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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/483 /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. WHIRLPOOL OF INDIA LTD. Respondent

I am directed to transmit herewith a certified copy of **Final order No.C/49/08-CUSTOMS dated 18.02.08**

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. WHIRLPOOL OF INDIA LTD.
   28, NIT FARIDABAD, HARYANA
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

Assistant Registrar
(Customs Appeal Branch)

CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL,
PRINCIPAL BENCH,
NEW DELHI, COURT NO.1

CUSTOMS APPEAL NO.483 OF 2005

Date of Hearing/Decision: 18.2.2008

[Arising out of Order-in-Appeal No. CC(A)/91/ACU/D-I/2005 dated 22.2.2005 passed by the Commissioner of Customs (Appeals), New Delhi]

Date of Hearing/Decision: 18.2.2008

Hon'ble Mr. Justice S.N. Jha, President
Hon'ble Mr. M. Veeraiyan, Member (Technical)

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 should 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 Departmental authorities? :

CC, New Delhi
Applicant
[Rep. by: Mr. R.K.Verma,Authorized Representative (DR)]

Versus

Whirlpool of India Ltd.
Respondent
M [Rep. by None]

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

Final **ORDER** C/49/08

The appeal by the Department is directed against the order of the Commissioner of Customs (Appeals) dated 22.2.2005 by which while setting aside the order of the Deputy Commissioner of Customs (Refund) he directed the authority to decide the refund claim of the respondent on merit. Earlier, the Deputy Commissioner had rejected the respondent's refund claim on the ground that assessment on the bill of entry had not been challenged by the respondent and the proper course of action was to file An appeal against the assessment order. In passing the said order, the Deputy Commissioner relied on the decision of Supreme Court in **CCE, Kanpur Vs. Flock India Pvt. Ltd.**, 2000(120) ELT 285(SC). The Commissioner (Appeals) noticed the said decision of the Supreme Court; however, after giving reference to some other cases, he observed as follows :-

> "Perusal of this case law indicates that the judiciary has adopted a consistent stand that a refund claim can be filed against the Assessment Order directly without necessarily having to follow the Appeal route. I find myself in complete agreement with this ratio laid down repeatedly."

2. The appeal has come up for final hearing. However, none appeared on behalf of the respondent, despite service of notice on it. After hearing the learned Departmental Representative we are satisfied that the issue is squarely covered by decisions of the Supreme Court and there being no ambiguity on the point, the appeal can be decided ex parte without issuing another notice to the respondent. The point for consideration is whether without challenging the assessment order it is open to the assessee to apply for refund. A similar issue arose in **CCE, Kanpur Vs. Flock (India) Pvt.Ltd.**, 2000 (120) ELT 285 (SC), (supra) and it was answered in the negative in these words :-

> "10.Coming to the question that is raised there is little scope for doubt that 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 the position is accepted then 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. The view taken by us also gain support from the provisions in sub-rule (3) of Rule 11 wherein it is laid down that where as a result of any order passed in appeal or revision under the Act, refund of any duty becomes due to any person, the proper officer, may refund, the amount to such person without his having to make any claim in that behalf. The provision indicates the importance attached to an order of the appellate or revision authority under the Act therefore, an order which is appealable under the Act is not

challenged then the order is not liable to be questioned and the matter is not to be reopened in proceeding for refund ,which if we may term it so is in the nature of execution of a decree/order. In the case at hand it was specifically mentioned in the order of the Assistant Collector that the assessee may file appeal against the order before the Collector (Appeals) if so advised."

3. The Supreme Court had occasion to consider the same question in **Priya Blue Industries Ltd. Vs. Commissioner of Customs (Preventive),** 2004 (172) ELT 145 (SC) wherein submissions to the contrary were repelled in these words:-

"5......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 1year 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 as not correct and could claim refund on that basis even without filing an Appeal.

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 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 proceeding. 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 make a claim for refund. In other words, they enable a person who has paid duty in pursuance of an Order of Assessment to claim refund. These words do not lead to the conclusion that without the Order of Assessment having been modified in Appeal or reviewed a claim for refund can be maintained."

4. Learned Departmental Representative submitted that a Larger Bench of this Tribunal has given similar finding relying on the said decisions of the Supreme Court and another judgments. In view of the binding precedents the Apex Court there is no escape from the conclusion that the assessee cannot apply for refund without challenging the assessment order. It was on

this ground that the Deputy Commissioner had rejected the refund claim of the respondent and the impugned order of the Commissioner(Appeals) directing the Deputy Commissioner to pass fresh order in accordance with law, can not therefore be sustained.

5. Accordingly, the appeal is allowed. The order of the Commissioner (Appeals) dated 22.2.2005 is set aside and that of the Deputy Commissioner (Refund) dated 13/14.11.2003 is restored.

[Dictated and pronounced in the open Court]

[Justice S.N. Jha]
President

[M. Veeraiyan]
Member (Technical)

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