IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
WEST ZONAL BENCH AT MUMBAI
COURT No. I

APPEAL No. C/96/2012

(Arising out of Order-in-Appeal No. 618(CRC-I)/2011(JNCH)/IMP-538 dated 20.10.2011 passed by Commissioner of Customs (Appeals), JNCH, Nhava Sheva, Mumbai)

Currency Note Press **Appellant**

Vs.

Commissioner of Customs (I), Nhava Sheva **Respondent**

Appearance:

Shri A.B. Nawal, Advocate, for appellant
Shri Roopam Kapoor, Commissioner (AR), for respondent

CORAM:

Hon'ble Ajay Sharma, Member (Judicial)
Hon'ble Mr. Sanjiv Srivastava, Member (Technical)

Date of Hearing: 25.10.2018
Date of Decision: 11.01.2019

ORDER No. **A/85039/2019**

Per: Sanjiv Srivastava

This appeal is directed against order in appeal No 618(CRC-I)/ 2011 (JNCH)/IMP-538 dated 20.10.2011 of the Commissioner of Customs (Appeal) Mumbai –II. By the said order Commissioner (Appeal) has upheld the order of Deputy Commissioner of Customs CRC-1 JNCH URA, rejecting the refund claim filed by the Appellants. The order of Deputy Commissioner is reproduced below:

“I reject the refund amount of Rs 1,13,33,651/- (Rupees One Crore Thirteen Lakhs Thirty Three Thousand Six Hundred and Fifty One Only) pertaining to three refund claims under Section 27 of the Customs Act, 1962 as claimed by M/s Currency Note Press Nashik Road.”

2.1 Appellants have vide Bill of Entries as detailed below imported NRB CWBN paper and paid duty at the time of clearance.

S No	B/E Number & Date	TR-6 Challan No & Date	Amount
1	85524 dtd 15.01.2010	10322879 dtd 19.01.2010	6905756
2	911004 dtd 23.02.2010	10364127 dtd 24.02.2010	861070
3	885303 dtd 05.02.2010	10345047 dtd 09.02.2010	3566825
			11333651

2.2 The goods imported by the appellants as per them were exempted under Notification No 21/2002-Cus dated 01.03.2002 Sl No 155). However inadvertently they filed the Bill of Entry and assessed the goods without claiming the benefit of said exemption. They paid the duty assessed.

2.3 Later on realizing their mistake they filed the refund claim in respect of the duty paid by them in respect of the goods imported by them under the said three B/E’s, by claiming the benefit of exemption under notification No 21/2002-Cus.

2.4 The refund claim filed by the appellants was rejected by the Deputy Commissioner holding as stated in para q, supra. On appeal Commissioner (Appeal) upheld the order of Deputy Commissioner.

2.5 Aggrieved by the order of Commissioner (Appeal), Appellants are in appeal before us.

3.1 We have heard Shri A B Nawal Advocate for the appellant and Shri Roopam Kapoor, Commissioner (Authorized Representative) for the revenue.

3.2 Arguing for the Appellants learned counsel submitted that-

i. The duty in the present case was paid under mistake of law on the goods on which absolute exemption was granted under Notification No 21-2002-Cus dated 01.03.2002, hence question of challenging the assessment order does not arise at all.

ii. In the following decisions, refund has been allowed in similar situation-

a. Kent RO Systems Pvt Ltd [2017 (347) ELT 405 (Del)]
b. Lalit Kumar [2017 (358) ELT 395 (T-Del)]
c. Suryalaxmi Cotton Mills Ltd [2015 (327) ELT 718 (T-Mum)]
d. Litle Bee Impex [2017 (49) STR 361 (T-Del)]
e. Hindustan Petroleum Corporation Limited [2015 (328) ELT 490 (T-Mum)]

f. Micromax Infomatics Ltd [2016 (335) ELT 446 (Del)]

g. Hero Cycles {2009 (240 ELT 490 (BOM)] SLP dismissed in [2010 (262) ELT A103 (SC)]

h. Karnataka Power Corporation Ltd [2002 (143) ELT (SC)]

i. Whirlpool of India Ltd [2007 (211) ELT 223 (T-Mum)]

j. Crest Chemicals [2009 (244) ELT 361 (T-Mum)]

k. HEG Ltd [2006 (205) ELT 254 (T-Mum)]

l. MECON Ltd [2003 (153) ELT 574 (T-Kol)]

m. Hindustan Petroleum Corporation Limited [2003 (156) ELT 425 (T-Chennai)]

n. Senka Carbon Pvt Ltd [2007 (216) ELT 397 (T-Chen)]

3.3 Arguing for the revenue, learned Authorized Representative submitted-

i. Issue whether the appellants could have claimed the refund without challenging the assessment order is no longer res-integra and he relies on the following decisions-

   a. Flock India [2000 (120) ELT 285 (SC)]

   b. Priya Blue Industries [2004 (172) ELT 145 (SC)]

   c. Maharastra Cylinders Pvt Ltd [2010 (259) ELT 369 (Bom)]

d. BPL Telecom Ltd. [2015 (325) ELT 467 (SC)]

e. ACE Designers [2015 (3290 ELT 109 (Mad)]

f. Karari Associates [2009 (236) ELT 23 (Bom)]

ii. In view of the above decisions the appeal filed by the appellants do not have any merit and needs to be dismissed.

4.1 We have considered the submissions made in appeal and during the argument.

4.2 The refund claim filed by the appellant was rejected by the Deputy Commissioner after recording as follows:

"However, the Bills of Entry under reference are of 19.01.2010, 09.02.2010 & 24.02.2010. It is noticed that the importer has not produced any evidence regarding having filed an appeal with the Appellate Authority against the above referred 3 Bills of Entry, and having the decision of the Appellate Authority in their favour setting aside the assessment done under Section 17 of the Customs Act, 1962. As such a Personal Hearing was held on 15.11.2010 when Mr. Venktesh Iyer, Consultant appeared for the same. During the Personal Hearing he submitted that the authorization letter has already been submitted along with the refund application, the exemption Notification No.21/2002-Cus. dated 01.03.2002 (Sr.No. 155) was in existence on the day filing the Bills of Entry & stated that it is settled law when the exemption prevails on the day of importation which should be allowed, there was no need to file any appeal as the refund claim was submitted within the stipulated time period under section 27 of Customs Act,

1962, he prayed that due to genuine error by the Currency Note Press, wholly owned Govt. of India, the duty was paid, which otherwise was not payable. The Govt. does not get unduly enrichment by the small amount of Rs.1,13,33,651/- but being auditable point he requested for the earliest sanction. He also pleaded that in exactly identical case of Commissioner of C. Ex. Nhava Sheva V/s Crest Chemicals [2009(244) ELT 34 Tribunal Mumbai], the issue has been settled in favour of the Crest Chemicals that the section 149 of Customs Act, 1962 has no time limit & hence the amendment in the document can be made on the basis of documents existed at the time of clearance, even after the clearance of the goods. At the end he submitted the relevant case law & requested for the earliest sanction.

I find that the said case law cannot be made applicable in case of above 3 Bills of Entry. It has been explicitly made it clear in the case of Hon'ble Supreme Court of India in the case of Commissioner of Central Excise V/s Flock India Pvt. Ltd. [2000(120)ELT 285(SC)] that a refund claim is not maintainable if the assessment order is not challenged, in other words which has become final. This order being of the highest judicial authority will prevail over all the judgments of the Junior Judicial Authority."

4.3 Upholding the order of adjudicating authority Commissioner (Appeal) has recorded in para 5 and 6 of his order as follow:

"5. I have gone through the impugned order and submission of the appellant. The appellant's contention is that an assessed Bills of Entry cannot be treated as assessment order and therefore law laid down by Hon'ble Supreme Court in the case of Flock India 2000

(120) ELT 285 (SC) and Priya Blue 2004 (172) ELT 145 (SC) is not applicable to the present case. In this regard it is observed that it is settled law that Bill of Entry in itself an appealable order. Hon'ble Tribunal in the case of Max India Ltd. V/s. Commissioner of Customs (ICD), New Delhi – 2005 (192) ELT 246 (Tri.-Del) has held that assessment on Bill of Entry under section 47 is an appealable order in itself and can be challenged only in higher appellate forum within the period of limitation provided for the appeal. Similarly in the case of Amba Exports Inc. V/s. Commissioner of Customs, New Delhi – 2006 (199) ELT 734 (Tri-Del), Hon'ble Tribunal has held that assessment Bill of Entry is to be regarded as appealable order. Therefore there is no merit in the argument that assessed Bill of Entry is not an appealable order.

6. The appellant have argued that the B/E may be reassessed under Section 149 of the Customs Act. In this regard, it is observed that section 149 empowers proper officer to permit amendment of the Bill of Entry. However, the present appeal has not been filed against an order of rejection of the appellant's application for amendment of B/E under Section 149. The appeal has been filed against rejection of refund and not against any order refusing amendment in the Bill of Entry. The above two are separate issues. The appellant had not filed any application before the Assistant Commissioner for amendment of Bill of Entry under Section 149 and got the same amended before seeking the refund vide their aforesaid letter dated 4.10.2010. What they had sought was refund of excess duty paid. Further, it is observed that question of reassessment of Bill of Entry under Section 149 came up before Hon'ble Madras High Court in the case of Commissioner of Customs, Tuticorin Vs.

Thiru Arooran Sugars Ltd. – 2010 (254) ELT 45 (Mad.) and the Hon'ble High Court held that the Dy./Asstt. Commissioner was justified in rejecting the amendment of B/E under Section 149 when it involved re-quantification of duty.

7. The appellant has also argued that the exemption was not claimed at the time of assessment because the applicability of the exemption notification was doubtful. I find that the present issue is directly covered by the judgment of the Hon'ble Tribunal in the case of Commissioner of Customs (Imp.), Mumbai Vs. L.K. Steel Factory P. Ltd. – 2008 (225) ELT 113 (Tri.-Mumbai). In the said case also the appellant had failed to claim the benefit of exemption from the adjudicating authority. The Hon'ble Tribunal held that non-claiming of exemption cannot be considered as a clerical mistake and provisions of Section 27 and 28 would prevail over the Sections of the Customs Act. Hon'ble Supreme Court in the case of Priya Blue Industries Ltd. Vs. Commissioner of Customs (Preventive) – 2004 (!72) ELT 145 (SC) has categorically laid down that officer considering a refund claim cannot sit in appeal and also cannot review an assessment order. The observation of the Supreme Court are reproduced below:

"6. .... Once an Order of Assessment is passed the duty would be payable as per that order. Unless that order of assessment has been reviewed under Section 28 and/or modified in an Appeal that Order stands. So long as the Order of Assessment stands the duty would be payable as per that Order of Assessment. A refund claim is not an Appeal proceeding. The Officer considering a refund claim cannot sit in Appeal over an assessment made by a competent Officer. The Officer considering the refund claim cannot also review an assessment order.""

4.4 In case of Mafatlal Industries [1997 (89) ELT 247 (SC)], a nine member bench of Hon'ble Supreme Court has laid down-

"70. *Re : (II) :We may now consider a situation where a manufacturer pays a duty unquestioningly - or he questions the levy but fails before the original authority and keeps quiet. It may also be a case where he files an appeal, the appeal goes against him and he keeps quiet. It may also be a case where he files a second appeal/revision, fails and then keeps quiet. The orders in any of the situations have become final against him. Then what happens is that after an year, five years, ten years, twenty years or even much later, a decision is rendered by a High Court or the Supreme Court in the case of another person holding that duty was not payable or was payable at a lesser rate in such a case. (We must reiterate and emphasise that while dealing with this situation we are keeping out the situation where the provision under which the duty is levied is declared unconstitutional by a court; that is a separate category and the discussion in this paragraph does not include that situation. In other words, we are dealing with a case where the duty was paid on account of mis-construction, mis-application or wrong interpretation of a provision of law, rule, notification or regulation, as the case may be.) Is it open to the manufacturer to say that the decision of a High Court or the Supreme Court, as the ease may be, in the case of another person has made him aware of the mistake of law and, therefore, he is entitled to refund of the duty paid by him? Can he invoke Section 72 of the Contract Act in such a case and claim refund and whether in such a case, it can be held that reading Section 72 of the Contract Act along with Section 17(1)(c)* *of the Limitation Act, 1963, the period of limitation for making such a claim for refund, whether by way of a suit or by way of a writ petition, is three years from the date of discovery of such mistake of law? Kanhaiyalal is understood as saying that such a course is permissible. Later decisions commencing from Bhailal Bhai have held that the period of limitation in such cases is three years from the date of discovery of the mistake of law. With the greatest respect to the learned Judges who said so, we find ourselves unable to agree with the said proposition. Acceptance of the said proposition would do violence to several well-accepted concepts of law.* ***One of the important principles of law, based upon public policy, is the sanctity attaching to the finality of any proceeding, be it a suit or any other proceeding. Where a duty has been collected under a particular order which has become final, the refund of that duty cannot be claimed unless the order (whether it is an order of assessment, adjudication or any other order under which the duty is paid) is set aside according to law.***

So long as that order stands, the duty cannot be recovered back nor can any claim for its refund be entertained. *But what is happening now is that the duty which has been paid under a proceeding which has become final long ago - may be an year back, ten years back or even twenty or more years back - is sought to be recovered on the ground of alleged discovery of mistake of law on the basis of a decision of a High Court or the Supreme Court. It is necessary to point out in this behalf that for filing an appeal or for adopting a remedy provided by the Act, the limitation generally prescribed is about three months (little more or less does not matter). But according to the present practice, writs and suits are* *being filed after lapse of a long number of years and the rule of limitation applicable in that behalf is said to be three years from the date of discovery of mistake of law : The incongruity of the situation needs no emphasis. And all this because another manufacturer or assessee has obtained a decision favourable to him. What has indeed been happening all these years is that just because one or a few of the assessees succeed in having their interpretation or contention accepted by a High Court or the Supreme Court, all the manufacturers/Assessees all over the country are filing refund claims within three years of such decision, irrespective of the fact that they may have paid the duty, say thirty years back, under similar provisions - and their claims are being allowed by courts. All this is said to be flowing from Article 265 which basis, as we have explained hereinbefore, is totally unsustainable for the reason that the Central Excise Act and the Rules made thereunder including Section 11B/Rule 11 too constitute "law" within the meaning of Article 265 and that in the face of the said provisions - which are exclusive in their nature - no claim for refund is maintainable except under and in accordance therewith. The second basic concept of law which is violated by permitting the above situation is the sanctity of the provisions of the Central Excises and Salt Act itself. The Act provides for levy, assessment, recovery, refund, appeals and all incidental/ancillary matters. Rule 11 and Section 11B, in particular, provide for refund of taxes which have been collected contrary to law, i.e., on account of a mis-interpretation or mis-construction of a provision of law, rule, notification or regulation. The Act provides for both the situations represented by Sections 11A and 11B. As held by a seven - Judge Bench in Kamala Mills, following the* *principles enunciated in Firm & Illuri Subbaiya Chetty, the words "any assessment made under this Act" are wide enough to cover all assessments made by the appropriate authorities under the Act whether the assessments are correct or not and that the words "an assessment made" cannot mean an assessment properly and correctly made. It was also pointed out in the said decision that the provisions of the Bombay Sales Tax Act clearly indicate that all questions pertaining to the liability of the dealer to pay assessment in respect of their transactions are expressly left to be decided by the appropriate authorities under the Act as matters falling within their jurisdiction. Whether or not a return is correct and whether a transaction is exigible to tax or not are all matters to be determined by the authorities under the Act. The argument that the finding of the authority that a particular transaction is taxable under the Act is a finding on a collateral fact and, therefore, resort to civil court is open, was expressly rejected and it was affirmed that the whole activity of assessment beginning with the filing of the return and ending with the order of assessment falls within the jurisdiction of the authorities under the Act and no part of it can be said to constitute a collateral activity not specifically or expressly included in the jurisdiction of the authorities under the Act. It was clarified that even if the authority under the Act holds erroneously, while exercising its jurisdiction and powers under the Act that a transaction is taxable, it cannot be said that the decision of the authority is without jurisdiction. We respectfully agree with the above propositions and hold that the said principles apply with equal force in the case of both the Central Excises and Salt Act and the Customs Act. Once this is so, it is un-understandable how an assessment/adjudication made* *under the Act levying or affirming the duty can be ignored because some years later another view of law is taken by another court in another person's case. Nor is there any provision in the Act for re-opening the concluded proceedings on the aforesaid basis. We must reiterate that the provisions of the Central Excise Act also constitute "law" within the meaning of Article 265 and any collection or retention of tax in accordance or pursuant to the said provisions is collection or retention under "the authority of law" within the meaning of the said article.*

In short, no claim for refund is permissible except under and in accordance with Rule 11 and Section 11B. An order or decree of a court does not become ineffective or unenforceable simply because at a later point of time, a different view of law is taken. If this theory is applied universally, it will lead to unimaginable chaos. It is, however, suggested that this result follows only in tax matters because of Article 265. The explanation offered is untenable as demonstrated hereinbefore. As a matter of fact, the situation today is chaotic because of the principles supposedly emerging from Kanhaiyalal and other decisions following it. Every decision of this Court and of the High Courts on a question of law in favour of the assessee is giving rise to a wave of refund claims all over the country in respect of matters which have become final and are closed long number of years ago. We are not shown that such a thing is happening anywhere else in the world. Article 265 surely could not have been meant to provide for this. We are, therefore, of the clear and considered opinion that the theory of mistake of law and the consequent period of limitation of three years from the date of discovery of such mistake of law cannot be invoked by an assessee taking advantage of the *decision in another assessee's case. All claims for refund ought to be, and ought to have been, filed only under and in accordance with Rule 11/Section 11B and under no other provision and in no other forum. An assessee must succeed or fail in his own proceedings and the finality of the proceedings in his own case cannot be ignored and refund ordered in his favour just because in another assessee's case, a similar point is decided in favour of the manufacturer/assessee. (See the pertinent observations of Hidayatullah, CJ. in Tilokchand Motichand extracted in Para 37). The decisions of this Court saying to the contrary must be held to have been decided wrongly and are accordingly overruled herewith."*

4.5 In case of Flock India, supra Hon'ble Supreme Court has held as follows:

"10. *Coming to the question that is raised there is little scope for doubt that in a case where an adjudicating authority has passed an order which is appealable under the statute and the party aggrieved did not choose to exercise the statutory right of filing an 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 the adjudicating authority had committed an error in passing his order. If this position is accepted then the provisions for adjudication in the Act and the Rules, the provision for appeal in the Act and the Rules will lose their relevance and the entire exercise will be rendered redundant. This position in our view, will run counter to the scheme of the Act and will introduce an element of uncertainty in the entire process of levy and collection of excise duty. Such a position cannot, be countenanced. The view taken by* *us also gain support from the provision in sub-rule (3) of Rule 11 wherein it is laid down that where as a result of any order passed in appeal or revision under the Act, refund of any duty becomes due to any person, the proper officer, may refund, the amount to such person without his having to make any claim in that behalf. The provision indicates the importance attached to an order of the appellate or revisional authority under the Act therefore, an order which is appealable under the Act is not challenged then the order is not liable to be questioned and the matter is not to be reopened in a proceeding for refund which if we may term it so is in the nature of execution of a decree/order. In the case at hand it was specifically mentioned in the order of the Assistant Collector that the assessee may file appeal against the order before the Collector (Appeals) if so advised."*

4.6 In case of Priya Blue referred to by Learned Authorized Representative, Hon'ble Apex Court held as follows:

"5. *Under Section 27 of the Customs Act, 1962 a claim for refund can be made by any person who had (a) paid duty in pursuance of an Order of Assessment or (b) a person who had borne the duty. It has been strenuously submitted that the words "in pursuance of an Order of Assessment" necessarily imply that a claim for refund can be made without challenging the Assessment in an Appeal. It is submitted that if the assessment is not correct, a party could file a claim for refund and the correctness of the Assessment Order can be examined whilst considering the claim for refund. It was submitted that the wording of Section 27, particularly, the provisions regarding filing of a claim for refund within the period of 1 year or 6 months also showed that a claim for* *refund could be made even though no Appeal had been filed against the Assessment Order. It was submitted that if a claim for refund could only be made after an Appeal was filed by the party, then the provisions regarding filing of a claim within 1 year or 6 months would become redundant as the Appeal proceedings would never be over within that period. It was submitted that in the claim for refund the party could take up the contention that the Order of Assessment was not correct and could claim refund on that basis even without filing an Appeal.*

6. *We are unable to accept this submission. Just such a contention has been negatived by this Court in Flock (India)'s case (supra). Once an Order of Assessment is passed the duty would be payable as per that order. Unless that order of assessment has been reviewed under Section 28 and/or modified in an Appeal that Order stands. So long as the Order of Assessment stands the duty would be payable as per that Order of Assessment. A refund claim is not an Appeal proceeding. The Officer considering a refund claim cannot sit in Appeal over an assessment made by a competent Officer. The Officer considering the refund claim cannot also review an assessment order.*

7. *We also see no substance in the contention that provisions for a period of limitation indicates that a refund claim could be filed without filing an Appeal. Even under Rule 11 under the Excise Act the claim for refund had to be filed within a period of six months. It was still held, in Flock (India)'s case (supra), that in the absence of an Appeal having been filed no refund claim could be made.*

8. *The words "in pursuance of an Order of Assessment" only indicate the party/person who can make a claim for* *refund. In other words, they enable a person who has paid duty in pursuance of an Order of Assessment to claim refund. These words do not lead to the conclusion that without the Order of Assessment having been modified in Appeal or reviewed a claim for refund can be maintained.*

9. *In our view, the ratio in Flock (India)'s case (supra) fully applies. We, therefore, see no substance in the Review Petition. Accordingly, the Review Petition stands dismissed with no order as to costs."*

4.7 In case of BPL Telecom Ltd [2015 (325) ELT 467 (SC)] Hon'ble Apex Court held

"Though initially dispute arose about classification of the goods in question, viz., equipments pertaining to setting up of VSAT terminals used in television broadcasting, that was decided and on that basis, the respondent herein filed application for refund. This refund application was rejected by the Deputy Commissioner of Customs vide his orders dated 31-7-2000.

2. *Against this order of the Deputy Commissioner, the assessee filed the appeal. It appears from the reading of the orders dated 18-5-2006 [2006 (201) E.L.T. 503 (Tribunal)] passed by the Customs, Excise and Service Tax Appellate Tribunal (hereinafter referred to as 'CESTAT') in the said appeal that the CESTAT has merely gone into the issue of classification and has not dealt with the issue which was really involved, viz., whether the respondent was entitled to refund or not. That appeal, in any case, against the order of rejection qua refund claim preferred by the assessee was not maintainable as held by this Court in Priya Blue Industries Ltd. v. Commissioner of Customs (Preventive) [2005 (10) SCC 433]."*

4.8 In case of Maharastra Cylinders Pvt Ltd., supra Hon'ble Bombay High Court held as follows:

"8. *Where the goods are cleared under the self removal procedure basis on approved classification list and approved price list, the clearances are on self assessment and unless such self assessment is varied or altered, the question of refunding the duty paid on self assessment does not arise at all. The Apex Court in the case of M/s. Priya Blue Industries Ltd. v. Commissioner of Customs (Preventive) [AIR 2004 S.C. 5115]has held that validity of an assessment cannot be considered while dealing with the refund claim. The said ratio would apply to the self assessment as well."*

4.9 In case of Karan associates [2009 (236) ELT 23 (Bom)], Hon'ble High Court held –

"6. *The basic question raised in this appeal is, where the imported goods are assessed on the bill of entry by enhancing the invoice value without passing a speaking order and the goods are cleared on payment of duty as assessed, whether the importer is entitled to claim refund of duty paid on the enhanced value of the goods on the ground that the assessing officer has failed to pass a speaking order though repeatedly requested by the importer?*

7. *In the present case, admittedly, the appellant had cleared the imported goods on 30-1-2003 on payment of duty as assessed without any protest. Though the appellant by a letter dated 11-2-2003 requested the assessing officer to pass a reasoned order, it appears that a speaking order has not been passed in the matter. However, the fact that the assessing officer has failed to pass a speaking order would not invalidate the* *assessment order so as to file refund claim on 10-4-2003 and seek refund of duty paid on the enhanced value as per the assessment order. In other words, pendency of the application seeking a speaking order would not entitle the appellant to seek refund of duty paid as per the assessment order. It is well settled by the decisions of the Apex Court in the case of Flock (India) Pvt. Ltd. (supra) and Priya Blue Industries Ltd. (supra) that so long as the assessment order stands the question of granting refund does not arise at all.*

8. *The argument of the appellant that unless an appealable speaking order is passed, the importer cannot file an appeal against the assessment order is without any merit. Assessment order passed on the bill of entry is an appealable order and the same can be challenged even in the absence of a speaking order. In other words, in the absence of a speaking order, it cannot be said that the assessment order is not appealable. Where an assessment order is passed without giving reasons and in spite of repeated requests reasoned order is not passed, proceedings can be initiated for setting aside the assessment order passed on the bill of entry. In the present case, save and accept writing letters no proceedings have been initiated for setting aside the assessment order. Therefore, the fact that the assessing officer has not passed a speaking order would not entitle the appellant to claim partial refund of duty paid as per the assessment order.*

9. *Strong reliance was placed by the counsel for the appellant on the decision of the Apex Court in the case of Karnataka Power Corporation Ltd. v. Commr. of Cus. (Appeals), Chennai reported in 2002 (143) E.L.T. 482 (S.C.) followed by the Tribunal in the case of TELCO Ltd. (supra). Both the aforesaid decisions have no relevance to* *the facts of the present case, because, in both the above cases, the Apex Court as well as Tribunal have remanded the matter back to the adjudicating authority to consider the application of the importer regarding the reclassification of the goods as well as the refund flowing therefrom. In the present case, the question raised is, where reasoned assessment order is not passed, whether the ratio laid down by the Apex Court in the case of the Priya Blue Industries Ltd. (supra) would be applicable. The Tribunal has rightly held in the affirmative. In both the aforesaid cases relied upon by the appellant, the importer had sought reclassification of the imported goods and the consequential refund. In that context, the matters were remanded for decision on merits regarding reclassification and consequential refund, if any. In the present case, during the pendency of the application filed on 11-2-2003 seeking reasoned order, the appellant had filed refund claim on 10-4-2003. The said refund application dated 10-4-2003 was disposed off in the light of the decisions of the Apex Court in Priya Blue Industries Ltd. (supra). Thus, the aforesaid two decisions relied upon by the Tribunal are distinguishable on facts.*

10. *Reliance was placed by the counsel for the appellant on the decision of this Court in the case of Glaxo Laboratories v. A.V. Venkateswaran reported in AIR 1959 Bombay 372 as well as the decision of the Punjab High Court in the case of M/s. Shreeram Durgaprasad Tumsar v. Union of India & Ors. reported in AIR 1962 Punjab 360 which have no relevance to the facts of the present case. As held in these cases, the appellate authority can properly decide the appeal only if the assessment order is a reasoned order. But it does not mean that in the absence of reasons the duty paid* *pursuant to the assessment order is liable to be refunded.*

11. *By inserting Section 17(5) into the Customs Act, 1962 with effect from 13-7-2006 the legislature has made it mandatory for the assessing officer to pass a speaking order within the time stipulated therein. Even before the insertion of the above provisions, the assessing officer was bound to pass a speaking order wherever demanded. However, the fact that a speaking order is not passed would not entitle the importer to claim refund of duty paid as per the assessment order. Therefore, the decision of the authorities below in rejecting the refund claim of the appellant by relying upon the decision of the Apex Court in the case of Priya Blue Industries Ltd. (supra) cannot be faulted."*

4.10 Chennai High Court has in case of ACE Designers distinguished the decision of Karnataka High Court in case of Karnataka Power Corporation Ltd and that of Delhi High Court in case of Aman Medicals and held that without setting aside of the assessment order in appellate proceeding refund filed cannot be entertained. The relevant excerpts are reproduced below:

"13. *In Karnataka Power Corporation Ltd. case (supra), we find that a formal application for re-assessment of duty was made together with a refund of a part of the duty paid on the ground that the classification has to be correctly done. Therefore, both on the issue of classification and refund was at large. In those circumstances, the point at issue was whether, when a new classification is suggested before the appellate authority, the consequent relief flowing out could be held* *to be time barred. In that case, it is clear from the order that the appellant had sought for amendment before the Assistant Commissioner of Customs and in that view of the matter, refund was claimed. Therefore, the issue was at large before the competent authority. The facts, as narrated above, would reveal that the decision in Karnataka Power Corporation case (supra) relied on by the Tribunal is distinguishable on facts, as the issue on classification as well as refund was at large before the appellate authority. However, in the case on hand, such is not the case, as the order of assessment has not been challenged and the assessment has reached finality.*

14. *The distinction, as detailed above, which is evident from the facts of the present case, has not been appreciated in its proper perspective by the Tribunal while arriving at the decision.*

15. *The decision of the Delhi High Court, brought to the notice of this Court at the time of hearing in Aman Medical Products case (supra) is a case where the assessee paid higher rate of duty due to inadvertence without there being an order of assessment and in such a dispute, the question before the Court was whether the payment of duty will deprive the importer of his right to file refund under Section 27 of the Customs Act. However, the facts in the present case are totally different from the one before the Delhi High Court. The facts in the present case is that a new notification is pressed into service, at a belated stage, for claiming refund of the excess duty paid and without challenging the order of assessment. The facts in the present case are clearly distinguishable as we find that a new plea is taken at the time of refund by placing reliance on Notification No. 18/2000-Cus. The assessment made in the Bill of entry is totally a different claim from the one* *made in the refund application. We, therefore, have no hesitation to hold that the 1st respondent, having not challenged the order of assessment, cannot at a belated stage, claim refund by pressing into service another Notification and, therefore, the refection of the refund claim by the Assessing Officer and rightly held by the Commissioner (Appeals) is clearly sustainable. The Tribunal, without discussing the decisions, has, by a cryptic order, allowed the appeal of the 1st respondent following the decision of the Supreme Court in Karnataka Power Corporation Ltd. case (supra), which decision, is clearly distinguishable on facts, as narrated above. This Court is of the considered opinion that the decision of the Supreme Court in Flock (India) Pvt. Ltd. case and Priya Blue Industries case (supra) are squarely applicable to the facts of the present case. Accordingly, the substantial question of law is answered in favour of the appellant/Revenue and against the 1st respondent/assessee."*

4.11 App[4ellants have relied upon the decision of the Delhi High Court in acse of Kent Ro Systems Pvt Ltd [2017 (347) ELT 405 (Del)] wherein it has been held

"2. *The facts are that the assessee had imported eight consignments of ferrite magnets and filed bills of entry but at that time had not claimed exemption. The competent officer proceeded to assess them to duty even though he was obliged not to do so in view of the exemption Notification prevailing at that time 12/2012-Cus., dated 17-3-2012. The assessee realized that it had omitted to claim the benefit available to it and sought refund of the duty, i.e., of Rs 6,76,165/- which was initially rejected by the Deputy Commissioner on the ground that the bills of entry had not been challenged.*

The assessee's appeal was, however, allowed by the Appellate Commissioner in view of this Court's judgment in Aman Medical Products Ltd. v. CC, Delhi, 2010 (250) E.L.T. 30 (Del.) which considered the Supreme Court's decision in Priya Blue Industries Ltd. v. Commissioner of Customs, 2004 (172) E.L.T. 145 (S.C.). The Court held that where the duty had been paid by the assessee without an order of assessment and there was no lis pending between the parties then in such a situation, the refund claim of the assessee could not be rejected merely on the ground of non-filing of appeal against the bills of entry, which had subsequent attained finality."

The said decision of Delhi High Court is based on its earlier decision in case of Aman Medicals, which has been distinguished by Hon'ble Madras High Court as referred in para 4.10 above. Since the facts in present case are akin to the case under consideration of Madras High Court, we hold that this case too is distinguishable. Even otherwise in case where there are decisions of jurisdictional high Court and Apex Court on the subject, we are bound to follow the said decisions.

4.12 In case of Hero Cycles [2009 (240) ELT 490 (Bom)] referred to by the Appellants, Hon'ble Bombay High Court has held-

*"**9.** Once we exercise our extraordinary jurisdiction, we will have to issue directions to the respondents to amend the original order of assessment. In so far as the claim for refund is concerned, that would only arise after the order is amended. The relief of refund claimed is not maintainable before the order of assessment is amended*

or modified as held by the Supreme Court in Priya Blue Industries (supra). The Petitioner no doubt has contended that he has not passed on the duties and as such the question of unjust enrichment would not arise in the matter. That is not for us to answer today. That would only be on an appropriate application being filed for relief after original orders of assessment which have been quoted in our judgment are modified."

Plain reading of the above order makes it is clear that the refund claim is not maintainable till the order of assessment is modified in view of the decision of the Apex Court in case of Priya Blue. However exercising the extraordinary jurisdiction under Article 226 of Constitution of India, High Court has directed for amendment of the assessment order. Tribunal being the creation of statue do not have such extraordinary jurisdiction as can be exercised by the High Court. In fact the decision goes against the Appellant's as the ratio decidendi of the same is that refund claim is not maintainable without modification of the assessment order.

4.13 Thus the clear position which emerges from all the decisions of Hon'ble Supreme Court and High Courts is that the refund claim under section 27 is not maintainable unless the order of assessment is modified in the appellate proceedings.

4.14 In view of clear statement of law in term of the Hon’ble Supreme Court and High Courts we do are not taking the cases decided by the tribunal for further discussion.

5.1 In result we do not find any merits in the appeal filed by the appellant and dismiss the same.

(Pronounced in court on 11.01.2019)

(Ajay Sharma)
Member (Judicial)

(Sanjiv Srivastava)
Member (Technical)

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