IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
CHENNAI

REGIONAL BENCH – COURT NO. III

Customs Appeal No. 41718 of 2013

AND

Customs Appeal No. 41719 of 2013

(Arising out of Order-in-Appeal C.Cus. No. 730 & 731 /2013 dated 16.05.2013 passed by the Commissioner of Customs (Appeals), No. 60, Rajaji Salai, Custom House, Chennai – 600 001)

Commissioner of Customs **: Appellant**
Export Commissionerate,
No. 60, Rajaji Salai, Custom House, Chennai – 600 001

VERSUS

M/s. Vriksh Transworld Holding Limited **: Respondent**
No. 585/3, 1st Floor, T.H. Road,
Old Washermanpet, Chennai – 600 021

APPEARANCE:

Shri Harendra Singh Pal, Assistant Commissioner for the Appellant

None for the Respondent

CORAM:

HON'BLE MR. M. AJIT KUMAR, MEMBER (TECHNICAL)

FINAL ORDER NOs. 40858-40859 / 2023

DATE OF HEARING: 29.09.2023

DATE OF DECISION: 04.10.2023

Order :

These appeals have been filed by the Revenue against the Order-in-Appeal C.Cus. No. 730 & 731 /2013 dated 16.05.2013 (impugned orders) passed by the Commissioner of Customs (Appeals), No. 60, Rajaji Salai, Custom House, Chennai – 600 001.

2. Brief facts of the case are that the M/s. Vriksh Transworld Holding Limited, Chennai had filed five refund claims totally amounting to Rs.28,66,920/- being the amount paid towards 4% SAD against the import of various furniture vide 8 Bills of Entry under Notification No. 102/2007-Cus. dated 14.09.2007, as amended by Notification No. 93/2008 dated 01.08.2008. The details of the said claims are as under: -

Sl. No.	**Date of filing of claim**	**Amount (in Rs.)**
1.	08.03.2010	69,190/-
2.	29.04.2010	1,19,892/-
3.	03.05.2010	98,410/-
4.	31.05.2010	12,95,714/-
5.	28.06.2010	12,83,714/-
TOTAL		28,66,920/-

3.1 Out of the above five claims, the first four claims totally amounting to Rs.15,83,206/- was sanctioned vide Order-in-Original No. 12619/2010 dated 16.07.2010 and the fifth claim amounting to Rs.12,83,714/- was sanctioned vide Order-in-Original No. 12761/2010 dated 30.08.2010.

3.2 These two orders were reviewed by the Commissioner vide Review Order No. 334/2010 dated 15.11.2010 and Review Order No. 353/2010 dated 01.12.2010 on the ground that the copy of two invoices received from buyers obtained in the process of random verification, did not contain the declaration to the effect that "no credit of the additional duty of Customs levied under sub-section (5) of section 3 of the Customs Tariff Act, 1975 shall be admissible" as stipulated under condition 2(b) of Notification No. 102/2007-Cus. The other ground was that there is no finding in the Order-in-Original to the effect that the goods imported tally with the goods sold.

4. Based on the above, appeals were filed by the Department before the Commissioner of Customs (Appeals), Chennai, who vide order impugned herein has directed the Department to review the issue on the ground that the Reviewing Authority should have resorted to verification of all the invoices at the buyer's end before coming to a conclusion and held that the finding by the Reviewing Authority that there is no finding in the Order-in-Original to the effect that 'the imported goods tally with the goods sold', is a general observation and no specific discrepancy has been pointed out. Aggrieved by such order, the Revenue has filed the present appeals before this forum.

5. Shri Harendra Singh Pal, Ld. Authorized Representative (Assistant Commissioner) appeared for the appellant Revenue. The respondent was not represented, either in person or by counsel. However, since several adjournments had already been granted on the ground of non-appearance of respondent, the matter has been taken up for disposal on merits after hearing the Ld. Departmental Representative.

6. The Ld. AR stated that the Commissioner (Appeals) erred in directing the Department to review the issue once again and file fresh appeal within one month from the date of receipt of the order. The same is without the sanction of law as there is no provision for such directions under the Customs Act, 1962. The

direction of the Commissioner (Appeals) is contrary to the Board's Instruction in F.No. 275/34/2006-CX.8A dated 25.07.2008 wherein the Commissioner (Appeals) was directed to resort to enquiry in such appeals as may be necessary in the facts and circumstances of the case before passing a just and fair order in accordance with the provisions of the Act. These instructions were again reiterated vide Instruction in F. No. 275/34/2006-CX.8A dated 18.02.2010. The impugned order's are also contrary to the observations of the Hon'ble Apex Court in the case of ***MIL India v. Commissioner of C.Ex., Noida*** *[2007 (210) E.L.T. 188 (S.C.)].* The Commissioner (Appeals) has hence erred in not calling for the records, examining the matter and deciding the issue by passing suitable orders confirming, modifying or annulling the decision or order appealed against, as per the powers conferred on him by the statute. He hence prayed that the impugned order's be set aside.

4.2 The respondent has not filed cross objections or a written reply against the appeal. I find that the issue involves determining the authority who has to decide on the merits of the refund claims. A question of the power to remand lies at the heart of the appeal. Delay in a decision on this issue does not help even the respondent in settling his claims. The matter can move forward on merits only when placed before the proper authority for consideration. Adjournments will only delay statutory relief. Hence the matter is decided based on the legal position that has evolved and the issues available on record, as applicable.

5. Revenue has assailed the Commissioner (Appeals) order as there is no provision for the Commissioner (Appeals) to remand a matter under

consideration to be reviewed once again and to file a fresh appeal within one month from the date of receipt of the order as per the Customs Act, 1962. The direction of the Commissioner (Appeals) in the impugned order are averred by Revenue to be also contrary to the observations of the Hon'ble Apex Court against the powers of Commissioner (Appeals) to remand a matter, in the case of 'MIL India' supra. The implications of the said Apex Court's judgment has been examined in **Instructions F.No. 275/34/2006- CX.8A dated 18-2-2010** issued by CBIC. Relevant provisions of the circular are reproduced below.

> Section 35A(3) of the Central Excise Act, 1944 / Section 128A(3) of the Customs Act, 1962 as it existed before 11.5.2001 provided that Commissioner (Appeals) shall, after making such further enquiry as may be necessary, pass such order, as he thinks just and proper, confirming, modifying or annulling decision or order appealed against or may refer the case back to the adjudicating authority with such direction as he may think fit for a fresh adjudication or decision as the case may be, after taking additional evidence, if necessary.
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> **2.** An amendment was brought out in the aforesaid sections vide Finance Act, 2001 w.e.f. 11.5.2001 deleting the phrase as mentioned in bold above with an intention to withdraw the powers to Commissioner (Appeals) to remand the cases for fresh adjudication to the original adjudication authorities. After the amendment in 2001, the said Sections read as follows:-
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>> "The Commissioner(Appeals) shall, after making such further enquiry as may be necessary, pass such order, as he thinks just and proper, confirming, modifying or annulling the decision or order appealed against."
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> . . . . .

5. The Hon'ble Supreme Court in its judgement dated 1.3.2007 in Civil Appeal No. 6988/2005 in the case of MIL India Ltd. [2007(210) ELT.188(SC)] has observed that "in fact, the power of remand by the Commissioner(Appeals) has been taken away by amending Section 35A with effect from 11.5.2001 under the Finance Bill, 2001. Under the Notes to clause 122 of the said Bill it is stated that clause 122 seeks to amend Section 35A so as to withdraw the power of the Commissioner(A) to remand matters back to the adjudicating authority for fresh consideration." The said decision of the Supreme Court was brought to the notice of CESTAT in the case of CCE, Jallandhar Vs. Hawkins Cookers Ltd. reported in 2007(8)RLT.7, but the Tribunal held that the Supreme Court in the said case had only noted the provisions of amended law whereas the specific issue whether Commissioner(A) has power to remand after amendment to provisions of Section 35A has been considered by the Hon'ble Gujarat High Court in the case of Medico Lab and the High Court has held that the Commissioner (A) has power to remand under the amended provisions also. The appeal (CEA No.29/2008) filed by the Commissioner of Central Excise, Jallandhar against the said order in the Hawkins Cookers case stating that the said observations as quoted above are part of the ratio decidendi of the decision of the Hon'ble Supreme Court , has been allowed by the Punjab & Haryana High Court vide order dated 14.7.2008 relying upon its own judgement in the case of CCE, Jallandhar Vs. B.C. Kataria [2008 (221) ELT. 508].

6. In the light of the observations of Hon'ble Supreme Court in the case of MIL India Ltd. and the judgement of Hon'ble High Court of Punjab & Haryana in the case of M/s. Enkay (India) Rubber Co. Pvt. Ltd., M/s. B.C. Kataria and M/s. Hawkins Cookers Ltd., you are requested to issue suitable instructions to the Commissioners(A) working under your jurisdiction to follow the said judgments strictly. <u>It may also be brought to their notice that Hon'ble Supreme Court in the case of MIL India Ltd., while noting that the powers of remand had been taken away, has also</u>

> categorically stated that the Commissioner (A) continues to exercise the power of adjudicating authority in the matter of assessment and the Commissioner(A) can add or subtract certain items from the order of assessment made by the adjudicating authority and the order of Commissioner (A) could also be treated as an order of assessment. Board instructions dated 25.7.2008 (copy enclosed) may be referred in this regard.
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> (emphasis added)

The legal position has been brought out in the Boards circular. As clarified by the Apex Court the Commissioner (Appeals) continues to exercise the power of adjudicating authority in the matter of assessment. Hence having original powers in matters related to assessment as per the statute, it was expected of the lower authority to examine and dispose of the matter on merits. The Commissioner (Appeals) was not vested with any powers to remand a matter under consideration with a direction for the issue to be reviewed once again and if necessary to file a fresh appeal under the Customs Act, 1962. The amendment brought out in the sections pertaining to the powers of the Commissioner (Appeals) vide Finance Act, 2001 w.e.f. 11.5.2001, is a part of a beneficial legislation to ensure that matters are disposed of quickly and must be respected. The Apex Court in **Vijay Prakash D Mehta Vs Collector of Customs** [1989 (39) E.L.T. 178 (S.C.)] held:

> "9. Right to appeal is neither an absolute right nor an ingredient of natural justice the principles of which must be followed in all judicial and quasi-judicial adjudications. The right to appeal is a statutory right and it can be circumscribed by the conditions of the grant."

Similarly, the powers of the Commissioner (Appeals) being a statutory one he cannot act in breach of the provisions under which he functions. His powers are circumscribed by the conditions of the Customs Act 1962.

6. Having regard to the discussions above the impugned orders are set aside and the issues restored back to the Commissioner (Appeals) for a de novo decision in terms of law as discussed above. The lower authority shall follow the principles of natural justice and afford a reasonable and time bound opportunity to the appellant-department and the respondent to state their case on merits both orally and in writing if they so wish, before issuing a speaking order in the matter. Both the parties should also co-operate with the Commissioner (Appeals) in completing the process expeditiously and in any case within ninety days of receipt of this order. The appeal succeeds and is disposed of accordingly.

(Order pronounced in the open court on **04.10.2023**)

Sd/-
(M. AJIT KUMAR)
MEMBER (TECHNICAL)

Sdd