

Jindal Saw Ltd. Vs. C.C.

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : May-31-2006

Judge : M Ravindran

Appellant : Jindal Saw Ltd.

Respondent : C.C.

Judgement :

1. These two appeals are directed against the order in appeal-dated 7.4.2005 wherein the revenue's appeal has been allowed setting aside the orders in original that allowed refund to the appellants. Since the issues involved in both the cases are same both the appeals are disposed of by a common order.

2. The relevant facts that arise for consideration are that the appellant imported consignments of shots and grits and filed Bills of entries for home clearance, which were assessed as requested by the appellant. Subsequently a refund claim was filed by the appellant stating that they had paid excess duty. The said refund claim was scrutinized by the lower authorities and allowed. Revenue preferred appeals against the said orders, which were allowed by the appellate authority on the ground that once the Bill of Entries has been finally assessed then the route of the refund claim cannot be taken for the reassessment of the Bill of entries. Hence these appeals by the appellants.

3. The learned advocate appearing for the appellant submits that the order in appeal passed is not correct in as much that the appeal filed before the appellate

authority is not proper. It is his submission that the Commissioner's review order is faulty and it cannot be termed as an order of review. He draws my attention to the said order submits that the said order has title of "Authorisation" which can be given only after review order is passed under Section 129D of the Customs Act, 1962. It is his submission that if there is no review order then the appeal filed would fall on its own. On merits he submits that the appellant has filed the bill of entry and had by mistake paid excess duty and the order in original has corrected the mistake as provided under Section 154 of the Customs Act. It is his submission that the refund claimed due to corrections as contemplated in Section 154 cannot be construed as reassessment of Bill of entry. He relies upon the following case laws: Kirloskar Oil Engines Ltd. v. C.C., Mumbai (vi) C.C., Bangalore v. Integra Micro Systems (P) Ltd. 4. The learned DR on other hand would submit that the review order passed by the Commissioner is as per the provisions of the Customs Act.

It is also submitted that the order for filing the appeal by the Commissioner has all the requirements under the law. It is also submitted that the provisions of Section 154 cannot be invoked in these cases as the said provisions can be applicable only in the case of accidental omission and arithmetical errors, while in this case the appellant has not claimed the benefit of the notification when bill of entry was filed for clearances of the goods for home consumption.

5. Considered the submissions made by both sides and perused the records. It is the submission of the appellant that the appeal filed by the revenue before the appellate authority is not proper. In order to appreciate the proposition it is necessary to read the Provisions of the Customs Act. Section 129D(2) of the Customs Act, 1962 reads as under: SECTION 129D. Powers of Board or [Commissioner of Customs] to pass certain orders.- (2) The [Commissioner of Customs] may, of his own motion or on the application of any aggrieved person or otherwise, call for and examine the record of any proceeding in which an adjudicating authority subordinate to him has passed any decision or order of the nature referred to in Sub-section (5) of Section 129D for the purpose of satisfying himself as to the correctness, legality or propriety of such decision or order and may pass such order thereon as he thinks fit.

From the plain reading of the provisions it can be noticed that the act mandates the Commissioner to call for and review the orders passed by his sub-ordinates and if, in his view, the said order is not proper, legal and correct he may direct any to file an appeal. It may be seen that the commissioner has to pass an order to the effect that the said order is not proper, legal and correct. The Commissioner in this case has directed the Deputy Commissioner of Customs to file an appeal. The said Authorization reads as under: I have examined the Order-In-Original No. AC/Refund/04/2003 dtd.

19.01.2004 passed by the Assistant Commissioner of Customs (Refund), Custom House, Kandla which is not proper, legal and correct on the following ground: 1. The B/E No. F-9780 dtd. 27.05.2003 was assessed finally by the assessing officer. The order of assessment was appealable order.

However, M/s. Saw Pipes Ltd. did not choose to exercise the statutory right of filing an appeal but filed the refund claim. The sanction of the refund claim, when the correctness of the appealable order was not challenged by the party is not legal, proper and correct Therefore, I, C.M. Mehra, Commissioner of Customs, Custom House, Kandla hereby direct, Shri N.K. Sharma, Deputy Commissioner of Customs, Custom House, Kandla to file an appeal under Section 129D(4) of Customs Act, 1962 before the Commissioner (Appeals), Customs & Central Excise, Rajkot to determine the following among other issues arising out of impugned Order:- 1. Whether, the said order of the Assistant Commissioner of Customs, Custom House, Kandla be set aside; and 2. For passing such other order(s) as may be considered just and proper in view of the facts and circumstances of the case.

6. It can be noticed that, the authorization has two portions. The first portion indicates that the Commissioner of Customs after examining the order has come to conclusion that the order is not a proper, legal and correct and he has given reasons in para 1 the reasons for his conclusions. This part can be construed as a review order as para 1 indicates the reasons, albeit in a cryptic manner. But that itself cannot be a ground for not considering it as a review order. As, I have already indicated earlier that the provisions only mandate a commissioner to pass

a review order. To my mind this authorization as it is called is itself a Review order though it is labeled as authorization. Merely because the heading denotes as it being authorization, the essence of the review is built in the said authorization cannot be missed and discard the said order as non-est.

7. The objection raised by the appellant on this point is a non-starter and hence is unsustainable.

8. Having come to a finding that the appeal filed before the appellate authority being a correct one, I take up the second point of the appellant i.e. the order in original is an order passed under Section 154 of the Customs Act, 1962. The provisions of Section 154 read as under: SECTION 154. Correction of 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.

9. It can be seen that the said provisions can be brought in to play by the authorities only if there is an accidental omission or if there is arithmetical error. The benefit of the provisions can be availed if there is excess payment of duty due to calculation error or if the exchange rate is not correctly calculated or incorrect currency is quoted for the valuation of the goods. This is a settled position of law as can be seen from the case laws relied upon by the learned advocate. In this case, on perusal of the Bills of Entries produced, it is very pertinent to note that the appellant filed Bill of Entries for assessment, indicating the correct Tariff Rate applicable i.e. 40% and did not claim any benefit of notification and cleared the imported consignment on payment of the assessed duty. Subsequently they noticed that they have not claimed the benefit of the notification that would have enabled them to pay duty @ 25%, the appellant preferred a refund claim of the duty paid in excess of 25%. The adjudicating authority in his order in original has come to a finding which is as under: In this case, B/E No. 9780 dt. 27.05.2003 was assessed @ 40% basic duty + 16% CVD + 4% SAD and paid the duty vide TR-6 Challan No. 4272 dt. 27.05.2003 (cash entry no.). But applicable rate is 25% Basic + 16% CVD

+ 4% SAD as per General Exemption No. 107 (Noti. No. 21/2002-Cus dtd. 01.03.2002 as amended by Noti. No. 54/2002-Cus dt.

22.05.2002 and Notification No. 26/2003 dtd. 01.03.2003). The party has submitted and confessed that through oversight & erroneously they have paid the duty @ 40% basic. The difference of duty to be refunded is worked out as under: 10. It can be seen that the appellant has himself admitted that they have paid the excess duty through oversight and erroneously. If that being the case the appellant should have challenged the assessment of the Bill of Entry instead of taking a short cut of filing the refund.

The assessment of the Bill of Entries being unchallenged, have attained finality. Adopting the route of refund claim, they cannot seek to reopen the said final assessment. This is a settled law. The apex court in Priya Blue Industries Ltd's case 2004 (172) ELT 145 (SC) at paragraph 5 & 6 has held as: 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 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 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.

11. In view of the facts and circumstances as mentioned above the appellant appeal fails on merits also. I do not see any reason to interfere with the order of the appellate authority. The appeals are rejected.

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