CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
SZB, CHENNAI

COURT : Division Bench III

CUSTOMS APPEAL No. 40479/2013

(Arising out of Order-in-Appeal C. Cus. No. 1606/2012 dated 31.12.2012 passed by the Commissioner of Customs (Air), Chennai.)

M/s. National Institute of Ocean Technology **Appellant**
NIOT Campus,
Velacherry – Tambaram Main Road,
Narayanapuram, Pallikaranai,
Chennai-600 100.

Vs.

The Commissioner of Customs (Appeals) **Respondent**
Custom House, No. 60 Rajaji Salai,
Chennai-600 001.

APPEARANCE

For the appellant: Shri S. Murugappan, Advocate

For the respondent: Ms. K. Komathi, ADC (A.R)

CORAM

Hon'ble Ms. SULEKHA BEEVI C.S., MEMBER JUDICIAL
Hon'ble Shri VASA SESHAGIRI RAO, MEMBER TECHNICAL

Date of Hearing: **17.02.2023**

Date of Pronouncement: **16.03.2023**

FINAL ORDER No. 40163/2023

Order : Per Hon'ble Vasa Seshagiri Rao

M/s. National Institute of Ocean Technology, the appellant herein is a public funded Research Institution who imported various scientific and technical instruments which are eligible for

exemption of customs duties in terms of Notification No.51/1996 dated 23.06.1996. This notification provides for 5% basic customs duty and also grants total exemption from levy of additional duty in terms of Section 3 of Customs Tariff Act, 1975 (CTA,1975 in short). In respect of import of various scientific instruments imported by the appellant covered by 13 bills of entry filed between June, 2011 and August, 2011, the system reportedly not extended the exemption benefit of 4% special additional duty of customs (SAD in short), necessitating them to pay 4% SAD for clearance of these scientific and technical instruments and parts.

2.1 The refund claims filed were rejected as premature by the Assistant Commissioner of Customs (Refunds) as there was no challenge of assessment done in terms of the Hon'ble Apex Court decision in the case of *M/s. Priya Blue Industries Vs. Commissioner of Customs* – 2004 (172) ELT 145 (S.C). While communicating rejection of refund claims in a letter F. No. S25A/ Gen/27/2010-Ref (Air) dated 16.09.2011, the refund sanctioning authority has stated that the appellants were eligible for exemption of both excise duty portion and 4% SAD portion but as the reassessment was not done by the assessing group, the same could not be reviewed or modified.

2.2 On appeal, the Lower appellate authority has concluded that the Notification No. 51/1996 would not cover the exemption of SAD as at that relevant time as Section 3 of the CTA talks about levy of additional duty equal to excise duty, that with

effect from 13.05.2005, Section 3A ibid was omitted and that prior to that 'SAD' is equivalent to sales tax, local tax or other taxes for the time being leviable on like articles on its sale or purchase in India, was covered under Section 3A of CTA,1975. Since the notification under dispute No. 51/1996 was issued on 23.07.1996 and amended subsequently till 01.03.2007, did not carry any amendment with regard to SAD. The original notification when issued meant only additional duty of customs equivalent to excise duty chargeable on the like articles manufactured in India. The whole of additional duty of customs referred in the said notification means the exemption was available as a whole of excise duty, unlike partial exemption was given for basic customs duty. As both the levy of exemption of SAD is introduced by separate notifications, the exemption given under Notification No. 51/1996 which is specifically for BCD and CVD exemptions cannot be considered as a notification exempting SAD. He has held further that the system itself after reading the notification No. 51/1996-Cus had calculated the SAD portion under Notification No. 19/2006-Customs dated 01.03.2006. As such, he upheld the order of the rejection of refund. But, there were no findings on the issue of lack of challenge to the assessment and the applicability or otherwise of the decision of the Apex Court in *M/s. Priya Blue Industries Vs. Commissioner of Customs* (supra).

3.1 For the appellants, learned Counsel Shri S. Murugappan has argued that the relevant portion of the above customs

notification reads as "from the whole of the additional duty leviable thereon under Section 3 of the CTA". Special Additional Duty of customs is leviable in terms of sub-section 5 of Section 3 of CTA, after omission of Section 3A of CTA, 1975 with effect from 13.05.2005. He has also submitted that the issue in dispute is covered by the decision of the Tribunal, in their own case, in Final Order Nos. 41025-41036/2014 dated 23.12.2013.

3.2 Learned Advocate has drawn our attention to the following decisions regarding the need to challenge assessment or self-assessment for becoming eligible for refund of any excess duty paid out of ignorance or mistaken impression or for any other reason.

a. In the case of *M/s. Fresenius Medical Care India Pvt. Ltd. Vs. Commissioner of Customs-IV, Chennai* reported in 2018 (7) TMI 103 – CESTAT CHENNAI, it has been held there is no necessity to challenge an assessment order and that the adjudicating authority is in error to reject the refund claim on the ground that self-assessment was not challenged.

b. The Bombay High Court in the case of *New India Industries Ltd. Vs. UOI* reported in 1990 (46) ELT 23 (Bom.) relying on the Supreme Court's decisions observed "payment towards tax or duty which is without authority of law is a payment made under mistake within the meaning of Sec.72 of the Indian Contracts Act. Therefore, by claiming to retain the tax which has been collected without the authority of law, the Govt. cannot enrich

itself and it is liable to make restitution to the person who made payment under mistake or coercion. The state has violated Art. 265 and therefore has a binding duty to refund the duty illegally collected.

c. In the case of *Commissioner of Sales Tax U.P Vs. Auriaya Chamber of Commerce in Allahabad* reported in 1986 (25) ELT 867 (S.C), where in it was held that duty paid under mistake of law needs to be refunded. Rules of procedure are handmaids of justice and it's Mistress. State has no authority to retain tax collected without authority of law.

d. In the case of *Commissioner of Customs, New Delhi Vs. Prima Telecom* reported in 2011 (266) ELT 386 (Tri.-Del.), it has been held that there is no need to challenge the assessment when there is no lis between the department and the importer. The Tribunal ordered refund of the duty.

e. In the case of *Hero Cycles Ltd. Vs. UOI* reported in 209 (240) ELT 490 (Bom.), the Hon'ble Bombay High Court held that any duty paid under mistake of law or by oversight cannot result in being assessed to duty not payable and directed the authorities to amend the bills of entry for the purpose of granting the refund to the importers.

f. In the following cases, it was held that the relief can be sought without challenging the assessment.

i) *CCE, Nhava Sheva Vs. Crest Chemicals* 2009 (244) ELT 261 (Tri.-Mum.)

ii) *Bansal Alloys and Metals Pvt. Ltd. Vs. CC, Amritsar* 2009 (240) ELT 483 (P & H)

iii) *Bennet Coleman & Co. Ltd., Vs. CC, Bangalore* 2008 (232) ELT 367 (Tri.-Bang.)

iv) *HPCL Vs. CC, Kandla* 2011 (266) ELT 76 (Ahmd.)

4. Learned AR Ms. K. Komathi representing the Revenue has reiterated the findings of the lower appellate authority regarding eligibility of Customs Notification No. 51/1996 for special additional duty. She has argued that the system has not extended the benefit of SAD exemption as the above said notification would not cover SAD as the notification was issued at that relevant time to cover countervailing duty of excise only.

5.1 We have heard both sides and examined the records of the appeal. The issues involved in this appeal are:

(i) "Whether the appellant is eligible or not for exemption from payment of SAD in terms of customs Notification No. 51/96-Cus dated 23.07.1996 for import of various scientific and technical instruments during June, 2011 to August 2011?" and

(ii) Whether any excess duties paid are refundable or not without challenging the self-assessment or order of the assessment of the bills of entry as found in this appeal?

5.2 The appellant has imported various scientific instruments during June, 2011 and August, 011. Section 3 A of CTA, 1975 was omitted with effect from 13.05.2005 by Section 73 of the Finance Act, 2005. In 2011 that is during the import SAD was levied and collected in terms of Section 3 (5) of CTA, 1975 and

also we find that Notification 51/1996 was amended till 01.03.2007, till the relevant time of import. The original authority ie., refund sanctioning authority while rejecting the refund claims had communicated that the appellants were eligible for exemption of both CVD and SAD. As the assessment of the imported goods was not challenged by the appellants, refund claims were rejected as premature. The learned Counsel has argued that "the customs notification reads as "whole of the additional duty leviable thereon under Section 3 of the said CTA" and the SAD is leviable in terms of sub-section 5 of Section 3 of CTA and as such very much within the scope of exemption.

5.3 We find that the issue is covered in the assessee's own case vide Tribunal's Final Order Nos. 41025-41036/2014 dated 23.12.2013, which read as under:-

> "Exemption of additional customs duty –Notification No. 51/96 dated 23.07.1996 - held that there is no description of different types of additional duty of customs in the notification. The notification categorically states that exemption from whole of the additional duty of customs leviable on the goods under Section 3 of the Customs Tariff Act, 1975 is allowed. In absence of any description and nomenclature of additional duty in the notification there cannot be any interpretation otherwise possible to deprive the appellant from exemption of additional duty of Customs. In view of the clear mandate of the notification to exempt additional duty of customs, the goods imported are eligible to the exemption from additional duty of customs thereon. Decided in favour of assessee."
> (National Institute of Ocean Technology Vs. Commissioner of Customs (AIR) -2016 (343) ELT 532 (Tri.-Chen.)

5.4 On the issue of not having challenged the order of assessment against the bills of entry, the Tribunal has held in the case of *M/s. Fresenius Medical Care India Pvt. Ltd.* (supra) as follows:-

> "5.1 Indubitably, pursuant to the amendment to the definition of assessment in Section 2(34) of the Customs Act and to Section 17

with effect from 8.4.2011 and to the changes brought in under section 17 ibid, on the same day, the decision that was delivered by the Hon'ble Apex Court in Priya Blue Industries case can be distinguished in the facts of the present case. We also note that vide the Finance Act, 2011, with effect from 8.4.2011, section 27 was also amended inter alia to bring it with those provisions with the amended provisions concerning self-assessment of Bill of Entry.

5.2 We also note that the facts of the present appeals are very much pari materia with the case laws relied upon by the ld. counsel and will apply on all fours to the facts of the present case.

5.3 In the case of Micromax Informatics Ltd.- 2016 (335) ELT 446 (Del.), the Hon'ble High Court of Delhi, relying upon its earlier judgment in the case of Aman Medical Products Ltd. - 2010 (250) ELT 30 (Del.), reiterated that there is no necessity to challenge an assessment order and that the adjudicating authority is in error to reject the refund claim on the ground that self-assessment was not challenged. The relevant portion of the order is as under:-

> 8. In Aman Medical Products Limited v. Commissioner of Customs, Delhi (supra), a Division Bench of this Court was considering an instance of an importer having filed B/Es, paid customs duty and thereafter claimed refund under Section 27 of the Act. The question of law framed by the Court in the appeal filed by the assessee against an order of refusal of refund read as under :-
> Whether non-filing of appeal against the assessed Bill of Entry in which there was no lis between the importer and the Revenue at the time of payment of duty will deprive the importer of his right to file refund claim under Section 27 of the Customs Act, 1962?
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> 9. The above question was answered in the negative. Analysing Section 27 of the Act, as it then stood, the Court noticed that it was always not necessary to have an order of assessment for a person to claim refund of duty. The initial payment of duty in terms of Section 27(1)(i) of the Act could be pursuant to an order of assessment or in terms of Section 27(1)(ii) of the Act could be borne by him. The Court explained :-
> The object of Section 27(i)(ii) is to cover those classes of case where the duty is paid by a person without an order of assessment, i.e. in a case like the present where the assessee pays the duty in ignorance of a notification which allows him payment of concessional rate of duty merely after filing a Bill of Entry. In fact, such a case is the present case in which there is no assessment order for being challenged in the appeal which is passed under Section 27(1)(i) of the Act because there is no contest or lis and hence no adversarial assessment order.
> 10. The Court in Aman Medical Products Limited (supra) also took note of and held that the decisions in Collector of Central Excise v. Flock (India) (P.) Ltd. (supra) and Priya Blue Industries Ltd. v. Commissioner of Customs (Prevention) (supra) would not apply since those were cases where there is

> no assessment order on dispute/contest, like as is in the present case. It was held in Aman Medical Products Limited (supra) that the assessee was entitled to maintain the refund claim notwithstanding that there was no appeal filed against the assessed B/Es.

6. However, we note that the Hon'ble Apex Court in the case of *ITC Ltd. Vs. Commissioner of Central Excise, Kolkata-IV* reported in 2019 (368) ELT 216 (S.C) has held that the assessment order including self-assessment needs to be challenged to become eligible for refund. In this case, the appellants when applied for refund, the refund sanctioning authority has communicated vide their letter F. No. S25A/ Gen/27/2010-Ref (Air) dated 16.09.2011, that the order of assessment cannot be reviewed or modified in terms of the Hon'ble Apex Court decision in the case of *M/s. Priya Blue Industries Vs. Commissioner of Customs* (supra). Refund would arise only if the order is reviewed, modified or revised. The decision of the Hon'ble Apex Court in *ITC Ltd. Vs. Commissioner of Central Excise, Kolkata-IV* (supra) set aside the decisions in the case of *Aman Medical Products Limited v. Commissioner of Customs, Delhi* reported in 2010 (250) ELT 30 (Del.) and *Micromax Informatics Ltd.* reported in 2016 (335) ELT 446 (Del.). The Apex Court has held as under:-

> "Refund - Assessment order, necessity to challenge - Provisions of refund more or less in nature of execution proceedings and not open to Authority which processes refund to make fresh assessment on merits and to correct assessment on the basis of mistake or otherwise - Refund claim cannot be entertained unless the order of assessment or self-assessment is modified in accordance with law by taking recourse to the appropriate proceedings - Not be within ken of Section 27 of Customs Act, 1962 to set aside order of self-assessment and reassess duty for making refund - Any person aggrieved by any order including self-

assessment had to get order modified under Section 128 ibid or under other relevant provisions of Act - Section 27 of Customs Act, 1962. - *The expression which was earlier used in Section 27(1)(i) that "in pursuance of an order of assessment" has been deleted from the amended provision of Section 27 due to introduction of provision as to self-assessment. However, as self-assessment is nonetheless an order of assessment, no difference is made by deletion of aforesaid expression as no separate reasoned assessment order is required to be passed in the case of self-assessment - The provisions under Section 27 cannot be invoked in the absence of amendment or modification having been made in the bill of entry on the basis of which self-assessment has been made. In other words, the order of self-assessment is required to be followed unless modified before the claim for refund is entertained under Section 27. The refund proceedings are in the nature of execution for refunding amount. It is not assessment or re-assessment proceedings at all. Apart from that, there are other conditions which are to be satisfied for claiming exemption, as provided in the exemption notification. Existence of those exigencies is also to be proved which cannot be adjudicated within the scope of provisions as to refund. While processing a refund application, reassessment is not permitted nor conditions of exemption can be adjudicated. Reassessment is permitted only under Section 17(3)(4) and (5) of the amended provisions. Similar was the position prior to the amendment. It will virtually amount to an order of assessment or reassessment in case the Assistant Commissioner or Deputy Commissioner of Customs while dealing with refund application is permitted to adjudicate upon the entire issue which cannot be done in the ken of the refund provisions under Section 27. [1998 (97) E.L.T. 211 (S.C.); 2009 (240) E.L.T. 490 (Bom.); 2004 (172) E.L.T. 145 (S.C.) relied on].*

Refund - Scope of - Scope of the provisions of refund under Section 27 of Customs Act, 1962 cannot be enlarged - To be read with provisions of Sections 17, 18, 28 and 128 of Customs Act, 1962. Assessment - Definition - Includes self-assessment - Endorsement made on the Bill of Entry is an order of assessment - When there is no lis, speaking order is not required to be passed in "across the counter affair" - Sections 2(2) and 17 of Customs Act, 1962. - *It is apparent from the amended definition that self-assessment, provisional assessment, reassessment and any assessment in which the duty assessed is nil, is an assessment. Assessment includes self-assessment, when the provision of self-assessment has been incorporated in Section 17(1), and corresponding change has been made in the definition of assessment in Section 2(2). Earlier the word self-assessment was not included in the definition of assessment. [1998 (97) E.L.T. 211 (S.C.) relied on].*

Appealable order - Self-assessment - Appeal under Section 128 of Customs Act, 1962 provided not just against speaking order but against "any order" which is of wide amplitude - Order of self-assessment nonetheless an assessment order passed under Act and would be appealable by any person aggrieved thereby - Sections 17 and 128 of Customs Act, 1962. - *The expression 'Any person' is of wider amplitude. The revenue, as well as assessee, can also prefer*

> *an appeal aggrieved by an order of assessment. It is not only the order of reassessment which is appealable but the provisions of Section 128 make appealable any decision or order under the Act including that of selfassessment. The order of self-ssessment is an order of assessment as per Section 2(2), as such, it is appealable in case any person is aggrieved by it. There is a specific provision made in Section 17 to pass a reasoned/speaking order in the situation in case on verification, selfassessment is not found to be satisfactory, an order of reassessment has to be passed under Section 17(4). Section 128 has not provided for an appeal against a speaking order but against "any order" which is of wide amplitude. [1998 (97) E.L.T. 211 (S.C.) relied on]."*

In view of the decision of the Hon'ble Apex Court, now we do not find any need to decide about the eligibility of the appellant for SAD exemption under Notification No. 51/1996 was issued on 23.07.1996

7. Further, the facts in this appeal clearly indicate that the appellants have not challenged the order of assessment, as such, we have to hold that appellants are not eligible for the refund. The order of rejection of refund by the refund sanctioning authority is upheld. So, the appeal filed by M/s. National Institute of Ocean Technology is dismissed as not maintainable.

(Order pronounced in the Open Court on **16.03.2023**)

(**SULEKHA BEEVI C.S.**)
MEMBER JUDICIAL

(VASA SESHAGIRI RAO)
MEMBER TECHNICAL

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