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

Single Member Bench - Court – I

CUSTOMS APPEAL No. 30495 of 2019

(Arising out of **Order-in-Appeal** No. VIZ-CUSTM-000-APP-088-18-19 dated 13.03.2019 passed by Commissioner of Central Tax & Customs (Appeals), Guntur)

T R L Krosaki Refractories Ltd., .. **APPELLANT**
Belpur, Jharsuguda,
Kolkata – 768 281.

VERSUS

Commissioner of Customs .. **RESPONDENT**
& Service Tax
Visakhapatnam - Cus
4th Floor, Customs House,
Port Area, Visakhapatnam,
Andhra Pradesh – 530 035.

Appearance

Shri Satyaprem Majumder, Advocate for the appellant.
Shri L.V. Rao, Addl Commissioner for the Respondent.

Coram: Hon’ble Mr. P. VENKATA SUBBA RAO, MEMBER (TECHNICAL)

FINAL ORDER No. A/31111/2019

Date of Hearing: 06.12.2019
Date of Decision: 06.12.2019

[ORDER PER: MR. P. VENKATA SUBBA RAO]

1. This appeal is filed against Order-in-Appeal No. VIZ-CUSTM-000-APP-088-18-19 dated 13.03.2019.

2. The appellant herein filed four bills of entry for import of Magnesia Carbon Brick between May 2017 and June 2017 classifying them under 6902 10 40 in the Bills of Entry and claiming the benefit of exemption Notification No. 12/2012-Cus dated 17.03.2012 (Sl.No. 304). The bills of entry were assessed by the Revenue re-classifying the goods under 6815 99 90 which attracts a higher rate of customs duty. The appellant paid customs duty at the higher rate as assessed by the Revenue and thereafter filed letters requesting for speaking orders giving justification for revision of the

classification and denial of the benefit of their exemption notification sought by them. The revenue has not issued any speaking order in respect of any of the bills of entry. The appellant had not filed any appeal against the assessed bills of entry. Thereafter, they filed refund claims seeking refund of the differential duty under section 27 of the Customs Act, 1962. These claims were rejected by the Lower Authority and on appeal such rejection was upheld by the First Appellate Authority by the impugned order. Hence this appeal. The First Appellate Authority relied on the case law of Priya Blue Industries Vs Commissioner of Customs, Ahmedabad [2004 (172) ELT 145 (SC)] in which it was held as follows:

> 6. ….Once an Order of Assessment is passed the duty would be payable as per that order. Unless that 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…
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> 8. The words "in pursuance of an Order of Assessment" only indicate the party/person who can make a claim for refund. In other words, they enable a person who has paid duty in pursuance of an Order of Assessment to claim refund. These words do not lead to the conclusion that without the Order of Assessment having been modified in Appeal or reviewed a claim for refund can be maintained.

Similar decision was also taken by the Hon'ble Apex Court in the case of Flock India [2000 (120) ELT 285 (SC)]. Learned Counsel for the appellant submits that there was a difference between section 27 prior to 08.04.2011 and post 08.04.2011. Prior to 08.04.2011 Section 27 read as follows:

27. Claim for Refund of Duty. –

(1) Any person claiming refund of any duty and interest, if any, paid on such duty –

(a) paid by him in pursuance of an order of assessment; or

(b) 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

(a) in the case of any import made by any individual for his personal use or by Government or by any educational, research or charitable institution or hospital, before the expiry of one year;

(b) in any other case, before the expiry of six months, After 08.04.2011 only the assessment procedure has been changed under section 17 and self assessment procedure has been introduced, the words “in pursuance of an order of assessment” in section 27(1)(a) have been deleted. He would therefore, submit that their case pertains post 08.04.2011 and they were entitled to file a claim for refund without challenging the order of assessment. He relied on the case law of Aman Medical Products [2010 (250) ELT 30 (DEL)] and Micromax Informatics Ltd., [2016 (335) ELT 466 (DEL)] in which it was held that where there is no order of assessment, refund claim can be filed without challenging the assessment. He fairly submits that the aforesaid two judgments of the Hon’ble High Court of Delhi were also under challenge before the Larger Bench of the Hon’ble Apex Court in the case of ITC Ltd., in civil appeal no. 293-294/2019. It has been held by the Hon’ble Apex Court that even in a case where a refund is filed after self-assessment such refund cannot be sanctioned unless the self-assessment itself has been appealed against and modified. In other words, even in case of self assessment post 08.04.2011, if the person who has made an assessment feels that he made a mistake, he must appeal to the Commissioner (Appeals) to get his own self assessment modified before he can file a refund claim. The officer processing the refund claims cannot, by sanctioning refund, sit in judgment over the assessment done by the officer who assessed the bills of entry in the first place.

3. However, he submits that justice has been denied to them because they have not been given speaking orders when they actually requested for them. Therefore, they are still not aware of the reasons as to why their bills of entries were re-assessed and therefore they are unable to appeal before the First Appellate Authority. He also relied upon the judgment of High Court of Andhra Pradesh in the case of Fairway Trading Company [2014 (304) ELT 286 (Tri-Bang)] upheld by the Andhra Pradesh High Court as reported in [2015 (319)ELT A243 (AP)].

4. Learned DR submits that the issue is now settled by the Larger Bench of the Hon’ble Apex Court in the case of ITC Ltd., (supra) which judgment is binding on all courts in the country including this Bench and no refund can be sanctioned unless the underlying assessment (including self assessment) has been appealed against and therefore there is no infirmity in

the impugned order of the First Appellate Authority passed relying on the cases of Priya Blue Industries (supra) and Flock India (supra).

5. I have considered the arguments on both sides and perused the records. The issue of refund has been under examination at various judicial fora. In the case of Priya Blue Industries (supra) and Flock India (supra) the Hon'ble Apex Court had held that where a refund raises out of an order of assessment such refund cannot be sanctioned unless the underlying order of assessment itself has been appealed against and modified by the appellate forum. The reason for this is the officer sanctioning refund cannot sit in judgment over the officer who has done the assessment. Subsequently, in the case of Aman Medical Products Ltd. (supra), the Hon'ble High Court of Delhi has distinguished the claim for refund in that case from the case of Priya Blue Industries (supra). This case pertained to a period when although Section 17 of the Customs Act (as unamended) required the officer to do the assessment, the computer system of the customs EDI cleared the goods automatically based on the declarations made by the importer. Therefore, the officer had no chance of assessing the bills of entries at all. The question which arose was whether, in such cases, where there was no assessment order at all, the bills of entries needs to be challenged or can a refund be claimed directly. The Hon'ble High Court of Delhi held in a case where there is no order of assessment at all there is nothing to be challenged therefore, refund claim can be claimed and the same can be sanctioned. Subsequently, the case of Micromax Informatics Ltd., (supra) came up before the High court of Delhi. This pertained to the period when the Section 17 was amended introducing the concept of self assessment by the importers. In this case the Hon'ble High Court has held that in the case of self assessment since there is no assessment order by the officer the refund can be challenged without assessment by the officer. Both these cases as well as other cases before the Larger Bench of Hon'ble Apex Court in the case of ITC Ltd., (supra). It is now settled by the Hon'ble Apex Court that the refund cannot be sanctioned in any case including in case of self assessment unless the assessment is itself is challenged.

> 31. It is apparent from the aforesaid discussion that the endorsement made on the bill of entry is an order of assessment. It cannot be said that there is no order of assessment

passed in such a case. When there is no lis, speaking order is not required to be passed in "across the counter affair".

38. No doubt about it that the expression which was earlier used in Section 27(1)(i) that "in pursuance of an order of assessment" has been deleted from the amended provision of Section 27 due to introduction of provision as to self assessment. However, as self-assessment is nonetheless an order of assessment, no difference is made by deletion of aforesaid expression as no separate reasoned assessment order is required to be passed in the case of self assessment as observed by this Court in Escorts Ltd. v. Union of India & Ors. (supra).

47. When we consider the overall effect of the provisions prior to amendment and post-amendment under Finance Act, 2011, we are of the opinion that the claim for refund cannot be entertained unless the order of assessment or selfassessment is modified in accordance with law by taking recourse to the appropriate proceedings and it would not be within the ken of Section 27 to set aside the order of selfassessment and reassess the duty for making refund; and in case any person is aggrieved by any order which would include self assessment, he has to get the order modified under Section 128 or under other relevant provisions of the Act.

48. Resultantly, we find that the order(s) passed by Customs, Excise, and Service Tax Appellate Tribunal is to be upheld and that passed by the High Courts of Delhi and Madras to the contrary, deserves to be and are hereby set aside. We order accordingly. We hold that the applications for refund were not maintainable. The appeals are accordingly disposed of. Parties to bear their own costs as incurred.

As the present appeal is only against the rejection of refund claim by the Commissioner (Appeals) on the ground that the bills of entries has not been challenged, I find that in view of the ratio of the judgment of Hon'ble Larger Bench of the Apex Court in the case of ITC Ltd., the appeal is liable to be rejected and the impugned order is liable to be upheld and I do so. If the appellant's bills of entries have been reassessed and they sought speaking orders which have not been issued to them or the request for issue of speaking orders is rejected by the lower authority that itself becomes a decision by the lower authority which can be appealed against to the Commissioner before the Commissioner (Appeals). However, by not issuing the speaking orders or giving any reply to their requests for speaking order, the officer has denied the appellant their legitimate right to challenge the re-assessments. In the interest of justice, I find this a fit case to exercise my powers under Rule 41 of the CESTAT (Procedure) Rules, 1982 and direct the assessing officer to issue speaking orders as sought by the appellant in cases where the Bills of Entry were re-assessed. This will enable the appellants to understand the reasons for re-assessment and if aggrieved, challenge such re-assessments.

6. In view of the above, impugned order is upheld and the appeal is rejected. The assessing officer who re-assessed the bills of entry must issue speaking orders within four weeks from the date on which he receives a copy of this order from the appellant or from the Registry.

(Dictated and pronounced in open court)

(P. VENKATA SUBBA RAO)
MEMBER (TECHNICAL)

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