Commissioner of Central Excise Vs. Manaksia Ltd.

Commissioner of Central Excise Vs. Manaksia Ltd.

SooperKanoon Citation : sooperkanoon.com/47053

Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Mumbai

Decided On : Feb-27-2008

Judge : M Ravindran

Appellant : Commissioner of Central Excise

Respondent : Manaksia Ltd.

Judgement :

1. This appeal is filed by the revenue against the order-in-appeal No.SVS/320/NGP-ICD/2007 dated 20.9.2007 vide which the Commissioner (Appeals) set aside the order-in-original and directed the adjudicating authority to reconsider the refund application filed by the respondent.

2. The relevant facts that arise for consideration are that the respondent herein imported seven consignments of aluminium ingots and filed bills of entry. The said bills of entry were assessed by the Customs officers as per the declarations filed by the respondents and respondents were directed to pay the amount of duty assessed and education cess thereon. The respondents discharged the duty liability and cleared the consignments. Subsequently the respondents noticed that they had not availed the benefit of Notification No. 43/02 dated 19.4.02 which exempts the payment of the whole of the customs duty leviable thereon and other additional duty, filed refund claims with the authorities. Show cause notice was issued to the respondents directing them to show cause as to why such refund claim should not be rejected. After considering the submissions made by the respondents before him in reply, to the show cause notice as well as during the

personal hearing, the adjudicating authority rejected the refund claims. Being aggrieved by such rejection of refund claim by the adjudicating authority, the respondents filed an appeal before the Commissioner (Appeals). Commissioner (Appeals) relying upon the various decisions of the Tribunal came to the following conclusion.

14. Following the said CESTAT's judgment, I find that the refund application without challenging the assessment on the bill of entry is maintainable and the lower authority should examine the claim on merits and pass fresh order. Ordered accordingly.

3. Ld. SDR submits that the Commissioner (Appeals) has erred in permitting the refund application without challenging the assessment of bills of entry. It is his submission that the said decision of the Commissioner (Appeals) is totally against the law as is settled by the Hon'ble Supreme Court in the case of Priya Blue Industries Ltd. v.Commissioner of Customs (Preventive) It is his submission that once there is no challenge of the assessment of the bills of entry, the route of refund claim cannot be taken by the assessee for reassessment of the bills of entry. He submits that there is a gross error on the part of the Commissioner (Appeals) while allowing the appeal and directing the adjudicating authority to examine the claim on merits. He submits that the issue is squarely covered in favour of the revenue.

4. Ld. counsel appearing for the respondents draws my attention to the show cause notice issued by the lower authorities. It is his submission that the show cause notice sought to reject the refund claim of the appellant only on the ground which were mentioned in the show cause notice. It is his submission that the adjudicating authority instead of sticking to the grounds mentioned in the show cause notice, traversed beyond the show cause notice and rejected the refund claim. He draws my attention to the adjudicating authority's findings on the issue. He submits that the adjudicating authority having traversed beyond show cause notice, the order of the Commissioner (Appeals) in this case is correct. On a query from the Bench whether the law, as settled by the Supreme Court, be not considered by the adjudicating authority while deciding the case on the issue, it

was his submission that the adjudicating authority cannot go beyond the grounds set out in the show cause notice. For this proposition he submits the following case law;CCEx, Nagpur v. Ballarpur Industries Ltd. 5. In the rejoinder the SDR submits that the question of law can be raised even for the first time before the Supreme Court even if it is not raised before the Tribunal, the adjudicating authority has got reasons to rely upon the decisions of the Supreme Court on the issue and decide the matter even if it is not given in the show cause notice.

He relied upon the decision of the Supreme Court in the case of CCE, Ahmedabad v. Pioma Industries & Imperial Soda Factory and National Thermal Power Co. Ltd. v. Commissioner of Income-Tax .

6. Considered the submissions made at length by both sides and perused the records. The issue involved in this case is regarding the rejection of refund claim filed by the respondents. I find that the Office of the Assistant Commissioner of Customs ICD issued a show cause notice to the respondents when they filed the refund claim. Grounds which were informed to the respondents for rejection of refund claims are as under : 2. The said refund claims (total 7) were filed by the importer on 01.01.2005 which were returned as incomplete to the importer on 28.3.2005 with the following observations.

i) The grounds of claim are too cryptic and not supported by any documentary evidence.

ii) There is no evidence that the amount claimed as refund is not passed on to any other person.

iii) There is no certificate from the jurisdictional Central Excise Authorities about non-availment of credit of amount claimed as refund.

iv) There is no evidence that the amount claimed as refund is shown as receivable in the balance sheet/provisional balance sheet or any other documents v) Any other documentary evidence, which supports the claim, is not attached with the claim vi) Original duty paying TR6 challan case of B/E No. 002318/25.8.2004 and triplicate copies of the B/E in all cases are not attached with the claim.

3. The importer resubmitted these claims on 26.7.2005 without complying with the shortcomings pointed out in the above letter.

They have submitted a certificate issued by the superintendent, Central Excise Range Mouda which pertains to M/s Pennar Aluminium Company Ltd. Mouda and not the importer. Secondly the certificate is regarding portion of the education cess only whereas the refund of both cess are sought. This certificate was not accompanied by the abstracts of the Central Excise records. The other points mentioned in the letter addressed to the importer were also not complied by the importer.

4. Now therefore M/s Manaksia Ltd. (Formerly known as M/s Hindustan Seals Ltd.) 8/1, Lal Bazaar Street, Kolkata - 700001 are required to show cause to the Assistant Commissioner of Customs, Inland Container Deport, Ajni, Nagpur, as to why the refund claims resubmitted by them on 26-7-2005 and detailed in the chart above (total 7) should not be rejected under Section 27 of the Customs Act, 1962.

It can be noticed from the above reproduced grounds that the show cause notice clearly informed the respondents that the refund claim is said to be rejected on the grounds from 1-7 as indicated in the second para.

When the respondents made submissions accordingly to the adjudicating authority, the adjudicating authority did not issue any corrigendum to the show cause notice. Subsequently, the adjudicating authority rejected the refund claims of the respondents on the following findings.

27. Thus, I find that the importer filed refund claims without challenging the assessment before the appropriate authority within the stipulated time and without the assessment order being modified by the appellate authority and unless the 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 the order of assessment. Thus I find that the refund claims are not an appeal proceedings and the officer considering the refund claim cannot review an assessment order and without the order of assessments made in respect of above bill of entries of M/s Manaksia Limited are modified in appeal the

refund claim is not maintainable.

28. In view of the above discussion and findings I pass the following order: I reject the refund claims (total seven) filed by the importer M/s Manaksia Limited (Formerly known as M/s Hindustan Seals Ltd.) 8/1, Lal Bazaar Street, Kolkata - 700001 detailed in the above chart and totaling to Rs. 8,00,028/- (Rs. Eight lakh twenty eight only) under provisions of Section 27 of the Customs Act, 1962 as well as Customs Refund Application (Form) Regulations, 1995.

As against the said rejection of the refund claim, the Commissioner (Appeals) set aside the said order-in-original and directed the lower authorities to re-examine the claim on merits and pass fresh orders.

7. The basic question involved in this is whether the adjudicating authority was correct in law to invoke the ground which was never intimated to the respondents for rejection of the refund claims. It can be seen from the above reproduced grounds in the show cause notice, that the respondents were never made aware about the issue of non challenge to the assessed bills of entry. I find strong force in the contention raised by the ld. Counsel that the respondents had been directed to address only those grounds which are indicated in the show cause notice onwards. The Apex Court in the case of Reckitt & Colman of India Ltd. (supra) also held as under : 3. It will be remembered that the case of the Revenue, which the appellant had been required to meet at ever stage from the show cause notice onwards, was that the said product was a preparation based on starch. Having come to the conclusion that the said product was not a preparation based on starch, the Tribunal should have allowed the appeal. It was beyond the competence of the Tribunal to make out in favour of the revenue a case which the revenue had never canvassed and which the appellant had never been required to meet.

It is upon this ground alone that the appeal must succeed.

I also find that the Apex Court in the case of Ballarpur Industries Ltd. (supra) held as under 21. ...It is well settled that the show cause notice is the foundation in the mater of levy and recovery of duty, penalty and interest. If there is no invocation of

Rule 7 of the Valuation Rules, 1975 in the show cause notice, it would not be open to the Commissioner to invoke the said rule.

The ratio of the above two decisions of the Apex Court clearly indicate that the adjudicating authority cannot go beyond the grounds which were intimated in the show cause notice to the respondents for rejection of the refund claim. As such, the findings of the adjudicating authority that, the respondents having not challenged the assessment before the appropriate authority are prevented from doing so, by availing the right of refund claim is incorrect and not according to law as settled by the Apex Court. As such, these findings of the adjudicating authority are traversing beyond grounds in the show cause notice and hence are incorrect in law. Since the order of the adjudicating authority got merged with the order of the Commissioner (Appeals), I find that the Commissioner (Appeals) setting aside the order on these findings also is also not correct. When the respondents were never informed about the ground relied upon by the adjudicating authority to reject the refund claim, and the Commissioner (Appeals) setting aside such order, to my mind that both the orders of the lower authorities are incorrect.

8. The case laws relied upon by the SDR to canvas the point that this being the question of law, can be raised before any form seems to be misplaced. The question of law in this case is without putting the respondents on notice, would be a violation of principles of natural justice. The judgments cited by the SDR were rendered on different context and the facts and circumstances of the current case are totally different.

9. Accordingly, I am of the view that the impugned order-in-appeal in challenge is incorrect and is liable to the set aside only on the ground that the said impugned order is also traversing beyond show cause notice. As such both the order of the lower authorities are set aside and the matter is remanded back to the adjudicating authority to reconsider the issue afresh after granting an opportunity of personal hearing to the respondents. Respondents are free to canvass any point before the lower adjudicating authority. Accordingly the appeal is allowed as indicated in the above paragraphs and the matter is remanded back to the original adjudicating authority to reconsider the issue afresh in accordance with law. Appeal is disposed

off accordingly.

Since the appeal is disposed off, stay application does not survive.