CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, MUMBAI
REGIONAL BENCH
COURT No. I

Customs Appeal No. 746 of 2012

(Arising out of Order-in-Appeal No. 51/Mumbai-III/2012 dated 23.05.2012 passed by Commissioner of Customs (Appeals), Mumbai-III)

M/s. Tata Teleservices (M) Ltd. **Appellant**
Voltas House,
T.B. Kadam Marg,
Chinchpokali, Mumbai 400 033.

Vs.

Commr. of Cus. (ACC & Imp.), Mumbai **Respondent**
Air Cargo Complex,
Sahar, Andheri (E),
Mumbai 400 099.

Appearance:

None for the Appellant
Shri R.K. Dwivedy, Additional Commissioner, Authorised Representative for the Respondent

CORAM:

Hon'ble Dr. D.M. Misra, Member (Judicial)
Hon'ble Mr. Sanjiv Srivastava, Member (Technical)

FINAL ORDER NO. **A/86998/2019**

Date of Hearing: 29.08.2019
Date of Decision: 29.08.2019

PER: SANJIV SRIVASTAVA

This appeal is directed against the order in appeal No 51/ Mumbai III/2012 dated 23.05.012 of the Commissioner of Customs (Appeals), Mumbai Zone III. By the impugned order, Commissioner has set aside the order in original, of the Dy Commissioner Customs (EPCG) Air Cargo Complex Mumbai, Holdings as follows:

"25. In view of the above, exercising discretion & powers u/s 149 of the Customs Act, 1962, I authorize the subject

122 Bills of Entry Listed in Annexure 'A" hereto, to be amended-

- *a) to read the classification of the subject goods as 85252017 as against 85252019 mentioned in these Bs/E;*
- *b) to extend benefits under notification no 21/2002-Cus Sr No 313 dated 01.03.2002 to the subject goods viz Fixed Wireless Telephones, covered under the Bs/E;*
- *c) to delete claim of EPCG benefits in respect of the import of the subject goods, mentioned in the subject Bs/E."*

2.1 Appellants imported Fixed Wireless Telephones (FWT) under cover of 122 Bs/E during July 2003 to July 2004. They cleared the goods against EPCG License after payment of duty @ 5% as required under the EPCG scheme and after complying with the requirements of the scheme, as per notification No 55/2003 dated 01.04.203.

2.2 Following the Supreme Court decision in the case of appellant group company, Government issued Circular No 15/2006 stating as follows:

"I am directed to invite your attention to Board's Circular No. 57/2003 - Cus dated 27-06-2003 regarding eligibility of Fixed Wireless Telephones & Fixed Wireless Terminals working on cellular technology under notification No. 21/2002 -Cus dated 01-03-2002 S. No. 313. In the circular, it was clarified that the term 'Cellular Phone' in the notification No. 21/2002 -Cus (S.No. 313) dated 01-03-2002 covers only hand held mobile phones working on cellular technology. The entry does not cover either Fixed Wireless Terminals or Fixed Wireless Telephones working on cellular technologies.

2. You may be aware that the Board's aforesaid Circular no. 57/2003 - Customs dated 27-06-2003 had been temporarily suspended by the Hon'ble High Courts of Andhra Pradesh and the Panaji bench of Mumbai High

Court with the direction for provisional assessment supported by bank guarantee for difference of duty as an interim relief. The Board had appealed against the decision of both the High Courts before the Hon'ble Supreme Court.

3. The Hon'ble Supreme Court has since decided the issue. The Apex Court vide order dated 13-12-2005 observed that "...since there is no dispute that the technology used in the Fixed Wireless Telephone LSP 340 and the hand held mobile phone is the same, there is no warrant to limit either the tariff entry or the exemption notification to hand held cellular phones. Neither the range nor the size should make the difference." The order of the Hon'ble Supreme Court has been examined in the Board and it has been decided to accept the order as all relevant issues have been considered by the Apex Court.

4. In view of the above, it has therefore been decided to withdraw Board Circular No. 57/2003 dated 27-06-2003 and to restore status-quo ante prevailing prior to the issuance of the said circular. Consequently, the benefit of notification No. 21/2002 -Cus (S.No. 313) dated 01-03-2002 is available to all telephones(including Fixed Wireless Telephones) working on cellular technology."

2.3 Thereafter appellants sought amendments in the Bill of Entries in terms of Section 149 of the Customs Act, 1962 claiming the benefit of exemption under Notification No 21/2002-Cus dated 01.03.2002 (Sr No 313) and for deletion of EPCG benefits from the Bills of Entry. These amendments were allowed by the Deputy Commissioner as per his order referred in para 1, supra.

2.4 Revenue filed the appeal against the order of Deputy Commissioner which was allowed as per the impugned order.

2.5 Aggrieved by the impugned order, appellants have filed this appeal.

3.1 Matter was listed for hearing on several occasions, 12.12.2018, 30.01.2019, 11.03.2019, 09.04.2019, 12.06.2019, 23.07.2019 & 29.08.2019. None appeared for the appellant.

3.2 We have heard Shri R K Dwivedy, Additional Commissioner, Authorized Representative for the revenue. Arguing for the revenue learned Authorized Representative submitted that issue is squarely covered by the decision of Tribunal in case of PLG Power Ltd [Final Order No A/85252/2019 dated 24.01.2019. The amendment of B/E was sought by the appellant was for claiming the benefit of exemption, which had earlier not been claimed or allowed at the time of assessment of Bill of Entry. Thus the amendment claimed was not an amendment simplicitor, but was for purpose of changing the assessment order. It is settled law that the assessment order could have been changed modified only by way of an appeal before the Commissioner (Appeal). [Priya Blue Ltd 2004 (172) ELT 145 (SC), Flock India Pvt Ltd 2000 (120) ELT 285 (SC), BPL Telecom Ltd [2015 (325) ELT 457 (SC)], Thiru Arooran Sugars Ltd [2010 (254) ELT 45 (MAD)].

4.1 We have considered the impugned order along with the submissions made in appeal and during the course of arguments on appeal.

4.2 While allowing the revenue appeal, Commissioner (Appeal) has observed as follows:

“7. I have carefully gone through the facts of the case and submissions made by both the parties. It is admitted that appeal before Hon’ble Supreme Court was filed by the M/s Tata Teleservices Ltd against the provisional assessments done by the Import Commissionerate. In the case of the respondent M/s Tata Teleservices 9Maharastra) Ltd the Bs/E were assessed finally in the Export Commissionerate and the classification was done by the assessing officer of EPCG section as per the Board’s

Circular. The respondents never challenged the said assessment by way of appeal nor they challenged the Board Circular. Hence the assessment had attained finality. It is settled law that the Apex Court judgment will be applicable only in for assessments which were pending finalization and which had not attained finality.

8. It is observed that assessment involves determination of the rate of duty which requires classification of the goods and application of exemption notification if any. Assessment was done by the assessing officer. It cannot be modified under Section 149. The scope of Section 149 is not extendable to amendment of assessment. Assessment can be modified only in appeal proceedings as held by Hon'ble Supreme Court in case of Priya Blue Industries Ltd – 2004 (172) ELT 145 (SC). It is also a well known principle that what cannot be done directly, cannot be done indirectly. Since assessment can only be modified in appeal proceedings, the same cannot be indirectly modified under Section 149. Hon'ble Tribunal in the matter of Grasim Indus Ltd – 1998 (104) ELT 95 (Tribunal) has held that classification of goods is part of assessment order on Bill of Entry. Further, in the matter of L M Glass Fiber (India) Pvt Ltd – 2009 (235) ELT 146 (Tri-Chennai) it was held that classification of goods is as much a part of assessment as valuation. Hence the classification cannot be treated as clerical mistake and allowed to be amended under section 149."

4.2 We do not find any merits in the submissions made by the Appellant in appeal in view of the Tribunal decision in case of PLG Power Ltd, referred by the Authorized representative. Hon'ble Madras High Court has in case of Thiru Arooran Sugars Ltd [2010 (254) ELT 45 (MAD)] interpreting Section 149, held as follows:

"7. *Section 149 of the Customs Act reads as follows :*

*"**149. Amendment of documents**.- Save as otherwise provided in sections 30 and 41, the proper officer may, in his discretion, authorise any document, after it has been presented in the custom house to be amended :*

Provided that no amendment of a bill of entry or shipping bill or bill of export shall be so authorised to be amended after the imported goods have been cleared for home consumption or deposited in a warehouse, or the export goods have been exported, except on the basis of documentary evidence which was in existence at the time of goods were cleared, deposited or exported, as the case may be."

***8.** The section clearly provides for specific condition subject to which alone the amendment of documents can be authorised by the appropriate officer; in his discretion, after the import goods have been cleared for home consumption. In the instant cases, there was no dispute that the goods had been cleared and therefore, unless the other condition is satisfied, Section 149 of the Customs Act, 1962 cannot be applied. The Appellate Tribunal, while commenting about the original authority rejecting the amendment on the ground that the same would entail re-quantification of the duty, has not given reasons as to how it cannot be applicable."*

4.3 Further Hon'ble Supreme Court has in case of M/s ITC (Civil Appeal No 293-294/ 2009 Order dated 18.09.2019) while reiterating the views expressed in its earlier decision in case of Priya Blue held as follows:

"39. In Collector of Central Excise, Kanpur v. Flock (India) Pvt. Ltd. 2000 (120) ELT 285 (SC)= (2000) 6 SCC 650, the question which came up for consideration before this Court was non-challenge of an appealable order where the adjudicating authority had passed an order which is appealable under the statute, and the party aggrieved did not choose to file an appeal. This Court held that 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 the order. The provisions of the Central Excise Act, 1944 came up for consideration. The Court has observed:

"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 its 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 was taken by us also gains support from the provision in sub-rule (3) of Rule 11 wherein it is laid down that whereas 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, if 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 the 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 an appeal against the order before the Collector (Appeals) if so advised." (emphasis supplied)

40. In Priya Blue Industries Ltd. v. Commissioner of Customs (Preventive) 2004 (172) ELT 145 (SC) = (2005) 10 SCC 433, the Court considered unamended provision of Section 27 of the Customs Act and a similar submission was raised which was rejected by this Court observing that so long as the order of assessment stands, the duty would be payable as per that order of assessment. This Court has observed thus:

"6. We are unable to accept this submission. Just such a contention has been negatived by this Court in Flock (India) case (2000) 6 SCC 650. 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 provision for a period of limitation indicates that a refund claim could be filed without filing an appeal. Even under Section 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 the 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." (emphasis supplied)

41. It is apparent from provisions of refund that it is more or less in the

nature of execution proceedings. It is not open to the authority which

processes the refund to make a fresh assessment on merits and to correct assessment on the basis of mistake or otherwise."

5.1 In view of discussions as above we do not find any merits in the appeal and dismiss the same.

(Order pronounced in the open court)

(Dr. D.M. Misra)
Member (Judicial)

(Sanjiv Srivastava)
Member (Technical)

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