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

Division Bench

Court – I

Appeal No. C/3193/2011

(Arising out of Order-in-Appeal No.04/2011 (G) Cus dt.08.11.2011 passed by CCCE (Appeals), Guntur)

Commissioner of Central Tax –Guntur- GST
C.R. Buildings, Kannavarithota,
Guntur, AP – 522 004 **......Appellant**

VERSUS

M/s Sameera Trading Company,
Embitee Complex, Bellary Road,
Hospet, Karnataka – 583 201 **......Respondent**

Appearance

Present for the Appellant: Shri N. Bhanu Kiran, Authorized Representative
Present for the Respondent: None

Coram:

HON'BLE MS. SULEKHA BEEVI C.S, MEMBER (JUDICIAL)
HON'BLE MR. P. VENKATA SUBBA RAO, MEMBER (TECHNICAL)

FINAL ORDER No. A/30483/2019

Date of Hearing: 23.04.2019
Date of Decision: 23.04.2019

[Order per: SULEKHA BEEVI C.S.]

1. This appeal is filed by the department against Order-in-Appeal No.04/2011 (G) Cus dated 08.11.2011.

2. The brief facts of the case are that the respondents are engaged in export of iron ore fines. They filed shipping bill dated 10.06.2008 for export of 54,700 MT of iron ore fines. They paid Customs Duty of Rs.1,64,10,000/-

and Cess of Rs.54,700/- on 10.06.2008, Duty @ Rs.300/MT and Cess @ Rs.1/MT on the date of filing the shipping bill. After paying Customs Duty, they presented the shipping bill for assessment and the same was assessed and let export order was issued on 10.06.2008. By Notification No.78/2008-Cus dated 13.06.2008, the rate of duty was changed from specific rate to 15% adv with immediate effect. As the vessel did not arrive and no loading of goods was commenced by 13.06.2008, the Asst. Commissioner of Central Excise reassessed the shipping bill and directed the respondents to pay differential duty arrived by adopting 15% adv rate of duty as per notification 78/2008, vide letter dated 18.06.2008. The respondent submitted protest letter dated 20.06.2008 contending that the let export order was issued on 10.06.2008 much before the issuance of Notification No.78/2008-Cus and that they are not liable to pay the differential duty. The department did not allow the vessel for outward entry and then the respondent paid the differential duty of Rs.2,89,22,625/- on 25.06.2008 after incurring the detention charges for the vessel detention. The vessel was permitted to sail on 26.06.2008. The respondent thereafter realised that the authorities had assessed the export duty on FOB value as against cum-duty value and thus they paid excess duty of Rs.71,74,423/-. They then filed refund claim for Rs.71,74,423/- on 16.12.2008. On noting that they are not liable to pay enhanced duty of Rs.2,89,22,625/-charged @ 15% adv as per notification 78/2008 which has come to effect only on 13.06.2008 they filed revised refund claim on 13.03.2009. The refund sanctioning authority, after scrutiny of refund claim, rejected the refund claim holding that the respondent has not challenged the assessment and also on the ground that the revised refund claim for the enhanced duty is time barred. Against such order of rejection of refund, respondents filed appeal before the Commissioner

(Appeals) who, after accepting arguments of the respondent, set aside the Order-in-Original No. 13/2009 dated 27.02.2009 and remanded the matter to the adjudicating authority to decide the matter afresh after considering the submissions made regarding the revised refund claim also. Against such order, the department filed an appeal before the Tribunal and vide Final Order No.1068/2010 dated 15.07.2010 the Tribunal remanded the matter back to the adjudicating authority to reconsider the entire issue afresh and pass a speaking order following the principles of natural justice.

3. Pursuant to such remand order of the Tribunal, the refund sanctioning authority, after granting personal hearing to the respondent, rejected the refund claim on the ground that the duty paid in excess cannot be refunded because the respondents have not challenged the assessment order on the shipping bill. With regard to the revised refund claim of enhanced duty as per notification 78/2008 it was observed by the refund sanctioning authority that it is a subsequent refund claim and it was hit by limitation. Aggrieved by the order of the refund sanctioning authority dated 13.07.2011, respondent filed an appeal before the Commissioner (Appeals) who, vide the impugned order herein held that the respondents are eligible for refund. Hence, the department is now before the Tribunal.

4. On behalf of the department, learned authorized representative Shri N. Bhanu Kiran appeared and argued the matter. He reiterated the grounds of appeal. He explained that the respondents had filed the first refund claim for Rs.71,74,423/- on 16.12.2008 on the ground that they have paid excess duty on FOB value. Later they filed revised refund claim on 13.03.2009 for Rs.2,89,22,625/- contending that they are not liable to pay the differential

duty as the let export order was made on 10.06.2008 which is prior to the issuance of Notification No.78/2008-Cus dated 13.06.2008. The Commissioner (Appeals) has erred in holding that the date of receipt of original claim has to be considered for the computation of the limitation. When the subsequent claim was filed on 13.03.2009, it cannot be considered as revised claim and therefore, it is barred by limitation. Further, the original refund claim before the Asst. Commissioner was only regarding excess duty paid on the account of payment of duty on FOB value and duty ought to have been paid treating FOB as cum-duty value. Whereas the second claim is on the ground that they are not liable to pay higher duty as per Notification No.78/2008-Cus dated 13.06.2008. It is obvious that the second claim is on a different subject and therefore, the Commissioner (Appeals) ought not to have entertained the second claim as revised claim. He prayed that the appeal may be allowed.

5. None appeared on behalf of the respondents. The matter was taken up for disposal after hearing learned authorized representative and perusal of records. After hearing the appeal an application for adjournment was placed before us by the Court Master. The appeal having been heard we proceed to dispose the same.

6. The department is aggrieved by the order passed by the Commissioner (Appeals) who held that the respondents are eligible for refund as prayed for in their refund application. The details of the refund applications are tabulated as under:

Sl. No.	Date of filing/ Amount of refund	Reasons/ ground of filing of refund
1	16-12-08 / Rs.71,74,423/-	They had paid duty on FOB value, which has to be treated as 'cum-duty value'
2	13-03-09 / Rs.2,89,22,625/-	Since the date of filing of shipping bill and date of let export order is 10.06.2008, they need not pay duty as per Notification No.79/08-Cus, dt.13.06.08.

7. The refund for Rs.71,74,423/- has been denied mainly for the reason that the respondent has not challenged the assessment order on the shipping bill. The issue whether the assessee can file refund claim without challenging assessment order is settled by various decisions of the Courts. In **Karnataka Power Corporation Ltd Vs CC [2002 (143) ELT 482 (Supreme Court)]** and **Aman Medical products Ltd Vs CC., Delhi [2010 (250) ELT 30 (Tri-Delhi)]** it has been held that filing of refund claim itself is a challenge of the assessment order, and the legitimate right of refund cannot be ignored. Following the above decisions, we find that non-challenging of the assessment order is not a ground to deny the refund of duty wrongly collected and therefore, the decision of the Commissioner (Appeals) on this issue requires no interference.

8. The second ground raised in the appeal by the department is that the revised claim filed by the respondent for Rs.2,89,22,625/- is barred by limitation since it is filed only on 13.03.2009. It has to be noted that the said amount has been claimed as refund by the respondent for the reason that the notification has come into force only on 13.06.2008 whereas the let export order has been issued on 10.06.2008. On perusal of the impugned order it is seen that the Commissioner (Appeals) has referred to Section 16 & Section 51 of the Customs Act to arrive at the conclusion that the relevant date for reckoning the rate of duty to be paid is the date of let export order.

Further, it is seen that the enhanced duty was paid by the respondent after issuing letter of protest. Therefore, limitation does not apply even if it is considered as subsequent claim. The refund claim then cannot be said to be time barred. The Commissioner (Appeals) has correctly analysed the facts and law. From the discussions made above, we are of the considered opinion that the impugned order does not call for any interference.

9. The appeal filed by the department is dismissed.

(Operative part of this order was pronounced in the open court
on conclusion of hearing)

(SULEKHA BEEVI C.S)
MEMBER (JUDICIAL)

(P.VENKATA SUBBA RAO)
MEMBER (TECHNICAL)

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