

C.C. (import and Gen.) Vs. Unicorn Medident Pvt. Ltd.

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Feb-07-2006

Reported in : (2006)(108)ECC411

Judge : M Ravindran

Appellant : C.C. (import and Gen.)

Respondent : Unicorn Medident Pvt. Ltd.

Judgement :

1. This appeal is by the Revenue against Order-in-Appeal No.CC(A)/135/ACU/D-I/2005 dated 22.3.2005 wherein the Commissioner (Appeals) has set aside the Order-in-Original, vide which the refund claim of the respondents was set aside.
2. The relevant facts that arise for consideration are that the respondents herein imported Dental Micrometer. The Respondents cleared the goods after completing the formalities. Subsequently the respondents filed a refund claim of Rs. 94,842/- with the authorities on the ground that they had forgotten to claim the exemption of CVD under notification No. 10/2003(CE). The said refund claim was rejected by the adjudicating authority vide his letter dated 17.6.2003, directing the respondent to prefer an appeal against the finally assessed Bill of Entry. Aggrieved by the said order the respondents preferred an appeal and the Commissioner (Appeals) allowed the appeal and directed the adjudicating authority to decide the case on merits.

Hence, this appeal by the department.

3. The learned D.R. submits that the Commissioner (Appeals) has erred in allowing the appeal, as the respondents had failed to avail the benefit of the notification in the Bill of entry. By not claiming the benefit of Notification the respondents Bill of Entry has been correctly assessed by the assessing officer. He also relies upon the judgment of the Hon'ble Supreme Court in the case of Priya Blue Industries Ltd. v. C.C. (Preventive) 4. The learned Advocate appearing for the respondent submits that they have in a way challenged the assessment by filing the refund application. He relies upon the decision of Hon'ble Supreme Court in the case of Karnataka Power Corporation Ltd. v. C.C. (Appeals), Chennai, the decision of the Tribunal in the case of Faxtel Systems (India) Pvt. Ltd. v. C.C., Cochin(Tri.-LB), and Telco Ltd. v. C.C., Chennai for the proposition that even if the assessment of Bill of Entry is not challenged, the assessee can file refund claim.

5. Considered the submissions made by both sides and perused the records. It is not in dispute that the refund claim is filed by the respondents after the bill of entry has been assessed finally and the respondents made the payment of assessed duty on 17.5.2003. It is also not in dispute that the respondents had not claimed the benefit of notification No. 10/2003, when they filed Bill of Entry for the clearance of the goods. The refund claim of the respondents is to the tune of the amount, the respondents would not have paid, if they would have claimed the benefit of notification when they filed the Bill of Entry for clearance of the goods. The respondents in this case having not claimed the benefit of notification, at the time of filing and payment of Bill of Entry could have challenged the same, but they did not do so and filed a refund claim. The filing of refund claim for non-availment of the benefit of notification would amount to opening the finally assessed Bill of Entry, as, if refund claim would have got sanctioned, it would mean, that the Bill of Entry was assessed wrongly.

The provisions of the Customs Act, 1962 do not permit this. The respondents should have chosen time tested path of appealing against the assessed Bill of Entry. Further, I find, that, in this case the Deputy Commissioner of Customs

(Refund) vide his order/letter dated 17.6.2003 had clearly directed the respondents at Paragraph 2 as follows: In this regard it is informed that in this case, the said bill of entry has been assessed finally and you have paid duty amounting to Rs. 3,83,966/- vide TR-6 Challan dated 17.5.2003. Any availment of benefit of benefit under exemption notification should have been brought to the notice of the concerned group/customs authorities at the time of assessment.

The proper course of action in this case is to approach the appellate authority against the assessment order, if aggrieved, [as held by the Hon'ble Supreme Court in the case of CCE, Kanpur v. Flock India Pvt. Ltd.] and in case, the appeal is decided in your favour, the approach this office for the refund [as held by the Hon'ble CEGAT in the final order No. 42/2002-B dated 24.01.02 in the case of Kopran Ltd. v. CCE, New Delhi, in the case of Khemka Travel 1992 (57) ELT 452 and Hari and Co.

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It can be noticed that, the authorities in this case have responded very quickly and the respondents had still one month from 17.6.2003 to file an appeal to the Commissioner (Appeals) against the finally assessed Bill of Entry. The direction of the Dy. Commissioner of Customs (Refund) in this case was faultless and was in the interest of the respondents. The respondents instead of heeding to the advice of the lower authorities preferred an appeal. To my mind in this case the respondent is to be held as negligent all through, firstly when they filed Bill of entry for clearance of goods they did not claim benefit of notification, and secondly they did not file an appeal against the finally assessed Bill of entry, even when directed in time by authorities. It is a settled law by catena of decisions that, if the assessee has not claimed any benefit of notification, then the assessing officer could not be blamed for the outcome.

6. Further, I find that the ratio in the case of Karnataka Power Corpn.

Ltd. (supra) will not be applicable in this case in as much that, in that case, the Hon'ble Supreme Court came to conclusion after noting the fact that the appellant therein had sought reassessment of the Bill of entry, and the authorities had kept

quiet on such letter. In this case the lower authority has correctly advised the respondent to file an appeal.

7. The Hon'ble Supreme Court in the case of Priya Blue Industries Ltd. (supra) case has held as under: 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 negated 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." 8. In view of the above findings, the impugned Order of the Commissioner (Appeals) is not correct and

deserves to be set aside. I set aside the impugned Order and allow the department's appeal.

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