IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
REGIONAL BENCH, HYDERABAD
DIVISION BENCH
COURT NO. I

Appeal No. C/1151/2011

Arising out of Order-in-Appeal No. 12/2011 (VCH), Dated: 24.02.2011 Passed by Commissioner of Customs, Central Excise and Service Tax (Appeals), Visakhapatnam)

Date of Hearing: 09.01.2019
Date of Decision: 29.01.2019

COMMISSIONER OF CUSTOMS
VISAKHAPATNAM

Vs

M/s VEDANTA ALUMINIUM LTD

Appellant Rep by: Shri P S Reddy, Deputy Commissioner AR
Respondent Rep by: Smt A S K Swetha, Adv.

CORAM: M V Ravindran, Member (J)
P Venkata Subba Rao, Member (T)

Cus - The assessee filed a bill of entry for clearance of 12863 MT of Calcined Petroleum Coke - They have claimed exemption from basic customs duty under Notfn 21/2002- Cus - This entry had been deleted on 27.02.2010 i.e. before the bill of entry was filed and another entry Sl. No. 596 was inserted in the same notification which would have given them same relief - The bill of entry was assessed through RMS channel of EDI system by revenue and the bill of entry was assessed to tariff rate of duty of 10% instead of concessional rate of 5% because they entered the wrong serial number in exemption notification but they paid duty accordingly - They approached the customs officers asking them to correct the mistake in their bill of entry under Section 154 of Customs Act and got no response - Therefore, they filed a refund claim within the period along with certificate from the Chartered Accountant to the effect there was no unjust enrichment in their case - Section 17 of Customs Act now envisages self assessment in which the importer or exporter himself assess the duty payable on goods and pays accordingly - The officer has right to reassess the bill of entry or shipping bills - Wherever this assessment is through Customs EDI system, the system selects assessment based on Risk Management System (RMS) as to which Bill of Entry must be reassessed by the officers - In all cases, where the system does not select bill of entry for reassessment, the assessment made by importer or exporter is accepted and the goods are cleared - The assessing officers will not even be aware of existence of bill of entry or it is assessment - Therefore, there is no possibility of the officer even assessing/reassessing the bills of entr - This is one such case - Therefore,

there is no assessment in this case and no mistake has been committed clerical or arithmetical error by any officer - Admittedly, the assessee importer made a mistake by mentioning a wrong serial number of the notification and thereby paid excess duty - Their request for correction under Section 154 was correctly not accepted by the officers as plain reading of the Section does not show that the officers do not have the power to correct mistakes made by the assessee under Section 154 - The law laid down by Supreme Court in case of *Priya Blue Industries* - *2004-TIOL-78-SC-CUS* and *Flock (India) Pvt. Ltd.* - *2002-TIOL-208-SC-CX* is that this path of refund under Section 27 cannot be used as a way to subvert the order of assessment made by an officer - If the assessment has been made by an officer and the importer is not satisfied with it the right quote of challenge his assessment order - In many cases the tribunal including this bench has found cases where there applications for refund which arise not from reopening assessments made by an officer but only by correction of minor clerical or arithmetical mistakes - It has been held that in such cases Section 154 can be invoked by the officers and refund granted under Section 27 as this correction does not amount to reassessment - As a consequence of such correction, if any refund is payable, it could also be paid - The appeal is disposed of by expunging the order to correct the mistake in the bills of entry under Section 154 of the Customs Act but upholding the sanction of refund: CESTAT

Appeal disposed of

Case laws cited:

Priya Blue Industries Ltd - 2004-TIOL-78-SC-CUS... Para 2

Flock (India) Pvt. Ltd - 2002-TIOL-208-SC-CX... Para 2

Aman Medical Products Limited Vs. Commissioner of Customs - 2009-TIOL-566-HC-DEL-CUS... Para 8

FINAL ORDER NO. A/30140/2019

Per: P Venkata Subba Rao:

This appeal is filed by the Revenue against Order-in- Appeal No. 12/2011 (VCH) dated 24.02.2011.

2. Brief facts of the case are that the respondent herein filed a bill of entry No. 773129 dated 27.04.2010 for clearance of 12863 MT of Calcined Petroleum Coke falling under Chapter Heading No. 27131200. They have claimed exemption from basic customs duty under Notification No. 21/2002- Cus dt. 01.03.2002 (Sl. No. 77B). This entry had been deleted on 27.02.2010 i.e. before the bill of entry was filed and another entry Sl. No. 596 was inserted in the same notification which would have given them same relief. The bill of entry was assessed through RMS channel of the EDI system by the revenue and the bill of entry was assessed to tariff rate of duty of 10% instead of the concessional rate of 5% because they entered the

wrong serial number in the exemption notification but they paid duty accordingly. They approached the customs officers asking them to correct the mistake in their bill of entry under Section 154 of the Customs Act and got no response. Therefore, they filed a refund claim within the period along with certificate from the Chartered Accountant to the effect there was no unjust enrichment in their case. The Joint Commissioner of Customs in his Order-in-Original rejected the refund claim holding that the assessment was completed and the assessment has been not challenged by the appellants in this case. He relied upon the case of *Priya Blue Industries Ltd., [2004 (172) ELT 145 (S.C.)]* = *2004-TIOL-78-SC-CUS Flock (India) Pvt. Ltd., [2000 (120) ELT 285 (S.C.)]* = *2002-TIOL-208-SC-CX* . In his order, he explained the procedure followed in clearing the bills of entry. As per existing procedure, in terms of Section 17(1) of the Customs Act, assessment has to be done by the importer/exporter of the goods. However, proper officer can require the importer or exporter to produce any documents and any information and thereafter if necessary reassess the duty, if necessary under Section 17(2) of the Customs Act. This section also provides for a speaking order to be issued by the officer on reassessment. Before 08-04-2011, Section 17 required the proper officer to assess the Bills of Entry and there was no concept of self assessment. However, as time passed, the Department modernized the process of assessment and introduced Customs EDI system which, in a large number of cases, never gave an opportunity for the officers to discharge their responsibility of assessment under Section 17 of the Customs Act. The importer would make a declaration by filling the necessary information in the Customs EDI system and the system would allow him to pay duty and clear the goods. Thus, for the period after introduction of such features in the EDI system and until 08.04.2011 (when Section 17 was amended introducing self assessment), the officers had, per force, to abdicate their responsibility of assessment under Section 17 of the Custom Act. Thus, during this period, in such cases, there was no assessment either by the importer or by the officers. The present case pertains to such period. In this case the respondent had submitted the bill of entry on time describing the nature of the goods the value, the classification as well as the exemption notification and accordingly paid duty. The officer did not assess the goods in question, hence there was no order of the assessment by the officer nor self assessment. Thus, in this case what was available was only a declaration by the appellant based on which they paid duty.

3. Thereafter, the appellant requested the officers to correct the errors in their bills of entry under Section 154 in the Customs Act, which reads as follows:

Section 154 in the Customs Act, 1962

154. Correction, clerical errors, etc.—Clerical or arithmetical mistakes in any decision or order passed by the Central Government, the Board or any officer of customs under this Act, or errors arising therein from any

accidental slip or omission may, at any time, be corrected by the Central Government, the Board or such officer of customs or the successor in office of such officer, as the case may be.
4. As may be seen, this section authorizes the officers of customs, Board or Central Government, or their successors in office to correct clerical or arithmetical mistakes "in any decision or order passed by them". In this case no order was passed any officer. Therefore, the officers have not corrected the bill of entry as Section 154 does not authorize them to do so unless it is an order or decision made by them or their predecessors.

5. Relying on the judgement of the Hon'ble Supreme Court in the case of Priya Blue Industries and Folk (India) Pvt. Ltd, the lower authority rejected the refund claim filed by the respondent on the ground that they had not challenged the assessment order.

6. On an appeal, the First Appellate Authority held as follows: I find that the Revenue did not consider the request of the appellants for correction of the mistake as envisaged under Section 154 of Central Excise Act, 1962.

"Instead the appellants were denied of the relief on the frivolous grounds of assessment by the system and not by the assessment officer and not challenge of the assessment order etc."
The First Appellate Authority allowed the appeal of the respondent herein or in correction of the clerical mistakes in the impugned bill of entry with consequential reliefs as per the provisions of Section 154 of the Customs Act.

7. The appeal of the Revenue is on the following grounds. Section 154 of the Customs Act does not apply to the mistakes committed by the importer or CHA and the officers cannot correct such mistakes. It is the bounden duty of the importer to challenge the assessment order instead of filing a refund claim. For harmonious interpretation of Section 154 and Section 27 of the Customs Act, 1962 neither should be rendered nugatory. Rectification under 154 should not involve any refund or demand for which Sections 27 & 28 of the Customs Act have to prevail. Since the refund involves a substantive review of the assessment made earlier, Section 27 of the Customs Act, 1962 requires that such review should be undertaken by the appropriate higher authority. So wherever correction of errors amounts to review of assessment order on bill of entry, the provisions of Section 154 are not applicable. Therefore, they prayed to quash the impugned Order-in-Appeal passed by the Commissioner (Appeals).

8. Learned Counsel for the respondent reiterates the findings of the First Appellate Authority and submits that in a similar case in the case of *Aman Medical Products Limited Vs. Commissioner of Customs, reported in [2009 (9) TMI 41-Delhi High Court]* = *2009-TIOL-566-HC-DEL-CUS* wherein, it was held that the ratio of Priya Blue Industries and Flock (India) Pvt. Ltd., do not apply where there is no assessment order. They are covered by this case and accordingly the appeal may be rejected. He, fairly, submits that

this judgment of the Hon'ble High Court of Delhi has been challenged by the Revenue before the Supreme Court as reported at *[2010 (256) ELT A57 (S.C)]* but it has not been stayed.

9. We have considered the arguments on both sides and perused the records. It would be profitable to describe how the customs assessment process is completed. Assessments of customs duties used to be done by officers of customs and any such assessment whether or not a speaking order is passed is an order which can be appealed against by the affected party before the First Appellate Authority and thereafter before the CESTAT or higher judicial forum. Section 17 of the Customs Act now envisages self assessment in which the importer or exporter himself assess the duty payable on the goods and pays accordingly. The officer has right to reassess the bill of entry or shipping bills. Wherever this assessment is through Customs EDI system, the system selects assessment based on Risk Management System (RMS) as to which Bill of Entry must be reassessed by the officers. In all cases, where the system does not select bill of entry for reassessment (commonly called facilitated bills of entry) the assessment made by the importer or exporter is accepted and the goods are cleared. The assessing officers will not even be aware of the existence of the bill of entry or it is assessment. Therefore, there is no possibility of the officer even assessing/reassessing the bills of entry. This is one such case. Therefore, there is no assessment in this case and no mistake has been committed clerical or arithmetical error by any officer. Admittedly, the assessee importer made a mistake by mentioning a wrong serial number of the notification and thereby paid excess duty. Their request for correction under Section 154 was correctly not accepted by the officers as plain reading of the Section does not show that the officers do not have the power to correct mistakes made by the assessee under Section 154.

10. The next question is what relief is available to the assessee who admittedly made a mistake and paid excess duty. If the mistake is discovered before paying the duty the importer can go to the officer and ask him to recall the bill of entry from the system and assess the bill of entry. This is done often. However, if the assessee has missed the opportunity to get the assessment corrected because the goods have already cleared there is no scope for the officers to assess the bills of entry. In such a case, the question is whether it is open for the importer to claim refund of duty under Section 27 of the Customs Act. A plain reading of the section would show that the importer or any other person can claim refund of duty under Section 27. This refund application has to be considered by the officers and the decision taken thereon.

11. The law laid down by the Hon'ble Supreme Court in the case of Priya Blue Industries (supra) and Flock (India) Pvt. Ltd., (supra) is that this path of refund under Section 27 cannot be used as a way to subvert the order of the assessment made by an officer. If the assessment has been made by an officer and the importer is not satisfied with it the right quote of challenge

his assessment order. The relevant portions of the judgment in the case of Priya Blue Industries Ltd., which is as follows:

"4. We have heard parties at great length.

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 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 of 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 moths 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 negative 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."

The relevant portion of the judgment in the case of Flock (INDIA) Pvt. Ltd., which is as follows:

"6. At the relevant time the provision for claim for refund of duty was made in Rule 11. The said Rule reads as follows :

"Rule 11 Claim for refund of duty. - (1) Any person claiming refund of any duty paid by him may make an application for refund of such duty to the Assistant Collector of Central Excise before the expiry of six months from the date of payment of duty :

Provided, that the limitation of six months shall not apply where any duty has been paid under protest.

Explanation : Where any duty is paid provisionally under these rules on the basis of the value or the rate of duty, the period of six months shall be

computed from the date on which the duty is adjusted after final determination of the value or the rate of duty, as the case may be.

(2) If on receipt of any such application the Assistant Collector of Central Excise is satisfied that the whole or any part of the duty paid by the applicant should be refunded to him, he may make an order accordingly.

(3) Where as a result of any order passed in appeal or revision under the Act, refund of any duty becomes due to an person, the proper officer may refund the amount to such person without his having to make any claim in that behalf.

(4) Save as otherwise provided by or under these rules no claim for refund of any duty shall be entertained. Explanation : For the purposes of this rule, "refund" includes rebate referred to in Rules 12 and 12A."
7. Section 35 of the Act provides regarding appeals to Collector (Appeals). In sub-section (1) thereof it is laid down that any person aggrieved by any decision or order under the Act by a Central Excise officer lower in rank than a Collector of Central Excise may appeal to the Collector (Appeals) within 3 months from the date of communication to him of such decision or order. In the proviso to sub-section (1) the power is vested in Collector (Appeals) to extend the period by further three months if he is satisfied that the appellant was prevented by sufficient cause from presenting the appeal aforesaid within the period of three months prescribed under sub-section. Section 35-A lays down the procedure to be followed in disposal of the appeal. In sub-section (3) thereof it is provided that the Collector (Appeals) may after making such further inquiry as may be necessary pass such order as he thinks fit confirming, modifying or annulling the decision or order appealed against, or may refer the case back to the adjudicating authority with such directions as he may think fit for a fresh adjudication or decision, as the case may be. The proviso to the said sub-section are not relevant for the purpose of the present case. Section 35B(1)(b) makes an order passed by the Collector (Appeals) under Section 35A appealable to the appellate tribunal.

8. From the aforementioned provisions of the Act the position is clear that any order passed by an authority under the Act is appealable to the Collector (Appeals) and a further appeal to the appellate tribunal against the order of the Collector (Appeals) is also provided in section 35. The hierarchy of authorities for adjudication and determination of a matter relevant for charging the excise duty is for a purpose. It is not an empty formality. Classification of the goods manufactured by an assessee is important for the purpose of levy and collection of excise duty. Under Rule 173B every assessee is required to file with the proper officer a list of goods manufactured by him for approval and the proper officer shall after such inquiry as he deems fit approve the list with such modifications as are considered necessary and all clearances are to be made only thereafter.

9. A right of appeal is a creature of the statute. It is a substantive right. An order of the appellate authority is binding on the lower authority who is duty bound to implement the order of the superior authority. Refusal to carry out the direction will amount to denial of justice and destructive of one of the basic principles in the administration of justice based on hierarchy of authorities.

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 his 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 taken by us also gain support from the provision in sub-rule (3) of Rule 11 wherein it is laid down that where as 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, 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 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 appeal against the order before the Collector (Appeals) if so advised.

11. On the discussions made in the foregoing paragraphs and for the reasons stated therein the order of the tribunal is unsustainable. Accordingly the appeal is allowed and the impugned order is set aside with costs."

12. In many cases the tribunal including this bench has found cases where there applications for refund which arise not from reopening assessments made by an officer but only by correction of minor clerical or arithmetical mistakes. It has been held that in such cases Section 154 can be invoked by the officers and refund granted under Section 27 as this correction does not amount to reassessment. As a consequence of such correction, if any refund is payable, it could also be paid.

13. To some up, there are three types of cases where refund can arise in a customs case.

i) where an assessment has been made by an officer and the person claiming the refund does not agree with the assessment. In such cases, the case laws of the Hon'ble Supreme Court in the case of Priya Blue Industries and Flock (India) Pvt. Ltd., (supra) squarely apply and the refund cannot be sanctioned unless the assessment order itself is challenged and returned by superior appellate authority.

ii) cases where assessment is not in dispute but there are only clerical or arithmetical errors in the assessment as a result of which excess duty has been paid. Such mistakes in assessment can be corrected by the officers under Section 154 of the Customs Act. If any refund arises as a consequence the same can be sanctioned as has been held by the Tribunal in a number of cases.

iii) cases where the refund arises but there is no order of the assessment by any officer such as in this case because the assessment is only self assessment (in cases after 08.04.2011) or there is no assessment at all (prior to 08.04.2011) because the Customs EDI system did not allow the officers to discharge their responsibility of assessment under Section 17. There is no provision for the importer/exporter to file an appeal before the Commissioner (Appeals) in such cases. Section 128 of the Customs Act, 1962 empowers Commissioner (Appeals) to hear appeals only against the decisions or orders passed by an officer of customs lower in rank than the Commissioner of Customs or Principal Commissioner of Customs as a case may be. There is no provision under this section or anywhere else for the importer or exporter to file an appeal against his self assessment or where there is no assessment. Such self assessment cannot be challenged before the Commissioner (Appeals). The officers also cannot correct any mistakes in the declarations in the Bill of Entry made by the importer under Section 154 of the Customs Act because they can only correct mistakes made by them or their predecessors. However, in such cases, they can claim refund under Section 27, since there is no assessment and the limitation imposed by the Hon'ble Apex Court in the cases of Priya Blue Industries (supra) and Flock (India) Pvt. Ltd., (supra) does not apply. This position was clarified by the Hon'ble High Court of Delhi in the case of Aman Medical Products (supra). In view of the above, we find that the first appellate authority was wrong in ordering correction of mistake under Section 154 of the Customs Act in the declaration in the bill of entry by respondent herein. However, he was correct in concluding that the appellant was entitled to the refund because there was no assessment order at all. In view of the above, the appeal is disposed of by expunging the order to correct the mistake in the bills of entry under Section 154 of the Customs Act but upholding the sanction of refund.

14. The appeal is disposed of as herein above.

(Order pronounced in open court on 29.01.2019)