

**CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
REGIONAL BENCH AT HYDERABAD**

Division Bench
Court – I

Appeal No. C/2152/2010

(Arising out of Order-in-Appeal No. 29/2010- VCH dated 14.07.2010
passed by Commissioner of Customs, Central Excise and Service
Tax (Appeal), Visakhapatnam)

M/s Essel Mining & Industries Ltd.,Appellant(s)

Vs.

**Commissioner of Customs,
VisakhapatnamRespondent(s)**

Appearance

Shri G. Prahlad, Advocate for the Appellant.
Shri Dass Thavanam, Superintendent (AR) for the Revenue.

Coram:

**Hon'ble Mr. M.V. RAVINDRAN, MEMBER (JUDICIAL)
Hon'ble Mr. P. VENKATA SUBBA RAO, MEMBER (TECHNICAL)**

**Date of Hearing: 12/07/2018
Date of Decision: 12/07/2018**

FINAL ORDER No. A/30717/2018

[Order per: M.V. Ravindran]

This appeal is directed against Order-in-Appeal No.
34/2010- VCH dated 02.08.2010.

2. Heard both sides and perused the records.

3. On perusal of records, it transpires that the issue is regarding rejection of refund claim filed by the appellant with the Lower Authorities.

4. The relevant facts that arise for consideration, after filtering out unnecessary details are, the appellant herein filed the shipping bill for export on 20.09.2008 and discharged the applicable customs duty on 24.09.2008 considering FOB value as value on which customs duty needs to be discharged. Subsequently, appellant preferred an appeal for the refund of an amount of the customs duty in excess relying upon the board Circular dated 10.11.2008 wherein, board had clarified that till 31.12.2008, export duty discharged FOB will be the value as cum tax FOB. The said application for refund was rejected by the Adjudicating Authority as well as the First Appellate Authority on the ground that the assessment had become final, there being no challenge to such assessment the decision of the Apex Court in the case of *Priya Blue and Flock (India) Pvt. Ltd.*, will apply.

5. The Learned Counsel appearing for the appellant herein after bringing the facts of the case, to be knowledge of Bench, submits that identical issue in the case of *Sameera Trading Company* [2011 (264) ELT 578] was decided by the Tribunal in the favour of the appellants therein and submits that the said decision has been affirmed by the Apex Court in the another case of *Commissioner Vs.*

Muneer Enterprises [2015 (319) ELT A226 (S.C)]. He also relies upon the following case laws to submit that similar issue already been decided in favour of the appellants.

Sesa Goa Ltd., Vs. CCE & ST Bhubaneswar-I [2015 (12) IMI 60 – CESTAT - Kolkata]

Commissioner of Customs, Guntur Vs. ILC Industries Ltd., [2016 (341) ELT 131 (Tri.- Bang.)]

CCE, Chennai Vs. Bellary Iron Ores P. Ltd., [2017 (11) TMI 1533-CESTAT, Chennai]

CC Vs. Muneer Enterprises, Vibhutigudda Mines P. Ltd., [2010 (7) TMI 1005 – CESTAT Bangalore]

Sesa Goa Ltd., Vs. CCE & ST Bhubaneswar – I [2014 (313) ELT 314 (Tri. – Kolkata)]

6. Learned Departmental Representative on the other hand submits that on the date of issuance of the board Circular i.e., 10.11.2008, in the case in hand assessment was final and there was no challenge to such assessment. He relies upon another Board Circular No. 24/2004-Cus dated 18.03.2004 wherein, it was informed to the field formations that the decision of the Apex Court in the case of Flock (India) Pvt. Ltd., would apply in its full force in customs cases also. It is his submission the case in the hand seems to be that there being finalization of customs duty paid, in the absence of challenge to the assessment, the refund claim has been correctly rejected.

7. We find that there is no dispute as to the fact that filing of the shipping bill, discharge of the customs duty appellant herein and also question of considering the FOB as cum duty value. We find on an identical issue in the case of Sameera Trading Company (supra) wherein, (one of us was M.V, Ravindran was on the bench) held as under:

*“4. We have carefully perused the case records and considered the rival submissions. The facts of the case are that the respondents, M/s. Sameera Trading Company have exported 53,900 MTs of Iron Ore fines under shipping bill No. 64/08-09 dated 9-8-08. They paid export duty of Rs. 3,74,43,899/- on 11-8-08. Further, the exporter paid an additional amount of Rs. 2,08,408/- following chemical test of the sample for determining the Fe content and moisture content in the Ore. The Assistant Commissioner had assessed the duty liability on the export consignments taking FOB value as transaction value material for payment of duty. On 10-11-08, CBEC issued a Circular indicating that a policy decision had been taken that till 31-12-08, the existing practice of computation of export duty and cess by taking the FOB value as cum-duty price may be continued and directed to finalize all the pending cases accordingly. The respondents accordingly filed refund claim for the excess duty paid considering the FOB value as cum-duty value. After due process of law, the Assistant Commissioner rejected the refund claim on the ground that the respondents had not challenged the assessment on the shipping bill. In taking such a decision, he followed the Apex Court judgment in the case of Collector of Central Excise, Kanpur v. Flock India Pvt. Ltd. 2000 (120) E.L.T. 285 (S.C.)] and decision of the Tribunal in the case of **Super Cassettes Industries Ltd. v. Commissioner of Customs, Kolkatta** [2003 (162) E.L.T. 1148 (Tri. - Del)]. He also observed that re-assessment of the shipping bill under Section 17(4) of the Customs Act, 1962 (the Act) ordered on the shipping bill was for the limited purpose of revising liability following the ascertainment of exact Fe content and moisture content in the Ore. He also observed that Circular cited by the respondents did not apply to the assessments already finalized.*

5. We find that the impugned order relied on the following case laws to allow the appeal filed before him :

(i) *IP Rings Ltd v. CE (AIR), Chennai – [2006 (202) E.L.T. 61 (Tri. Chennai)]*

(ii) *Senka Carbon Pvt. Ltd. v. CC, Chennai [2007 (216) E.L.T. 397 (Tri. - Chennai)]*

(iii) *Birla Jute Manufacturing Company Ltd. v. CC, Calcutta [1984 (15) E.L.T. 179 (Tribunal)]*

The Commissioner found that the refund claim could not be rejected for the reason that order of assessment was not challenged and that, that omission could be corrected under Section 154 of the Act.

6. We find that the Original authority had assessed the impugned shipping bill contrary to the legal provisions. In the Circular No. 18/2008, dated 10-11-2008 issued by CBEC, it was clarified that by taking the FOB price declared by the exporter as cum-duty price and working backwards from the FOB price to determine the value for assessment was a practice followed for the last more than three decades. This practice was consistent with the statutory provisions. In the light of the above clarification, the original authority wrongly assessed the export duty on the impugned consignments taking the FOB value as transaction value. The excess duty claimed by the respondents considering the FOB price as cum-duty price is in accordance with law and the original authority should have allowed the refund. Vide the impugned order, the Commissioner noted the legal position in this regard and observed that the error could be corrected invoking provisions of Section 154 of the Act and by reassessing the shipping bills under Section 17(4) of the Act.

6.1 We find that the Apex Court observed as follows in *Flock India Pvt. Ltd. case (supra)* :

“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.”

The above judgment was concerned with the provisions relating to refund under the Central Excise Act. The ratio applies to refund claims under the Customs Act as well. However, Section 27 dealing with refund, etc. does not override the provisions of other Sections of the Act.

6.2 Section 154 of the Act reads as under:

“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.”

7. We find that it was the onus of the assessing officer to correctly quantify the duty liability on the export consignment. He had committed an error in computing the export duty considering the FOB value as transaction value. It was within his competence to correct the error invoking Section 154 of the Act as held by the Commissioner (Appeals).

7.1 In *Senka Carbon Pvt. Ltd. v. C.C., Chennai* [2007 (216) E.L.T. 397 (Tri. Chennai)] the Tribunal held as follows:

“2..... Once the imported goods were correctly declared in the Bills of Entry, it was the duty of the proper officer of customs to assess the duty due. Therefore, if the assessing officer committed a mistake, the same should be corrected and if any excess amount was collected pursuant to wrong assessment, that amount should be refunded. There was no need for the importer to challenge the assessment to obtain the refund of the excess amount paid.”

In VST Industries Ltd. v. Commissioner of Customs, Mumbai [2007 (207) E.L.T. 513 (Tri. - Mumbai) = [2007 (5) S.T.R. 59 (Tribunal)] case, the facts were that the appellant had paid excess duty by adopting the FOB value as transaction value instead of C & F value. The claim for refund of duty paid on excess freight was denied by the authorities following the decision of the Apex Court in the case of Collector v. Flock India Pvt. Ltd. [2000 (120) E.L.T. 285 (S.C.)] and Priya Blue Industries Ltd. v. Commissioner [2004 (172) E.L.T. 145 (S.C.)]. The Tribunal observed as follows while allowing the appeal filed by the assessee :

“4. A bare perusal of the above provisions makes it clear that no obligation has been cast on the appellant to make an application under the said section. The authorities mentioned therein are themselves competent to take note of any accidental slip or omission and correct thereafter at any time. Thus, the above provisions give enough power to the authorities mentioned therein without any limitation for carrying out the necessary corrections. Therefore, to say that the appellant has failed to move an application under Section 154 may not be legally correct. I, therefore, consider it necessary to remand the matter to the adjudicating authority for fresh adjudication and to pass a fresh speaking order in the matter after taking into consideration the provision of Section 154 of the Customs Act, 1952, particularly when the provisions of this section have not been considered in the aforementioned decisions of the Hon’ble Supreme Court.”

In another case of rejection of claim for refund of excess duty paid by the appellants, in M/s. Aditya Birla Nuvo Ltd. [2008 (222) E.L.T. 249 (Tri. Bang.) = [2009 (15) S.T.R. 752 (Tri)] case, following the ratio of the judgments of the Apex Court in Flock India Pvt. Ltd. (supra) and Priya Blue Industries Ltd (supra), the Tribunal held that the appellants were entitled to claim reassessment in terms of their refund application. The appeal was allowed by remand to the original authority. The Tribunal had followed the decisions in the case of Karnataka Power Corporation Ltd. v. Commissioner [2002 (143) E.L.T. 482 (S.C.)] and Jindal Vijayanagar Steels Ltd. v. Commissioner [2006 (206) E.L.T. 529 (Tribunal) = 2008 (11) S.T.R.108 (Tribunal)]. We also note that in this case excess amount of duty was paid owing to a mistake in the calculation of the duty. The Tribunal in the case of Commissioner of Customs, New Delhi v. Hero Honda Motors Ltd. [2008 (227) E.L.T. 482 (Tri. - Del.)] allowed the appeal filed by the assessee with the following findings :

“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 cannot 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.”

In another decision of the Tribunal in the case of I.P. Rings Ltd. v. Commissioner [2006 (202) E.L.T. 61 (Tri.)] cited by the respondents, the Tribunal in a similar case of erroneous assessment and collection of higher amount of duty, directed the assessing officer to reassess the Bill of Entry under Section 17(4) of the Act after allowing the assessee to amend the Bill of Entry under Section 149 of the Act.

8. We find that the impugned order is consistent with a plethora of the judicial authorities, a few of which are discussed above. In the circumstances, we find no merit in the appeal filed by the Revenue and reject the same.”

8. The above said ratio was followed by the Tribunal in the case of Muneer Enterprises (supra). The said judgment of the Muneer Enterprises was carried in appeal by the Revenue in Civil appeals before the Apex Court. Apex Court as cited at [2015 (319) ELT A226 (S.C.)] has dismissed the Civil Appeals after condoning the delay.

9. In view of the foregoing, it has to be held that the impugned order in the case in hand is unsustainable and liable to be set aside and we do so. The impugned order is set aside and the appeal is allowed with consequential reliefs, if any.

(Order pronounced & dictated in open court)

P. VENKATA SUBBA RAO
MEMBER (TECHNICAL)

M.V. RAVINDRAN
MEMBER (JUDICIAL)

Lakshmi....