IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,
WEST BLOCK NO.2, R.K. PURAM, NEW DELHI-110066

BENCH-DB

COURT – IV

Customs Appeal No. C/53199/2018 [DB]

[Arising out of Order-in-Appeal No. CC(A) CUS/D-I/ACC/Imp/181 & 182/2018 dated 21.06.2018 passed by the Commissioner of Customs (Appeals), New Delhi]

C.C., New Delhi ...Appellant

Vs.

Bright Point India Pvt. Ltd. ... Respondent

Present for the Appellant : Mr. Sunil Kumar, AR
Present for the Respondent: Mr. Amit Jain &
Mr. Ashwani Bhatia, Advocates

Coram: HON'BLE MR. C.L. MAHAR, MEMBER (TECHNICAL)
HON'BLE MRS. RACHNA GUPTA, MEMBER (JUDICIAL)

Date of Hearing / Decision 09.01.2019

FINAL ORDER NO. 50498/2019

PER: RACHNA GUPTA

The respondents filed two refund claims for Rs. 15,27,103/- and Rs. 1,35,00,494/- for excess duty paid against total No. of 04 Bills of entries filed between the period 19.02.2015 to 26.02.2015 on the ground that the respondents are eligible to claim the benefit of concessional rate of CVD at 1% provided under S. No 263A of Notification no. 12/2012-CE dated 17.03.2012 as amended by Notification No. 04/2014-CE dated 17.02.2014. The respondents while importing mobile phone parts, components and accessories during this said period paid CVD at tariff rate of 6% ad valorem (on MRP basis). After the decision of Hon'ble Supreme Court in the case of M/s SRF Ltd. Vs. Commissioner of Customs, Chennai (Civil Appeal No. 9440 of 2003) holding that the said excise exemption was applicable even in respect of imported goods (for CVD purposes) that the respondent submitted refund applications alongwith list of bills of entries filed between the period 19.02.2015 to 26.02.2015, CA Certificate and working sheet for differential excess duty payment.

2. During scrutiny of refund claim and documents submitted by the respondent department observed that the relevant bills of entries were not reassessed by the concerned appraising group which otherwise is a condition to seek exemption under the said Notification. Accordingly, a memorandum dated 21.12.2015 and its reminder dated 12.01.2016 were issued proposing rejection of both the said refund claims. The proposal was accepted vide Order-in-Original No. 886 and 887 dated 30.06.2016 passed by the Deputy Commissioner of Customs (Refund), ACC(Import), New Customs House, New Delhi. Being aggrieved, the Appeal was filed. Commissioner(Appeals) vide Orders-in-Appeal No. 181 & 182 dated 21.06.2018 had remanded the matter to original adjudicating authority to relook in the light of the observations made in the Orders and the judicial pronouncements cited. However, the said Order got reviewed vide Order of Commissioner of Customs (ACC Import) and Commissioner

Customs (Airport & General), New Delhi dated 26.09.2018 directing to file an Appeal against the Order-in-Appeal dated 21.06.2018. In furtherance thereof the Department is in Appeal before this Tribunal.

3. We have heard both the parties.

4. It is submitted on behalf of the Department that the Commissioner (Appeals) has erred in holding that post year 2011, the refund provision has changed and the conditionality of payment having been made pursuant to an Order of Assessment did not exist. He has further erred in holding that under the amended Section 27, the authority cannot refuse to consider a refund application only because no Appeal had been filed against the assessment order and that self assessment is not an assessment order per se. The Commissioner(Appeals) has erred in distinguishing the decisions of the Hon'ble Supreme Court in the case of **C.C.E. Kanpur Vs. Flock (India) Pvt. Ltd. 2000 (120) E.L.T. 285 (S.C.)** and the case of **Priya Blue Industries Ltd. Vs. Commissioner of Customs (Preventive) 2004 (172) E.L.T. 145 (S.C.)** which are applicable even post the amendment of 2011.

5. While rebutting, Ld. Counsel for the appellant has submitted that the issue relating to applicability of exemption notification with identical condition as stated above, regarding non availment of cenvat credit in relation to imported goods

was settled by the Hon'ble Supreme Court of India in a judgment dated 26.03.2015 in the matter of **SRF Ltd. Vs. Commissioner of Customs, Chennai** reported at **2015 (318) E.L.T. 607 (S.C.)**. In this matter, the Hon'ble Supreme Court interpreted Condition No. 20 of Notification No. 06/2002-CE dated 01.03.2002 wherein exemption was granted from payment of excise duty to certain textile fibres subject to the condition that no credit under the Cenvat Credit Rules, 2002 had been taken in respect of inputs and capital goods used for manufacture of such products. However, the importer in the cited case had been denied the exemption from payment of CVD on the ground that being an importer the above mentioned Condition 20 of the Notification could not have been fulfilled by him. The Apex Court however, held that the exemption from payment of CVD shall be available even in respect of imported goods for the reason that no question of availing cenvat credit under the Cenvat Credit Rules, 2002 arises where inputs are produced in a country other than India. Thus, the condition must be considered to be fulfilled. The aforesaid judgment was challenged by the Department by way of a review petition which were dismissed by the Apex Court vide Order dated 15.07.2016.

6. After hearing both the parties, it is observed and held as follows:

6.1 The sole dispute in the present case is whether re-assessed bills of entry are required in respect of the refund claim filed under Section 27 of the Customs Act, 1962. The requirement to furnish re-assessed bills of entry existed in the erstwhile Section 27 as it existed prior to 08.04.2011 before the introduction of self assessment. The relevant portion of the erstwhile Section 27 has been extracted below for ease of reference:

> *"**Section 27**.... Claim for refund of duty – (1) Any person claiming refund of any duty –*
>
> *(i) paid by him in pursuance of an order of assessment; or*
>
> *(ii) borne by him,*
>
> *may make an application for refund of such duty and interest, if any, paid on such duty to the Assistant Commissioner of Customs or Deputy Commissioner of Customs..."*

6.2 A perusal of the erstwhile Section 27 of the Customs Act would provide that refund was admissible in respect of duty which was paid in pursuance of the order of assessment. Thus, if there was an order of assessment by an officer, the same was subject to challenge by way of an appeal subsequent to which refund would accrue to an assessee in light of a favourable appellate order.

6.3 On 08.04.2011, Section 27 of the Customs Act was amended. This new Section is worded differently, as has been extracted below –

> *"**Section 27**.....Claim for refund of duty – (1) Any person claiming refund of any duty or interest –*
>
> *(i) paid by him, or*

(ii) borne by him

may make an application for refund of such and manner as may be prescribed for such refund to the Assistant Commissioner of Customs or Deputy Commissioner of Customs, before the expiry of one year, from the date of payment of such duty or interest."

6.4 As per the existing provisions of Section 27 of the Customs Act, it is not mandatory that a claim for refund of duty be made only against an order of assessment. This is because where there is self assessment, the question of any assessment order does not arise. So long as the assessee is able to show that the duty is paid by him or borne by him, he is entitled to file a claim for refund. Thus, if duty has been paid under self assessment basis, a claim for refund can be made without filing any appeal against the bill of entry.

6.5 The Hon'ble Delhi High Court in the case of **Aman Medical Proiducts Ltd. Vs. Commissioner of Customs, Delhi 2010 (250) E.L.T. 30** held that a claim for refund would be maintainable in absence of an Appeal against bills of entry where the duty was paid inadvertently.

"4. If therefore we refer to language of Section 27, it is more than clear that the duty which is paid is not necessarily pursuant to an order of assessment but can also be 'borne by him'. ***Clause (i) and (ii) of sub-section (1) of Section 27*** *are clearly in the alternative as the expression 'or' is found in between clauses (i) and (ii). The object of section 27(i)(ii) is to cover those classes of case where the duty is paid by a person without an order of assessment, i.e in a case like the present where the assessee pays the duty in ignorance of a notification which allows him payment of concessional rate of duty merely after filing a Bill of Entry. In fact, such a case is the present case in which there is no assessment order for being challenged in the appeal which is passed under Section 27(1)(i) of the Act because there is no contest or lis and hence no adversarial assessment order.*

> *5. The Tribunal has referred to the cases of CCE,* ***Kanpur v. Flock (India) Pvt. Ltd.****[2000 (120) ELT 285] and Priya Blue Industries Ltd. Petitioner/ v. Commissioner Of Customs (Preventive)) 2004 (172) ELT 145 (SC). In both these cases, referred to by the Tribunal there was an assessment order which was passed and consequently it was held that where an adjudicating authority passed an order which is appealable and the party did not chose to exercise the statutory right of 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 adjudicating authority had committed an error in passing his order. These judgments will therefore not apply when there is no assessment order on dispute/contest, like as is in the facts of the present case.*
>
> *6. We, therefore, answer the question framed by holding that the refund claim of the appellant was maintainable under Section 27 of the Customs Act and the non-filing of the appeal against the assessed bill of entry does not deprive the appellant to file its claim for refund under Section 27 of the Customs Act, 1962 and which claim will fall under clause (ii) of sub section (1) of Section 27."*

6.6 In the present case, Ld. Deputy Commissioner of Customs (Refund) passed two Orders-in-Original Nos. 886/PS/2016 and 887/PS/2016 both dated 30.06.2016 rejecting refund claims of the respondent on ground that the respondent has failed to submit any re-assessment orders or re-assessed bills of entry, relying on the judgments of **C.C.E. Vs. Flock India Pvt. Ltd.** reported at **2000 (120) E.L.T. 285 (S.C.)** and **Priya Blue Industries Vs. Commissioner** reported at **2004 (172) E.L.T. 145 (S.C.)**. But in the case of **Micromax Informatics Ltd. Vs. Union of India 2016 (335) E.L.T. 446 (Del.)**, the Hon'ble Delhi High Court distinguished the judgment in the case of Priya Blue and held that consequent to the amendment to Section 27 of the Customs Act, it is not necessary to opt for re-assessment before filing a refund claim. The Hon'ble High Court of Madras in the case of **Micromax Informatics Ltd. Vs. Principal Commissioner of Cusotms, Chennai 2017 (358) E.L.T. 3 (Mad.)** and the Hon'ble High Court of Bombay in the case of **Micromax Informatics Ltd. Vs. Union of India 2018-TIOL-2675-HC-Mum-Cus** follows the aforesaid line of reasoning.

6.7 The issue relating to applicability of exemption notification with identical condition as stated above, regarding non availment of cenvat credit in relation to imported goods was settled by the Hon'ble Supreme Court of India in a judgment dated 26.03.2015 in the matter of **SRF Ltd. Vs. Commissioner of Customs, Chennai** reported at **2015 (318) E.L.T. 607 (S.C.)**. In this matter, the Hon'ble Supreme Court interpreted Condition No. 20 of Notification No. 06/2002-CE dated 01.03.2002 wherein exemption was granted from payment of excise duty to certain textile fibres subject to the condition that no credit under the Cenvat Credit Rules, 2002 had been taken in respect of inputs and capital goods used for manufacture of such products. However, the importer in the cited case had been denied the exemption from payment of CVD on the ground that being an importer the above mentioned Condition 20 of the Notification could not have been fulfilled by him. The Apex Court however, held that the exemption from payment of CVD shall be available even in respect of imported goods for the reason that no question of availing cenvat credit under the Cenvat Credit Rules, 2002 arises where inputs are produced in a country other than India. Thus, the condition must be considered to be fulfilled. The aforesaid judgment was challenged by the Department by way of a review petition which were dismissed by the Apex Court vide Order dated 15.07.2016.

7. In view of entire above discussion we find that there is no legal lacunae in the impugned Order-in-Appeal dated 21.06.2018 and therefore we uphold the same and accordingly the Appeal of the Revenue is dismissed being without any merit.

[Operative part pronounced in the open Court]

(C.L. MAHAR)
MEMBER (TECHNICAL)

(RACHNA GUPTA)
MEMBER (JUDICIAL)

D.J.