CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL MUMBAI

REGIONAL BENCH-COURT NO.1

CUSTOMS APPEAL NO: 86080 OF 2014

[Arising out of Order-in-Appeal No: 1374(CRC-I)/2013(JNCH)/IMP-1111 dated 19th December 2013 passed by the Commissioner of Customs (Appeals), Mumbai – II.]

Polynova Industries Ltd
92-101, Kundaim Industrial Estate, Panaji Ponda Road,
Goa- 403 110. … ***Appellant***

versus

Commissioner of Customs
JNCH, Nhava Sheva, Uran, Raigad. ***…Respondent***

APPEARANCE:

Shri Akhilesh Kangasia, Advocate for the appellant

Shri Deepak Sharma, Assistant Commissioner (AR) for the respondent

CORAM:

HON'BLE MR C J MATHEW, MEMBER (TECHNICAL)

FINAL ORDER NO: 85466 /2024

DATE OF HEARING: 18/04/2024
DATE OF DECISION: 18/04/2024

This appeal lies against the setting aside of refund, granted by competent authority in pursuance of operation of rule 21 of Customs Tariff (Identification, Assessment and Collection of Anti-Dumping

Duty on Dumped Articles and for Determination of Injury) Rules, 1995, which, at the instance of the reviewing jurisdictional Commissioner, was held in order[1] of the Commissioner Customs (Appeals), JNCH, Nhava Sheva to be inappropriate grant of refund by following the decisions of the Hon'ble Supreme Court *M/s Priya Blue Industries v. Commissioner of Customs [2004 (172) ELT 145 (SC)]*.

2. Learned Counsel for appellant submits that M/s Polynova Industries Ltd had, *vide* bill of entry no 863480/26.09.2010 and no. 804290/17.08.2010, imported goods of description that were admittedly, subject to 'provisional anti-dumping duty' of ₹ 5,41,375/- under notification no. 77/2010-Cus dated 26th July 2010 but upon issue of final 'anti-dumping duty' notification no. 66/2011-Cus dated 26th July 2011 stood excluded, and, thereby, entitling them to refund of duty paid. It was submitted that the original authority had allowed the refund claim but the first appellate authority, at the instance of the reviewing jurisdictional Commissioner of Customs, had in accordance with the spirit of the decision of Hon'ble Supreme Court in *re M/s Priya Blue Industries Ltd* reversed the sanction for not having complied with pre-requisite of appeal against the assessment which, in terms of section 9(8) of Customs Tariff Act, 1975, detailing the manner in which such contingencies were to be handled, and relying upon the decision of the Hon'ble High Court of Madras in *Enterprise*

[1] [order-in-appeal No. 1374(CRC-I)/2013(JNCH)/IMP-1111 dated 19th December 2013]

International Ltd v. Commissioner of Customs, Chennai [2013 (295) ELT 659 (Mad.), was erroneous as the consequence of any alteration of anti-dumping duty after being imposed provisionally is unquestioned sanction of refund.

3. Learned Authorized Representative contended that section 9(8) of Customs Tariff Act, 1975 mandates applicability of all provisions in Customs Act, 1962, concerned with levy and collection of duty which includes 'anti-dumping duty', and, therefore, that refund of 'anti-dumping duty' was to have no treatment different from that of the imports. He placed further reliance on the decision of the Tribunal in *Ual Industries v. Commissioner of Customs, Kolkata [2024 (3) TMI 992-CESTAT Kolkata]*.

4. The provisions for imposition of 'anti-dumping duty' are incorporated as an independent levy in Customs Tariff Act, 1975 and, considering that it is to be collected at the time of assessment, section 9(8) of Customs Tariff Act, 1975 affords the sole recourse for predicate action thereto. The contention of the Learned Authorized Representative that every aspect of levy and collection, including refund and recovery are, for better or were, to be aligned with Customs Act, 1962 follows from that linkage. It is seen that the order sanctioning refund came to be challenged in appellate proceedings and, therefore, the appellant had been impliedly, on notice of the

grounds for denial of refund; to the extent that this aspect of challenge was included in the appeal filed before first appellate authority. However, it appears, from the records, that the appeal before the first appellate authority was limited to 'non-challenge of assessment' before filing claim for refund as justification to reject jurisdiction for sanction. The question, therefore, is whether it was possible or necessary to challenge the assessment. Assessment, under section 17 of Customs Act, 1962, stands upon two pillars, the charging section in section 12 of Customs Act, 1962 and the valuation provision in section 14 of Customs Act 1962 to the extent that duties are levied on *ad valorem* basis. In the present case, the charge of duties has arisen, exclusively, from its origin with neither of these factors in play and therefore, assessment is merely an appendage of the regular assessment for charging of basic customs duty and additional duties of customs. In such circumstances, the process peculiar to determining assessment, or reassessment, would not arise and, therefore, rendering the factual matrix of the decisions relied upon by first appellate authority to be inapplicable here. Furthermore, the refund is contingent upon satisfaction of Assistant Commissioner of Customs that duty has been collected without authority of law as occurs in circumstances contemplated in section 27 of Customs, 1962 but by operation of provisions of law itself in the special circumstances embodied in Customs Tariff Act, 1975. There is, therefore, no exercise of mind in sanctioning refund or, for that matter, assessment or reassessment that requires review on merit.

5. An identical issue was before Hon'ble High Court of Madras in *re Enterprise International Ltd* which was disposed off thus

> *'7. Section 9A(1) of the Customs Tariff Act, 1975 provides for imposition of provisional anti-dumping duty and Section 9A(2) of the Customs Tariff Act, 1975 provides for determining the final anti-dumping duty on the articles imported. Clause (b) of Section 9A(2) of the Customs Tariff Act, 1975 provides for refund of the anti-dumping duty which has been collected in excess shall be made. Therefore, in terms of Section 9A(8) of the Customs Tariff Act, 1975 all that the petitioner has to do is to file an application for refund. There is no question of reassessing the bill of entry which has been assessed on the basis of provisional anti-dumping duty. What has been imposed is a provisional antidumping duty in terms of Section 9A(1) of the Customs Tariff Act, 1975 and the Bill of Entry has been finally assessed. The refund becomes automatic after the final order is passed in terms of Section 9A(2) of the Customs Tariff Act, 1975 and, therefore, the refund as contemplated under the provisions of the Customs Tariff Act, 1975 will have to be processed as such, as the duty becomes refundable if it stands reduced in the final notification as in the present case. There is no necessity for filing an appeal against the assessment or reassessment, as the importer becomes entitled to refund consequent to the final notification issued in terms of Section 9A(2) of the Customs Tariff Act, 1975. All that is required to be done is claim refund of excess anti-dumping duty and it shall be made as per the mandate of Section 9A(2) of the Customs Tariff*

Act, 1975 if and when an application for refund is made as per procedure set out under the Customs Act, 1962.

8. The provisions of the Customs Tariff Act, 1975 provide for imposition of provisional anti-dumping duty; and for finalization of provisional anti-dumping duty; and for consequent refund, if there is a reduction in the anti-dumping duty. The benefit, if any, will have to flow automatically. The respondent/department cannot insist on filing an appeal to the Appellate Authority or direct the petitioner/importer to approach the appropriate authority for reassessment of the order. No specific provision has been shown in the impugned proceedings as to how such a procedure is required and on what basis such a direction can be issued. The second respondent has failed to refer to any of the provisions of the Customs Act, 1962 or the Customs Tariff Act, 1975 which requires reassessment of the Bill of Entry or filing of the appeal before even refund is claimed consequent upon finalization of provisional anti-dumping duty. Therefore, the impugned proceedings is contrary to the provisions of the Customs Tariff Act, 1975 and the Customs Act, 1962. A condition not authorized by law cannot be imposed for a claim for refund.

9. ………….

10. Similarly, in M/s.Priya Blue Industries Vs. Commissioner of Customs [2004 (172) ELT 145 (SC)], the petitioner therein imported a ship for breaking purposes. That was assessed and cleared by payment of certain duty under protest and thereafter refund was claimed on the ground that duty had been wrongly levied. The refund was rejected and confirmed before the Appellate forum. There again the Tribunal came to hold that as against the assessment order no appeal has been *filed and, therefore, the refund claimed is not maintainable. In that case, the Supreme Court has held as follows:*

> *"6. We are unable to accept this submission. Just such a contention has been negatived by this Court in Collector of Central Excise v. Flock (India) Pvt. Ltd., 2000 (120) ELT 285 (SC). 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.*
>
> *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." In the case on hand, the wrong payment of duty is not sought to be refunded. The payment of provisional anti-dumping duty is subject to the finalization of the anti-dumping duty in terms of Section 9A(2)(b) of the Customs Tariff Act, 1975 and refund becomes automatic after the final notification is issued. There is no necessity for filing an appeal or seeking modification of the order, so as to seek refund. The facts of the case before the Supreme Court in Priya Blue Industries case stand entirely on a different footing.'*

6. The decision of Tribunal in *re Ual Industries* rests entirely upon the decision of the Hon'ble Supreme Court in *ITC v. Commissioner of Central Excise, Kolkata [2019 (368) ELT 216 (SC)]* and pertains to refund arising from and concluding within section 27 of Customs Act,

1962. Consequently, that ruling is not applicable to the factual matrix in the present case.

7. In the light of the facts of above, and respectfully following the decision of Hon'ble High Court of Madras, the impugned order is set aside and the order of the original authority is restored.

(Dictated and Pronounced in Open Court)

C J MATHEW)
Member (Technical)

**/as*