM:

HON'BLE MR. P. DINESHA, MEMBER (JUDICIAL)
HON'BLE MR. VASA SESHAGIRI RAO, MEMBER (TECHNICAL)

FINAL ORDER NO. 40498 / 2023

DATE OF HEARING: 26.05.2023

DATE OF DECISION: 28.06.2023

Order : [Per Hon'ble Mr. P. Dinesha]

Brief undisputed facts that emerge from perusal of the orders of lower authorities are that the assessee filed seven refund claims for refund of Customs Duty paid in respect of import of 'non-coking coal in bulk' imported under seven Bills-of-Entry. According to the assessee, the refund of Customs Duty paid for the above import arose since the assessable value was worked out by adding 2% of CIF value on high seal sales load at the time of assessment of import of goods, which the assessee wanted

to be re-assessed by adding Rs.33/- per M.T., apparently paid to the supplier viz. M/s. MMTC Ltd. as trade margin, to the assessable value.

2. It appears from the record that seven Show Cause Notices came to be issued, but which are not placed on record or along with the appeal memorandum, proposing *inter alia* to reject the refund claims of Rs.45,45,970/-. It also appears that the respondent herein filed a common reply justifying its claim for refund, which was thereafter considered in adjudication.

3. It appears that the adjudicating authority, entertaining a belief that the claims of the assessee were not in order and that the assessee did not produce any documentary evidence to prove that their claim was not hit by unjust enrichment as enshrined under proviso to Section 27(2) of the Customs Act, 1962, after considering the reply filed by the assessee, vide Order-in-Original dated 31.12.2012, rejected all the assessee's claims, as proposed in the Show Cause Notices.

4.1 It appears that the assessee preferred an appeal before the first appellate authority against the rejection of its refund claims and the first appellate authority, vide impugned Order-in-Appeal No. 28/2013 dated 30.04.2013 has allowed the appeal of the assessee-appellant before him, thereby setting aside the rejection order of the adjudicating authority.

4.2 The learned first appellate authority has, in the impugned Order-in-Appeal, observed that: -

- The appellant had produced relevant purchase order / invoice showing payment of high sea sales commission charges at Rs.33/- per M.T.

- The above was not considered by the adjudicating authority.

- Reference is made to Board Circular No. 32/2004-Cus. dated 11.05.2004 which *inter alia* clarified that the adjudicating authority has no choice but to adopt the high sea sales commission / trade margin.

- Reference was also made to the Instructions in C.B.E.C. Manual on refunds, which was not considered by the adjudicating authority.

- The adjudicating authority has also not given any finding nor has he considered the provisions of Rule 10(3) and Rule 10(4) of the Customs Valuation Rules, 2007.

4.3 With the above observations, the learned first appellate authority has given a finding that the assessee was eligible for refund based on the duty paid on the assessable value plus Rs.33/- per M.T. by them as trade margin, but however, with respect to unjust enrichment, he has directed the assessee to produce all relevant documents before the lower authority to prove that the incidence of duty was not passed on to the buyers.

5. Aggrieved by the above, the Revenue has filed the present appeal on the following grounds: -

(i) The finding of the first appellate authority on Rule 10(3) and Rule 10(4) *ibid.*, is not applicable for an order under Section 17 of the Customs Act, 1962.

(ii) The importer should have filed appeal against the said order passed under Section 17 of the Customs Act.

(iii) The importer should have brought to the notice of the adjudicating authority the provision of Rule 10(3) and Rule 10(4) *ibid.*, the Board Circular

No. 32/2004-Cus. dated 11.05.2004 and also other case-law.

(iv) The addition of 2% to the assessable value is not in terms with the Board Circular No. 32/2004 and it is a voluntary act of the importer who added 2% notional value.

(v) There is no evidence placed on record by the importer as to any amendment in any of the Bills-of-Entry.

(vi) The importer did not pay the duty under protest nor were the impugned Bills-of-Entry assessed provisionally and since there was no contest from the importer in the particular assessment, the same is not an adverse order and consequently, the refund claims are contrary to an order which had attained finality.

(vii) Reference is drawn to Board Circular No. 24/2004-Cus. dated 18.03.2004 wherein the Board has clarified that when there was no challenge to the assessment order, any refund claim was not maintainable.

(viii) Reliance is placed on the following decisions:-

a. *ITC Ltd. v. Commissioner of Central Excise, Kolkata-IV [2019 (368) E.L.T. 216 (S.C.)]*

b. *Commissioner of Central Excise v. Flock (India) Pvt. Ltd. [2000 (6) SC 650]*

c. *Priya Blue Industries v. Commissioner of Customs (Preventive) [2004 (172) E.L.T. 145 (S.C.)]*

d. *Commissioner of Central Excise, Meerut v. B.H.E.L. [2004 (163) E.L.T. 100 (Tri. – Del.)]*

e. *Industrial House v. Commissioner of Customs, New Delhi [2008 (227) E.L.T. 539 (Tri. – Del.)]*

6. Shri S. Balakumar, learned Assistant Commissioner appearing for the appellant, reiterated the above grounds preferred by the Revenue.

7. *Per contra*, Shri R.R. Padmanabhan, learned Consultant, appeared for the assessee-respondent and supported the findings of the learned first appellate authority.

8. We have considered the rival contentions and we have perused the orders of the lower authorities.

9. After hearing both sides, we find that the only issue that arises for our consideration is: whether the order of the first appellate authority in holding that the assessee/appellant therein was eligible for refund, is correct in law?

10.1 The first appellate authority has held that the appellant had produced relevant purchase order and invoice, showing high sea sales commission charges of Rs.33/- per M.T. which was not considered by the adjudicating authority. In the adjudication order, however, the following observations were made by the authority, after verifying documents submitted by the importer: -

a) Import cargo was assessed to import duty based on the price as per the formula set forth in the purchase order dated 24.02.2011 and purchase order dated 25.09.2010.

b) In the purchase order, it has been enumerated as to how the weighment quantity for assessment purpose to be followed, i.e., by adding bonus point for gross calorific value / ash content, etc., at clause 8.1.

c) The weighment quantity declared as per the draft survey report (ADB) and C&F price payable, as per clause 2.1, based on the certificate of sampling

analysis report, were considered for assessment purposes.

d) The cargo was self-assessed by adding 2% HSS commission to the CIF price which was approved as per Board's Circular No. 32/2004-Cus. dated 11.05.2004.

e) The duty as per the self-assessment in respect of the Bills-of-Entry involved was accepted by M/s. TNEB and the same was also paid. The same has become final.

10.2 The trade margin of Rs.33/- per M.T. paid by the appellant to M/s. MMTC is claimed to be in terms of agreement at clause 2.1 of the purchase orders dated 24.02.2011 and 25.09.2010. In terms of the purchase orders, the adjudicating authority had observed that the value depended on two factors, namely, quantity and price adjusted as per load port test results, and that the documents furnished by them were sufficient to prove the transaction value; that the levy of 2% on assessable value was not as per the Board's Circular (*supra*); the amount of excess duty paid on account of inclusion of 2% on CIF as HSS charges in the assessable value instead of Rs.33/- per MT, was to be refunded.

10.3 The adjudicating authority observes that the importer did not file any documents in support of their claim that the burden / incidence of duty was not passed on to the ultimate consumers within the meaning of Section 27(2) of the Customs Act, 1962. It is the claim of the importer that the assessable value of the cargo was arrived at by adding 2% HSS load to the CIF price at the time of self-assessment instead of adding the trade margin of Rs.33/- per M.T. to the CIF value.

10.4 With regard to the quantity of import cargo, it was found by the adjudicating authority that there was variation between that declared in the Bills-of-Lading

vis-à-vis Bills-of-Entry and thus the importer failed in the first test.

10.5 Further, he has observed that the cargo was assessed to import duty based on the price as per the formula set forth in the purchase orders and in the purchase orders, it was mentioned as to how the weighment quantity for assessment purpose was to be followed.

11.1 There is no dispute that the HSS agreement entered into was based on the purchase orders, the weighment quantity declared as per their own draft survey report (ADB) and the C&F price payable, as per clause 2.1, based on the certificate of sampling analysis report, were considered for assessment purposes. It is only thereafter that the self-assessed Customs Duty by adding 2% HSS commission was accepted. With regard to the trade margin of Rs.33 per M.T., the importer had not demonstrated as to how the margin of profit of Rs.33/- per M.T. was arrived at, anywhere in the documents furnished by it.

11.2 The importer's claim as to the Bill-of-Lading quantity to be adopted for assessment is contradictory to the conditions set forth in the purchase order, which is mutually agreed upon between the parties, specifically at clause 3.5 of the purchase order as pointed out by the adjudicating authority and this fact has not been controverted by the assessee. If the claim of the importer is to be accepted then the survey report based on ADB quantity is farce, which is again declared by the importer himself. Moreover, the Board Circular mandates that high sea sale contract price paid by the last buyer is required to be established with supporting documents whereas no such documentary evidences were submitted to prove the trade margin of Rs.33/- per M.T. and therefore, the claim of the importer is clearly contrary to the instruction of the Board Circular.

11.3 Assessable value adopted by the claimant-importer by including 2% HSS load and duty calculated by them was accepted by the proper officer and the duty so arrived at was also paid by M/s. TNEB without any protest, but however, the fact that remains to be ascertained is whether the incidence of duty has been passed on to the ultimate consumer.

11.4 Value addition, if any, as prescribed under Rule 10 of the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007, could always be a point of dispute since a claim for such addition by an importer needs to be supported by documentary evidence, to the satisfaction of the adjudicating authority. Further, as we have analysed in the above paragraphs, the satisfaction of the assessing officer / adjudicating authority is paramount since he is the proper officer under the statute who is to be satisfied in the first place as to such claims by an importer. Hence, we are of the clear view that these aspects could only be considered during adjudication proceedings and not in any other proceedings.

12. Further, we find that the importer is claiming refund, thereby indirectly challenging the assessment order, which is contrary to the law laid down by the Hon'ble Supreme Court in the case of *Flock (India) Pvt. Ltd. (supra)* and *Priya Blue Industries (supra).*

13.1 It is the settled position of law that the right to appeal is available to an assessee as well as the Department, even against self-assessment; until and unless the "self-assessment" is modified and the duty thereafter is re-determined, no application would lie for refund of any duty from such self-assessment since the refund authority cannot assume the role of an adjudicating / assessing authority. This is because the scope of refund is limited as against the scope of adjudication proceedings and hence, the authority considering any refund application cannot revisit the adjudication proceedings for

which he has no jurisdiction. This is also in view of separate statutory provisions being provided for, for both refund as well as adjudication proceedings.

13.2 The Hon'ble Supreme Court in the case of *M/s. ITC Ltd. (supra)* has held that even an order of self-assessment is an order against which an appeal would lie, provisions of Section 27 cannot be invoked in the absence of amendment or modification having been made in the bill-of-entry and that refund proceedings are in the nature of execution for refunding amount. In this regard, the following paragraphs are relevant: -

> *"43. As the order of self-assessment is nonetheless an assessment order passed under the Act, obviously it would be appealable by any person aggrieved thereby. The expression 'Any person' is of wider amplitude. The revenue, as well as assessee, can also prefer an appeal aggrieved by an order of assessment. It is not only the order of re-assessment which is appealable but the provisions of Section 128 make appealable any decision or order under the Act including that of self-assessment. The order of self-assessment is an order of assessment as per Section 2(2), as such, it is appealable in case any person is aggrieved by it. There is a specific provision made in Section 17 to pass a reasoned/speaking order in the situation in case on verification, self-assessment is not found to be satisfactory, an order of re-assessment has to be passed under Section 17(4). Section 128 has not provided for an appeal against a speaking order but against "any order" which is of wide amplitude. The reasoning employed by the High Court is that since there is no lis, no speaking order is passed, as such an appeal would not lie, is not sustainable in law, is contrary to what has been held by this Court in Escorts (supra).*
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> *44. The provisions under Section 27 cannot be invoked in the absence of amendment or modification having been made in the bill of entry on the basis of which self-assessment has been made. In other words, the order of self-assessment is required to be followed unless modified before the claim for refund is entertained under Section 27. The refund proceedings are in the nature of execution for refunding amount. It is not assessment or re-assessment proceedings at all. Apart from that, there are other conditions which are to be satisfied for claiming exemption, as provided in the exemption notification. Existence of those exigencies is also to be proved which cannot be adjudicated within the scope of provisions as to refund. While processing a refund application, re-assessment is not permitted nor conditions of exemption can be adjudicated. Re-assessment is permitted only under Section 17(3)(4) and (5) of the amended provisions. Similar was the position prior to the amendment. It will virtually amount to an order of assessment or re-assessment in case the Assistant*

Commissioner or Deputy Commissioner of Customs while dealing with refund application is permitted to adjudicate upon the entire issue which cannot be done in the ken of the refund provisions under Section 27. In Hero Cycles Ltd. v. Union of India - 2009 (240) E.L.T. 490 (Bom.) though the High Court interfered to direct the entertainment of refund application of the duty paid under the mistake of law. However, it was observed that amendment to the original order of assessment is necessary as the relief for a refund of claim is not available as held by this Court in Priya Blue Industries Ltd. (supra).

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47. When we consider the overall effect of the provisions prior to amendment and post-amendment under Finance Act, 2011, we are of the opinion that the claim for refund cannot be entertained unless the order of assessment or self-assessment is modified in accordance with law by taking recourse to the appropriate proceedings and it would not be within the ken of Section 27 to set aside the order of self-assessment and reassess the duty for making refund; and in case any person is aggrieved by any order which would include self-assessment, he has to get the order modified under Section 128 or under other relevant provisions of the Act."

13.3 In the case on hand, we find that the refund application is clearly not maintainable by applying the *ratio decidendi* in *M/s. ITC Ltd. (supra).*

14. In view of the above, we find that the direction of the first appellate authority to issue refund is clearly unsustainable and hence, we set aside the same.

15. Resultantly, the appeal of the Revenue stands allowed and the order of the original authority is restored.

(Order pronounced in the open court on **28.06.2023**)

Sd/-
(VASA SESHAGIRI RAO)
MEMBER (TECHNICAL)

Sd/-
(P. DINESHA)
MEMBER (JUDICIAL)

Sdd