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CUSTOMS. EXCISE & SERVICE TAX APPELLATE TRIBUNAL
PRINCIPAL BENCH, WEST BLOCK No.2, R.K.PURAM, NEW DELHI - 110066
CUSTOMS APPEAL BRANCH

Appeal No. C/484 /2005 Date 17/03/2008

Assistant Registrar
C.E.S.T.A.T, New Delhi

To :
COMMISSIONER OF CUSTOMS
NEW CUSTOMS HOUSE, NEAR IGI AIRPORT,
TERMINAL-II NEW DELHI
110037

COMMISSIONER OF CUSTOMS Appellant
Vs
M/S NICHOLAS PIRAMAL INDIA LTD. Respondent

I am directed to transmit herewith a certified copy of **Final order No. C/48/08 - CUSTOMS** **dated 22.02.08**

passed by the Tribunal under Section 129, (B) of the Customs Act,1962 & Financial Act 1994 relating to Service Tax

Assistant Registrar
(Customs Appeal Branch)

Copy to :

1. Respondent

M/S NICHOLAS PIRAMAL INDIA LTD.
B-6, DEEP SHIKHA BUILDING, RAJINDRA PLACE,
NEW DELHI.

2. Adv. / Consult

3. S.D.R.
4. J.C.D.R.
5. Bar association, CESTAT, New Delhi
6. M/s. Deeparchi Publications, M-93, marg. 43, saket, New
7. M/s Centax Publictions (P) Ltd., 1512-E, Bhishm Pitamah
8. Excise & Customs cases, B-37, Sector -1, NOIDA - 201301
9. R.Venkatraman Constt. 44-B, S.Suncity, Ghaziabad -
10. Nidheshak publications, I.P.Estate, new Delhi
11. Taxmann Allied Service Pvt Ltd., 21/35, West Punjabi Bagh,
12. Co, Law Institution
13. TAX INDIA, B-XI/8183,Vasant Kunj, New Delhi - 110070
14. Office Copy
15. Guard file

Asst. Registrar
(Customs Appeal Branch)

IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
West Block No.2, R.K.Puram, New Delhi-110066.
Principal Bench, New Delhi.

C/484/05-CST

[Arising out of Order-in-Appeal No.CC(A)/103/ACU/D-1/2005 dt.4.3.05 passed by the Commissioner of Customs(Appeals), New Delhi)

For approval and signature:

Hon'ble Mr. JUSTICE S.N.JHA, PRESIDENT
Hon'ble Mr. M.VEERAIYAN, MEMBER TECHNICAL

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1. Whether Press Reporters may be allowed to see: the Order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982?

2. Whether it would be released under Rule 27 of : the CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not?

3. Whether their Lordships wish to see the fair : copy of the order?

4. Whether order is to be circulated to the : Department Authorities:

Commissioner of Customs,New Delhi Appellant

Versus

M/s Nicholas Piramal India Ltd.. Respondent

Appearance

Shri A.Jain, Authorised Representative(DR) For Appellant

None For Respondent

Coram: Hon'ble Mr. Justice S.N.Jha, President
Hon'ble Mr. M.Veeraiyan, Member Technical

Final

Date of decision: 22.2.08
Order No. C/48/08

Per Justice S.N.Jha:

This appeal filed by the Revenue arises from the order of Commissioner of Customs(Appeals) dt.4.3.05 remanding the case to the lower authority for decision on merit. The lower authority i.e. the Asstt. Commissioner(Refund) had earlier rejected the refund claim of the respondent.

2. None appeared on behalf of the respondent at the time of hearing. The case of the Revenue is that assessment order not having been appealed against the respondent, refund claim was not maintainable in view of the decisions of the Supreme Court in CCE, Kanpur vs Flock(India) Pvt. Ltd. 2000(120)ELT.285 and Priya Blue Industries Ltd. vs CC(Prev.) 2004(172)ELT.145(SC) and therefore, the Commissioner committed error in remanding the case to the Asstt. Commissioner for decision on merit on the refund claim of the respondent.

3. In Flock (India) Pvt. Ltd. the Supreme Court held as under:

> "In a case where an adjudicating authority has passed an order which is appealable under the statute and the party aggrieved did not choose to exercise the statutory right of filing an appeal, it is not open to the party to question the correctness of the order of the adjudicating authority subsequently by filing a claim for refund on the ground that the adjudicating authority had committed an error in passing his order. If this position is accepted then the provisions for adjudication in the Act and the Rules, the provision for appeal in the Act and the Rules will lose their relevance and the entire exercise will be rendered redundant. This position in our view, will run counter to the

scheme of the Act and will introduce an element of uncertainty in the entire process of levy and collection of excise duty. Such a position cannot, be countenanced".

3. The issue arose for consideration in the case of Priya Blue Inds. Ltd.(supra) and it would be useful to extract the relevant paragraphs as under:

> "5. Under Section 27 of the Customs Act,1962 a claim for refund can be made by any person who had (a) paid duty in pursuance of an Order of Assessment or (b) a person who had borne the duty. It has been strenuously submitted that the words "in pursuance of an Order of Assessment" necessarily imply that a claim for refund can be made without challenging the Assessment in an Appeal. It is submitted that if the assessment is not correct, a party could file a claim for refund and the correctness of the Assessment Order can be examined whilst considering the claim for refund. It was submitted that the wording of Section 27, particularly, the provisions regarding filing of a claim for refund within the period of 1 year or 6 months also showed that a claim for refund could be made even though no Appeal had been filed against the Assessment Order. It was submitted that if a claim for refund could only be made after an Appeal was filed by the party, then the provisions regarding filing of a claim within 1 year or 6 months would become redundant as the Appeal proceedings would never be over within that period. It was submitted that in the claim for refund the party could take up the contention that the Order of Assessment was not correct and could claim refund on that basis even without filing an appeal.
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> 6. We are unable to accept this submission. Just such a contention has been negatived by this Court in Flock(India)'s case (supra). Once an Order of Assessment is passed the duty would be payable as per that order. Unless that order of assessment has been reviewed under Section 28 and/or modified in an Appeal that Order stands. So long as the Order of Assessment stands the duty would be payable as per that Order of Assessment. A refund claim is not an Appeal proceedings. The Officer considering a refund claim cannot sit in Appeal over an assessment made by a competent Officer.

The Officer considering the refund claim cannot also review an assessment order.

8. The words "in pursuance of an Order of Assessment" only indicate the party/person who can made a claim for refund. In other words, they enable a person who has paid duty in pursuance of an Order of Assessment having been modified in Appeal or reviewed a claim for refund can be maintained"

4. Ld. Commissioner placed reliance on an order of Supreme Court in Karnataka Power Corpn. Ltd. vs Commissioner of Customs(Appeals), Chennai, 2002(143)ELT.482(SC). It is evident that the order was passed in the facts of the case without laying down any principle of law much less contrary to the law laid down in the cases of Flock(India) Pvt. Ltd. and Priya Blue Inds. Ltd. Facts of the case were that epoxy coils were imported by the appellant and duty was paid classifying the goods under tariff entry 8544.11. Thereafter the appellant made an application requesting for re-classification of the goods under entry 8501.64 and re-assessment of duty accordingly. No order was passed on the said application and another application was made on 27.8.1994. On 3.1.1995, the Asstt. Commissioner declined the application. The appeal was dismissed by the Collector(Appeals). The second appeal too was dismissed by the Tribunal. The Tribunal observed that when a new classification is suggested before the appellate authority, the consequential relief flowing out of it can become time barred, and accordingly concluded the matter against the assessee. The Supreme Court took the view that the appellant had amended the claim before the Asstt. Commissioner himself, and accordingly set aside all the

orders and remitted the matter back to the Asstt Commissioner for fresh decision.

5. It is evident that the order was passed in the facts of the case and it cannot be treated as a precedent on the point that the assessee can file refund claim even though he did not challenge the assessment order. We are satisfied that the issue involved is squarely covered by the decisions of the Supreme Court in the cases of Flock(India) Ltd. and Priya Blue Inds. Ltd. and the order of the Commissioner(Appeals) therefore cannot be sustained which is accordingly set aside.

6. We may mention here that the respondent has filed cross objection. The Cross objection is dismissed while the Revenue's appeal is allowed on merit with consequential relief.

Order dictated in the open Court.

(Justice S.N.Jha)
President

(M.Veeraiyan)
Member Technical

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