

Amco India Ltd. Vs. Cce

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Nov-17-2006

Reported in : (2007)(114)ECC311

Judge : M Ravindran

Appellant : Amco India Ltd.

Respondent : Cce

Judgement :

1. This appeal is directed against the order in appeal dated 18th April 2006, which upheld the order in original that rejected the refund claim of the appellant.
2. The relevant facts that arise for consideration are that the appellant imported Aluminium Foil and filed Bill of entry dated 22nd March 2005 for assessment of the duty as per the tariff rate. The said bill of entry was assessed finally and the appellant also paid the assessed duty. Subsequently it was noticed by the appellant that they are eligible for concessional rate of duty on the said imported goods vide notification No. 11/2005 - Cus dated 01/03/2005. Appellant filed a refund claim with the adjudicating authority for the excess duty paid by them claiming that the benefit of notification is not deniable to them. Adjudicating authority rejected the refund claim on the ground that the appellant has not challenged the assessment of the bill of entry and hence the assessed duty was correct. In an appeal, appellant challenged the rejection of the refund claim and also challenged the assessment order. The learned Commissioner (Appeals)

dismissed the appeals on the ground of limitation as regards the challenge to the assessment of the bill of entry and on the ground of refund being claimed without challenging the assessment. Hence this appeal.

3. The learned advocate appearing for the appellant submits that they are not challenging the dismissal of their appeal as regards the assessment of the bill of entry for the reason that the appeal has been filed belatedly before the first appellate authority. It was submitted that the rejection of the refund claim was not correct, as the appellant should have been given the benefit of the reduced rate of the duty as per the notification No. 11/2005 - cus. It was his submission that the mistake of not claiming the benefit of notification is not a major one on the other hand the benefit should have been given by the authorities themselves. He submits that facts of this case are totally different than the Priya Blue case. It was also submitted that the ratio of the decision of the division bench in the case of Tata Iron & Steel Co. Ltd. v. CC (port) Kolkata as reported at 2006 (202) ELT 719 would apply in this case. He also relies upon the decision of the Hon'ble Supreme court in the case of Shree Hari Chemicals Export Ltd. v. U.O.I. As reported at 2006 (193) ELT 257 for the proposition that "relief to the assessee not deniable for wrong mention of statutory provisions provided he is otherwise entitled thereto".

4. The learned SDR on the other hand submits that it was for the appellant to claim the benefit of the notification. Since the notification is a budget notification it cannot be said that the appellant is not aware of the said notification. He reiterates the findings of the lower authorities and submits that the ratio of the decision of the Hon'ble Supreme Court in the case of Priya Blue Industries Ltd., v. CC (Prev) as reported at covers the issue.

5. Considered the submissions made by both sides at length and perused the records. It is seen from the records that the appellant filed the Bill of entry on 22.3.2005 for the assessment of the duty of the imported goods as per the tariff rate. It is seen that the appellant has not claimed the benefit of notification 11/2005 - cus even though the same was in force on the day when the bill of entry was filed. It would be noteworthy to mention here that even after noticing the error of excess payment of duty the appellant did not prefer an appeal against the

assessment of bill of entry, instead preferred a refund claim claiming mistaken payment of duty. The contention of the learned SDR that the benefit of notification or lower duty cannot be forced on the assessee, has strong force in as much that the appellant may have intended to pay the duty without claiming the benefit of notification for the reasons best known to them. Hon'ble Supreme Court in the case of Priya Blue Industries Ltd., (supra) held as under: (2) The facts necessary for the purposes of this order are as follows: The Petitioners had imported a ship for breaking purposes. They filed a Bill of entry. The amount of duty payable was assessed. The petitioner paid the duty under protest. They then filed a claim for refund of Rs. 79,64,648/- on the ground that duty had been wrongly levied. Their refund was rejected on 30th August, 2000. The appeal filed by them was rejected on 31st October, 2001. The further appeal filed before the Customs, Excise & Gold Control Appellate Tribunal was dismissed by the Tribunal on 28th May, 2002. The Tribunal followed the judgment of this Court in the case of Collector of Central Excise v. Flock (India) Pvt Ltd. . The Tribunal held that as no appeal had been filed against the assessment order the refund claim was not maintainable. The Civil Appeal filed before this Court was dismissed by our order dated 14th November, 2003.

(3) As it has been contended that the provisions of the Customs Act, 1962 are not in para materia with the provisions of the Excise Act and that the judgment of this Court in Flock India's case supra would not be applicable, notice was issued.

(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. 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 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.

(7) We also see no substance in the contention that provisions for a period of limitation indicates that a refund claim could be filed without filing an appeal. Even under Rule 11 under the Excise Act, the claim for refund had to be filed within a period of six months.

It was still held in Flock India's case *supra* that in the absence of an appeal having been filed, no refund claim could be made.

(8) The words 'in pursuance of an order of assessment only indicate the party/person who can make a claim for refund. In other words, they enable a person who has paid duty in pursuance of an order of assessment to claim refund. These words do not lead to the conclusion that without the order of assessment having been modified in appeal or reviewed, a claim for refund can be maintained.

6. It can be noticed that the ratio of the judgment of the apex court in the case of Priya Blue Industries Ltd., squarely covers the issue in the case before me. As regards the case laws cited by the learned advocate I find that they are not directly on the issue.

7. Accordingly, in the facts and circumstances of the case, the impugned order is correct in law and does not require any interference and requires to be upheld and I do so. The appeal is dismissed.

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