IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 09.04.2019

CORAM

THE HONOURABLE Dr. JUSTICE ANITA SUMANTH
W.P.No.23439 of 2018
and
W.M.P.No.27352 of 2018

International Flavors & Fragrances India Pvt. Ltd.,
Represented by S.Mahesh, Assistant Manager - Exim,
1-5, Seven Wells Street, St.Thomas Mount,
Chennai - 600 016. .. Petitioner

Vs.

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

2.Deputy Commissioner of Customs,
Air Cargo Complex, Group-2,
Meenambakkam,
Chennai - 600 027. .. Respondents

Prayer:- Writ Petition filed under Article 226 of the Constitution of India praying for the issuance of a Writ of Certiorarified Mandamus to call for the records in File No.S.25A/GEN/66/2016-Refunds - Air and quash Letter dated 19.07.2016 issued by the First Respondent and direct the Respondent to refund the excess duty paid in Bill of Entry No.4888763 dated 12.04.2016.

For Petitioner : Mr.Joseph Prabakar
For Respondents : Mr.G.M.Syed Nurulllah, Senior Panel Counsel

O R D E R

Heard, Mr.Joseph Prabakar, learned counsel for the petitioner and Mr.Mr.G.M.Syed Nurulllah, learned Senior Panel Counsel for the respondents.

2.Counter and a reply affidavit along with a compilation of relevant documents and case laws have been filed in the matter.

3.The prayer in the writ petition is for a writ of Certiorarified Mandamus seeking quash of letter dated 19.07.2016, issued by the Assistant Commissioner of Customs and to direct the respondents to refund the excess duty paid in Bill of Entry No.4888763 dated 12.04.2016.

4.Facts and issues as submitted by Mr.Joseph Prabakar, learned counsel for the petitioner are as follows:

(i)The petitioner has imported 100Kg of 'Tea Flavour - Black' from IFF(Australia) Pty Ltd on 07.04.2016, under Bill of Entry No.4888763 dated 12.04.2016. Duty was computed at a sum of Rs.20,85,274/-, payable on an assessable value of Rs.70,82,891/- and was duly remitted on 13.04.2016. The goods were cleared on 23.04.2016.

(ii)Thereafter, a mistake was noticed in the invoice, which had indicated a unit price of USD 1033.85 per kg. instead of USD 10 per kg. The custom duty had been paid on the enhanced unit price, which was incorrect. The actual duty after the correct price was taken into account amounted to Rs.30,264/- as against which Rs.20,85,274/- had been paid.

(iii) This was confirmed by the overseas supplier as well. The supplier issued a letter dated 28.04.2016 to the second respondent intimating him of the error committed in the reflection of the erroneous unit price.

(iv) A refund was thus claimed of a sum of Rs.20,55,010/- and the petitioner filed a refund application on 22.06.2016 seeking the same.

(v) The second respondent called for and received all the required documents for assessing the proper value of goods and consequential duty thereupon. Personal hearing was also conducted on various dates and the petitioner filed all the documents as called for by the respondents.

(vi) No assessment order has been passed till date.

5. While this is so, the impugned order has been passed by the first respondent stating thus 'Refund will arise only if such Order is lawfully modified or revised' and on the ground that it is premature and a refund application may be filed once again if Bill of Entry was re-assessed accepting the change in unit price. The impugned letter states as follows:

> "Please refer to your above refund application. It is seen from the statement of facts and grounds of claim submitted by you that you are claiming change on the ground that the supplier had wrongly mentioned unit price in the invoice and that they wrongly filed the said Bill of Entry with the Incorrect unit price, resulting in payment of excess duty of Rs.20,55,010/-.
>
> However, it is seen from your refund application that the Bill of Entry submitted by you in your application is not re-assessed by the concerned assessing group. An order of assessment given by the competent authority i.e. the concerned Group

> cannot be reviewed or modified by the Refund section. As held by the Apex Court in the case of M/s.Priya Blue Industries Vs Commissioner of Customs (2004 (172) ELT 145(SC)- "Refund will arise only if such order is lawfully modified or revised". Therefore, it is advised that you may approach the concerned assessing Group for amendment/re-assessment of your Bills of Entry and then file refund application in this case.
>
> You may file refund application if your Bill of Entry is re-assessed if any, granting the change in unit price claimed by, as aforesaid.
>
> Therefore, your refund application is returned herewith as premature at this stage as per the procedure laid down in the Customs Refund Application(form) Regulations, 1995 issued vide M.F.(D.R) Notification No.34/95-Cus.(NT), dated 26.05.1995."

6.It is as against the aforesaid order that the petitioner has filed this writ petition.

7. Paragraph 4, comprises admitted facts, upon which Mr.Syed Nurullah, learned Senior Panel Counsel has no quarrel. The question of law argued by the petitioner is that the provisions of Section 27 of the Customs Act, 1962 (in short the 'Act') provide for a claim to be made for refund of duty, by a person in regard to duty paid by him or borne by him and as such, such claim ought to have been entertained by the respondent.

8. Mr.Nurullah, however, relies upon a judgment of the Supreme Court in the case of Priya Blue Industries Vs Commissioner of Customs(2004(172)ELT 145(SC) distinguished by Mr.Prabhakar for the reason that the law has been amended pursuant to 2011 and the aforesaid Judgment would thus not be applicable in the light of the amended law.

9. Mr.Nurullah also relies on the provisions of Section 149 of the Act to state that amendment of Bill of Lading is called for to reflect any change in Unit price and that such amendment can be effected only by the 'Proper Officer'. Such amendment has not been done in the present case and in the absence of the same and consequent assessment of the proper value of the units and consignment imported, the impugned order is perfectly correct and no interference is warranted.

10. The petitioner for its part relies on a decision of this Court in the case of Micromax Informatics Ltd Vs Union of India(2016 (335) E.L.T. 446(Del.)21) and a decision of the Delhi High Court in the case of Aman Medical Products Ltd. v. Commissioner(250 ELT 30) prompting Mr.Nurullah, to immediately state that the aforesaid decision has not been accepted by the Department but, has been appealed before the Supreme Court in Civil Appeal No.2960 of 2010, and admitted. I need not advert to this case for the reason that the assesse in Aman Medical Products Ltd (supra) has been assessed whereas in this present case, no order of assessment has been passed. The case of Aman Medical Products Ltd (supra) is thus distinguishable on facts.

11. The petitioner has also relied upon the following decisions:

Rawmin Mining and Industries Pvt.Limited Vs.C.C. (Prev.) Jamnagar [2018 (12) G.S.T.L.74(Tri.-Ahmd.)]; Ordnance Factory Vs. Commissioner of Customs (Import, Mumbai) [2017 (358) E.L.T. 1229 (Tri.-Mumbai)]; Cenuary Enka Ltd. Vs. Commissioner of Central Excise, Pune [2017 (358) E.L.T.1002 (Tri.Mumbai)]; Liebherr India Pvt.Ltd. Vs.Commissioner of Customs (Port), Kolkata [2017 (358) E.L.T.656)(Tri-Kolkata)]; KBK Palscon Pvt.Ltd. Vs. Union of India [2016 (339) E.L.T.350 (All.)]; Indian Potash Ltd. Vs.Commissioner of Customs, Kandla [2016 (339) E.L.T.140 (Tri.-Ahmd)]; CEAT Ltd. Vs. Commissioner of Customs, Kolkata [2016 (335) E.L.T.693 (Tri. Mumbai)]; CEAT Ltd.Vs. Commissioner of Customs, Kolkata [2015 (335) E.L.T.791 (Tri.-Mumbai)]; Joneja Bright Steels Pvt.Ltd. Vs. Commr.of Customs (ICD), New Delhi [2015 (329) E.L.T.952 (Tri.Del.)]; Commissioner of Customs (Appeals) Vs. ACE Designers [2015 (329) E.L.T. 109 (Mad)]; Hindustan Petroleum Corpn. Ltd. Vs. Commr. Of Cus. (Imports), Mumbai [2015 (328) E.L.T.490 (Tri.-Mumbai); Commissioner of Customs, Bangalore Vs. BPL Telecom Ltd. [2015 (325) E.L.T.467 (S.C.)].

12. Heard learned counsels.

13. The Supreme Court had occasion to consider the interpretation of Section 27 in the case of Priya Blue Industries (supra) and had opined that a refund would lie in the context of Section 27 as it stood then, only if an assessee has been served with an order of assessment. For the sake of completion, I extract hereunder the provisions of erstwhile Section 27 as it stood when the Judgment in the case of Priya Blue Industries (supra) was rendered:

> 27.Claim for refund of duty.-(1) Any person claiming refund of any duty-
>
> (i) paid by him in pursuance of an order of assessment; or
>
> (ii) borne by him, may make an application for refund of such duty and interest, if any, paid on such duty to the Assistant Commissioner of Customs or

Deputy Commissioner of Customs.

14. Thus, prior to 2011 when Section 27 stood amended, a person was entitled to seek refund only in a situation where the claim arose out of the payment made by him in pursuance of an order of assessment or borne by him in pursuance of an order of assessment as per the law settled by the Supreme Court in the case of Priya Blue Industries (supra). Subsequent to amendment of Section 27, the provisions of Section 27 have been considerably widened, by omission of the phrase in pursuance of the order of assessment as a result of which, after 08.04.2011, a claim for refund would lie in respect of any amount paid or borne by a person. The amended provision reads thus:

> 27. Claim for refund of duty
> (1)Any person claiming refund of any duty or interest,
> (a)paid by him; or
> (b)borne by him,
> may make an application in such form and manner
>
> as may be prescribed for such refund to the Assistant Commissioner of Customs or Deputy Commissioner of Customs, before the expiry of one year, from the date of payment of such duty or interest:....
> (2)If, on receipt of any such application, the [Assistant Commissioner of Customs or Deputy Commissioner of Customs] is satisfied that the whole or any part of the [duty and interest, if any, paid on such duty] paid by the applicant is refundable , he may make an order accordingly and the amount so determined shall be credited to the Fund:

15. This aspect of the matter has been completely lost sight of by the first respondent in passing the impugned communication. The sole ground on which the refund application has been returned is that the Bill of Entry submitted by the petitioner has not been re-assessed by the concerned assessing officer. This observation falls in the face of the position that the passing of an order of assessment is not within the control of an assessee. It is for the Assessing Officer to take up a Bill of Lading and frame an assessment thereon. If the statement in the impugned letter is to be carried its logical conclusion, no refund may be sought by any person unless an order of assessment is made, which itself is only at the discretion of an Assessing Officer. Therefore, the statement is clearly contrary to law and untenable.

16. In the present case and in the light of Section 27 as it stands now, the Assistant Commissioner ought not to have insisted upon an order of assessement having been passed and reliance upon the case of Priya Blue Industries (supra) is unwarranted and untenable.

17. This position has been taken note of by a learned Single Judge of this Court in the case of Micromax Informatics (supra), wherein the change in law has been noted and all the case laws referred to in above paragraphs have been exhaustively considered. In conclusion, the learned Judge states thus:

> "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."

18. In the light of the above discussion, the impugned letter is quashed and the petitioner is permitted to re-submit its application for refund within a period of two(2) weeks from today. The said applications will be considered by the respondents on merits and in accordance with law. I may mention here that the provisions of Section 27(2), extracted elsewhere in this order, provide for a refund to be granted only upon satisfaction of the Officer concerned that the whole or any part of the refund sought is refundable. In the light of the provisions of Section 27 (2), the apprehension expressed by Mr.Sundereswaran, stand allayed.

19. His reliance on Section 149, in the present case extracted below, has also no merit in so far as the operation of Section 149 is different and distinguishable from the provisions of Section 27.

> Section 149.Amendment of documents
>
> Save as otherwise provided in sections 30 and 41, the proper officer may, in his discretion, authorise any document, after it has been presented in the customs house to be amended:
>
> PROVIDED that no amendment of a bill of entry or a shipping bill or bill of export shall be so authorised to be amended after the imported goods have been cleared for home consumption or deposited in a warehouse, or the export goods have been exported, except on the basis of documentary evidence which was in existence at the time the goods were cleared, deposited or exported, as the

case may be.

20. Section 149 deals with amendment of documents. In the present case, the refund application is filed under Section 27 and refund is to be granted upon a satisfaction of the assessing authority in this regard. The refund is sought on the basis of a error in the Unit Price as mentioned in the Bill of Lading. If satisfied, the Assessing Authority would grant the same. It is not necessary that a formal amendment of document be carried out to warrant the refund, if the claim is otherwise in order.

21. In the light of the above discussion, this Writ Petition is allowed. Consequently, connected miscellaneous petition is closed. No costs. Such an order shall be passed within a period of six(6) weeks from the date of conclusion of personal hearing.

Sd/-
Assistant Registrar(CS VIII)

//True Copy//

Sub Assistant Registrar

tsg/ska

To

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

2.Deputy Commissioner of Customs,
Air Cargo Complex, Group-2,
Meenambakkam,
Chennai - 600 027.

+1cc to Mr.Joseph Prabakar , Advocate SR.No.35133
+1cc to Mr.G.M.Syed Nurulllah, , Advocate SR.No. 34515

W.P.No.23439 of 2018
and
W.M.P.No.27352 of 2018

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