

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
SOUTH REGIONAL BENCH AT HYDERABAD
BENCH - SM
COURT - I**

Application(s) Involved:

C/CROSS/30339/2018 in C/30414/2018-SM

Appeal(s) Involved:

C/30414/2018-SM

(Arising out of Order-in-Appeal No. HYD-CUS-000-APP-118-17-18 dated 12/01/2018 passed by Commissioner of Customs & Central Excise (Appeals) Hyderabad)

**Commissioner of Customs,
Hyderabad**

Appellant(s)

Versus

S S K Ventures Pvt Ltd

Respondent(s)

Appearance:

Mr Mallikarjuna Reddy, A.R. for the Revenue
Mr Mohmmad Aslam, Adv for the Respondent.

CORAM:

HON'BLE Mr. M.V.Ravindran, MEMBER (JUDICIAL)

Date of Hearing: 05/12/2018

Date of Decision: 05/12/2018

Final Order No. A/ 31549 / 2018

[Order per: M.V.Ravindran.]

This appeal is filed by the Revenue against order-in-appeal No. HYD-CUS-000-APP-118-17-18 dated 12/01/2018.

2. After hearing both sides, I find that the issue lies in a very narrow compass.

3. The respondent herein had filed bills of entry which were self-assessed and subsequently noticing that they have not claimed the benefit of Notification which was due to them, filed refund claims which got rejected. On an appeal, the 1st appellate authority by the impugned order set aside the order-in-original and remanded the matter back to the adjudicating authority for reassessment and consequent refund.

4. The grounds of appeal as filed by the revenue in the appeal memoranda is as under.

“2.1 The appellate authority’s decision is mainly placing reliance on the decision of the Hon’ble High Court of New Delhi in case of Aman Medical Products Ltd., Vs. Commissioner of Customs, Delhi [2010 (250) E.L.T. 30 (Del.)]. In this regard, it is to submit that the Hon’ble Apex Court granted the leave vide order dated 01.04.2010 [2010 (256) E.L.T. A57 (S.C.)] in the Special Leave to Appeal filed by the department against the above said decision. It is settled law that once the Hon’ble Apex Court grants special leave and decides to hear the matter on merits, the judgment of the Hon’ble High Court or Tribunal is in jeopardy and will not have any precedential value. In this regard, reliance is placed on the decision of the Hon’ble Apex Court in case of Union of India Vs. West Coast Paper Mills Ltd., [2004 (164) E.L.T. 375 (S.C.)] and the relevant extracts are reproduced below for ready reference.

“38. In the aforementioned cases, this Court failed to take into consideration that once an appeal is filed before this Court and the same is entertained, the judgment of the High Court or the Tribunal is in jeopardy. The subject matter of the lis unless determined by the last Court, cannot be said to have attained finality. Grant of stay of operation of the judgment may not be of much relevance once this Court grants special leave and decides to hear the matter on merit.”

Thus, in view of the ratio laid down by the Hon’ble Apex Court in the above decision, it appears that the decision of the Hon’ble High Court in case of Aman Medical Products Ltd., will be in jeopardy and will not have any precedential value inasmuch as the Hon’ble Apex Court has granted the Special Leave and the appeal is entertained. Accordingly, the learned Commissioner (Appeals) appears to have erred in placing reliance on the above cited decision which has not attained finality.

2.2 As per Sub-Section (2) of Section 2 of the Customs Act, 1962, ‘assessment’ includes “**Self-assessment**” and further Sub-Section (2) of Section 17 of the Act, ibid allows the proper officer for verification of the self-assessment made by the importer and allows for re-assessment under Sub-Section (4) of Section 17 of the Act, ibid. Thus, in both the cases, whether Bill of Entry is self-assessed or assessed by the proper officer, the Bill of Entry assessed becomes **an order of assessment**. The said assessment can only be modified by way of filing an appeal against the said order of assessment before the appellate authority. It is a settled law in view of the ratio laid down by the

Hon'ble Apex Court in cases of Priya Blue Industries Ltd., Vs. Commr. Of Customs (Preventive) [2004 (172) E.L.T. 145 (S.C.)] and Collector of Central Excise, Kanpur Vs. Flock (India) Pvt. Ltd., [2000 (120) E.L.T. 285 (S.C.)]. As such, the refund claim contrary to the assessment order cannot be entertained without being modified by way of appeal proceedings.

2.3 Further, a refund claim is not an appeal proceeding and 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 which has already become final.”

5. I find that the 1st Appellate Authority in the impugned order in paragraph No 5 has recorded the following while remanding the matter back to the adjudicating authority:

“5. I have considered the grounds of appeal and the submissions made by the appellant during the hearing held. The issue to be decided in the appeal is whether the decision of the original authority to reject the claim of refund on the ground that since an order of assessment has been made and duty paid by appellants claim for refund of duty cannot be considered without the order being modified in appeal is correct or not. I find that the concerned Bills of Entry had been self-assessed on the basis of declarations made by the appellant-importer at the time of filing the Bills of Entry under Section 46 of the Customs Act, 1962. The appellant has come before this appellate authority without seeking re-assessment of the goods which is an option available to them. However, the appeal arisen presumably in view of the prevalent, but in my considered view a wrong perception, that the decision of Hon'ble Supreme Court in the case of Priya Blue Industries Ltd., Vs. Commissioner of Customs (Preventive) [2004 (172) ELT 145 (SC)] would apply to the facts of the instant case. It is my view that the ratio of the said case does not apply to this case. The decision of the Hon'ble Supreme Court in the said case has been distinguished in various cases before the Hon'ble Tribunal and High Courts. One such decision is by the Hon'ble Delhi High Court in the case of Aman Medical Products Ltd., Vs. Commissioner of Customs, Delhi reported in [2010 (250) ELT 3- (Del)]. In the said case, after examining the applicability of the judgments of the Hon'ble Supreme Court in the cases of Priya Blue Industries Ltd., and Flock (India) Pvt. Ltd., [2000 (120) ELT 285], it has been held that the said judgments had been made in the context of an assessment order being passed by the officer of Customs which was required to be reviewed/upset by appellate process so as to enable an assessee to claim refund of duty. It has also been held that the ratio of the said judgments would not apply in cases where there is no assessment order on the dispute passed by the proper officer of the Department. Accordingly, it has been held that a refund claim filed in cases where there is no order of assessment passed by an officer of Customs would be maintainable under the present Section 27 of the Act, 1962 and that non-filing of appeal against the self-assessed Bill of Entry does not deprive the importer's right to claim refund. The said ratio of the said judgment of the Hon'ble Delhi High Court which has not, as on date, been stayed by the Hon'ble Supreme Court despite an appeal of stay filed by Department is required to be followed. To this extent, the ratio of the judgement in the case of Priya Blue Industries Ltd does not apply to the facts of this case. In this case as mentioned earlier, an order of assessment by the proper officer has not been

made. Duty was paid on self-assessment made in the Indian EDI System and out of charge of goods granted. The order granting out of charge is not an assessment order made by the proper officer of customs having regard to the classification and valuation of goods. Therefore, the appellant is entitled to re-assessment of goods to duty in the hands of the proper officer of customs on the basis of the claim for refund made and as per law. The entitlement of the appellants to exemption from payment of duty is required to be so examined in the course of the re-assessment proceedings by the proper officer of customs, which he may consider and pass appropriate orders including refund, if admissible as per law and subject to Section 27 of the Act, 1962. Therefore, in my considered view, appropriate authority is required to act and pass the order of re-assessment with consequential benefits, if any, as per law and after hearing the appellants in person.”

It can be seen from the above reproduced paragraph that the 1st Appellate Authority has directed the adjudicating authority to reassess the goods which in my view is a correct appreciation of the facts and law, in the case in hand. I do not find any reason to interfere in such a well reasoned order passed by the 1st appellate authority. Accordingly the impugned order is upheld and the appeal stands rejected.

(Order pronounced and dictated in open court)

M.V.Ravindran
MEMBER (JUDICIAL)

Neela Reddy