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

**MA (EH)-77675-77687/18**
**& Cus.Appeal Nos.75850-75862/18**

(Arising out of Orders-in-Appeal Nos.47-59/CUS/CCP-GST/2017 dt.22.12.2017, passed by Commr. (Appeals) GST, Excise & Customs, Bhubaneswar)

M/s Paradeep Phosphates Ltd.

Applicant (s)/Appellant (s)

**Vs.**

CGST,Excise & Customs, BBSR

Respondent (s)

Appearance:

Shri S. C. Mohanty, Advocate for the Appellant (s)
Shri S. Guha, Asstt.Commr. (AR) for the Revenue

**CORAM:**
**HON'BLE SHRI P.K.CHOUDHARY, MEMBER (JUDICIAL)**
**HON'BLE SHRI V. PADMANABHAN, MEMBER (TECHNICAL)**

Date of Hearing : 04.03.2019
Date of Decision : 04.03.2019

**ORDER NO.MO/75133-75145/2019 & FO/75233-75245/2019**

**Per Shri P. K. Choudhary :**

The present Misc.Applications are for early hearing of the Cus.Appeal Nos.75850-75862/18, which have been filed against the Orders-in-Appeal Nos.47-59/CUS/CCP-GST/2017 dt.22.12.2017, passed by Commr. (Appeals) GST, Excise & Customs, Bhubaneswar.

2. After carefully considering the reasons as cited in the applications, the early hearing is allowed. With the concurrence of both sides, the appeals itself are taken up for decision.

3. The facts of the case in brief are that the appellants are engaged in the manufacture of chemical fertilizers and has imported Rock Phosphate for use of manufacture. Contracts with overseas suppliers

contain price variation clause on account of annual discount/quantity rebate, determined after end of the contract period. The Bills of Entry were filed and duty was paid on the price as per Bill of Lading, which is higher. Annual discount/quantity rebate, resulted in reduction of price/assessable value under Section 14 of the Customs Act, 1962. Refund claims were filed along with all the documents including BRC. The claims were rejected on the ground that the assessments are final and as such, refund claims are not maintainable.

4. Heard both sides and perused the appeal records.

5. We find that the raw material i.e. Rock Phosphate was imported from Morocco, with whom the appellants have long terms contracts. The said contract contains price variation clause, according to which depending upon the quantum of off take, the overseas supplier offers quantity rebate and price discount, which can only be ascertained at the end of the contract period. The above factual aspects are admitted by the authorities below, and therefore, those are not under dispute. Since the quantity rebate/price discount was not known at the time of import, the imported goods were cleared on payment of duty, on the basis value shown by the overseas supplier, in the bill of lading.

6. After completion of the contract period, and as a result of price negotiation between the parties, the quantity rebate/price discounts were determined. Thereafter, the appellant raised debit notes on the foreign suppliers, consequent upon which the differential amount was refunded to the appellant, through the authorised banking channel. This fact is also not under dispute. In all the thirteen cases, the bills of entry were presented, following the self assessment procedure in

terms of Sectin 17 (1) of the customs Act, 1962 and customs duty was accordingly paid on the value, as shown in the relevant bills of lading. As mentioned above, upon determination of quantity rebate/price discount, the foreign suppliers refunded the differential amount. The amount refunded by the foreign suppliers, had consequential impact on the valuation of imported goods. As a consequence, the value of imported rock phosphate was reduced by the amount of refund. Such reduced value represented the transaction value of imported Rock Phosphate, in terms of Section 14 of the Customs Act.

7. As stated above, the appellant at the time of importation, paid duty on the value shown in the bill of lading, which was higher than the transaction value, determined subsequently, after receipt of discount/rebate amount from the foreign suppliers. Transaction value, in terms of Section 14 of the Act, means the price actually paid/ payable for the imported goods. Duty, in terms of Section 14 of the Act, is leviable/payable on the transaction value. Duty payable in this case became lesser than the duty already paid by the appellant.

8. The Assistant Commissioner, relying upon the decision of the Hon' 'ble Supreme Court in the case of Flock (India) Pvt. Ltd. 2000 (120) E.L.T. 285 (S.C.) and Priya Blue Industries 2004 (172) E.L.T. 145 (S.C.), had held that since the appellant did not challenge the assessment of bill of entry by filling appeal against the same, Refund Applications are not maintainable. Aggrieved by the adjudication orders of the Assistant Commissioner, the appellant filed appeals before the commissioner (Appeals), which were rejected by the

impugned common order, against which the present appeals are filed before this Hon'ble Tribunal.

9. On perusal of the impugned order, we find that the refund claim was rejected mainly on the ground that the assessment made by the appellant in the Bill of Entry reached its finality, which they have not challenged.

10. The lower authorities followed the decision of the Hon'ble Supreme Court in the case of Priya Blue Industries Limited Vs. Commissioner 2004 (172)ELT 145 (S.C.).

11. We find that the Tribunal in the case of Commissioner of Customs (Export) New Delhi Vs. Lalit Kumar reported in 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."*

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

(Dictated and pronounced in the open court.

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| Sd/ | Sd/ |
| **(V.Padmanabhan)** | **(P. K. Choudhary)** |
| **Member (Technical)** | **Member (Judicial)** |

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