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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/489 /2005 Date 16/04/2008

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 HERO HONDA MOTORS LTD. Respondent

I am directed to transmit herewith a certified copy of **Final order No. C/97/2008-CUS. DT. 07.04.08**

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 HERO HONDA MOTORS LTD.
37 KM STONE, DELHI JAIPUR HIGHWAY,
SECTOR-33, GURGAON – 122001.

2. Adv. / Consult MR.MOHAN LAL, ADV.
B-67,FLATTED FACTORIES COMPLEX,
OKHLA PHASE-III, N DELHI – 20.

3. S.D.R.
4. J.C.D.R.
5. Bar association, CESTAT, New Delhi
6. M/s. Deeparchi Publications, M-93, Marg. 46, Saket, New Delhi 110017
7. M/s Centax Publictions (P) Ltd., 1512-B, Bhishm Pitamah marg, Opp. ICICI Bank of Defence Colony, New Delhi -
8. Excise & Customs cases, B-37, Sector -1, NOIDA - 201301 Gautam Budh Nagar, (U.P.)
9. Raghuraman's 44-B, Regal Flat,Shipra Suncity, Indirapuram - 201010,Ghaziabad, DT, U.P.
10. Nidheshak publications, I.P.Estate, new Delhi
11. Taxmann Allied Service Pvt Ltd., 21/35, West Punjabi Bagh, New Delhi - 110026
12. Commercial Laws of India Pvt Ltd Post Bag No. 1033, No.70(Old No. 88), Thyagaraya Road, T. Nagar,Chennai 60017
13. Taxindiaonline.com Pvt.Ltd, B-XI/8183,Vasant Kunj, New Delhi - 110070
14. Office Copy
15. Guard file

Assistant Registrar
(Customs Appeal Branch)

CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL WEST BLOCK-II, R.K. PURAM, PRINCIPAL BENCH, NEW DELHI, COURT NO. I

Custom COD No. 40 of 2008 & Custom Appeal No. 489 of 2005

{Arising out of order in appeal No. CC(A)/65/ACU/D-I/2005 dated 4.2.2005 passed by the Commissioner of Customs (Appeals), New Custom House, New Delhi}.

Date of hearing/decision: 07.04.2008

For approval and signature:

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.	:	No
2. Whether it should be released under Rule 27 of the CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not?	:	Yes
3. Whether Their Lordships wish to see the fair copy of the Order?	:	Seen
4. Whether Order is to be circulated to the Departmental authorities?	:	Yes

CC, New Delhi ...Appellant
[Rep. by Mr. R.K. Verma, DR]

Versus

M/s Hero Honda Motors Limited ...Respondent
[Rep. by Mr. R.K. Tiwary, Advocate]

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

Final ORDER No C/97/08

Per: Justice S.N. Jha:

This appeal by the Revenue has come up for hearing on the point of condonation of delay. The brief facts are that the copy of the impugned order of the Commissioner (Appeals) was received in the Commissionerate on 08.02.2005. The period of limitation for filing appeal in the Tribunal being three months, the appeal could be filed by 7.5.2005. It was filed 13 days after expiry of the limitation on 20.5.2005.

2. The objection of the learned Counsel for the respondent is that the appeal could be filed alongwith condonation of delay application. In the instant case it was filed after inordinate delay only when respondent pointed out the defect. We are of the view that the fact that the condonation of delay application has been filed after filing of the appeal and there has been delay during the intervening period is not relevant. What is relevant is whether the applicant had a reasonable cause for not preferring appeal within time. In other words, the applicant is merely required to explain the delay of thirteen days, in the instant case, in filing the appeal.

3. In the condonation application it has been stated that the Department was misled by mention of the date of receipt of the copy of the order in the Commissionerate as "7.3.2005" whereas the copy was received on 8.2.2005. As per the Commissioner's instructions, accordingly, the Department was required to file appeal before 6.6.2005 (treating the date of receipt of the copy of the order as 7.3.2005). Appeal was filed on 20.5.2005. In sum, the explanation is that the delay was due to wrong mention of the date of receipt of the copy of the order. In the facts and circumstances, we are inclined to accept the plea.

4. On behalf of the respondent reliance was placed on the Larger Bench decision of the Tribunal in CCE vs. Thermit Alloys Pvt. Ltd., -1991 (56) ELT 581 (Tri.). In that case, the application for COD was not filed even after adjournment. A request was made for further adjournment which was refused and the appeal was dismissed. In the instant case, the condonation of delay application was filed within time allowed. Reliance was also placed on CCE, Bhopal Vs. Narmada Gilatine Ltd., 2005 (190) ELT 104 (Tri-Del), in which, on facts, it was held by a Single Member Bench of the Tribunal that there was no sufficient cause for not filing appeal within the period of limitation. On behalf of the Department, on the other hand, reliance was placed on a decision of Supreme Court in State of Nagaland vs. Lipok AO – 2005 (183) ELT 337 (SC) in which it was held that public interest may suffer if appeal is dismissed merely on the ground of some delay. We are of the view that the decisions relied upon on behalf of the respondent are not applicable in the instant case. We are satisfied that the delay in filing the appeal was not deliberate. The delay is accordingly condoned and the COD application is thus allowed.

Appeal No. 489 of 2005

5. After the above order was dictated Counsel for the parties stated that since the appeal has been also listed for final disposal under the heading 'Regular Matters', the appeal may be finally heard and disposed of. We, accordingly, heard the parties.

6. This appeal is directed against the order of the Commissioner (Appeals) setting aside the order of the Deputy Commissioner (Refund) dated 2.7.2003 whereby refund claim of the respondent was rejected on the ground that the respondent did not challenge the assessment by way of appeal and without doing so, the refund claim was not maintainable. In

taking this view, the Deputy Commissioner had placed reliance on Flock India [2000 (120) ELT 285 (SC)] and also a few decisions of the Tribunal. While setting aside the order, the Commissioner (Appeals) referred to the Supreme Court decision in Karnataka Power Corporation vs. Commissioner of Customs (Appeals) Chennai 2002 (143) ELT 482 (SC) and a few other decisions of the Tribunal.

7. Before adverting to the issue involved and the decisions, it may be mentioned that the appellant had imported 435 pieces of Cutting Tools kept in one packet. The item Cutting Tools figures at sl. no. 337 of Notification No. 27/03 dated 01.03.2003, but by mistake in the bill of entry, this serial number was mentioned as 281. Serial No. 281 refers to Textile Garments which is an altogether different commodity falling under Chapter 62 of the Customs Tariff as against Cutting Tools falling under Chapter 82 of the Tariff. It may also be mentioned that while Cutting Tools are leviable to the customs duty @ 25% ad valorem, on Textile Garments duty @ 25% or Rs.285/- per piece whichever is higher is leviable. Since respondent had mentioned sl. no. 281 in stead of 337 in the bill of entry, the duty liability was assessed at Rs. 1,85,606/- @ Rs. 285/- per piece, being higher than @ 25%. The case of the respondent is that had duty been worked out @25%, the duty liability would have worked out to Rs.80,606/-. In other words, excess of Rs. 1,05,000/- was charged and paid by the respondent.

8. In these facts, the respondent filed refund claim for the sum of Rs.1,05,000/- which, as indicated above, was rejected on the ground that the assessment order being appealable, no appeal having been preferred against it by the respondent, the refund claim was not maintainable.

9. In course of hearing learned Counsel for the appellant pointed out that the duty was assessed as per EDI system under which the duty liability is

determined by the computer on the basis of data generated as per the particulars mentioned in the bill of entry. It was stated that not only the goods were correctly described as Cutting Tool, the respondent had also mentioned the correct heading per the eight digit level being 82079090, the notification was also correctly mentioned as 27/2003. RITC code was also correctly mentioned. In such situation, the goods having been correctly described, and the goods being entirely different from the goods falling at sl. no. 281, merely because a wrong serial number was mentioned, the determination of duty as such resulted in excess payment. According to the Counsel, the mistake was of the nature mentioned in Section 154 of the Customs Act which ought to have been corrected in exercise of power thereunder and the order of the Deputy Commissioner (Refund) relegating the respondent to the appellate forum and rejecting the refund claim on the ground that the respondent had not preferred appeal, was not justified.

10. On behalf of the Revenue, learned DR submitted that in view of the decisions of the Apex Court in Flock India (supra) and Priya Blue Industries Ltd. Vs CC, Ahmedabad, 2004 (172) ELT 145 (SC), even where the assessment of duty was wrong, without challenging the same in appeal, the assessee is not entitled to claim refund.

11. Section 154 of the Customs Act reads as under:-

> "Section 154. Correction of clerical errors, etc – Clerical or arithmetical mistakes in any decision or order passed by the Central Government, the Board or any officer of customs under this Act, or errors arising therein from any accidental slip or omission may, at any time, be corrected by the Central Government, the Board or such officer of customs or the successor in office of such officer, as the case may be".

On a plain reading it is manifest that not only clerical or arithmetical mistake in any decision or order, but errors arising from any accidental slip or omission may, at any time, be corrected by the concerned authority. In the facts of the case, briefly noted above, we are satisfied that the mention of serial no. 281 instead of serial no. 337 was an accidental slip on the part of the respondent leading to mistake in the calculation of duty and the respondent should not be denied the benefit of the remedy under section 154. We are of the view that the decisions of Supreme Court relied upon on behalf of the Revenue can not be applied in cases covered by Section 154 of the Act and where refund is the logical consequence of correction of some clerical or accidental error under section 154, the person should not be denied the benefit merely because he did not prefer appeal against the assessment order. What benefit he is actually entitled to, as a consequence, is to be considered by the Proper Officer.

12. We, accordingly, do not find any error in the order of the Commissioner (Appeals) remanding the case to the Deputy Commissioner (Refund) and would therefore decline to interfere with the order. It is needless to say that Deputy Commissioner (Refund) will pass the appropriate order in accordance with law.

13. In the result, the appeal is dismissed.

(Pronounced & dictated in the open Court)

[Justice S.N. Jha]
President

[M. Veeraiyan]
Member [Technical]

[Pant]