IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, KOLKATA

REGIONAL BENCH – COURT NO.2

Customs Appeal No. 75231 of 2021

(Arising out of Order-in-Appeal No. KOL/CUS(PORT)/AKR/54/2021 dated 13.01.2021 passed by Commissioner of Customs (Appeals), Kolkata.)

M/s. Sree Rajendra Textiles
(No. 385, 4th Flr, RMV Second Stage, 2nd Block, 85th Road, Sanjay Nagar, Bangalore.)

...Appellant

VERSUS

Commissioner of Customs (Port), Kolkata
(Customs House, 15/1 Strand Road Kolkata- 700001.)

...Respondent

APPERANCE :
Present for the Appellant: Mr. V. M. Doiphode, Advocate
Present for the Respondent: Mr. S. Debnath & Ashish Misra, Commissioner, Authorized Representative

CORAM:
HON'BLE MR. R. MURALIDHAR MEMBER (JUDICIAL)
HON'BLE MR. RAJEEV TANDON MEMBER (TECHNICAL)

FINAL ORDER No...75185/2024

DATE OF HEARING :30.01.2024

DATE OF PRONOUNCEMENT : 08.02.2024

PER: RAJEEV TANDON

The appellant an importer of silk yarn and silk fabrics has filed the present appeal assailing the Order in Appeal No. KOL/CUS(PORT)/AKR/54/2021 dated 13.01.2021.

2. During the period August 2009 to December 2009, the appellant imported silk yarn and silk fabrics vide 18 Bills of Entry. The appellant claims that in order to save demurrage and other charges at the time of assessment of the Bills of Entry, they paid the disputed amount of CVD alongwith basic customs duty as "*under protest*". It is their case that no orders were subsequently issued with reference to the CVD paid under protest and as no speaking order was passed by the assessing officers as required under Section 17(5) of the **Customs Act**[1], they filed a refund claim for the amount of CVD paid for Rs. 76,62586/- on 16 June 2010, i.e. well within the limitation period as prescribed under Section 27 of the Act.

3. The refund claim filed by the assessee came to be rejected vide Order in Original No. KOL/CUS/AC/465/ARS/2018 dated 17.05.2019, on merits without going into the aspect of finalization of the said assessment wherein duty was paid "*under protest*", and the assessment therefore cannot be considered as final. We note that the learned adjudicating authority mentions at para 5 of the order that, *"An office note dated 23.4.2019 was issued to the Deputy Commissioner of Customs, Appraising Group- 3 asking for reassessment order for the subject refund."*

4. Thereafter, however in para 7 of the said order the learned adjudicating authority observed as under:

> " *7. In response to the Office Note dated 23.04.2019, the Deputy Commissioner of Customs, Apprising Group-3 vide their office note dated 13.05.2019 intimated that:*
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> > *(i) All the Eighteen (18) Bills of Entry belong to the now abolished Gr. 7, it could not be ascertained whether the importer had paid the duty under protest or not.*

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1. The Act.

(ii) EDI data in respect of these Bills of Entry does not reflect the duty was paid under protest.

(iii) No appeal order has been passed in respect of these Bills of Entry. All the Bills of Entry were assessed finally, also there is not any order from higher authority to re-ascertain these B/E."

5. We also note that the learned adjudicating authority in para 8 has pointed out that the claimant vide letter dated 14.05.2019 submitted that they did not want any personal hearing and requested to process the refund application on the basis of available documents. It is seen that the adjudicating authority thus proceeds to decide the subject refund matter on the merits of the issue, irrespective of the outcome of the finalization of the provisional assessment whereby import duties were said to be paid "*under protest*" in respect of each of the said imports. In fact, the adjudicating authority observes that the claimant have not submitted any reassessment order from the concerned Appraising Group in support of their claim.

6. At this juncture, a preliminary question arises as to the decision of the subject matter on merits, without finalization of the subject issue wherein the duty was paid "*under protest*". In terms of proviso to Section 27 of the Customs Act, it is categorical that the normal limitation thereof does not apply. The appellant has enclosed with the appeal papers, a communication dated May 6, 2019 addressed to the Commissioner of Customs, Kolkata seeking a reassessment order or certificate in respect of the said Bills of Entry clearly pointing out that the said goods at the time of import were assessed in Group 7H/B and that they had paid duty under protest at the time of release of the goods from Customs. They had also enclosed with this application, the relevant protest letters filed by the appellant, as also form part of the appeal papers. In the same vein the appellant has placed separate letters of protest as per the following table;

Date	For B/E No.s. & Date
12.10.2009	491480 dated 29.08.2009 491481 dated 29.08.2009
12.10.2009	493740 dated 09.09.2009 495896 dated 22.09.2009
13.10.2009	491482 dated 29.08.2009 491491 dated 29.08.2009 498077 dated 06.10.2009 498079 dated 06.10.2009 498209 dated 07.10.2009
13.10.2009	495895 dated 22.09.2009 495897 dated 22.09.2009
13.10.2009	498191 dated 07.10.2009 498211 dated 07.10.2009 498212 dated 07.10.2009 498221 dated 07.10.2009

intimating the department of their willingness to pay *"the 8% CVD under protest to your office,"* filed at the time of import and prior to clearance of the goods. In addition there are again detailed letters of protest all dated 08.12.2009 addressed to the group AC. From the language used therein, it is evident that the appellant has very categorically sought the issuance of reassessment orders or certificate for the subject Bills of Entry.

7. At this juncture in the first place let us understand "*what is a protest."* The **Black's Law Dictionary-** Seventh edition on page 1239 defines protest as a formal statement or action expressing dissent. It describes the term as a formal statement, disputing a debt's legality or validity but agreeing to make payment while reserving the right to recover the amount at a later time. It states the disputed debt to be described as "*under Protest*."

8. The Tribunal in the case of **CCE, Chandigarh Vs. Iron Factory, Bhopal,**[2] had observed that the protest would stand vacated only once the question on which duty was paid under protest is decided. In the present case the assessing group has to give its finding on the subject question for which duty in the first place has been paid under protest and then alone the question of taking a decision on the subject refund claim would mature for a consideration.

Likewise in the case of **Venkateshwara Synthetics Vs. CCE, Jaipur**[3]**,** it was held that the protest gets vacated with the finalization of RT-12 assessment i.e. to point out that only by way of an assessment process can it be considered that the protest is neutralized or vacated. A decision on a refund claim is not the appropriate way and cannot be considered a legal way forward, of taking a call on the protest lodged by the importer and it needs to be first separately squared up before taking a decision on the refund claim filed by the assessee. Further, in the case of **A.P Paper Mills Ltd. Vs. CCE, Guntur**[4]**,** it was observed that a protest for any purpose, is a protest for all purposes and therefore it is formally necessary to bury the protest by deciding thereupon, whereafter any other issue arising, be it refund or anything else can only be examined, considered and decided upon.

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2. 2004 (91) ECC 57 T.

3. 2001 (131) ELT 114 T.

4. 2002 (104) ECR 1103 T.

9. From the facts on record placed by the appellant, and the legal position as explained above, there is nothing left to imagination that the impugned assessment would automatically be deemed to be provisional as CVD thereon was paid "*under protest,*" at the time of import and clearance of goods for home consumption in accordance with the scheme of the statue. It is therefore imperative to first finalize the assessment undertaken at the time of import. The decision on merits of the refund claim filed shall arise only thereafter once a speaking order in terms of Section 17(5) of the Customs Act has been issued finalising the assessment of the imported goods. In case the department is not able to lay its hands on the subject documents evidencing payment of duty under protest, we direct the department for the re-construction of the files and on the basis of documents filed by the appellant alongwith the subject refund claims filed by the importer/appellant. Under the circumstances, we set aside and quash the orders passed by of the lower authorities and remand the matter to the assessing group to decide on the protest lodged, by the importer at the time of import and payment of duty (CVD) "*under protest*". We would like to point out that we have purposely restrained ourselves from commenting on the merits of the case, so as not to in anyway influence or prejudice the decision making authority.

10. As this is an old matter, we direct the lower authority to complete the assessment process and passing of the necessary orders as per law within a period of four months of the receipt of the present order. We further direct that the refund claim referred to supra shall thereafter be taken up by the department for appropriate consideration in accordance with law.

11. The appeal is disposed by way of remand as aforestated.

(Pronounced in the open court on…08.02.2024..)

Sd/-
(R.Muralidhar)
Member (Judicial)

Sd/-
(Rajeev Tandon)
Member (Technical)

K.M