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

REGIONAL BENCH - COURT NO.2

Customs Appeal No.75 of 2011

(Arising out of Order-in-Appeal No.KOL/CUS/CKP/320/2010 dated 29.11.2010 passed by Commissioner of Customs (Appeals), Kolkata.)

M/s. Bharat Petroleum Corporation Limited
(Haldia Coastal Installation, Patikhali, P.O. Durgachak, Dist. Purba Medinipur, West Bengal-726102.)

...Appellant

VERSUS

Commissioner of Customs, Kolkata

.....Respondent

(15/1, Strand Road, Custom House, Kolkata-700001.)

APPEARANCE

Dr. Samir Chakraborty, Sr. Advocate & Shri Abhijit Biswas, Advocate for the Appellant (s)
Shri A.Mishra & Shri S.Debnath, both Authorized Representatives for the Revenue

CORAM: HON'BLE SHRI R. MURALIDHAR, MEMBER(JUDICIAL)
HON'BLE SHRI K. ANPAZHAKAN, MEMBER(TECHNICAL)

FINAL ORDER NO. 75945/2024

DATE OF HEARING : 16.05.2024
DATE OF DECISION : 16.05.2024

Per : R. MURALIDHAR :

The Appellant had paid 4% SAD amounting to Rs.1,34,12,105.20. Subsequently, they found that they are not required to pay the SAD. They filed refund claim of this amount. The Adjudicating authority has rejected the refund claim on the ground that the Assessment Order of the Bill of Entry was not challenged by the appellant before the Commissioner(Appeals). Being aggrieved by the Order-in-Original, the Appellants filed Appeal before the Commissioner(Appeals), who has upheld the Order-in-Original. Being aggrieved, the Appellant is before the Tribunal.

2. The Ld.Counsel submits that the payment of 4% SAD was not at all called for which was paid by the Appellant, a reputed Public Sector Undertaking, by mistake. The lower authorities are in error in rejecting the refund claim. However, he fairly admits that the assessment was taken up in the year 2010, when the self-assessment regime had not come into force in respect of imports.

3. The Ld.AR for the Department submits that since the assessment was completed before 2010, the Appellant is not covered by any case law holding that further the Appeal is not required to be filed by them. He justifies the rejection of the refund claim by the lower authorities.

4. Heard both sides and perused the documents available on record.

5. We find that the consignment was imported on 09.02.2010 and the Appellant has paid the SAD of 4% without claiming the exemption under Notification No.25/2006-CUS dated 01.03.2006. The Appellants without filing any Appeal before the Commissioner(Appeals), have directly filed their refund application before the Adjudicating authority during the period under consideration. The Hon'ble Supreme Court in the case of Priya Blue and other cases had clearly held that the refund application cannot be directly entertained unless the assessment order is challenged.

6. The Adjudicating authority has given the following findings :-

> *"I have gone through the submissions both written and that made before me during the Personal Hearing. It has been submitted that the claimant had willingly paid the higher duty amount. <u>It is a fact that the claimant did not claim for the duty exemption under the subject Customs Notification No.20/2006 at the time of assessment, resulting in excess payment of duty of Rs 1,32,12,105.20. They had filed the Bill of Entry which was duly assessed by the proper officer and the duties were paid accordingly</u>. Duty was also paid 'under protest'. <u>The assessment on the Bill of Entry being an appealable order, without filing any appeal against the assessment order, refund is not maintainable</u>.*

Moreover in light of the judgments of the Hon'ble Supreme Court in the cases of Karnataka Power Corporation and <u>Priya Blue Industries (supra), it is held that in case the assessment order is not challenged, the refund is not maintainable. This guideline is also highlighted in the CBEC Circular no-24/2004 CUS dated 18/03/2004. The assessment order which had reached its finality was not challenged</u>. The Hon'ble CESTAT, EZB, Kolkata also vide its Order No A-403 dated 27.07.09 in the matter of Commissioner of Customs (Port) vs. Kothari Metals Ltd had held that "In case the assessment order is not challenged, the refund is not 'maintainable'. Although the error appears to be inadvertent in nature, as I understand from the submissions made by the claimant, who are a Public Sector Undertaking that due to urgent requirement of the imported goods viz Fuel, they took clearance of the goods, not challenging the assessment or asking for reassessment, the ratio of the various judgments discussed above are very much applicable in this case and binding

Under the circumstances as stated above, it appears therefore that the Refund in the instant case is not maintainable."

6. We do not see any reason to interfere with the considered decision of Adjudicating Authority. Accordingly, we dismiss the Appeal filed by the Appellant.

(Dictated and pronounced in the open Court.)

Sd/
(R. MURALIDHAR)
MEMBER (JUDICIAL)

Sd/
(K. ANPAZHAKAN)
MEMBER (TECHNICAL)

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