

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE
TRIBUNAL, MUMBAI**

REGIONAL BENCH - COURT NO. I

Customs Appeal No. 89976 of 2014

(Arising out of Order-in-Appeal No. MUM-CUSTOM-AXP-APP-309/14-15 dated 21.08.2014 passed by the Commissioner of Customs (Appeals), Mumbai-III)

M/s Cipla Limited

L.D. Building, Mehra Industrial Estate,
Asha-Usha Compound, L.B.S. Marg,
Vikhroli (West), Mumbai – 400 079

.... Appellant

Versus

Commissioner of Customs, ACC, Mumbai

Air Cargo Complex, Sahar, Andheri (E),
Mumbai – 400 099

.... Respondent

Appearance:

Shri Akhilesh Kangasia, Advocate for the Appellant

Shri Adeeb Pathan, Authorized Representative for the Respondent

CORAM:

HON'BLE MR. S.K. MOHANTY, MEMBER (JUDICIAL)

HON'BLE MR. M.M. PARTHIBAN, MEMBER (TECHNICAL)

FINAL ORDER NO. A/85680/2024

Date of Hearing: 10.07.2024

Date of Decision: 10.07.2024

Per: S.K. Mohanty

Brief facts of the case are that the appellants herein are engaged in the manufacture and export of bulk drugs and pharmaceutical products. During the disputed period, they had imported branded medicaments namely, Glivec-400 mg. Imatinib tablets and claimed classification of the said goods under Tariff Sub-heading No. 3004 2099 of the Customs Tariff Act, 1975. The Bill of Entry (B/E) filed by them was self-assessed and the customs duty on merit rate was paid by them by debiting the DEPB license No. 0310631674. Subsequent to finalization of the assessment and clearance of the imported goods, the appellants had noticed that the correct classification of the imported goods should

have been under Customs Tariff Item (CTI) 3004 9049, instead of CTI 3004 2099. The goods under CTI 3004 9049 attract exemption from payment of customs duty in terms of Serial No.83(A) read with List 4 of Notification No.21/2002-Customs dated 01.03.2002. Accordingly, against the assessed B/E, the appellants have preferred an appeal before the Commissioner (Appeals) under Section 128 of the Customs Act, 1962. The appeal filed by the appellants was disposed of vide Order-in-Appeal No. MUM-CUSTOM-AXP-APP-309/14-15 dated 21.08.2014 (for short, referred to as 'the impugned order'), holding that the appeal is premature and thus, the same is rejected. The learned Commissioner (Appeals) has made the following observations, in support of rejection of appeal filed by the appellants:

"5. In the matter under consideration, it is neither claimed that assessment done by the officer is contrary to the claim made in Bill of Entry nor is it claimed that request for amendment and consequential refund was filed and rejected by the department. As such, no adversarial decision or order has been made by an officer of customs for an appeal to be filed in terms of Section 128 of the Customs Act, 1962. In light of above, the appeal being pre-mature, is rejected, as being not maintainable under Section 128 of the Customs Act."

2. Feeling aggrieved with the impugned order, the appellants have preferred this appeal before the Tribunal, contending *inter alia* that assessment order is an appealable order and the same can be appealed against before the learned Commissioner (Appeals) in terms of Section 128 *ibid*. In this context, they have relied upon the judgement of the Hon'ble Supreme Court in the case of ITC Limited Vs. Commissioner of Central Excise, Kolkata-IV -2019 (368) E.L.T. 216 (S.C.) and the Final Order No. A/86984-86985/2019 dated 01.11.2019 passed by this Tribunal. Further, it has also been stated that the appellate remedies provided under Section 128 *ibid* vis-à-vis Section 149 *ibid* for amendment of the document (B/E in this case) are entirely distinct and separate proceedings, and both the statutory provisions cannot be clubbed together, which has been done in the impugned order dated 21.08.2014.

3. Heard both sides and perused the case records.

4. We find that the appellants have initially claimed the classification in the B/E with regard to the imported goods under CTI 3004 2099 and after realizing the mistake that the subject goods should appropriately be classified under CTI 3004 9049, had filed the appeal before the learned Commissioner (Appeals) under Section 128 *ibid* against the assessed B/E. In so far as filing of appeal against the self-assessment is concerned, the Hon'ble Supreme Court in the case of *ITC Limited (supra)* have held that the self-assessed B/E is an assessment order, passed under the Customs Act, 1962 and thus, would be appealable. By relying upon the said judgement of the Hon'ble Supreme Court, this Bench of the Tribunal, in the case of *M/s. H & R Johnson (supra)* has allowed the appeal by way of remand to the learned Commissioner (Appeals). The relevant paragraphs in the judgement of the *ITC Limited (supra)*, referred to in the said order of the Tribunal are extracted herein below:

*"43. As the order of self-assessment is nonetheless an assessment order passed under the Act, obviously it would be appealable by any person aggrieved thereby. The expression 'Any person' is of wider amplitude. The revenue, as well as assessee, can also prefer an appeal aggrieved by an order of assessment. It is not only the order of re-assessment which is appealable but the provisions of Section 128 make appealable any decision or order under the Act including that of self-assessment. The order of self assessment is an order of assessment as per section 2(2), as such, it is appealable in case any person is aggrieved by it. There is a specific provision made in Section 17 to pass a reasoned/speaking order in the situation in case on verification, self-assessment is not found to be satisfactory, an order of re-assessment has to be passed under section 17(4). Section 128 has not provided for an appeal against a speaking order but against "any order" which is of wide amplitude. The reasoning employed by the High Court is that since there is no lis, no speaking order is passed, as such an appeal would not lie, is not sustainable in law, is contrary to what has been held by this Court in *Escorts (supra)*.*

*44. The provisions under section 27 cannot be invoked in the absence of amendment or modification having been made in the bill of entry on the basis of which self-assessment has been made. In other words, the order of self-assessment is required to be followed unless modified before the claim for refund is entertained under Section 27. The refund proceedings are in the nature of execution for refunding amount. It is not assessment or reassessment proceedings at all. Apart from that, there are other conditions which are to be satisfied for claiming exemption, as provided in the exemption notification. Existence of those exigencies is also to be proved which cannot be adjudicated within the scope of provisions as to refund. While processing a refund application, re-assessment is not permitted nor conditions of exemption can be adjudicated. Re-assessment is permitted only under Section 17(3), (4) and (5) of the amended provisions. Similar was the position prior to the amendment. It will virtually amount to an order of assessment or re-assessment in case the Assistant Commissioner or Deputy Commissioner of Customs while dealing with refund application is permitted to adjudicate upon the entire issue which cannot be done in the ken of the refund provisions under Section 27. In *Hero Cycles Ltd. v. Union of India**

2009 (240) ELT 490 (Bom.) though the High Court interfered to direct the entertainment of refund application of the duty paid under the mistake of law. However, it was observed that amendment to the original order of assessment is necessary as the relief for a refund of claim is not available as held by this Court in Priya Blue Industries Ltd. (supra).

45. Reliance was also placed on a decision of Rajasthan High Court with respect to service tax in Central Office Mewar Palace Org. v. Union of India 2008 (12) STR 545 (Raj.). In view of the aforesaid discussion, we are not inclined to accept the reasoning adopted by the High Court, that too is also not under the provisions of the Customs Act.

46. The decision in Intex Technologies (India) Ltd. v. Union of India has followed Micromax (supra). The reasoning employed by the High Courts of Delhi and Madras does not appear to be sound. The scope of the provisions of refund under Section 27 cannot be enlarged. It has to be read with the provisions of Sections 17, 18, 28 and 128.

47. When we consider the overall effect of the provisions prior to amendment and post-amendment under Finance Act, 2011, we are of the opinion that the claim for refund cannot be entertained unless the order of assessment or self-assessment is modified in accordance with law by taking recourse to the appropriate proceedings and it would not be within the ken of Section 27 to set aside the order of self-assessment and reassess the duty for making refund; and in case any person is aggrieved by any order which would include self-assessment, he has to get the order modified under Section 128 or under other relevant provisions of the Act."

5. In view of the foregoing discussions, we are in agreement with the submissions made by the appellants that self-assessed B/E is an appealable order and can be appealed against before the learned Commissioner of Customs (Appeals) under Section 128 *ibid*.

6. Therefore, by setting aside the impugned order, the appeal is allowed by way of remand to the learned Commissioner (Appeals) for deciding the appeal on merits, as to whether, the product in question should be classifiable under CTI 3004 9049 or under CTI 3004 2099 and whether the appellants should be entitled for the benefits provided under Serial No. 83(A) read with List 4 of Notification No.21/2002-Customs dated 01.03.2002. It is made clear that while disposing of the appeal, the learned Commissioner (Appeals) should not insist for amendment of the document (B/E) as per Section 149 *ibid*, inasmuch as the appeal provisions are entirely different than the provisions relating to amendment of documents provided in the statute. Needless to say, that the appellants should be provided with reasonable opportunity for effective participation in the appeal proceedings.

7. In the result, the appeal is allowed by way of remand to the learned Commissioner of Customs (Appeals).

(Operative portion of the order pronounced in open court)

(S.K. Mohanty)
Member (Judicial)

(M.M. Parthiban)
Member (Technical)

Sinha