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

Appeal No. C/170 /2008-SM[BR] & C/CO/ 227/ 2008-SM[BR]\ Date 26/06/2008

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

To :
C.C. (PREVENTIVE) AMRITSAR
CUSTOM HOUSE, CENTRAL REVENUE BUILDING,
THE MALL, AMRITSAR 143001.

C.C. (PREVENTIVE) AMRITSAR Appellant

Vs

M/S A.P.M.INTERNATIONAL Respondent

I am directed to transmit herewith a certified copy of **Final order No.** 1001 /2008 –SM[BR] dated 13.6.2008

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

Assistant Registrar

(SM Appeal Branch)

Copy to :

1. Respondent

   M/S A.P.M.INTERNATIONAL

   751, EKTA MARG,
   GURU GOBIND SINGH NAGAR,
   NEW SHIMLA PURI,
   LUDHIANA

2. Adv. / Consult SHRI D.S. BEDI, CO. REPRESNTATIV.
   M/S RESPONDENT;------------------------

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
(SM Appeal Branch)

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

CUSTOMS APPEAL NO. 170 OF 2008 AND CUSTOMS CROSS-OBJECTION 227 OF 2008

Date of Hearing: 13th June,2008
Date of Decision: 13th June, 2008

[Arising out of Order-in-Appeal No.157/CUS/APPL/LDH/2007 dated 6.12.2007 passed by the Commissioner (Appeals), Central Excise, Jalandhar]

Hon'ble Mr. Justice S.N. Jha, President

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(Prev.), Amritsar — Appellant
[Rep. by: Shri S. Gautam, DR]

Versus

M/s.APM International — Respondent
[Rep.by:Shri D.S. Bedi, Company Representativ]

Final **ORDER** No. 1001/08-SM(BR)

Per Justice S.N.Jha:

The Revenue is aggrieved by the order-in-original of the Assistant Commissioner of Customs, Lundhiana dated 7.10.2006 sanctioning refund of amount of Rs.3,14,724/- to the respondent and the order-in-appeal of the Commissioner (Appeals), Jallandhar upholding the said order. Commissioner. The case of the Revenue is that customs duty was paid by the respondent pursuant to assessment on the bill of entry; the order of assessment is an appealable order; and if the respondent was not satisfied, they should have challenged the order by way of appeal, without which the refund application was not maintainable. The case of the respondent is that amount of Rs.1,05,699/- only was payable as customs duty but by mistake they paid Rs.4,20,433/- which was in excess of the duty liability, and therefore, they were entitled to refund. It was submitted on behalf of the respondent that where excise duty is paid by mistake, it is not necessary to follow the appeal route, and without filing any appeal, they were entitled to refund of excess amount paid.

2. The issue is covered by the decisions of the Supreme Court in **Collector of Central Excise, Kanpur Vs. Flock (India) Pvt. Ltd.**-2000 (120) ELT 285 (SC) and **Priya Blue Industries Ltd. Vs. Commissioner of Customs Ltd.**-2004 (172) ELT 145 (SC). In the former case it was observed:-

> "10. ....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 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. In the case of **Priya Blue Industries Ltd.**, an attempt was made to distinguish the decision in **Flock (India) Pvt. Ltd.** The appeal of the assessee stood dismissed earlier. Contending that the provisions of the Customs Act are not in *pari materia* with the provisions of the Central Excise Act - in the context of which **Flock (India) Pvt. Ltd.** had been decided – and therefore, the matter required reconsideration, the appellant filed review petition. Repelling the contention it was observed :-

> "5.Under Section 27 of the Customs Act, 1962 a claim for refund can be made by any who had (a) paid duty in pursuance of any 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 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.

4. It may be mentioned that the Supreme Court following the said decisions, appeals of the assessee have been dismissed by the Supreme Court in the cases of **Motilal Dulichand Vs. Commissioner of Customs, New Delhi** vide 2003 (157) ELT 265, **Super Casette Industries Ltd. Vs. Commissioner of Customs** vide 2004 (163) ELT A 116 and **M/s. HCL Perot System Ltd. Vs. Commissioner of Customs.**

5. In view of the legal position settled by the Supreme Court in the cases of **Flock(India) Pvt. Ltd.** and **Priya Blue Industries Ltd.,** followed consistently in subsequent cases, it is not possible to take a different view in favour of the respondent. The legal position is thus well-settled that where duty is paid pursuant to assessment order, and not suo motu on one's own, the refund claim is not maintainable, where the assessment order is not challenged. There is no dispute that assessment on bill of entry amounts to assessment order and such an order is appealable. In these premises, it has to be held that the Assistant Commissioner was not justified in sanctioning the

refund in view of the admitted position that no appeal had been preferred against assessment by the respondent. The Commissioner (Appeals) also committed error in declining to interfere in the matter.

3. In the result, the impugned orders of the Assistant Commissioner and the Commissioner (Appeals) are set aside. The appeal of the Revenue is allowed.

[Dictated and pronounced in the open Court]

[Justice S.N. Jha]
President

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