IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
WEST ZONAL BENCH AT MUMBAI

APPEAL NO: C/87117/2017

[Arising out of Order-in-Appeal No: 358(CRC-I)/2017/(JNCH)-Appeal – II dated 9th June 2017 passed by the Commissioner of Customs (Appeals – II), Mumbai – II.]

Avery Dennison Pvt Ltd …***Appellant***

versus

Commissioner of Customs - NS – III
Nhava Sheva, Mumbai – II ***…Respondent***

Appearance:

Shri R Krishnan, Advocate for appellant

Shri MK Mall, Assistant Commissioner (AR) for the respondent

CORAM:

Hon'ble Shri C J Mathew, Member (Technical)

Date of hearing:	**04/12/2017**
Date of decision:	**04/12/2017**

ORDER NO: ____________________________

Appellant, M/s Avery Dennison Pvt Ltd, is in appeal against rejection of refund claim as upheld by Commissioner of Customs (Appeals – II), Mumbai – II *vide* order-in-appeal no. 358(CRC-I)/2017/(JNCH)-Appeal – II dated 9th June 2017.

2. The issue relates to anti-dumping duty paid by the appellant as *per* notification no. 79/2010-Cus dated 30th July 2010 on import of 'PVC flex film' declared as 'self adhesive PVC film' which, according to them, was not liable to anti-dumping duty; nevertheless, on the insistence of the proper officer of customs, duty was paid, under protest, on imports against various bills of entry filed between 7th October 2010 and 23rd October 2010. On the basis of subsequent clarification dated 21st October 2010 of Ministry of Finance that the said notification does not cover the item under import, refund claim was preferred before the competent authority. After due notice and on conclusion of proceedings, the refund claim was rejected on the ground that the assessment itself had not been challenged before the appellate authority. The first appellate authority relied upon the decision of the Hon'ble Supreme Court in *Flock India v. Commissioner of Central Excise [2000 (120) ELT 284 (SC)]* and *Priya Blue Industries v. Commissioner of Customs [2004 (172) ELT 145 (SC)]* to uphold the order of the lower authority.

3. Heard Learned Counsel for appellant and Learned Authorised Representative for Revenue. Learned Authorised Representative reiterated the findings of the order of the first appellate authority

4. Learned Counsel relied on the decisions in

i. *Styleman v. Commissioner of Customs, Chennai [2006*

(198) ELT 559 (Tri.Chennai)];

ii. *Aditya Birla Nuvo Limited v. Commissioner of Customs, Bangalore [2008 (222) ELT 249 (Tri.Bang.)];*

iii. *Palco Recycle Exchange Ltd v. Commissioner of Customs, Kandla [2014 (311) ELT 704 (Tri.-Ahmd.)];*

iv. *Steelco Gujarat Ltd v. Commissioner of Customs (Exports), Mumbai – I [2014 (314) ELT 425 (Tri.-Mumbai)]*

v. *Commissioner of Customs & Central Excise, Goa v. Narayan Bandekar & Sons Pvt Ltd [2010 (252) ELT 417 (Tri.Mum)];*

vi. *Aman Medical Products Ltd v. Commissioner of Customs, Delhi [2010 (250) ELT 30 (Del.)];*

vii. *Micromax Informatics Ltd v. Union of India [2016 (335) ELT 446 (Del.)]*

5. It is seen from the decision of the Hon'ble High Court of Delhi in *re Aman Medical Products Ltd* that

> *'4. If therefore we refer to language of 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*

case 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.

5. The Tribunal has referred to the cases of 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.

6. We, therefore, answer the question framed by 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 accordingly set aside the impugned order dated 3-4-2008 of the CESTAT [2008 (228) E.L.T. 593 (Tri.-Del.)] and uphold the order of the Commissioner of Customs (Appeals) dated 28-1-2005 and remand of the matter to the original authority viz Deputy Commissioner of Customs (Refund) to examine the merits of the matter in accordance with law after providing due opportunity to *the appellant.'*

6. For the above reason, the impugned order is set aside and the appeal is allowed.

(Pronounced in Court)

(C J Mathew)
Member (Technical)

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