

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

APPEAL No. C/739/2012

(Arising out of Order-in-Appeal No. 263(Gr.IIB)/2012 (JNCH)IMP 221 dated 9.5.2012 passed by Commissioner of Customs (Appeals), Mumbai-II, JNCH)

Tranasia Bio-Medicals Ltd.

Appellant

Vs.

Commissioner of Customs (I), Nhava Sheva

Respondent

Appearance:

Shri Vipul Khandar, C.A, for appellant

Ms. Trupti Chauhan, Assistant Commissioner (AR), for respondent

CORAM:

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

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

Date of Hearing: 01.11.2018

Date of Decision: 15.01.2019

ORDER No. **A/85080/2019**

Per: Sanjiv Srivastava

Appellants have filed this appeal against the order in appeal No 263 (Gr. IIB)/2012 (JNCH) IMP 221 dated 09.05.2012 of the Commissioner of Customs (Appeals) Mumbai II. By the said order Commissioner (Appeal) held as follows:

"I have gone through the impugned order and submissions of the appellant. The appellant's contention is tht the imported goods Instachk HBsAg Test Card (WB) were inadvertently classified in chapter 30 instead of

Chapter 38. It is observed that Chapter Heading 3822 covers diagnostic and laboratory reagents. Only diagnostic agents are exempt under Sl. No.83 of Notification No.21/2002 read with Sl. No.31 of the list 4 of the notification. The Bill of Entry was facilitated under RMS. The appellant had not submitted any product literature or any other evidence at the time of assessment nor had claimed the assessment of goods as diagnostic agents under chapter 38. Further, at the time of filing the Bill of Entry, the importer had not requested for exemption from duty under Notification No. 21/2002. Since the concessional rate was not claimed, the goods were not subjected to any chemical test for verification of the description of the goods. The appellant has claimed the benefit of exemption at the appellate stage on the basis of the evidence which was not submitted at the assessment stage. Hon'ble Tribunal in the case of Velere Power India Pvt. Ltd. Vs Commissioner of C. Ex, Bangalore I – 2011 (265) ELT 156 (Tri. Bang) has held that in absence of technical literature, it is not possible to form a view about claim of any importer as to the technical nature of the goods. Further, under Rule 5 of Customs (Appeals) Rules, 1982, the appellant is not entitled to submit additional evidence at the appellate stage. Considering the facts and circumstances of the case, I pass the following order:

Order

I uphold the assessment and reject the appeal.”

2.1 Appellants have imported “Instachk HBsAg Test Card (WB) & Instachk HCV Test Card (WB)” from InTec Products, INC China. For the import of the said goods appellant filed B/E No 3665574 dated 31.05.2011 claiming classification of said goods under heading

30022011. The goods were accordingly assessed to duty @ 10% (Basic) + Nil (CVD) + 2% (Edu Cess) +1% (SHE) +4 % (SAD). As per the assessment done appellants have paid the duty and cleared the goods.

2.2 Subsequent to clearance of goods appellant filed an appeal against the assessed bill of entry claiming that "Instachk HBsAg Test Card (WB)" are regularly imported and are classified under CTH 38220090 and allowed benefit of exemption under notification No 21/2002-Cus dated 01.03.2002 (S No 83, List 4 Sl No 31).

2.3 The said appeal filed by the appellants has been rejected by the Commissioner (Appeal) by his order as referred in para 1, supra.

2.4 Aggrieved appellants are in appeal before CESTAT.

3.1 We have heard Shri Vipul Khandar Chartered Accountant for the Appellant and M/s Trupti Chauhan, assistant Commissioner (Authorized Representative) for the revenue.

3.2 Arguing for the appellants learned Chartered accountant drew our attention to subsequent B/E No 3070152 dated 29.03.2011 for import of "Instachk HBsAg Test Card (WB)" wherein the same goods have been classified under heading No 38220090 and allowed benefit of exemption under notification No 21/2002-Cus dated 01.03.2002 (S No 83, List 4 Sl No 31). He thus

submitted that order of Commissioner (Appeal) rejecting their appeal for non submission of technical/ product literature at the time of importation/ clearance of goods, or their not claiming the benefit of exemption at that time. It has been held by various authorities that appellants could have filed the Appeal against the assessment order and claim the benefit of exemption otherwise admissible but not claimed by them at the time of filing/ assessment of Bill of Entry. He thus prayed for allowing the appeal.

3.3 Learned Authorized Representative reiterated the order in appeal and submitted that in view of clear finding by the Commissioner (Appeal) that product literature or any other evidence at the time of assessment/ clearance of goods, the appeal filed by the appellant do not have any merits and needs to be dismissed.

4.1 We have considered the submissions made in appeal and during the course of arguments.

4.2 It is now settled law that against the assessment of B/E, appellants can file the appeal before the Commissioner (Appeal). In their appeal they could have claimed re-assessment of B/E, in terms of classification, valuation or any other benefit which they intended to seek but has been not sought by them at the time of filing the B/E. The observation of the Commissioner

(Appeal) that *“The appellant has claimed the benefit of exemption at the appellate stage on the basis of the evidence which was not submitted at the assessment. Hon’ble Tribunal in the case of Velere Power India Ltd Vs Commissioner of C Excise Bangalore-I -2011 (265) ELT 156 (Tri Bang)] has held that in absence of technical literature, it is not possible to form a view about the claim of an importer as to the technical nature of goods. Further, under Rule 5 of Customs (Appeal) Rules, 1982, the appellant is not entitled to submit additional evidence at the appellate stage”, is totally contrary to the settled position in law.*

4.3 The decision of tribunal relied upon by the Commissioner (Appeal) while disallowing the appeal of Appellant has been set aside by Karnataka High Court in [2012 (279) ELT 501 (Kar)]. Hon’ble High Court held –

“3. *During the pendency of the appeal, the assessee on 29-4-2009 produced before the Tribunal documents showing the general description of rectifiers, technical specification of rectifiers, physical specification of rectifiers, environmental characteristics of rectifiers, other specification relevant for use of rectifiers, process flow chart of rectifier modification, description of processes in the flow chart, a specimen log of test of rectifier modules and BSNL’s requirement of power plant described.*

4. *The learned counsel for the assessee at the time of arguments relied on the aforesaid documents to substantiate their contention that the process carried out by the assessee constitutes manufacturing process. It appears the judgment was reserved and was*

pronounced three months after the date of hearing. At para 5.1 of the impugned order the Tribunal [2011 (265) E.L.T. 156 (Tribunal)] has observed as under :

“In the entire submissions made by the appellant before us and before the adjudicating authority, there is no technical write up which would indicate as to how the processes (as recorded hereinabove), are incidental or ancillary to the manufactured product. Before us also, the learned Counsel has only submitted that programming and burning test would be a test, which is to be considered incidental or ancillary to the manufactured product. We find that in the absence of any technical write up as to how the rectifiers, which were imported by the assessee, and the rectifiers cleared by the assessee after undergoing the processes as indicated hereinabove had resulted in a better rectifiers cleared from the assessee’s unit. We are unable to accept the assessee’s contention that the processes indicated herein above, would amount to process which is incidental or ancillary for the completion of the manufactured product.”

5. *Therefore, it is obvious that the technical particulars which was furnished to the Appellate Authority on 29-4-2009 which is produced along with these papers and which are at pages 69 to 91 are not taken note of the by the Tribunal while passing the order. Therefore, the order passed ignoring the material on record cannot be sustained. In these circumstances, the impugned orders requires to be set aside.”*

4.4 Hon’ble Bombay High Court has in case of Hero Cycles [2009 (240) ELT 490 (Bom)] has held as follows:

“8. *In the instant case, the Petitioners admittedly, based on the said notification were being granted benefit of the notification previous to the imports in issue and also subsequent to the imports in question. In other*

words, both the parties were aware of the said notifications. If the Petitioner on account of an inadvertent error chose not to apply for the benefit, would that result in denial of the benefit. In our opinion that by itself would not be answer as a duty is cast on the authority to assess the goods and impose duty according to law which includes a statutory notification, if duty cannot be demanded if otherwise not payable. Once there be a power to assess there is a corresponding duty to assess according to law. The fact that the Petitioner has paid the duty under mistake of law and or in the instant case by oversight, cannot result in being assessed to duty which was otherwise not payable. In our opinion, this will be a case of manifest injustice and on the face of it erroneous.”

4.5 Hon'ble Bombay High Court has in case of Karan Associates [2009 (236) ELT 23 (Bom)] has held as follows:

“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.”*

4.6 In the present case in view of the law laid down in a various decisions of the High Court, we are of the view that matter in respect of re-classification and claim of

exemption need to be remanded back to the assessing authority for reconsideration of the said claim on the basis of the evidences that appellant would like to place on record in support of his claim. After considering the said claim and evidences assessing authority shall pass a reasoned speaking order accepting or denying the claim of appellant.

5.1 In result the appeal filed by the appellant is allowed and the matter remanded back to assessing authority for reconsideration. Needless to say since the matter is quite old assessing authority shall decide the issue within three months of receipt of this order.

(Pronounced in court on 15.01.2019)

(Ajay Sharma)
Member (Judicial)

(Sanjiv Srivastava)
Member (Technical)

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