**IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, KOLKATA**
**EASTERN ZONAL BENCH: KOLKATA**

**Appeal No.C/13/2010**

(Arising out of Order-in-Appeal No.33/CUS/BBSR-I/2009 dated 16.09.2009 passed by the Commissioner (Appeals), Central Excise, Customs & Service Tax, Bhubaneswar)

M/s Mid East Integrated Steels Ltd.
Applicant (s)/Appellant (s)

**Vs.**

Commissioner of Central Excise, Customs & Service Tax, BBSR
Respondent (s)

Appearance:
Shri K.K.Acharya, Advocate for the Appellant (s)
Shri S.N.Mitra, AC(AR) for the Respondent (s)

**CORAM:**
**Hon'ble SHRI P.K.CHOUDHARY, Member (Judicial)**
**Hon'ble SHRI C.L.Mahar, Member (Technical)**

Date of Hearing/Decision:- 27.06.2018

ORDER NO.FO/76817/2018

**Per Shri P.K.Choudhary**

The facts of the case in brief are that the appellant is an EOU. The appellant exported goods against 7 shipping bills on payment of export duty and cess during the period 17.07.2008 to 08.11.2008. That the FOB was taken as assessable value for computation of export duty. The foreign buyers paid the FOB value to the appellant in addition to actual sea freight and insurance that the burden of duty and the cess was borne by the appellant. Subsequently, the appellant filed 7 refund claims, claiming refund of excess duty paid on FOB value (cum duty price) of exports of Pig Iron and Iron Ore Fine by relying the Board Circular No.18/2008 dated 10.11.2008. The Adjudicating Authority rejected all the refund claims as untenable. On appeal, the Ld. Commissioner (Appeals) passed the following order:

> *"In view of the foregoing discussions, in respect of Shipping Bill No.000297/Pig Iron/08-09 Dt.17.07.2008, on the ratio of Hon'ble Supreme Court decision in the case of M/s Priya Blue Industries, the Refund claim fails. In respect of other six Shipping Bills, rejection of Refund without finalization of provisional assessment is premature and is set aside as these have been assessed provisionally and are yet to be finalized."*

2. Heard both sides and perused the appeal records.

3. As per records the issue is whether the appellant is required to challenge the assessment of Bill of Entry in order to claim refund of excess duty paid, we are of the view that there is no dispute on the eligibility of the exemption notification which holds the position that there is no lis between the assessee and the revenue. The appellant is therefore not required to challenge the assessment of Bill of Entry for claiming the refund of excess duty paid.

4. We further find that the Hon'ble High Court of Delhi in the case of Aman Medical Products Ltd. vs. Commissioner of Customs, Delhi [2010(250) ELT 30 (Del.)], distinguishing the judgment of the Hon'ble Apex Court in the case of Priya Blue Industries Ltd. v. Commissioner of Customs (Preventive) [2004(172)E.L.T. 145 (S.C.) held as under:

> ***3.*** *Before we proceed to decide the issue, it would be necessary to reproduce the relevant part of the relevant provision, namely, Section 27 of the Customs Act, 1962 which is as under :*
>
> ***"27. Claim for refund of duty. -*** *(1) Any person claiming refund of any duty-*
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> *(i) paid by him in pursuance of an order of assessment; or*
>
> *(ii) 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 or Deputy 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, from the date of payment of duty and interest, if any, paid on such duty in such form and manner as may be specified in the regulations made in this behalf and the application shall be accompanied by such documentary or other evidence (including the documents referred to in section 28C) as the applicant may furnish to establish that the amount of duty and interest, if any, paid on such duty in relation to which such refund is claimed was collected from, or paid by, him and the incidence of such duty and interest, if any, paid on such duty had not been passed on by him to any other person:*

*Provided that where an application for refund has been made before the commencement of the Central Excise and Customs Laws (Amendment) Act, 1991, such application shall be deemed with in accordance with the provisions of sub-section (2)."*

***4.*** *If therefore we refer to language of Section 27, it is more than clear that the duty which is paid is not necessarily pursuant to an order of assessment but can also be 'borne by him'. Clauses (i) and (ii) of sub-section (1) of Section 27 are clearly in the alternative as the expression 'or' is found in between clauses (i) and (ii). The object of Section 27(i)(ii) is to cover those classes of case where the duty is paid by a person without an order of assessment, i.e. in a case like the present where the assessee pays the duty in ignorance of a notification which allows him payment of concessional rate of duty merely after filing a Bill of Entry. In fact, such a case is the present case in which there is no assessment order for being challenged in the appeal which is passed under Section 27(1)(i) of the Act because there is no contest or lis and hence no adversarial assessment order.*

***5.*** *The Tribunal has referred to the cases of CCE, Kanpur v. Flock (India) Pvt. Ltd. [2000 (120) E.L.T. 285] and Priya Blue Industries Ltd. v. Commissioner of Customs (Preventive), 2004 (172) E.L.T. 145 (S.C.). In both these cases, referred to by the Tribunal there was an assessment order which was passed and consequently it was held that where an adjudicating authority passed an order which is appealable and the party did not chose to exercise the statutory right of 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 adjudicating authority had committed an error in passing his order. These judgments will therefore not apply when there is no assessment order on dispute/contest, like as is in the facts of the present case.*

***6.*** *We, therefore, answer the question framed by holding that the refund claim of the appellant was maintainable under Section 27 of the Customs Act and the non-filing of the appeal against the assessed bill of entry does not deprive the appellant to file its claim for refund under Section 27 of the Customs Act, 1962 and* *which claim will fall under clause (ii) of sub-section (1) of Section 27."*

5. From the above judgment of the Hon'ble High Court of Delhi, it is seen that if the duty is paid and borne by the assessee, refund is admissible without challenging the Bill of Entry. In the present case also the excess duty was paid and borne by the appellant. In view of the legal position, it is our considered view that if the excess duty is paid in excess under self-assessment of bill of entry and borne by the appellant for claiming of refund of excess duty paid, the appellant was not required to challenge the self-assessed bill of entry.

6. In view of the above discussions the impugned order is set aside in respect of Shipping Bill No.000297/Pig Iron/08-09 Dt.17.07.2008 and the appeal filed by the appellant is allowed with consequential relief, if any.

(Order Portion have already been pronounced in the Open Court)

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| **S/d.** | **S/d.** |
| **(C.L.Mahar)** | **(P.K.Choudhary)** |
| **Member (Technical)** | **Member (Judicial)** |

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