(2015) 03 MAD CK 0290

Madras High Court

Case No: C.M.A. No. 3193 of 2008

Commissioner of Customs (Appeals) Custom House		APPELLANT
	Vs	
Ace Designers and Others		RESPONDENT

Date of Decision: March 20, 2015

Acts Referred:

- Customs Act, 1962 - Section 12, 20, 27, 28
- Customs Tariff Act, 1975 - Section 3

Hon'ble Judges: R. Sudhakar, J; R. Karuppiah, J

Bench: Division Bench

Advocate: E. Vijay Anand, for the Appellant

Judgement

R. Sudhakar, J.
Aggrieved by the order of the Tribunal in allowing the appeal filed by the assessee, the appellant/Revenue is before this Court by filing the present appeal. This Court, vide order dated 31.10.08, while admitting the appeal, framed the following substantial question of law for consideration:--

"Whether re-assessment can be permitted at the refund stage when the order of assessment is final and not appealed against or not?"

2. The facts, in a nutshell, are as hereunder:--

"The first respondent claimed refund of Special Additional Duty (for short ''SAD'') on re-importation of CNC Lathe Machine Model LT-20C under Bill of Entry No. 024656 dated 13.08.01. The goods were assessed to ''NIL'' rate of customs duty, 16% of excise duty and 4% SAD. The said machine was re-imported and, therefore, the first respondent claimed the benefit of Notification No. 94/96-Cus dated 16.12.1996. According to the 1st respondent, it re-imported the goods in order to avoid demurrage charges, therefore, SAD was paid, though it was not required by law. The

bill of entry was assessed and the goods were allowed to be cleared on the basis of the said claim. Thereafter, a refund claim was made on 11.10.01 on the ground that the above-stated machine, originally exported, had to be re-imported as payment was not received. A plea was made that goods of Indian origin was exempt from customs duty under Notification No. 94/96-Cus. and only countervailing duty is leviable and the excess duty claimed is to be refunded. Placing reliance on Section 20 of the Customs Act, 1962, the Deputy Commissioner of Customs came to hold that in the present case, the Notification 94/96-Cus. alone is applicable and the benefit of Notification No. 18/2000-Cus will not be applicable. The plea of the 1st respondent that Section 3-A is applicable only to imported goods and not to re-imported goods was negatived by placing reliance on the provisions of Section 20 of the Act. For better clarity, the relevant portion of the order of the original authority is extracted hereinbelow:--

"I have carefully gone through the records of the case. All the goods imported into the country whether imported or re-imported are leviable to all duties prescribed under the Customs Act, 1962 with amendment of Sec. 20 of CA 62 (from 1995) Notification 94/96 was issued separately providing ''relief'' to indigenous subject to certain condition in the said Notification 94/96. But for any exemption issued by the Government the goods re-imported (if identity is established) and specifically exempted from payment of such much of the duty of the customs leviable thereon specified in the I schedule the additional duty under Sec. 3 of the Customs Tariff Act, 1975 and Special Additional Duty of Customs (SAD) leviable under sub sec. of 3A of CTA 1975 subject to the relief in the Customs Notification 94/96.

From the above, it is clear that as per Customs Notification 94/96, the levy under Section 3A of the Customs Tariff Heading is not exempted for indigenous goods under the Notification 94/96. Importer argument that Section 3A is applicable only to imported goods and not re-imported Indian goods does not hold because Section 20 of CA 62, as it stands at present, does not distinguish the imported and re-imported (indigenous goods exported and re-imported) goods, for levying the duties of Customs under Section 12 of CA 62. Reimported Indian goods are treated of CA 62 subject to condition and restriction as prescribed. In the instant case, Notification 94/96 only still applicable but Notification 18/2000 will not be applicable. Hence, I pass the following order:--

ORDER

In view of the above findings, I reject the refund claim of M/s. ACC Designers for refund of SAD for Rs. 66,528/- (Rupees Sixty Six Thousand Five Hundred and Twenty Eight only) against their Bill of Entry No. 24656 dated 13.08.01."

3. Aggrieved against the said order, the 1st respondent preferred appeal before the Commissioner (Appeals), who also dismissed the appeal of the 1st respondent holding that the goods were assessed by the proper officer based on the claim

made by the assessee in terms of Notification No. 94/96-Cus. and the Notification No. 18/2000-Cus dated 1.3.2000, on which the importer relied upon for making the claim for refund, for the first time, is contrary to the claim in the Bill of Entry. The Commissioner (Appeals) also came to hold that the assessment and Bill of Entry depicts goods, which are exempted only from customs duty by enforcing Notification No. 94/96 Sl. No. 1(E) and not the very levy of additional duty, which is equivalent to excise duty. The Commissioner (Appeals) further held that the goods are not exempted from levy of additional duty and Notification No. 18/2000-Cus. is not enforceable. The Commissioner (Appeals) further held that there was nothing to hold that the order of the lower authority denying the benefit of Notification No. 18/2000-Cus dated 1.3.2000 is per se illegal and, consequently, the rejection of refund by the lower authority was in order. The Commissioner (Appeals) also went into the scope of Notification No. 18/2000-Cus. vis-�-vis Notification No. 94/96-Cus., the relevant portion of the order, for better clarity is extracted hereinbelow :--

"Notwithstanding the above position of the facts of the case, on perusal of Sl. No. 31 of the Notification No. 18/2000-Cus. dated 01.03.2000, I find that all goods which are exempted from (a) the whole of duty of Customs leviable thereon under the first schedule and (b) the whole of the additional duty of Customs leviable thereon under sub-sec (1) of Section 3 of the Customs Tariff Act are liable to be charged to "nil" rate of duty. Here, I concur with the lower authority that the said notification did not distinguish between import of indigenous or non-indigenous goods. The only precondition to avail exemption from levy of SAD was that the goods should be exempted wholly from customs duty and additional duty/CVD. However, the assessment and the Bill of Entry lucidly depicts that goods are exempted only from the Customs duty, by enforcing the Notification No. 94/96 (Sl. No. 1 (e)) and not from levy of additional duty which is equivalent to excise duty. When the goods are not exempted from levy of additional duty, the Notification No. 18/2000 is not enforceable. In the circumstances, I do not find anything amiss in the order of the lower authority denying the benefit of the Notification No. 18/2000-Cus dated 01.03.2000."

4. The Commissioner (Appeals) further held that the claim of the 1st respondent could not be accepted for the following factual reason :--

"However, it is not difficult to see that in the case of the impugned goods which were earlier exported under bond without payment of Central Excise duty and have been subsequently imported have been obviously charged to additional duty of Customs equal to the Central Excise duty and that basic Customs duty and special Customs duty is exempted. Going by the ratio of the judgment, I do not find any infirmity or incongruity in the order of assessment, charging the impugned goods to additional duty of Customs equivalent to the Excise duty."

5. The foremost and primary plea of the appellant that SAD is applicable only to goods which are imported originally and not on reimports was rejected by the

Commissioner (Appeals), the relevant portion of which is extracted hereinbelow for better clarity :--

"The appellant has also contended that SAD is applicable only to goods which are imported originally. Levy of special additional duty is governed by the provisions enshrined in Section 3A of the Customs Tariff Act, 1975. The provisions covered under the Section do not expressly distinguish between import of indigenous and non-indigenous products nor do they exempt reimport of indigenous goods from levy of SAD. In the circumstances, the contention of the appellant is not legally tenable."

6. Going further, the Commissioner (Appeals) also held that it is an admitted case that duty was collected pursuant to the order of assessment and the question of refund of duty does not arise till the order of assessment is lawfully modified to the benefit of the claimant. The Commissioner (Appeals) clearly held that the Officer, considering the refund claim, cannot review or modify the assessment order and to substantiate the same, placed reliance on the decision of the Supreme Court in Priya Blue Industries Ltd. Vs. Commissioner of Customs (Preventive), AIR 2004 SC 5115 : (2004) 96 ECC 217 : (2004) 172 ELT 145 : (2004) 8 JT 262 : (2004) 8 SCALE 13 : (2005) 10 SCC 433 : (2004) AIRSCW 5867 : (2004) 6 Supreme 635 . The Commissioner (Appeals) also held that the refund claim is not an appeal proceedings and the Officer considering the refund claim cannot sit in appeal over the assessment made by a competent officer. Consequently, rejecting the appeal, the following order was passed :--

"Notwithstanding the legal positions and facts of the case discussed supra, it is anybody''s case that the amount of duty was collected in pursuance to the orders of assessment. Hence, the question of refund of duty does not arise till the order of assessment is lawfully modified to the benefit of the claimant and the lower authority, the officer considering the refund claim cannot review or modify an assessment order. This position of law is well settled by the Apex Court in the case of Priya Blue Industries Ltd. Vs. Commissioner of Customs (Preventive), AIR 2004 SC 5115 : (2004) 96 ECC 217 : (2004) 172 ELT 145 : (2004) 8 JT 262 : (2004) 8 SCALE 13 : (2005) 10 SCC 433 : (2004) AIRSCW 5867 : (2004) 6 Supreme 635 . While disposing the Review Petition No. 96 of 2004 in the Civil Appeal No. 9405 of 2003, the Supreme Court has observed that once an order of assessment is passed, the duty would be payable as per the order. Unless the 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 the order of assessment. A refund claim is not an appeal proceeding. The officer considering the 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. Going by this position of law and the ratio of the judgment stated above, I find that the claim of the appellant for refund of duty is not maintainable ab initio when the order of

assessment is not modified as per law. This position of law also emerges from the judgment of the Apex Court in the case of M/s. Super Cassette Industries Ltd. (2004 (183) ELT A116 (SC)).

In the circumstances discussed above, the order of assessment, in pursuance to which the duty was paid by the appellant, stands and no refund of duty accrues to the claimant as these orders of assessment are not modified or reviewed by an appeal."

7. Aggrieved against the order of the Commissioner (Appeals), the 1st respondent filed appeal before the Tribunal. The appeal, however, came to be allowed by the Tribunal on the premise that the case of the assessee is covered by the decision of the Supreme Court in Karnataka Power Corporation Ltd. Vs. Commr. of Cus. (Appeals), Madras, (2002) 83 ECC 518 : (2002) 143 ELT 482 : (2002) 6 JT 47 . However, the decisions of the Supreme Court in Priya Blue Industries case and Flock (India) Pvt. Ltd. case (supra) have not been discussed by the Tribunal. However, by a cryptic order, the appeal was allowed in favour of the 1st respondent, against which the appellant/Revenue is before this Court by filing the appeal.

8. The learned standing counsel appearing for the appellant/Revenue submits the 1st respondent having not challenged the order of assessment, the claim for refund is not maintainable as has been consistently held by the Supreme Court in a catena of decisions, more particularly the decision in Priya Blud Industries case (supra). It is further submitted by the learned standing counsel for the appellant that the importer having not claimed the benefit of Notification No. 18/2000 either before the goods were assessed by the proper officer or during assessment and cleared it after payment of duty, cannot, at a belated stage, i.e., at the time of refund proceedings, contend that the 1st respondent is entitled to the benefit of Notification No. 18/2000 and, therefore, is eligible for refund. It is the further stand of the appellant/Revenue that the said Notification No. 18/2000 and so also Section 3A of the Customs Tariff Act, makes no distinction between imports of indigenous and non-indigenous goods and, therefore, the distinction drawn by the 1st respondent on the above aspect cannot be sustained. Further the Bill of Entry shows that the goods were exempt only from customs duty by enforcing Notification No. 94/96 and not from additional duty, which is equivalent to Excise duty. The Commissioner (Appeals) has rightly held that the 1st respondent is not entitled to refund, which has not been appreciated in its proper perspective by the Tribunal and, therefore, the order of the Tribunal is liable to be set aside.

9. Heard Mr. Vijay Anand, learned standing counsel appearing for the appellant/Revenue and also perused the documents available in the typed set of papers as also the judgments relied on by the lower authorities. Inspite of service of notice, none appears for the 1st respondent.

10. At the time of hearing yet another decision by the Delhi High Court in the case of Aman Medical Products Ltd. Vs. Commissioner of Customs, (2009) 170 ECR 233 : (2010) 250 ELT 30 : (2009) 3 ILR Delhi 346 Supp was brought to the notice of this Court.

11. Before proceeding further, it would be worthwhile to find out the applicability of the judgments relied on by the Commissioner (Appeals) as well as the Tribunal in support of their findings and decision.

12. In Priya Blue Industries case (supra), the facts as could be culled out from the said decision as is set out in para-2 of the said judgment would reveal that reasons have been given for rejecting the claim for automatic refund. The Supreme Court, placing reliance on Collector of Central Excise, Kanpur Vs. Flock (India) Pvt. Ltd. C-7, Panki Industrial Area, Kanpur, AIR 2000 SC 2484 : (2000) 71 ECC 4 : (2000) 92 ECR 1 : (2000) 120 ELT 285 : (2000) 8 JT 524 : (2000) 5 SCALE 445 : (2000) 6 SCC 650 : (2000) 2 SCR 156 Supp : (2000) AIRSCW 2777 : (2000) 5 Supreme 432 , 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. 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 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."

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.

16. For the reasons stated above, this appeal, filed by the appellant/Revenue is allowed and the order of the Tribunal, dated 23.2.07, is set aside. However, in the circumstances of the case, there shall be no order as to costs.