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

REGIONAL BENCH - COURT NO.2

Customs Miscellaneous Application No.76814 of 2018 (COD)
(On behalf of Appellant)
AND
Customs Appeal No.78100 of 2018

(Arising out of Order-in-Appeal No.07/CUS/CCP/2017 dated 28.02.2017 passed by Commissioner(Appeals), Central Excise, Customs & Service Tax, Bhubaneswar.)

M/s. Indian Farmers Fertilizer Co-operative Limited
(Paradeep, 754142 (Odisha))

...Appellant

VERSUS

Commissioner of Customs(Preventive), Bhubaneswar
.....Respondent
(Bhubaneswar, Odisha)

WITH

(i) Customs Miscellaneous Application No.76815 of 2018(COD) and Customs Appeal No.78101 of 2018 (M/s.Indian Farmers Fertilizer Co-operative Limited); (ii) Customs Miscellaneous Application No.76816 of 2018(COD) and Customs Appeal No.78102 of 2018 (M/s.Indian Farmers Fertilizer Co-operative Limited); (iii) Customs Miscellaneous Application No.76817 of 2018(COD) and Customs Appeal No.78103 of 2018 (M/s.Indian Farmers Fertilizer Co-operative Limited);

(i) (Arising out of Order-in-Appeal No.08/CUS/CCP/2017 dated 28.02.2017 passed by Commissioner(Appeals), Central Excise, Customs & Service Tax, Bhubaneswar.)

(ii) (Arising out of Order-in-Appeal No.09/CUS/CCP/2017 dated 28.02.2017 passed by Commissioner(Appeals), Central Excise, Customs & Service Tax, Bhubaneswar.)

(iii) (Arising out of Order-in-Appeal No.06/CUS/CCP/2017 dated 28.02.2017 passed by Commissioner(Appeals), Central Excise, Customs & Service Tax, Bhubaneswar.)

APPEARANCE

Shri H.K.Pandey, Advocate for the Appellant (s)
Shri S.Guha, Authorized Representative for the Respondent (s)

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

MISCELLANEOUS ORDER NO. 77597-77600/2019

FINAL ORDER NO. 76702-76705/2019

DATE OF HEARING : 27 November 2019
DATE OF DECISION : 27 November 2019

P.V.SUBBA RAO :

The learned Advocate appearing on behalf of the Appellant has filed an affidavit signed by the Joint General Manager (F & A) of the appellant company stating the reasons for the inordinate delay in filing the appeals. It has been further submitted that they have a strong case on merits and the delay is unintentional. They have also relied upon the judgement of the Hon'ble Apex Court in the case of Land Acquisition Anantnag and Another vs. M.S.T. Katiji & Others [1987 (28) ELT 185 (SC).

2. In view of the submissions as made by the learned Advocate and the reasons as explained in the affidavit and the Miscellaneous Applications, the prayer for condoning the delay in filing the appeal before the Tribunal is allowed.

3. With the consent of both the sides, appeals itself are taken up for disposal.

4. In these cases appellant had filed refund claim with respect to fertilizers which have been imported on which they have paid excess Customs duty taking the wrong value for the purpose of calculation. Initially, the assessments were done provisionally and subsequently they were finalized by the Assistant Commissioner of Customs. Thereafter, the appellant filed a refund claim which was rejected by the lower authority and such rejection was upheld by the first appellate authority by the impugned orders on the ground that the assessments which were done by the adjudicating authority were not challenged by the assessee. He relied on the case law – Flock (I) Pvt.Ltd. [2000 (120) E.L.T. 285 (SC)] and Priya Blue Industries Ltd. [2004 (172) ELT 145(SC)] to reject the refund applications.

5. Aggrieved by this rejection by the first appellate authority, present appeals have been filed.

6. Learned Authorized Representative for the Revenue points out that the issue is now settled by the larger of the Supreme Court in the case of ITC Ltd. v. Commissioner of Central Excise, Kolkata-IV (Civil Appeal No.293294 of 2009) as reported in 2019-TIOL-418 (SC-CUS-LB). It is now settled by this judgement that no refund claim can be allowed arising out of an assessment unless the assessment itself has been challenged.

7. Learned Counsel for the Appellant submits that they were also denied the principles of natural justice while finalizing the assessment inasmuch as they were not given a personal hearing before finalizing the assessment.

8. We have considered the arguments of both the sides and perused the records. The short question which falls for consideration in these appeals is whether the first appellate authority was correct in rejecting the appeals of the appellant and upholding the rejection of their refund claims by the lower authority; merely on the ground that they have not challenged the assessment orders from which such refund arises.

9. We find that this issue has gone through several judicial decisions. In the case of Priya Blue Industries (supra) and Flock India Ltd.(supra), the Hon'ble Apex Court had held that where a refund arises out of the assessment such refund cannot be sanctioned unless the assessment itself has been challenged and modified. The reason for this is officers sanctioning the refund cannot sit in judgement over the assessment which in itself is an adjudication process. Therefore the assessment must be challenged before the Commissioner(Appeals) before refund claim can be filed. Sanction of refund is mere a mechanical process which arises out of such re-assessment or modification of assessment at the appellate stage. Subsequently, in the case of Aman Medical Products Limited [2009-TIOL-566-HC-DEL-CUS] and Micromax Informatics Ltd. [2016-TIOL-978-HC-DEL-CUS) the Hon'ble High Court of Delhi has distinguished the cases of Priya Blue Industries and Flock India Ltd. and held that where there is no assessment order itself there is nothing for the assessee to challenge

and in such cases the refund can be sanctioned without challenging the assessment. The case of Aman Medical Products pertained to a Customs case where the department introduced a system of Risk Management System(RMS). Although section 17 of Customs Act required the assessing officer to assess the Bills of Entry, the officer had no way of carrying out the assessment as the RMS used to automatically clear the goods based on the declarations filed by the assessee. The question was whether in such a case, the assessment of Bill of Entry done by the RMS based on the declaration by the importer has to be challenged before seeking a refund. The case of Micromax Informatics Ltd. (supra) pertained to the period when self-assessment procedure has been introduced under section 17 of the Customs Act, 1962. In this case, assessee had self-assessed duty at the higher rate and thereafter sought refund. The Hon'ble High Court had held that it being a self-assessment there is no order by any officer and hence nothing to be challenged and refund can be processed and sanctioned accordingly.

10. Both these cases and many similar appeals have come up before the Hon'ble Supreme Court in the case of I.T.C. Ltd. (supra). The Hon'ble Apex Court has held that in all cases including cases of self-assessment, the assessment must be challenged before refund can be sanctioned. Paras 44-48 of this judgement are reproduced below:-

> ***"44.*** *The provisions under Section 27 cannot be invoked in the absence of amendment or modification having been made in the bill of entry on the basis of which self-assessment has been made. In other words, the order of self-assessment is required to be followed unless modified before the claim for refund is entertained under Section 27. The refund proceedings are in the nature of execution for refunding amount. It is not assessment or re-assessment proceedings at all. Apart from that, there are other conditions which are to be satisfied for claiming exemption, as provided in the exemption notification. Existence of those exigencies is also to be proved which cannot be adjudicated within the scope of provisions as to refund. While processing a refund application, re-assessment is not permitted nor*

conditions of exemption can be adjudicated. Re-assessment is permitted only under Section 17(3)(4) and (5) of the amended provisions. Similar was the position prior to the amendment. It will virtually amount to an order of assessment or re-assessment in case the Assistant Commissioner or Deputy Commissioner of Customs while dealing with refund application is permitted to adjudicate upon the entire issue which cannot be done in the ken of the refund provisions under Section 27. In Hero Cycles Ltd. v. Union of India - 2009 (240) E.L.T. 490 (Bom.) though the High Court interfered to direct the entertainment of refund application of the duty paid under the mistake of law. However, it was observed that amendment to the original order of assessment is necessary as the relief for a refund of claim is not available as held by this Court in Priya Blue Industries Ltd. (supra).

45. *Reliance was also placed on a decision of Rajasthan High Court with respect to service tax in Central Office Mewar Palace Org. v. Union of India - 2008 (12) S.T.R. 545 (Raj.). In view of the aforesaid discussion, we are not inclined to accept the reasoning adopted by the High Court, that too is also not under the provisions of the Customs Act.*

46. *The decision in Intex Technologies (India) Ltd. v. Union of India has followed Micromax (supra). The reasoning employed by the High Courts of Delhi and Madras does not appear to be sound. The scope of the provisions of refund under Section 27 cannot be enlarged. It has to be read with the provisions of Sections 17, 18, 28 and 128.*

47. *When we consider the overall effect of the provisions prior to amendment and post-amendment under Finance Act, 2011, we are of the opinion that the claim for refund cannot be entertained unless the order of assessment or self-assessment is modified in accordance with law by taking recourse to the appropriate proceedings and it would not be within the ken of Section 27 to set aside the order of self-assessment and reassess the duty for making refund; and in case any person is aggrieved by any order which would include self-assessment, he has to get the order modified under Section 128 or under other relevant provisions of the Act.*

> ***48.*** *Resultantly, we find that the order (s) passed by Customs, Excise, and Service Tax Appellate Tribunal is to be upheld and that passed by the High Courts of Delhi and Madras to the contrary, deserves to be and are hereby set aside. We order accordingly. We hold that the applications for refund were not maintainable. The appeals are accordingly disposed of. Parties to bear their own costs as incurred."*

11. As the issue has now been settled by the larger Bench of the Hon'ble Apex Court, we hold that the appellant was not entitled to the refund without having first challenged the assessment order itself and therefore the impugned order denying such refund is correct.

12. We have considered the arguments of the learned Counsel for the appellant that they were not given an opportunity of being heard before finalizing the assessment. Nevertheless, the fact remains that such assessment has not been challenged at all by the appellant. This appeal is not with respect to finalization of provisional assessment but with respect to refund. Respectfully following the ratio of the decision of the larger Bench of the Hon'ble Supreme Court, we find that the rejection of the refund by the impugned orders of the first appellate authority are correct and call for no interference.

The impugned orders are upheld and the appeals are rejected.

(Dictated and pronounced in the open Court.)

SD/
(P.K.CHOUDHARY)
MEMBER (JUDICIAL)

SD/

(P.V.SUBBA RAO)
MEMBER (TECHNICAL)

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