IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
WEST ZONAL BENCH AT MUMBAI
COURT NO.

Appeal No. C/1000/2009

(Arising out of Order-in-Appeal No. 160/2009/MCH/AC/Export/09-10 passed by the Commissioner of Customs (Appeals), Mumbai)

Commissioner of Customs (EP), Mumbai : **Appellant**

VS

M/s. Zenith Birla (India) Ltd. : **Respondent**

Appearance

Shri S. R. Nair, EO (A.R.) for Appellant

Shri H.G. Dharmadhikari, Advocate for respondent

CORAM:

Hon'ble Shri Ramesh Nair, Member (Judicial)
Hon'ble Shri Raju, Member (Technical)

Date of hearing : 03/04/2018
Date of pronouncement : 17/5/2018

ORDER NO. A/86421/2018

Per : Raju

This appeal has been filed by Revenue against order of Commissioner (Appeals) directing the Assistant Commissioner to consider the refund application.

2. Ld. AR pointed out that the respondents were engaged in export of Black Steel Pipes/Tubes and on 9.6.2008 and 10.6.2008 they filed various shipping bills on which Let Export Order was given on 13.6.2008. He pointed out that prior to 13.6.2008 certain export duty was leviable and consequently respondent had paid the export duty in

respect of these shipping bills. He further pointed out that vide notification No. 77/2008-Cus dt. 13.6.2008 the export duty on the said goods was withdrawn and consequently respondent filed refund claim of the same. The refund claim was rejected by the original adjudicating authority, on the ground that the Notification No. 77/2008-Cus., exempting these goods from export duty was effective from midnight of 13.6.2008 and was not applicable to goods exported on or before 13.6.2008. For this purpose he relied on an earlier order of Commissioner (Appeals) dt. 31.12.2008. In appeal proceedings the Commissioner (Appeals) set aside the order of rejection holding that the notification No. 77/2008 was effective from 00 hrs., on 13.6.2008 and therefore in respect of goods on which Let Export Order was given on 13.6.2008 the the exemption would be available Ld. AR argued that in these circumstances the benefit of notification cannot be extended to these export. He further argued that the shipping bills were finally assessed and in view of decision of Hon'ble Apex Court in the case of *Collector of Central Excise, Kanpur Vs. Flocks India* 2000 (20) ELT 285 (SC) & *M/s. Priya Blue Inds. Vs. Commissioner of Customs (Preventive)* 2004 (172) ELT 145 (SC) no refund can be granted the respondent had not been challenged this aspect.

3. Ld. Counsel for the respondent pointed out that the notification would be effective from the 00 hrs., on the date on which they are notified. The goods were thus exempted by virtue of Notification No. 77/2008-Cus. Dt. 13.6.2008. He relied on the decision of Tribunal in the case of *Jindal Saw Ltd. Vs. Commr. of Cus. (Export), Mumbai* 2012 (280) ELT 135 (Tri. Mumbai). Ld. Counsel further pointed out that the second ground regarding failure to challenge the assessment order

was not raised earlier and therefore the same cannot be raised before the second appellate authority for the first time. He further relied on the decision of Hon'ble High Court of Delhi in the case of *Aman Medical Products Ltd. Vs. Commissioner of Customs, Delhi* 2010 (250) ELT 30 (Del.) to assert that it is not necessary to challenge the order of assessment. He pointed out that the decision of Hon'ble High Court of Delhi in the said case was passed after considering the decision of Hon'ble Apex Court in the case of *M/s. Flocks India Ltd. (supra)* and *M/s. Priya Blue Industries Ltd. (supra).*

4. We have carefully considered the rival submissions, we find that so far as the eligibility of exemption is concerned the matter stands decided by Tribunal decision in the case of Jindal Saw Ltd. 2012 (280) ELT 135 wherein following has been observed.:

> *"We have carefully considered the rival submissions in the instant case the appellant had challenged the assessment order before the Commissioner (Appeals) at the relevant time who rejected their appeal and they are before us against the said order. Therefore, the ratio of the Priya Blue does not apply to the facts of the present appeals. As regard the applicability of Notification No. 77/08 which is dated 13.6.2008 there is no doubt or dispute about the fact that Notification takes effect from the midnight of 12th and 13th June 2008. In the instant case, the 'Let Export Order' has been given on 13.6.2008 and therefore the benefit of notification No. 77/08 dated 13.6.2008 shall apply to the exports made by the appellant and hence they are rightly entitled for the refund of export duties wrongly paid by them and we hold accordingly".*

In view of the above, we hold that the goods exported on 13.6.2008 would be eligible for the exemption under Notification No.77/2008-Cus.

5. The second issue relates to failure of the respondent to challenge the assessment of the shipping bills and consequent application of the decision of Hon'ble Apex Court in the case of *Priya Blue Industries Ltd.(supra) and Flocks India Pvt. Ltd. (supra).* The second issue which needs to be decided as if the fresh ground regarding the failure respondent to challenge the assessment of shipping bills can be raised for the first time before Tribunal.

6. We find that the said ground regarding failure to challenge the assessment of shipping bill has been raised for the first time before Tribunal. It is settled law that Revenue cannot raise fresh grounds at the second appellate stage. For this purpose reliance is placed on the decision of Tribunal in the case of *Kalyani Sharp India Ltd. Vs. Commissioner of Central Excise, Pune-III* 2008 (226) E.L.T.197 (Tri.-Mumbai) and in the case of *Commissioner of Cus. (Import), Mumbai Vs. Voith India Pvt. Ltd.* 2009 (242) ELT 263 (Tri.-Mumbai).

7. In these circumstances, we do not find any merit in the Revenue appeal and the same is dismissed.

(Pronounced in court on 17/5/2018)

(Ramesh Nair)
Member (Judicial)

(Raju)
Member (Technical)

SM.