

Commissioner of Customs Vs. Cjv International

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Mar-01-2006

Reported in : (2006)(105)ECC159

Judge : M Ravindran

Appellant : Commissioner of Customs

Respondent : Cjv International

Judgement :

1. This appeal is directed against the Order in appeal dated 6.4.2005 wherein the Commissioner (Appeals) has set aside the order in original, which rejected the refund claim of the respondents.

2. The brief facts that arise for consideration are the respondents imported a leather polishing machine and filed a bill of entry dated 28.6.2003. After assessment, respondents paid customs duty and CVD and cleared the goods. The respondents subsequently filed refund claim on the ground that they have by mistake not claimed the benefit of Notification No. 21/2002 which if applied, there would be lower rate of CVD on their goods. The adjudicating authority rejected the refund claim on the ground that the bill of entry has been finally assessed.

The Commissioner (Appeals) allowed the appeal of the respondents. Hence this appeal by the department.

3. Considered the submissions made by both sides at length. The issue involved in this case is regarding whether the refund is eligible to the respondents in respect of the clearance taken by the respondents on bill of entry which is finally assessed. I find that the respondents had not claimed the benefit of concessional rate of duty under Notification No. 21/2002. Having not claimed the benefit on the bill of entry, the respondents' refund claim against the said assessed bill of entry was rejected by the authorities. It is settled law that any benefit of exemption or concessional rate of duty has to be claimed by the respondents at the time of the clearance of the goods. In this case, the respondents have not sought any benefit of exemption of Notification No. 21/2002 on the bill of entry which they have filed.

The respondent is trying to reopen the assessment, which attained finality, not permissible under the law as settled by the Hon'ble Supreme Court in the case of Priya Blue Industries v. Commissioner of Customs (Preventive) as reported at . The Hon'ble Supreme Court at paras 5 and 6 of the decision has decided as under: 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 of (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 filling 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.

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.

4. From the above, it is clear that the respondents are not eligible to reopen the assessment without challenging the assessment of bill of entry. The impugned order is liable to be set aside and I do so. The appeal of the department is allowed.

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