CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
REGIONAL BENCH AT HYDERABAD
Division Bench - Court No. – I

Customs Appeal No 138 & 139 of 2010
(Arising out of **Order-in-Appeal** No.22/2009 (V-II) Cus, dated 23.09.2009 passed by Commissioner of Customs, Central Excise & Service Tax (Appeals), Visakhapatnam)

Coromandel Fertilisers Ltd., .. **APPELLANT**
Beach Road, Kakinada,
Andhra Pradesh – 530 005.

VERSUS

Commissioner of Customs, Vijayawada .. **RESPONDENT**
D. No. 55-17-3, 2nd Floor, C-14,
Road No. 2, Industrial Estate,
Vijayawada,
Andhra Pradesh – 520 007.

Appearance
Shri Suresh Astekar, Advocate for the Appellant.
Shri A. Rangadham, Superintendent for the Respondent.

Coram: Hon'ble Dr. D.M. MISRA, MEMBER (JUDICIAL)
Hon'ble Mr. P.V. SUBBA RAO, MEMBER (TECHNICAL)

FINAL ORDER No. A/30776-30777/2020

Date of Hearing:21.01.2020
Date of Decision:21.01.2020

[ORDER PER: P.V. SUBBA RAO]

1. This appeal is filed against Order-in-Appeal No.22/2009 (V-II) Cus, dated 23.09.2009.

2. The appellants are manufacturers of fertilisers and they import Muriate of Potash (MOP) through Kakinada Port. They imported MOP and filed bills of entry to clear the cargo. These bills were provisionally assessed as the test report from the chemical examiner was awaited. While assessing the bills provisionally, the assessing officer included barge charges, towing charges and stevedoring charges for the purpose of calculation of duty. After receiving the test report, the assessing officer finalised the assessment of the bills of entry based on the test reports and also including the above charges in the assessable value. According to the appellant, these charges are not includable in the assessable value in view of the judgment of the Hon'ble Apex Court in the case of Ispat Industries Ltd., Vs CC, Mumbai [2006 (202) ELT 561 (SC)]. Without challenging the assessment of the bills of entry, they have filed refund applications before the Assistant Commissioner which were returned with deficiency memos. After the

deficiencies were rectified, the adjudicating authority rejected the refund claims on the ground that the appellant had not challenged the finally assessed bills of entry holding that such challenge is a necessary pre-requisite for filing the refund claims in terms of the judgment of the Hon'ble Apex Court in the case of Priya Blue Industries Ltd., [2004 (170) ELT A308 (SC)] and Flock India Pvt Ltd., [2000 (120) ELT 285 (SC)].

3. Aggrieved by the rejection of refund, the appellant appealed to the First Appellate Authority who, by the impugned order, upheld the order of the adjudicating authority and rejected the appeals. Hence this appeal.

4. Heard Learned Counsel for the appellant and the Learned AR. The short point to be decided in these cases is whether the appellant is entitled to refund of excess duty paid when the bills of entry are finalised or otherwise. While finalising the bills of entry Assessing Officer has included certain charges which according to the appellant are not includable in the assessable value in the light of the judgment of the Hon'ble Apex Court in the case of Ispat Industries Ltd., (supra). Both the lower authorities have rejected their refund claims on the ground that before filing a refund claim, the appellant should have first challenged the assessment of the bills of entry which they did not do.

5. The question which arises is whether an application for refund under Section 27 could be filed in respect of any duty paid in excess in pursuance of an assessment order under Section 17 of the Customs Act, 1962 without first challenging the assessment order itself. In other words, when the duty has been assessed wrongly in excess by the Assessing Officer or by the assessee under self assessment and it has been paid does the appellant have to first challenge the assessment order or whether the appellant can directly claim refund of the excess duty so paid. This issue has been a point of contention and Hon'ble Apex Court in the case of Flock India Pvt Ltd., (supra) and Priya Blue Industries Ltd., (supra) held that the assessment order has to be first challenged before a refund claim can be filed under Section 27. The reason for this is the Officer sanctioning the refund cannot sit in judgment on the assessment done by the Assessing Officer. An assessment is a quasi judicial function exercised by the Assessing Officer against which an appeal lies before the Commissioner (Appeals) and not before the Officer sanctioning the refund. Sanction of refund is a mere

mechanical process of seeing if duty was paid in excess and refunding the same.

6. After the aforesaid judgment of the Hon'ble Apex Court, there were some deviations from this rule made in the case of Micromax Informatics Ltd., [2016 (335) ELT 446 - Del] and Aman Medical Products Ltd., [2010 (250) ELT 30 - Del] passed by the Hon'ble High Court of Delhi. After the judgments of the Hon'ble Apex Court in the case of Flock India Ltd., (supra) and Priya Blue Industries Ltd., (supra), the customs department has introduced a system of risk management in its computer customs EDI network according to which some declarations of the importers were cleared automatically without any assessment or verification. Although Section 17 required the officers to assess the bills of entry they never had an opportunity to do so in view of the changes in the customs EDI system. Thereafter, in 2011 w.e.f. 08.04.2011 Section 17 of the Customs Act which deals with the assessment has been revised completely and the assessment by the officer has been replaced with an self-assessment by the importer himself. The officers were given the option of re-assessing in certain cases. The question which was addressed by the Hon'ble High Court of Delhi in the case of Micromax Informatics Ltd., (supra) and Aman Medical Products (supra) is whether in such cases where there is no assessment order by the officer either because of the RMS system clearing the goods or because there was only self assessment by the importer whether a refund claim can be filed if any excess duty was paid. The Hon'ble High Court of Delhi distinguished such cases from the case judgments of Flock India Ltd., (supra) and Priya Blue Industries Ltd., (supra) and held that in such cases refund can be sanctioned even without challenging the assessment of the bills of entry.

7. All such matters have reached the Hon'ble Apex Court and the Larger Bench of the Hon'ble Apex Court in the case of ITC Ltd., [2019-TIOL-418-SC-CUS-LB] has held that no refund can be claimed in respect of any assessment including self assessment unless the assessment itself is challenged and set aside by the appellate authority. This is now the law which should apply to all cases including the present one. In view of the judgment of the Larger Bench of the Hon'ble Apex Court in the case of ITC Ltd., (supra), respectfully following the ratio we hold that the refund claims

have been correctly rejected as the assessment themselves have not been challenged in this case by the appellant.

8. In view of the above, the appeals are dismissed and impugned orders are upheld.

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

(Dr. D.M. MISRA)
MEMBER (JUDICIAL)

(P. VENKATA SUBBA RAO)
MEMBER (TECHNICAL)

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