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

Appeal Nos. C/77033, 77034 & 77035/2018

(Arising out of Order-in-Appeal Nos. 28/CUS/CCP-GST/2018 dated 19.03.2018, 29/CUS/CCP-GST/2018 dated 19.03.2018 & 27/CUS/CCP-GST/2018 dated 19.03.2018 all passed by the Commissioner (Appeals) GST, Central Excise & Customs, Bhubaneswar.

M/s. Indian Farmers Fertilizer Cooperative Ltd.

Appellant (s)

Vs.

Commissioner of Customs, Bhubaneswar

Respondent (S)

Appearance:
Shri H. K. Pandey, Adv. For the Appellant (s)
Shri S. K. Naskar, A. C. (A. R.) for the Revenue

CORAM:
HON'BLE SHRI P.K.CHOUDHARY, MEMBER (JUDICIAL)
HON'BLE SHRI BIJAY KUMAR, MEMBER (TECHNICAL)

Date of Hearing: -18.09.2018
Order No. FO/76956-76958/2018

PER SHRI P.K.CHOUDHARY

The facts of the case in brief are that the appellants are manufacturer of fertilizer products classifiable under Chapter 31 of the First Schedule to the Central Excise Tariff Act, 1985 and for that imported Rock Phosphates of Jordan origin from an overseas Supplier M/s. Jordan Phosphate Mines Limited, Amman and Jordon on the basis of the memorandum of agreement. They got some rebate on CTR price on account of higher moisture and Silica contained in the imported Rock Phosphate and reduction of freight on account of subsequent changing in freight rate. The appellant filed different claims on reduction of freight in respect of the impugned Bills of Entry, which is mentioned below:-

SI No.	Appeal No.	Bill of Entry No.	Date	Refund claim amount (in Rs.)
01.	C/77033/2018	6335058	11/08/2016	31,298/-
02.	-do-	6335063	11/08/2016	54355/-
03.	C/77034/2018	8001197	28/12/2016	4,10,104/-
04.	C/77035/2018	3695450	23/12/2015	3,49,890/-
05.	-do-	4316468	19.02.2016	1,22,941/-
06.	-do-	4534557	10/03/2016	1,15,721/-
07.	-do-	4661812	21/03/2016	2,14,440/-
08.	-do-	4766478	31/03/2016	2,38,814/-
09.	-do-	4884707	12/04/2016	1,21,899/-
10.	-do-	4985692	21/04/2016	84,953/-
11.	-do-	5243185	12/05/2016	1,15,645/-
12.	-do-	5379595	24.05.2016	68,897/-
13.	-do-	5457446	31.05.2016	1,32,360/-
Total Refund Claim Amount (in Rs.)				2,061,317/-

2. By the impugned orders, the Commissioner (Appeals) rejected the appeal filed by the assessee. Hence, the present appeal before the Tribunal.

3. Heard both sides and perused the appeal records.

4. On perusal of the impugned orders, we find that the refund claims were rejected solely on the argument that the appellants had

resorted to self-assessment procedure for payment of Customs Duty on imported Rock Phosphate and the impugned Bills of Entry including the declaration made there in respect of such goods. This has been passed through RMS in EDI system, reaches its finality, which the appellants have not challenged.

5. The Lower Authorities followed the decision of the Hon'ble Supreme Court in the case of Priya Blue Industries Ltd. Vs. Commissioner 2004 (172) ELT 145 (S.C.).

6. We find that the Tribunal in the case of Commissioner of Customs (Export) New Delhi Vs. Lalit Kumar – 2017 (358) 395 (Tri – Del) after considering the decision of Priya Blue Industries Limited (Supra), dismissed the appeal filed by the Revenue. The relevant portion of the said decision is reproduced below:

> *"5. On perusal of the case records, we find that the refund application filed by the respondent on 25-5-2011, claiming refund of excess duty paid by it was returned by the Assistant Commissioner (Refund) under the cover of his letter dated 24-8-2011. Thereafter, the respondent had filed the appeal before the Commissioner (Appeals) on 12-9-2011. Cause of action for filing appeal will not be considered as the date of assessment of the Bill of Entry inasmuch as the benefit of duty exemption provided under the above referred notifications was claimed by the respondent in the refund application, since the same was not considered at the time of assessment. Decision taken by the Department for non-consideration of the refund application filed after finalization of assessment and return of the same under the cover of letter dated 24-8-2011, assigning the reason of premature and not maintainable, in*

our considered opinion, would give rise to the cause of action for filing appeal before the ld. Commissioner (Appeals). Since, the decision of the adjudicating authority has been conveyed in the letter dated 24-8-2011, it can be concluded that the said letter is only detriment to the interest of the respondent, against which the appeal was preferred before the Commissioner (Appeals). Appeal against the said letter having been filed within a period of sixty days from the date of its communication in our opinion, there is no delay in filing appeal before the ld. Commissioner (Appeals). Thus, we do not find any merits in the contention of Revenue that filing of appeal before the Commissioner (Appeals) is barred by the limitation of time.

6. Section 27 ibid provides the modalities and procedures for claiming refund of Customs Duty. The said provision mandates that duty paid in pursuance of an order of assessment or borne by the importer, can claim the same as refund. In this case, an amount of Rs. 6,06,887/- towards excise duty/additional duty of customs was paid by the respondent, since the benefit provided under notification dated 1-3-2006 was not claimed in the Bill of Entry. On the basis of information furnished by the respondent, since the Bill of Entry was assessed by the Customs Department and the assessed duty was paid by the respondent, it cannot be said that the duty was paid by the respondent "in pursuance of an order of assessment". The case of the respondent falls under the second category, i.e., "borne by him" contained in Section 27 ibid, according to which, since the duty incidence has been borne by the respondent, claiming of refund of such excess duty in terms of Section 27 ibid, in our view is in conformity with the statutory provisions.

7. The judgment of Hon'ble Supreme Court in the case of Priya Blue Industries Ltd. (supra) cited by Revenue in their grounds of appeal is distinguishable from the facts of the present case inasmuch as the duty in such case was paid by the importer in pursuance of an assessment order and the Hon'ble Supreme Court have ruled that so long as the order of assessment stands, the duty would be payable as per that order of assessment and refund claim is not an appeal proceeding. Contrary is the case in hand, wherein the respondent was not aggrieved by the order of assessment inasmuch as on the basis of information furnished by it in the Bill of Entry, the same was assessed by the Customs Department. Thus, there was no scope on the part of the respondent to file any appeal before the Commissioner (Appeals) against the assessed Bill of Entry. Further, the alternative provided in Section 27 ibid, i.e., 'borne by him' was not the subject matter of dispute before the Hon'ble Supreme Court. Considering the second alternative provided in Section 27 ibid, the Hon'ble Delhi High Court in the case of Aman Medical Products Ltd. v. Commissioner of Customs, Delhi reported in 2010 (250) E.L.T. 30 (Del.) have held that duty borne by the person can claim refund under Section 27 ibid. The relevant paragraphs in the said judgment are extracted herein below :-

If, therefore, we refer to language of 4. 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 cases, 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.*

The Tribunal has referred to the cases of 5. 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 choose 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.

We, therefore, answer the question framed by 6. 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".

7. We also find that the Co-Ordinate Bench of the Tribunal in the case of C.C. (NS-III), JNCH, NHAVA SHEVA Vs. PHYSICAL RESEARCH LABORATORY has dismissed the Department's appeal by observing as under:

> ***"3.Learned Authorized Representative contends that the recourse to refund without appeal against assessment is not in accordance with the decision of the Hon'ble Supreme Court in Commissioner of Central Excise, Kanpur v. Flock (India) Pvt. Ltd. [2000 (120) E.L.T. 285] and in Priya Blue Industries Ltd. v. Commissioner of Customs (Preventive) [2004 (172) E.L.T. 145 (S.C.)]. According to him, reliance placed on Aman Medical Products Ltd. v. Commissioner of Customs, Delhi [2010 (250) E.L.T. 30 (Del.)] in the impugned order may not be sound as the Hon'ble Supreme Court had admitted the Special Leave Petition filed by the Commissioner against the order of the Hon'ble High Court of Delhi.***
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> ***4.Learned Counsel for respondent relies upon Hero Cycles Ltd. v. Union of India [2009 (240) E.L.T. 490 (Bom.)], Aman Medical Products v. Commissioner of Customs, Delhi [2010 (250) E.L.T. 30 (Del.)], Akzo Nobel Coating India Pvt. Ltd. v. Commissioner of Customs (Sea), Chennai [2014 (312) E.L.T. 91 (Tri.-Chennai)], Commissioner of Customs (ACC & Imp), Mumbai v. Andrew Telecom India P. Ltd. [2014 (306) E.L.T. 503 (Tri.-Mumbai)], Sesa Goa Ltd. v. Commissioner of Central Excise & Customs, Goa [2014 (314) E.L.T. 674 (Tri.-Mumbai)] and Priya Blue Industries Ltd. v. Commissioner of Customs (Preventive) [2004 (172) E.L.T. 145 (S.C.)].***
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> ***5.We note that the claim has been examined on merits by the first appellate authority and it was held that duty had been paid in excess. We do not think that the reliance on the decision of the Hon'ble High Court of Delhi in re Aman Medical Products is misplaced for two reasons, viz., that, while the special leave petition has been admitted by the Hon'ble Supreme Court the order has not been***

stayed and as the statutory provision for assessment in Customs Act, 1962 is now different than when the dispute in re Priya Blue Industries Ltd. engaged the attention of the Hon'ble Court. In a regime of self-assessment, the scope for grievance and filing of appeal is non-existent. Nor can the assessing officer be compelled by assessee to resort to re-assessment to enable filing of appeal. This has been discussed at length in the impugned order. On the contrary as observed by the Hon'ble High Court of Bombay in re Hero Cycles Ltd.

The first question that we are called upon to consider is, '6. whether in the absence of impugning the original order of assessment by preferring a statutory appeal which was available, should this Court, ought to exercise its extraordinary jurisdiction. … … … …. The petitioners though had statutory remedy of an appeal against the order of assessment, did not invoke that remedy, but instead directly filed the applications for refund. … … … … … … … … While dismissing the petition, the Court noted that where the party feels aggrieved by an order of the authority and has adequate alternative remedy which it may resort to and if it does not avail of that remedy, the High Court will require a strong case to be made for entertaining the petition in its writ jurisdiction… …

This Court in Wasp Pump Private Limited v. Union of India, 2008 (230) E.L.T. 405 (Bom.) in a case where the petitioner did not avail of the alternative remedy, but had alleged violation of the principles of natural justice and fair play, entertained the writ petition in spite of alternative remedy being available. This Court also noted that once there be notifications, even if attention of the respondents had not been drawn by the petitioners to those notifications, a duty was cast on the Assessing Officer to consider the said notification considering that he is the authority to assess if they were relevant for the purpose of assessment.'

The Hon'ble High Court has drawn attention to two aspects that would be relevant in the context of

submissions made on behalf of Revenue. It has been made clear that even if the benefit of notification has not been claimed, responsibility is cast on the tax authority in an assessment. More important is the observation that writ jurisdiction can be invoked to allow refunds without filing an appeal even if the law has been interpreted to require an appeal to seek refund of excess duty. In the matter before us, filing of an appeal is questionable owing to self-assessment. At the same time, the self-assessment regime prevents the officer from extending the benefit of notification that inspector was entitled objected to. In the circumstances, the law laid down in re Flock (India) Pvt. Ltd. and Priya Blue Industries Ltd. is not applicable.

6.We notice that the Hon'ble High Court of Delhi in re Aman Medical Products has elucidated that 'duty having been borne' is a qualification in Section 27 of Customs Act, 1962 in addition to 'duty paid by him' which was the rationale for the decision in re Flock (India) Pvt. Ltd. and re Priya Blue Industries before holding that :

The Tribunal has referred to the cases of '5. 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.

We, therefore, answer the question framed by 6. 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.'***
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> ***7.The judgment supra has not been stayed. Therefore, we find no reason to hold that the first appellate authority had erred. We find no justification to interfere with the impugned order".***

8. In view of the above decisions, the impugned orders cannot be sustained and are accordingly, set aside. The appeals filed by the appellants are allowed.

(Operative part of the order was pronounced in the open court.)

Sd/-	Sd/-
(Bijay Kumar)	**(P. K. Choudhary)**
Member (Technical)	**Member (Judicial)**

Pooja