Customs, Excise & Service Tax Appellate Tribunal
West Zonal Bench At Ahmedabad

REGIONAL BENCH- COURT NO.3

Customs Appeal No.10423 of 2020

(Arising out of OIA-JMN-CUSTM-000-APP-211-19-20 dated 07/01/2020 passed by Commissioner (Appeals) Commissioner of Central Excise, Customs and Service Tax-AHMEDABAD)

INSECTICIDES INDIA LIMITED **.....Appellant**
401-402, Lusa Tower, Azadpur Commercial Complex
Delhi

VERSUS

C.C.-JAMNAGAR(PREV) **.....Respondent**
Sharda House...Bedi Bandar Road,
Opp. Panchavati, Jamnagar, Gujarat

APPEARANCE:
Shri Hardik Modh, Advocate for the Appellant
Shri Rajesh K Agarwal, Superintendent (AR) for the Respondent

CORAM: HON'BLE MEMBER (JUDICIAL), MR. RAMESH NAIR

Final Order No. A/ 11329 /2022

DATE OF HEARING: 11.10.2022
DATE OF DECISION: 01.11.2022

RAMESH NAIR

The issue involved in the present appeal is that whether the refund claim of the appellant have been rightly rejected on the ground that Appellant had not challenged the assessment of Bills of Entry.

1.1 Brief facts of the case are that the appellant filed a refund claim of Rs. 31,69,748/- on account of Anti Dumping Duty paid against the BOE No. 4673216 dated 01.01.2018 and BOE No. 4367944 dated 12.12.2017 vide their letter dated 04.05.2018 on 07.05.2018. The Bill of entry dated 01.01.2018 was assessed to the duty of Rs. 15,45,715/- and Bill of entry dated 12.12.2017 was assessed to the duty of Rs. 15,57,623/- and the duty amount were paid by the Appellant. The Appellant imported the 'Phosphorus Acid" and declared in both the Bills of Entry under CTH 28092010. On post clearance Audit of above said Bills of Entry, it was found that goods imported under CTH 28092010 attract anti dumping duty vide Notification No. 33/2013-CUS (ADD) dated 31.12.2013. Therefore, the differential duty of Rs. 30,48,283 along with interest of Rs. 1,21,465/- was demanded by the

department vide letter dated 12.03.2018. The Appellant paid the said amount vide challan dated 28.03.2018. The Appellant vide letter dated 04.05.2018 contended that there is no Anti Dumping Duty on Phosphorous Acid. The department letter dated 12.03.2018 wrongly mentioned the import of "Phosphoric Acid" instead of "Phosphorous Acid". The Appellant contended that Phosphorus Acid falls under CTH No. 28111990 instead of 28092010 and therefore the amount deposited by the Appellant under Anti –dumping duty along with interest needs to be refunded. Appellant again vide letter dated 23.08.2018 wrote to the department seeking refund of the erroneous anti-dumping duty collected from the Appellant along with interest. The Deputy Commissioner of Customs vide OIO dated 06.03.2019 rejected the refund claim on the ground that he was not the proper authority for review or appeal. The claimant has to first challenge the assessment order at the appropriate appellate authority. Being aggrieved with the said order Appellant filed the Appeal before the Commissioner (Appeals), who vide impugned order –in-appeal dated 07.01.2020 upheld the Order-In-Original dated 06.03.2018 and rejected the appeal filed by the appellant. Hence, the present appeal.

02. Shri Hardik Modh, learned Counsel, appearing on behalf of Appellant submits that Learned Commissioner (Appeals) ought to have appreciated that the BOEs were never amended by the department to levy Anti – Dumping duty on the imported goods. The Anti-Dumping duty was collected by the Customs department vide letter dated 12.03.2018. The BOEs do not anywhere specify levy of Anti-dumping duty and the same has attained finality. Therefore, deputy commissioner of Customs in the first place should not have collected the Anti- Dumping duty. Even though collected, the Deputy Commissioner should have refunded, because no Anti –dumping duty was leviable on the imported goods i.e. "Phosphorus Acid."

2.1 He submits that without there being any assessment order on anti-dumping duty, the customs department does not have to review or sit in appeal which the primary reason stated in the impugned order. In the absence of any Assessment order demanding anti-dumping duty, there is no requirement to challenge the assessment order and hence, the present impugned order is materially irregular and deserves to be discarded. The appellant deposited anti-dumping duty based on the letter dated 12.03.2018 issued by the department. It was an obligation upon the Customs Authority

to issue the show cause notice under Section 28 for demanding anti-dumping duty or challenge the assessment order.

2.2 He further submits that appellant vide written communication on 04.05.2018 and 23.08.2018 stated before the Customs Authority for correction, providing information and also seeking refund of the erroneously imposed anti-dumping duty paid under protest. It is stated that even after raising of the issue of correction and refund, no response was received from the department until passing of Order-In-Original dated 06.03.2019.

2.3 He also submits that it is assumed that the assessment has been done in the matter, the same being done without affording any opportunity to the Appellant to defend their case even in the event when it is crystal clear that the Appellant paid the Anti-dumping duty under protest and brought all material facts before the department. Without considering any of the facts of the matter and without any hearing passing of such order is fatal under law.

2.4 He argued that Learned Commissioner (Appeals) has erred by not considering the fact that the Appellant imported "Phosphorous Acid" classified under CTH 28111990 and not "Phosphoric Acid" classified under CTH 28092010 which attract no anti- dumping duty and hence, in the present case no duty was to be recovered and hence, the same has been erroneously recovered which needs to be refunded to the Appellant. It is also to be seen that due to minor inadvertence the classification of the goods imported was wrongly mentioned. The product imported by the Appellant i.e."Phosphorus Acid and which is wrongly classified i.e " Phosphoric Acid" are materially different, having different chemical composition and having different usage and purpose which are easily distinguishable. The end usage of both the products are entirely different and both cannot be substitutes for each other and hence, there cannot be any intention of the appellant for wrongly classifying the same.

03. Shri Rajesh Agarwal, learned Superintendent (AR) appearing on behalf of the revenue reiterates the findings of the impugned order-in-appeal.

04. After hearing both sides and on perusal of the record, I find that by relying the judgment of Hon'ble Supreme Court in the case of *Priya Blue* (supra) [2004 (172) E.L.T. 145 (S.C.)] learned Commissioner (Appeals) has

held that where an assessment order is final a refund claim cannot be filed without first challenging the assessment that was done by the officer. However I observed that after the introduction of customs EDI system and its Risk Management Systems, a large number of consignments are cleared automatically based on the declarations with no assessment by any officer of the Bill of Entry. In such cases, where there is no assessment order at all by the officer there is nothing to appeal against. In such cases, if there is any error resulting in excess payment of duty the same can be claimed as refund. Various Benches of CESTAT has also held in several cases where no re-assessment is necessary but only some arithmetical or clerical mistakes are noticed such mistakes can be corrected by the successor officer in terms of Section 154 of the Customs Act, 1962. Therefore, any claim for refund involving correction of clerical or arithmetical errors by the officer do not fall under the scope of the judgment of *PriyaBlue* (supra) and such refunds are admissible. In this case, I find that the appellant in their normal course of business imported " Phosphorous Acid" and inadvertently mentioned HSN code as 28092010 instead of correct HSN code of 28111990. However description of goods was correctly mentioned as "Phosphorous Acid" by the Appellant on all the import documents and the same was not disputed by the department at the time of import. I find that the appellant in question have imported the goods " Phosphorous Acid" and therefore no Anti-dumping duty was payable on them. However, appellant inadvertently mentioned the HSN code 28092010 which was related to "Phosphoric Acid". This is a clerical error in the bills of entry but not by the officer but by the appellant themselves. In case of processing of bill of entry in customs EDI where the bill of entry which was sent to the officer for assessment, the officer can re-assess or correct the bills of entry. In such a case the officer should have corrected the bills of entry. If such was not the case, then the clerical error of correction in HSN code in Bill of entry can be corrected under Section 154 by the successor of the officer. On a plain reading of Section 154 of the Act, it is manifest that not only clerical or arithmetical mistake in any decision or order, but errors arising from any accidental slip or omission may, at any time, be corrected by the concerned authority. In the facts of the case, briefly noted above, I satisfied that the mention of wrong HSN code 28092010 instead of correct HSN code 28111990 in Bill of entry was an accidental slip and leading to erroneous collection of anti-dumping duty. I am of the view that the decisions of Supreme Court relied upon on behalf of the Revenue cannot be applied in cases covered by Section 154 of the Act

and where refund is the logical consequence of correction of some clerical or accidental error under Section 154, the person should not be denied the benefit merely because he did not prefer appeal against the assessment order. What benefit he is actually entitled to, as a consequence, is to be considered by the Proper Officer.

4.1 The point of dispute is as to whether before filing the refund claim of the excess duty paid due to errors / mistakes, the assessment order was required to be challenged. I find that this very issue had been dealt with by the Tribunal in the cases of *Tata Iron & Steel Co. Ltd.* v. *CC (Port)*, *Kolkata* (supra) 2006 (202) E.L.T. 719 (Tri. - Kolkata) = 2008 (10) S.T.R. 515 (Tri. – Kolkata and *Celcius Refrigeration Pvt. Ltd.* v. *CC, New Delhi* (supra), 2007 (213) E.L.T. 364 (Tri. - Del.) wherein the Tribunal has held that mention of wrong currency in the bill of entry as the application of wrong exchange rate is a clerical mistake and when on account of such clerical error a higher amount of duty has been paid the re-assessment is not required before filing of refund claim, as the clerical mistake can be corrected in terms of the provisions of Section 154 of the Customs Act, 1962.

4.2 Moreover, in the present case the payment of anti dumping duty is not due to assessment or reassessment of Bills of entry but merely by a letter from the department, therefore there is nothing in the bills of entry to challenge. Even the amount collected thru a letter by the department was also not adjudicated by due process of law such as issuance of show cause notice and adjudication thereof, for this reason also there is no need to file any appeal in order to claim the refund of anti dumping duty paid by the appellant. I am therefore of the view that before filing of the refund, it was not required for the appellant to challenge the assessment order and, as such, the judgment of the Apex Court in the case of *Priya Blue Industries Ltd.* v. *CC (Preventive)* (supra) is not applicable to the facts of this case, and therefore, the impugned order upholding the rejection of the refund claim on this ground is not sustainable and is liable to be set aside.

05. Accordingly, in view of my above discussion and finding, the impugned order is set aside. The appeal is allowed with consequential relief, if any, in accordance with law.

(Pronounced in the open court on 01.11.2022)

(RAMESH NAIR)
MEMBER (JUDICIAL)

Mehul