

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 07.02.2017

DELIVERED ON : 18.04.2017

Coram

The Honourable Mr. Justice RAJIV SHAKDHER

Writ Petition No.3486 of 2016

Micromax Informatics Ltd.,
represented by its Manager (Legal),
Mr. Asad Shakeel
Plot No.21/14, Block A,
Naraina Industrial Area Phase II,
New Delhi - 110 028.

... Petitioner

Vs.

1. The Principal Commissioner of Customs
(Air Cargo),
Air Cargo Complex, Meenambakkam,
Chennai - 600 016.
2. The Assistant Commissioner of Customs
(Refunds-Air),
Office of the Principal Commissioner of
Customs (Air Cargo),
Air Cargo Complex, Meenambakkam,
Chennai - 600 016.

... Respondents

PETITION filed under Article 226 of The Constitution of India praying for the issuance of Writ of Certiorarified Mandamus, to call for the records comprised in the impugned order in No S. Misc 8/2015-Refunds-Air dated 23.11.2015 on the file of the second respondent quash the same and consequently direct the respondents decide the refund claims of the petitioner on merits in accordance with law after giving opportunity to the petitioner herein.

For Petitioner : Mr. Tarun Gulati

For Respondents : Mr. A. P. Srinivas,
Senior Standing Counsel

O R D E R

Prefatory Facts

1. This Writ Petition is directed against the order dated 23.11.2015, passed by the second respondent.

1.1. By virtue of the impugned order, the second respondent, has, in effect, returned four (4) refund applications filed by the appellant, qua various amounts, on the ground that they were premature.

1.2. The reason furnished in the impugned order for coming to such a conclusion is pivoted on the second respondent's appreciation of the ratio of the judgement in the matter of : Priya Blue Industries Vs. Commissioner of Customs, 2004 (172) ELT 145 (SC). Thus, according to the second respondent, in substance, the case for refund would arise, only, if, clearance made via self-assessment procedure, which is construed as an order, is either modified or revised.

2. In order to adjudicate upon the instant writ petition, the following relevant facts are required to be noticed :

2.1. The petitioner is in the business of importing and selling electronic products, which includes mobile phones (its parts and accessories), tablets and television sets, etc., It appears, as a part of its business activities, over a period of time, the petitioner had imported mobile phones, qua which Bills of Entires (in short 'BEs') were filed.

2.2. The petitioner claims that at the relevant point in time, i.e., at the time of clearance of the said goods, it was not granted the benefit of concessional rate of duty. The petitioner, evidently, had been paying duty at the rate of 13.5% [comprising of 0% Basic Customs Duty (BCD), 13.5% Countervailing Duty (CVD) {including 1% National Calamity Contingent Duty (NCCD)}, 0% Education Cess, 0% Higher Secondary Education Cess and 0% Special Additional Duty (SAD)].

2.3. The petitioner, evidently, took the stand that, since, CVD imposed upon it, emanates from the provisions of Section 3 (1) of the Customs Tariff Act, 1975, which provides that CVD shall be equal to the excise duty for the time being leviable on a like article produced or manufactured in India, it was entitled to the benefit of the following notifications, i.e., Notification No.12/2012-CE, (as amended by Notification No.04/2014-CE, dated 17.02.2014); and Notification No.12/2015-CE, dated 01.03.2015 - as its case came within the purview of Entry 263A of the said notification.

2.4. For the sake of convenience, the relevant part of the said notification is extracted hereafter :

Sl. No.	Chapter or heading or sub-heading or tariff item of the First Schedule	Description of excisable goods	Rate	Condition No.
263A	8517	i) Mobile handsets including cellular phones	12.5%	16
		ii) Mobile handsets including cellular phones	1%	

2.5. A perusal of the notification would show that the mobile phones are liable to excise duty, either at the rate of 12.5%, or, at a concessional rate of 1%, in case, condition No.16, as incorporated in the said notification, is satisfied.

2.6. Condition No.16 stipulates that a manufacturer will be imposed concessional rate of duty, only, if, no credit under rule 3 or 13 of the CENVAT Credit Rules, 2004, has been taken in respect of the inputs or capital goods used in the manufacture of the goods, qua which, concessional rate of duty is claimed. For the sake of convenience, condition No.16 is extracted hereafter :

"16. If no credit under rule 3 or 13 of the CENVAT Credit Rules, 2004, has been taken in respect of the inputs or capital goods used in the manufacture of these goods."

2.7. It appears that, because of the Circular No.37/2001-Cus, dated 18.06.2001, issued by the Central Board of Excise and Customs and the view taken by the Central Excise, Gold and Appellate Tribunal, Larger Bench, in the matter of : Puyesh Chemicals and Metals V. Commissioner of Central Excise, Bangalore, 2000 (38) RLT 588 (7), the importers of goods, were not claiming the benefit of concessional rate of CVD, as they did not, according to the view taken by the Tribunal in the aforementioned judgement, fulfill the requirements of condition No.16, to which I have made a reference above.

2.8. Given these circumstances, the petitioner was importing mobile phones, qua which, it paid duty at 13.5% (includes 1% of NCCD) and instead of 2% (including 1% NCCD), albeit, with effect from 01.03.2015.

2.9. According to the petitioner, this position changed after the Supreme Court rendered its judgement in the matter of : SRF Industries Vs. Commissioner of Customs, Chennai, 2015 (318) ELT 607 (SC). Via the said judgement, in effect, the Supreme Court ruled that SRF Industries, which was an importer of goods, was entitled to the benefit of the said exemption notification, which contained condition No.20, which was similar to condition No.16 obtaining in Notification No.12/2012-CE. The rationale being, as it appears, that since, the manufacturer of imported goods is situate outside India, and therefore, would not be entitled to take credit under the CENVAT Credit Rules, 2002, it shall be presumed that the condition for non-availment of concessional rate of duty, which was, the non-availment of CENVAT Credit, stood satisfied.

3. Based on the aforesaid position in law, on 14.09.2015, the petitioner lodged four (4) refund claims in respect of imports made between April and July 2015. These refund claims pertained to 233 BEs. The details, with regard to the refund claims, are, for the sake of convenience, set out herein below :

Sl. No.	Period	No.of BEs	Refund Application No.	Amount (in Rs.)
1	April 2015	18	S25A/Gen/81/2015 (Refunds-Air)	1,22,33,346.72
2	May 2015	107	S25A/Gen/74/2015 (Refunds-Air)	5,36,33,733.11
3	June 2015	88	S25A/Gen/76/2015 (Refunds-Air)	5,84,10,536.14
4	July 2015	20	S25A/Gen/75/2015 (Refunds-Air)	1,63,54,316.52
	Total	233		14,06,31,932.49

3.1. To be noted, in the interregnum, which is prior to the lodgement of the claim for refund, the petitioner had taken the stand that it was entitled to take the benefit of concessional rate of duty, i.e., 2% (which included NCCD of 1%), based on the judgement of the Supreme Court in SRF Industries case. These letters are dated 22.04.2015, 30.04.2015, 16.06.2015 and 19.06.2015. The said letters were addressed to the Deputy Commissioner of Customs.

3.2. Despite the aforesaid stand having been taken by the petitioner, the respondents vide impugned order dated 23.11.2015, returned the refund applications.

4. Being aggrieved, the petitioner has approached this Court via the instant writ petition.

Submissions of Counsels

5. In support of the writ petition, arguments were advanced by Mr.Tarun Gulati, Advocate, while, on behalf of the respondents, submissions have been made by Mr.A.P.Srinivas, Advocate.

6. The submissions of Mr.Gulati, can, broadly, be paraphrased as follows :

6.1. The second respondent had, based on an erroneous appreciation of the ratio of the judgment of the Supreme Court rendered in Priya Blue Industries case, returned the refund applications on the ground that they were premature. It was contended that the decision in Priya Blue Industries case was rendered by the Supreme Court prior to the amendments carried out in Sections 17 and 27 of the Customs Act, 1962 (in short "the Act"), via the Finance Act, 2011.

(i) The submission, thus, was that since, the words "in pursuance of an order of assessment ..." had been deleted, after the amendment in 2011, there was no requirement to lay challenge to the assessment order, if, it could be called an 'order' as understood in law.

(ii) According to the learned counsel for the petitioner, the petitioner was, thus, entitled to register a claim for refund of duty under the amended Section 27 of the Act, once, it was shown that duty had been paid by it or, borne by it.

(iii) Since, there is no dispute with regard to this aspect of the matter, the applications for refund could not have been returned on the ground that they were premature.

6.2. There was no provision in the Act, for passing an order of the kind, which had been passed by the second respondent, which is, to, simply, return the applications. The second respondent was required to either allow or reject the applications for refund. The impugned order was, thus, not sustainable in law.

6.3. Despite making a specific demand that a personal hearing be granted to the petitioner in terms of the provision made, in that behalf, in the refund application, the impugned order was passed without affording any opportunity of hearing to the petitioner. The impugned order, thus, violated the principles of natural justice, and would, consequently, have to be set aside on this short ground alone.

6.4. Since, the BEs had to be filed via an electronic mode, the petitioner had no opportunity to avail of the benefit of a lower rate of CVD based on the decision rendered by the Supreme Court in SRF Industries case, and therefore, a protest was lodged, both via letters dated 22.04.2015, 30.04.2015, 16.06.2015 and 19.06.2015 addressed to the Deputy Commissioner of Customs, and through endorsement made in the refund application dated 02.11.2015.

6.5. Post 08.04.2011, the entire scheme vis-a-vis, (i) clearance of goods imported ; and (ii) refund of duty, which, the importer may claim, has undergone a change. Under the amended provisions of Section 17, the importer is required to self-assess the goods, as regards classification, value, rate of duty and, whether or not, it is entitled to the benefit of a concession notification.

(i) In so far the customs authorities are concerned, verification with regard to the aforesaid aspects has been made optional. In case, the customs authorities have doubts with regard to the aforesaid aspects, they may subject the goods to the self-assessment, examination and test under the provision of Section 17(2) of the amended Act. For this purpose, the customs authorities can ask the importer to produce any document, or information, referred to in Section 17(3) of the Act.

(ii) Upon completion of the verification, examination and/or testing of goods and verification of information, the Proper Officer may re-assess the duty leviable on such goods. If he finds that the self-assessment was not done correctly, albeit, without prejudice to any other action that may be taken under the Act.

(iii) Under Sub-section (5) of Section 17, if the importer does not accept in writing the re-assessment carried out by the proper officer, the said officer would, necessarily, have to pass a speaking order, qua the re-assessment done, within a period of fifteen (15) days commencing from the date of re-assessment of the BE. In other words, according to the learned counsel for the petitioner, the proper Officer, i.e., concerned Customs Authority, had the discretion as to whether or not, he would want to subject the goods to examination and re-

assessment. Thus, the submission of the learned counsel was that the assessee had no right to invoke the provisions of Section 17 of the Act.

6.6. Based on the aforesaid contentions, learned counsel submitted that since, Section 27 of the Act had been amended to reflect the changes brought about in the mode and manner of assessment (as provided under Section 17 of the Act), the assessee could claim refund immediately, after the duty had been either paid or borne by him.

6.7. It was, thus, contended that there was no requirement in law, to first challenge the assessment order, if, it can be called one, and to claim a refund, only, if, it was reviewed or modified in appeal.

6.8. In support of his submissions, learned counsel for the petitioner relied upon the following judgments and/or orders :

(i) Aman Medical Products Ltd. V. Commissioner of Customs, Delhi, 2010 (250) ELT 30 ; (ii) Suryalaxmi Cotton Mills V. Commissioner of Central Excise, Nagpur, 2014-TIOL-3015-CESTAT-MUM; (iii) Central Office Mewar Palace Org. V. Union of India, 2008 (12) STR 545 (Raj.); (iv) Commissioner of Central Excise, Goa V. Sesa Goa Ltd., 2014 (299) ELT 221 (Tri.-Mumbai); (v) Cipla Ltd., V. Commissioner of Customs (ACC & Import), Mumbai, 2015-TIOL-201-CESTAT-MUM; (vi) CGG Veritas Services Ltd. V. Commissioner of S.T., Mumbai, 2015 (38) STR 1139 (Tri.-Mumbai); (vii) Styleman V. Commissioner of Customs, Chennai, 2006 (198) ELT 559 (Tri.-Chennai); (viii) Jindal Vijayanagar Steels Ltd. V. Commissioner of Customs, Mangalore, 2008 (11) STR 109 (Tri.-Bang.); (ix) Manipal Media Network Ltd. V. Commissioner of Customs, Cochin, 2009 (234) ELT 647 (Tri.-Bang.); (x) Orxy Fisheries Private Limited V. Union of India, 2011 (266) ELT 422 (SC); (xi) Union of India V. Real Slotted Angles Company, 2010 (252) ELT 329 (Bom.); (xii) Zuari Agro Chemical Ltd. V. Union of India, 2014 (207) ELT 874 (Bom.); (xiii) Commissioner of Central Excise, Delhi-I V. S.G.Engineers, 2015 (322) ELT 204 (Del.); (xiv) C.B.Gautam V. Union of India, (1993) 1 SCC 78; (xv) Micromax Informatics Limited V. Union of India and others, 2016 (335) ELT 446 (Del.) - Micromax Informatics Limited-I; (xvi) Judgement of the Delhi High Court dated 04.04.2016, in W.P.(C)Nos.2802 and 2803 of 2016, titled : Micromax Informatics Limited V.

Union of India and others - Micromax Informatics Limited-II; (xvii) Judgement of the Delhi High Court dated 03.08.2016, in W.P.(C)No.6750 of 2016, titled : Yu Televentures Private Limited V. Union of India and Others; (xviii) Common Order of the Calcutta High Court dated 20.07.2016, in a batch of writ petitions and the lead writ petition being : W.P.Nos.473 of 2016, titled : SGS Marketing Vs. Union of India and Others; (xix) Judgement of the Delhi High Court dated 05.09.2016, in W.P.(C) No.7851 of 2016, titled : Vishal Video and Appliances Private Limited V. Union of India and Others; (xx) Judgement of the Delhi High Court dated 28.09.2016, in W.P.(C)No.4712 of 2016, titled : Micromax Informatics Limited V. Union of India and others - Micromax Informatics Limited-III.

7. On the other hand, Mr.A.P.Srinivas, learned Senior Standing Counsel for the respondents, relied upon the impugned order to contend that no interference was called for by this Court in the impugned order, at this stage.

7.1. Learned counsel sought to defend the impugned order, whereby, the refund applications had been returned, by relying upon the Regulation 3 of Customs Refund Application (Form) Regulations, 1995 (in short "1995 Regulations"), which was brought into force, via the following Notification : M.F. (D.R.) Notification No.34/95-Cus.(NT), dated 26.05.1995. Based on the aforesaid, learned counsel says that the second respondent was entitled to return the refund applications, as they were deficient and incomplete.

7.2. It was further contended by the learned counsel that in order to claim refund, the petitioner had to establish that the duty paid by it was in excess of that, which was payable in law, and that, this fact would only be set at rest, after the BE was re-assessed. Since, there was no re-assessment, qua which, the second respondent did not have the necessary jurisdiction, the refund applications had been rightly returned, as being premature, via the impugned order.

7.3. Furthermore, learned counsel submitted that, if, as contended by the petitioner, that the BEs were assessed, without its consent, and that, duty was paid under protest, it could have asked for issuance of a speaking order under Section 17(5) of the Act. In support of this contention, learned counsel submitted that the petitioner had self-assessed the rate of CVD and this rate having been accepted by the proper Officer, there was, in fact, no lis obtaining between the petitioner and the

Department, which was exemplified by the fact that as per the 'protest record' maintained by the Department, no protest stood registered.

7.4. The impugned order provided sufficient reasons as to why refund applications could not be processed. Since, the BE had not been re-assessed by the proper officer, the second respondent could not have reviewed or modified the order of assessment.

7.5. Furthermore, my attention was drawn to the averments made in paragraph 28 of the counter affidavit dated 30.05.2016, wherein, it is indicated that vide a letter dated 02.01.2016, it was communicated to the petitioner that its applications for refund had been returned, not only on the ground that they were premature, but also on account of the fact that the refund section had no jurisdiction to process the same.

7.6. To be noted, the said letter, however, has not been placed on record by the respondents.

7.7. Notwithstanding the above, learned counsel submitted that, since, the refund applications were merely returned on the ground that they were premature, and filed before an authority, which did not have the necessary jurisdiction, no personal hearing was warranted in the matter.

7.8. Learned counsel contended that, if, the petitioner was aggrieved by the impugned order dated 23.11.2015, which reflected the aforesaid position, it was open to the petitioner to prefer an appeal with the Commissioner of Appeals against the said order.

Reasons

8. I have heard the learned counsel for the parties and perused the record.

9. According to me, what, clearly, emerges from the record, is as follows :

9.1. The petitioner had got cleared consignments of mobile phones imported by it between April and July 2015, qua which, it had paid CVD at the rate of 13.5% (inclusive of 1% NCCD).

9.2. With the Supreme Court rendering its judgement in the matter of : SRF Industries V. Commissioner of Customs, Chennai, 2015 (318) ELT 607 (SC), on 26.03.2015, the petitioner lodged its protest vide letters dated 22.04.2015, 30.04.2015, 16.06.2015 and 19.06.2015. In sum, via these letters, the

petitioner claimed the benefit of Notification No.12/2012-CE.

9.3. Given this background, on 02.11.2015, the petitioner filed four (4) refund applications. In these applications, the petitioner highlighted the fact that excess payment of CVD was made under protest.

9.4. The second respondent vide the impugned order, i.e., order dated 23.11.2015, returned the refund applications on the ground that they were premature. The reason given in the impugned order, in effect, was that the self-assessment order had not been modified or revised, and hence, the refund applications could not have been processed. For this purpose, the second respondent placed reliance on the judgement of the Supreme Court in Priya Blue Industries case.

10. Therefore, given these facts, the issue, which arises for consideration, is, as to whether the claims made by the petitioner between April 2015 and July 2015 were tenable. In other words, was the petitioner entitled in law, to straight away seek refund of duty without having the assessment order modified or revised ?

10.1. In this behalf, it would be relevant to not only examine the scheme of the Act both prior to and post the amendments, but also the stand taken by the respondents, both in their counter affidavit and generally in other matters, which raise a similar issue.

11. A comparative analysis of the provisions of Sections 17 and 27 of the Act, as they stood both before and after the amendment, would reveal the following :

11.1. Under the unamended Section 17 of the Act, once, an importer or exporter had entered any goods under Section 46 or 50 of the Act respectively, the said goods were required to be examined and tested by the Proper Officer without undue delay under sub-section (1) of the very same Section.

11.2. Based on such examination and testing, the duty, if any, leviable on such goods, would be assessed, save and except, as otherwise provided under Section 85 of the Act.

11.3. The proper Officer, in carrying out the exercise of assessing duty was empowered under sub-section (3) of Section 17 of the Act to require the importer or exporter or any other person to produce such documents and/or information, as stipulated therein.

11.4. Under sub-section (4) of Section 17, the proper Officer was, inter alia, authorised to re-assess duty, if he found, on examination or testing, the goods or otherwise, that any statement made, while entering goods for clearance, or, in the document, or, information so furnished was not true in respect of any matter relevant to the assessment of the goods.

11.5. Under sub-section (5) of Section 17, if, the importer or the exporter were to accept the re-assessment made, which was contrary to the assessment made by the importer or the exporter, in writing, then, the matter ended at that stage. However, if, the said position did not obtain, the proper Officer was required to pass a speaking order within fifteen (15) days from the date of assessment of the BE, or the shipping bill, as the case may be.

12. Under unamended Section 27 of the Act, a person could claim refund of duty and interest, if any, paid on such duty, in two situations : first, if, duty had been paid in pursuance of an order of assessment; and second, if, the duty had been borne by him.

12.1. After the amendments were carried out via the Finance Act, 2011 (8 of 2011) with effect from 08.04.2011, the following relevant changes were made in the Act, in so far as they are relevant to this case : In the definition Section, i.e., Section 2 of the Act, the term assessment, inter alia, included self-assessment.

12.2. The provisions of Section 2 of the Act post amendment read as follows :

2. Definitions - In this Act, unless the context otherwise requires -

(2) "assessment" includes provisional assessment, self-assessment, re-assessment and any assessment in which the duty assessed is nil."

12.3. Furthermore, in so far as Section 17 of the Act was concerned, the scheme of assessment of duty was changed from a system of examination and testing by the Proper Officer to self-assessment of duty. This change was brought about in sub-section (1) of Section 17, whereby, the importer or the exporter, could enter goods under Sections 46 or 50 of the Act, as the case may be, by self-assessing the duty leviable on goods sought to be cleared.

12.4. Under sub-section (2) of Section 17, the Proper Officer was given the option of verifying the self-assessment

made qua the goods sought to be cleared, and, if, such an option was exercised by the proper Officer, he could examine and/or test the goods, or any part thereof, as was found necessary.

12.5. Like in the unamended section, where verification was carried out, the Proper Officer under sub-section (3) of Section 17 was given the power to require the importer or the exporter, or any other person, to produce documents and/or information referred to therein.

12.6. Similarly, under sub-section (4) of Section 17, after the verification, examination or testing of goods, if, the Proper Officer found that the self-assessment was not done correctly, he could, without prejudice to any other action, which may be taken under the Act, re-assess the duty leviable on such goods.

12.7. In case, the duty qua the goods was re-assessed, and such re-assessment was not accepted in writing by the importer, or the exporter, the proper Officer under sub-section (5) of Section 17 of the Act, is required to pass a speaking order within fifteen (15) days from the date of re-assessment of the BE or the shipping bill, as the case may be.

12.8. Furthermore, sub-section (6) of Section 17, authorizes the Proper Officer to audit the assessment of duty of imported goods or goods sought to be exported, at his office, or, at the premises of the importer or the exporter, as may be considered expedient, in cases, where, either re-assessment had not been done or a speaking order had not been passed on re-assessment.

12.9. In so far as amended Section 27 of the Act is concerned, any person could claim refund of duty or interest, in two situations : (a) where duty had been paid by him ; (b) where duty was borne by him.

13. Thus, a comparative analysis of the unamended and amended provisions of Section 17 and Section 27 of the Act would show that while under the old regime, it was incumbent on the Proper Officer to verify, examine and thereafter, re-assess the duty leviable before the goods could be cleared for export/import, under the amended regime, the importer, or the exporter could make a self-assessment of the duty leviable qua the goods in issue.

13.1. The new regime, which was brought into play after the amendment, gives an option to the Proper Officer to choose from the cases involving self-assessment, those, which he would want to subject to verification, examination or testing.

13.2. Resultantly, if, upon verification, examination or

testing, the Proper Officer comes to the conclusion that the self-assessment is not done correctly, he is now empowered to re-assess the duty leviable on such goods. In case, the re-assessment, as carried out by the Proper Officer, whether with regard to valuation of goods, or classification, or examination, or concession of duty availed of, consequent to any notification, is different to what had been done via self-assessment procedure and the same is not accepted by the importer or the exporter, he is required to pass a speaking order within fifteen (15) days of such determination.

13.3. The new regime, therefore, envisages a situation where self-assessment constitutes an order, if regard is had to the amended provisions of Section 17 read with Section 2(2) of the Act, which, includes within the definition of the term assessment, self-assessment.

14. Having said so, the difficulty, which arises and one which cannot be overlooked, is that, BE or the Shipping Bill, as the case may be, is required to be uploaded in an electronic form, unless special permission is given by the concerned authority to file the said documents in a physical form. Therefore, where an importer or an exporter is of the view that he is entitled to be assessed at a lower rate of duty (which would include a 'nil' rate of duty), as against that rate demanded by the customs authority, there is no facility available to lodge a protest.

14.1. The only methodology, therefore, which is available to the importer or the exporter, at the moment, as it appears, is to record their protest in writing letters with the concerned authorities.

14.2. In this particular case, as is evident from the narration of facts set out above, protests were lodged by the petitioner, both via letters, as well as by making a reference qua the same in the applications for refund.

15. The question, therefore, is, that upon, such protests being lodged, is the Proper Officer not made aware of the fact that the clearance of goods made, by paying duties at the rate demanded by the customs authorities, is accompanied by a caveat.

16. The next question, which, arises for consideration, is that, if, such a situation obtains, is the proper Officer not required to verify, examine, or, test the claim of the importer, or, the exporter, as reflected in its protest letters.

17. I must indicate herein that the customs authorities

appear to be taking contradictory stands in matters depending on what suits them in a case.

17.1. In the case titled : M/s.Ingram Micro India Private Limited V. The Principal Commissioner of Customs and others (W.P.No.26874 of 2016), in which, I have delivered the judgment dated 18.04.2017, the customs authorities had taken the stand that notwithstanding the lodgment of protest, since, the clearance made by an importer in that case led to emergence of a self-assessment order, a refund claim could be processed only, if, firstly, an appeal was preferred qua the same to the Commissioner of Appeals under Section 128 of the Act, and secondly, an order was obtained, which either reviewed or modified the assessment Order.

17.2. In this case, however, the customs authorities/respondents take the position that, though, there is a facility for registering the protest, no protest was registered, and that, if, such a protest was lodged, a speaking order would have been passed by the proper Officer.

17.3. This aspect of the matter, clearly, emerges upon a perusal of the assertions made in paragraph 40 of the counter affidavit dated 30.05.2016.

17.4. I must indicate herein that the respondents have filed another counter affidavit, which is dated 03.06.2016, in which, except for a few stray sentences, the stand taken is identical to the extent that even paragraph numbers are the same. In so far as the assertions made in paragraph 40 are concerned, the following has been averred:

"40. Had the petitioner believed that he was eligible for the exemption he is claiming now, he could have filed his Bills of Entry accordingly and registered his protest and got a speaking order in terms of Section 17(5) of the Act."

17.5. This position is contrary to the stand, as indicated above, taken by the customs authorities in Ingrams Micro India Private Limited case (cited supra), wherein, the direction sought by the petitioner in that case, to seek issuance of speaking order, was resisted on the ground that unless the Proper Officer on his own choses to verify the goods subjected to self-assessment by the importer or exporter, in exercise of powers under Section 17(2) of the amended Act, no direction could be issued for passing a speaking order.

17.6. I had found the stance taken by the respondents

unsustainable in Ingrams Micro India Private Limited case (cited supra), for the reason, that once, a protest is lodged, the Proper Officer is made aware of the fact that the clearance of goods at the rate of duty demanded by the customs authorities is being done with a caveat, and therefore, he is bound to verify, examine and test the goods, and pass a speaking order.

18. I have also held that unless a speaking order is passed, the aggrieved party, i.e., the importer or exporter, cannot lodge a viable appeal with the Commissioner of Customs (Appeals), as it would in the absence of reasons present, in a manner of speech, an "inscrutable face of the sphinx".

18.1. In view of the definitive stand taken in the counter affidavit by the respondents in the present case, that once, a protest was lodged, it was incumbent upon the Department to pass a speaking order, nothing further need to be said on this aspect. However, in the instant appeal, I must also deal with the stand taken by the respondents that no protest was lodged with it, as per the protest record maintained by the Department.

18.2. To be noted, along with the writ petition, a typed set of documents were filed on 25.01.2016, wherein, a specific reference was given by the petitioner to four (4) letters dated 22.04.2015, 30.04.2015, 16.06.2015 and 19.06.2015, whereby, apparently, protest was lodged with the Deputy Commissioner of Customs.

18.3. The respondents, while taking the stand that no objection was lodged, have carefully, as it appears, averred that no protest was registered "in the Protest Record maintained by the Department". The respondents have carefully chosen to side step the fact as to whether or not the letters said to have been despatched by the petitioner to the Deputy Commissioner of Customs were received in his office. The petitioner has reiterated its stand of having sent the aforementioned four (4) letters in paragraph 16 of its rejoinder. The respondents have chosen not to file a sur-rejoinder.

18.4. This apart, in the applications for refund, quite clearly, the petitioner has taken the stance that the excise duty was paid under protest. Therefore, to my mind, what emerges is that, what the respondents seek to deftly portray is the fact that the lodgment of refund claim was not in accordance with the procedure contained in facility circular No.5 of 2008.

18.5. In my view, apart from the fact that the said circular is an internal circular, which perhaps, was not available to the public, at large, this argument cannot help the cause of the respondents. The reason being, if, this stance were to be

accepted, it would give precedence to form over substance. It is not the respondents' case that there are any statutory rules or forms stipulated for lodging a protest, in a particular manner. Therefore, once, a protest is lodged, it was, even, according to the respondents incumbent upon the Proper Officer to pass a speaking order under Section 17(5) of the Act, on merits, for whatever it was worth, as to why the petitioner was not entitled to the benefit of concessional rate of CVD.

18.6. The facts in the instant case show that the respondents chose to deal with the protest lodged by the petitioner, by taking a more convenient route, which is, to return the applications lodged for seeking refund.

19. The question, therefore, which, arises for consideration is whether the petitioner, so to say, added a second string to its bow, by lodging applications straightaway and seeking a refund.

19.1. According to the petitioner, since Section 27 of the Act stands amended, upon payment of duty, it can, immediately, file for refund. This argument is based on the language of the amended provision (i.e., Section 27 of the Act), whereby, the words "in pursuance of an order of assessment", which follow the words "paid by him" have been deleted. The contention advanced on behalf of the petitioner is that once, self-assessment is made under the amended provisions of Section 17, which is not subjected to verification by the proper Officer, the importer or exporter is entitled to, immediately, file for refund, without having to lay a challenge to the assessment order, by way of an appeal, as long as duty has been paid or borne by such a person.

19.2. In support of this contention, reliance was placed by the learned counsel for the petitioner on the judgment of the Division Bench of the Delhi High Court rendered in : Aman Medical Products Limited V. Commissioner of Customs, Delhi, 2010 (250) ELT 30 (Del.), and the judgment delivered, albeit, by another Division Bench of the Delhi High Court in its own case titled : Micromax Informatics Limited V. Union of India, 2016 (335) ELT 446 (Del) - Micromax Informatics Limited-I.

19.3. It may be pertinent to note that the judgment in the matter of : Aman Medical Products Limited case was rendered by the Division Bench prior to the passing of the Finance Act, 2011. In that case, the Division Bench took the view that under the unamended provisions of Section 27 of the Act, an importer could seek refund of duty, even though the assessment order had not been assailed in appeal, as long duty was borne by him.

19.4. The rationale given was that, at the time, when, the

goods were cleared based on the assessment order passed under the unamended provision of Section 17 of the Act, the importer was not aware of a notification, which allowed him to pay duty on a concessional rate. In such like situations, the Court observed, there would be no challenge to an assessment order by way of an appeal. Based on this rationale, the Court held, albeit, under the unamended provisions of Section 27(1)(i) of the Act that while refund could not be claimed on the ground that the duty had been paid by the importer in pursuance of an order of assessment, it could, surely, be claimed under the provisions of Section 27(1)(ii) on the ground that it had been "borne by him".

19.5. The Division Bench, thus, held that importers refund claim was maintainable under Section 27 of the Act, even though, no appeal had been filed on the ground that its claim fell under clause (ii) of sub-section (1) of Section 27 of the unamended Act. The Division Bench, while coming to this conclusion in Aman Medical Products Limited case, distinguished the judgements of the Supreme Court rendered in Priya Blue Industries Ltd. case, on the ground that in that case, even though the adjudicating authority had passed an order, it had not been appealed against by the party seeking to claim refund.

19.6. Pertinently, in Micromax Informatics Limited-I case, the Division Bench noticed the reasoning of the Court in Aman Medical Products Limited case, and also the amendments made in Section 27 of the Act with effect from 08.04.2011.

19.7. Upon noticing the amendment made, the Court made the following observations in paragraphs 12 to 14 of the judgement :

"12. An important change that has been made is that a person can now claim refund of any duty or interest as long as such duty or interest was paid or borne by such person. The conditionality of such payment having been made pursuant to an order of assessment does not exist. Secondly, once an application is made under Section 27(1) of the Act, it is incumbent on the authority concerned to make an order under Section 27(2) determining if any duty or interest as claimed is refundable to the applicant. The proviso to Section 27(2) of the Act sets out the instances where refund should be paid to the claimant instead of being credited to the Consumer Welfare Fund. The only relevance as far as payment of duty under protest is concerned is indicated in the second proviso to sub-section (1) of Section 27 of the Act which states that the limitation of one year shall not apply in such event. In other words, whether or

not the duty is paid under protest once an application for refund is made in the requisite manner and form as prescribed, it is incumbent on the authority to deal with such an application. Where there is an assessment order, the authority will take it into account in deciding the application for refund. If such assessment order has been reviewed or modified in appeal such further order will obviously be taken into account. In other words, under Section 27 of the Act, as it now stands, it is not open to an authority to refuse to consider the application for refund only because no appeal has been filed against the assessment order, if there is one.

13. As far as the present case is concerned, there was indeed no assessment order as such passed by the customs authorities. Although under Section 2 (ii) of the Act, the word 'assessment' includes a self-assessment, the clearance of the goods upon filing of the B/E and payment of duty is not per se an 'assessment order' in the context of Section 27 (1) (i) as it stood prior to 8th April 2011, particularly if such duty has not been paid under protest. In any event, after 8th April 2011, as noticed hereinbefore, as long as customs duty or interest has been paid or borne by a person, a claim for refund made by such person under Section 27(1) of the Act as it now stands, will have to be entertained and an order passed thereon by the authority concerned even where an order of assessment may not have reviewed or modified in appeal.

14. The Assistant Commissioner (Refund), in the present case, appears to have not noticed the decision of this Court in Aman Medical Products Limited (supra) which was rendered in the context of Section 27 of the Act as it stood prior to 8th April 2011. Further he failed to notice that the said provision has undergone a significant change with effect from 8th April 2011. The impugned order of the Assistant Commissioner (Refund) rejecting the refund claim of the Petitioner on the ground of maintainability was, for the aforementioned reasons, plainly erroneous."

(emphasis is mine)

19.8. A perusal of the same would show that, once, an

application for refund is filed, it is incumbent on the authority concerned to pass an order under sub-section (2) of Section 27 of the Act, to determine whether whole or part of the duty and interest, if any, paid on such duty, by the applicant is refundable. The refund of duty or interest, if any, paid, is to be made to the applicant, if, it fulfills, the conditions set out in Section 27(2) of the Act. In case, conditions are not fulfilled, then, the duty and the interest, if any, paid on the duty, is to be credited to the Consumer Welfare Fund.

20. To be noted, the applicant need not, necessarily, be an importer, he could also be a buyer, who had not passed on the incidence of duty and interest, if paid, on such duty, to any other person [See Clause (c) of proviso to Section 27(2) of the Act)].

21. Therefore, having regard to the aforesaid discussion, it is clear that the petitioner, in fact, has a second string to its bow, and thus, the concerned authority was required to pass an order on the refund applications, even if, it is assumed, for the moment, that no protests were lodged or the protest lodged did not accord with the provisions of Circular No.5/2008.

22. I may also indicate herein that the petitioner, in support of its aforesaid submission, has relied upon a series of other orders, to which, I have made a reference above, during my narration, which only follow the line of reasoning adopted by the Division Bench of the Delhi High Court in Micromax Informatics Limited-I case. For the sake of brevity, I think it fit not to advert to those orders in detail. Suffice it to say, I am in agreement with the view taken in Micromax Informatics Limited-I, for the reasons given herein above.

23. I may also indicate herein that in the course of arguments, the respondents sought to place reliance on a Division Bench judgement of this Court in Commissioner of Customs V. Ace Designers, (2015) 329 ELT 109 (Mad). As correctly pointed out by the learned counsel for the petitioner, this judgement also dealt with the provisions of Sections 17 and 27 of the Act, which stood on the statute prior to the 2011 amendment.

24. The record would, thus, show that the second respondent has not passed any order on merits in respect of the refund applications. The second respondent has, merely, returned the

refund applications by wrongly appreciating the ratio of the decision rendered in Priya Blue Industries case. The said decision, as indicated above, was rendered prior to the 2011 amendment made to Sections 17 and 27 of the Act.

25. Furthermore, the impugned order, whereby, the applications were returned, albeit, without hearing the affected party did entail civil consequences.

25.1. The defence advanced on behalf of the respondents based on the Regulation 3 of the 1995 Regulations is, to my mind, erroneous.

26. Quite clearly, it was not as if the applications for refund contained is defect or were incomplete, as alleged or at all. The applications were returned on the ground that there was no order on record modifying or reviewing the rate of duty determined via the self-assessment mode. This conclusion of the second respondent, in view of what is stated above, is, clearly, wrong.

27. Therefore, the impugned order, in my view, is flawed in the eyes of law, even on this score. This is more so, in view of the fact that in the refund applications against the column, which requires the applicant to state whether or not personal hearing is required, the petitioner had indicated in no uncertain terms that it would require a personal hearing in the matter.

28. Furthermore, the facts, in this case, would show that after the impugned order was passed, whereby, the applications for refund were returned, the petitioner vide letter dated 09.01.2016 sought to bring to fore the fallacy in the impugned action of the second respondent. This communication dated 09.01.2016, however, was not accepted; a fact, which is borne out, from the tracking report filed by the petitioner. The tracking report is indicative of the fact that the respondents refused to accept the delivery of the said communication dated 09.01.2016.

29. Thus, for all these reasons, I am inclined to allow the writ petition. Consequently, the impugned order dated 23.11.2015 is set aside, with a direction to the respondents to take a decision qua the refund applications filed by the petitioner, albeit, in accordance with law, after giving an opportunity of

personal hearing to the petitioner's authorised representative.

30. Given the facts and circumstances of the case, there shall, however, be no order as to costs.

Sd/-
Assistant Registrar(CS V)

//True Copy//

Sub Assistant Registrar

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To

1. The Principal Commissioner of Customs
(Air Cargo),
Air Cargo Complex, Meenambakkam,
Chennai - 600 016.
2. The Assistant Commissioner of Customs
(Refunds-Air),
Office of the Principal Commissioner of
Customs (Air Cargo),
Air Cargo Complex, Meenambakkam,
Chennai - 600 016.

+1cc to Mr.A.P.Srinivas, Advocate, S.R.No.23754

+1cc to Mr.K.Magesh, Advocate, S.R.No.22897

order in
Writ Petition No.3486 of 2016
सत्यमेव जयते

CS/13/06/17

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