IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL, SOUTH ZONAL BENCH, CHENNAI

COURT HALL No. I

Customs Appeal No. 40297/2021

(Arising out of Order-in-Appeal C. Cus. No. II/797/2020 dated 15.5.2020 passed by Commissioner of Customs (Appeals – II), Chennai)

M/s.TATA Projects Ltd. **...Appellant**
Mithona Towers-1, 1-7-80 to 87
Opp. Wesley Co-Ed Jr. College,
Prenderghast RD
Near Paradise Circle
Secunderabad – 500 003.

Vs.

Commissioner of Customs **...Respondent**
Chennai II Commissionerate
Custom House
60, Rajaji Salai
Chennai – 600 001.

APPEARANCE:

Shri Ramnath Prabhu, Advocate for the Appellant
Shri Harendra Pal Singh, AC (AR) for the Respondent

CORAM:

HON'BLE SHRI P. DINESHA, MEMBER (JUDICIAL)
HON'BLE SHRI M. AJIT KUMAR, MEMBER (TECHNICAL)

DATE OF HEARING : 08.02.2024
DATE OF DECISION: 22.03.2024

Final Order No. 40327/2024

Per P. DINESHA

This appeal is filed by the taxpayer against the Order in Appeal C. Cus. No. II/797/2020 dated 15.5.2020 passed by the Commissioner of Customs (Appeals – II), Chennai.

2. Brief facts which are relevant as could be gathered from the Show Cause Notice / Order in Original / Order in Appeal and upon hearing the appellant, are that the appellant in the course of its business, imported aluminium framework from South Korea, sought for clearance of the

same vide 4 Bills of Entry Nos. 8399040 dated 1.2.2017; 8292662 dated 23.1.2017; 8478520 dated 8.2.2017 and 9258621 dated 20.2.20217 and the said goods were classified under CTH 7610 9020. The appellant had claimed exemption from BCD (Sl. No. 610 of Notification No. 15/2009-Cus. dated 31.12.2009 as amended).

2.1 It appears that the supplier of the goods in question had classified the same under CTH 8480.60.

2.2 It is the case of the appellant that the above error regarding classification was an inadvertent mistake which came to the light when the Bills of Entry were taken by the Risk Management System (RMS) of the Customs during scrutiny / audit. This prompted the Revenue to issue a pre-consultative notice dated 9.10.2017 indicating inter alia that the classification under the Bills of Entry and the import documents did not match with CTH declared; that the Notification benefit claimed could not be extended and that therefore, the differential duty of Rs.96,34,170/- was required to be paid by the importer.

2.3 It appears that the appellant did make the payment of the demanded differential duty along with interest as proposed in the consultative notice vide challans dated 26.10.2017 and 30.10.2017 towards duty and interest respectively.

3. It appears that the appellant having realized that the classification under CTH 7610 9020 was incorrect and that the imported goods merited classification under CTH 848060 and thus, filed an application for refund of duty and interest

(Rs.53,62,737.57) on 16.7.2018 under section 27(1)(a) of the Customs Act, 1962. The appellant also claimed to have filed a Chartered Accountant's certificate indicating that the incidence of duty had not been passed on. The Assistant Commissioner of Customs (Refunds) having considered the above application for refund vide the order dated 25.2.2019 did not entertain the importer's request for the reasons that

(i) the differential duty paid by the importer was not under-protest,

(ii) The importer did not file appeal against the order of Deputy Commissioner (RMS / PCA),

(iii) The refund did not arise consequent to self-assessment but the same was raised by the Revenue which was accepted by the importer who also made the payment,

(iv) The refund claim being premature was closed for want of any sustainable grounds.

4. It appears, the appellant approached the first appellate authority against the above rejection of refund claim by filing an appeal. But however, even the first appellate authority having upheld the rejection of the appellant's refund, the appellant has assailed the same in this appeal.

5. Shri Ramnath Prabhu, learned counsel appearing for the appellant contended as follows:-

- The rejection of refund was on a wrong premise that the consultative letter was a decision / re-assessment order.
- The refund had arisen on account of self-assessment as there was no re-assessment in the present case and

hence no appeal could have been filed against self-assessment in the absence of a speaking order.

- The Revenue did not appreciate that the amounts paid by the appellant had not attained the character of duty inasmuch as there was no crystallization or determination of demand by following the procedure under the Act.
- The impugned order is not a speaking order since the first appellate authority has not dealt with the submissions made by the appellant in its grounds of appeal as also those made in the written submission.
- The pre-notice consultative letter dated 9.10.2017 could never be considered as an appealable order nor could it replace the issuance of Show Cause Notice; it is not a decision or order and hence payment made against the above consultation letter assumes the character of duty under sec. 28(2) of the Customs Act, 1962 only when the same is accompanied by a letter specifically requesting for non-issuance of a notice.
- The Commissioner (Appeals) erred in holding that the duty and interest having been deposited, the Revenue did not proceed with the formal process of issuance of demand notice in terms of Circular No. 43/2005-Cus.
- The first appellate authority further erred in rejecting the appeal by holding that the appellant having voluntarily agreed with the payment expressed by the Deputy Commissioner (Customs / RMS) it had exhausted its opportunity of appeal at that point in

time itself.

- Without prejudice, once the refund claim has been filed, the payment of duty is required to be considered under protest and a speaking order dislodging the protest has to be issued.
- The learned counsel also relied upon the judgment of the Hon'ble High Court of Calcutta in the case of Gateway and Commodities Pvt. Ltd. Vs. UOI – 2016 (333) ELT 263 (Cal.).

6. Per contra, Shri Harendra Pal Singh, learned Assistant Commissioner defended the impugned order.

7. We have heard the rival contentions, perused the documents / orders available on record. We find that the only that is required to be considered by us is, "whether the Revenue authorities were correct in not entertaining the appellant's claim?"

7.1 The scope of the appeal revolves around the interpretation of section 28 of the Customs Act, 1962, the relevant portion of which is extracted herein below:-

> *"Recovery of duties not levied or not paid or short-levied or short-paid or erroneously refunded (1) Where any duty has not been levied or has been short-levied or short-paid or erroneously refunded, or any interest payable has not been paid, part-paid or erroneously refunded, for any reason other than the reasons of collusion or any willful mis-statement or suppression of facts, -*
>
> *(a) The proper officer shall, within two years from the relevant date, serve notice on the person chargeable with the duty or interest which has not been so levied or paid or which has been short-levied or short-paid or to whom the refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice;*
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> *Provided that* ***before issuing notice, the proper officer shall hold pre-notice consultation*** *with the*

person chargeable with duty or interest in such manner as may be prescribed.

(b) the person chargeable with the duty or interest, may pay before service of notice under clause (a) on the basis of –

(i) his own ascertainment of such duty; 0r

(ii) the duty ascertained by the proper officer

the amount of duty along with the interest payable thereon under section 28AA or the amount of interest which has not been so paid or part-paid

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(2) The person who has paid the duty along with interest or amount of interest under clause (b) of sub-section (1) shall inform the proper officer of such payment in writing, who, on receipt of such information, shall not serve any notice under clause (a) of that sub-section in respect of the duty or interest so paid or any penalty leviable under the provisions of this Act or the rules made thereunder in respect of such duty or interest."

(emphasis supplied)

8. A close look at section 28 as extracted supra indicates that a pre-notice consultation is necessary before issuing notice i.e. Show Cause Notice. The purpose of the same as understood, is obviously to indicate the 'recovery of duties not levied or not-paid or short-levied or short-paid'. Here in the case on hand, a pre-notice consultation dated 9.10.2017 was issued in terms of proviso to section 28(1)(a) ibid to the 'person chargeable with duty or interest' and apparently, the appellant responded positively without any demur by paying the duty and interest as indicated. What was indicated / proposed to be demanded was a differential duty and hence nothing more needs to be said about the 'characteristic' of the demand since when proposed to be demanded, the payment was made religiously. Hence, we do not agree with the contentions of the learned counsel that the payment made by the appellant would assume the 'character of duty'

under section 28(2) only when the same is accompanied by a letter specifically requesting for non-issuance of a notice.

9. We find that much emphasis has been laid on the non-issuance of letter / communication in writing as specified under sec. 28(2) and it is the case of the appellant that it having not issued any such communication in writing, the payment made by it loses the characteristic of duty. We again do not agree with this contention since section 28 applies with equal force to both the Revenue as well as the appellant, the appellant having adhered / accepted proviso to section 28(1)(a), cannot turn around to say that sec.28(2) was also to be complied with or that it has no responsibility after making the payment. Further, we find that a positive act followed the pre-notice consultation and hence, we do not have to look beyond for anything. If we were to consider the pleas urged, then there should have been a communication to the least, indicating as to why payment as proposed / demanded was made, but no such things appear in the file. The appellant having acquiesced, no further action was felt necessary. When we consider the scope and objective of the pre-notice consultation, the same is issued to avoid a possible litigation. So, when pre-notice consultation is issued, the notice could choose either to accept the proposal made therein, or not to accept in which event, the Revenue would invariably issue a Show Cause Notice, that cause of action is clearly missing here, for the Revenue to issue Show Cause Notice. That means to say, the Revenue was estopped from proceeding further in terms of

section 28(1)(a) since the appellant accepted the short-payment of duty and made the payment as proposed / demanded.

10. We also consider the case of the appellant from one another angle. It appears that the differential duty arose on account of mis-match with regard to the classification of the product imported. It is the case of the appellant that the correct classification was 8480.60. But there was no request made for rectification / re-assessment, since it is the settled position of law that since acceptance of Bill of Entry is considered as self-assessment per se, the importer if aggrieved by the same, has to seek for modification / rectification / re-assessment as held by the Hon'ble Supreme Court in the case of ITC Ltd. Vs. CCE, Kolkata reported in AIR Online 2019 SC 1088 = (2019) 12 SCALE 543. The relevant portion of the said judgment is extracted for ready reference:-

> *"……. 41. It is apparent from provisions of refund that it is more or less in the nature of execution proceedings. It is not open to the authority which processes the refund to make a fresh assessment on merits and to correct assessment on the basis of mistake or otherwise.*
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> *42. It was contended that no appeal lies against the order of self assessment. The provisions of Section 128 deal with appeals to the Commissioner (Appeals). Any person aggrieved by any decision or order may appeal to the Commissioner (Appeals) within 60 days. There is a provision for condonation of delay for another 30 days. The provisions of Section 128 are extracted hereunder:*
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> *. . .*
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> *43. As the order of self-assessment is nonetheless an assessment order passed under the Act, obviously it would be appealable by any person aggrieved thereby. 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 self-assessment. The order of self assessment 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, self-assessment 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. The reasoning employed by the High Court is that since there is no lis, no speaking order is passed, as such an appeal would not lie, is not sustainable in law, is contrary to what has been held by this Court in Escorts (supra).

44. 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.

. . .

. . .

47. When we consider the overall effect of the provisions prior to amendment and post-amendment under Finance Act, 2011, we are of the opinion that the claim for refund cannot be entertained unless the order of assessment or self-assessment is modified in accordance with law by taking recourse to the appropriate proceedings and it would not be within the ken of Section 27 to set aside the order of self-assessment and reassess the duty for making refund; and in case any person is aggrieved by any order which would include self-assessment, he has to get the order modified under Section 128 or under other relevant provisions of the Act.

48. Resultantly, we find that the order(s) passed by Customs, Excise, and Service Tax Appellate Tribunal is to be upheld and that passed by the High Courts of Delhi and Madras to the contrary, deserves to be and are hereby set aside. We order accordingly. We hold that the applications for refund were not maintainable. The appeals are accordingly disposed of. Parties to bear their own costs as incurred."

Rather, the appellant chose to seek only the refund which

according to us has rightly been rejected by the original authority.

11. In the light of the above discussions, we do not find any merit in the case of the appellant and consequently we dismiss the appeal.

(Order pronounced in open court on 22.03.2024)

(M. AJIT KUMAR)
MEMBER (TECHNICAL)

(P.DINESHA)
MEMBER (JUDICIAL)

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