CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
REGIONAL BENCH AT HYDERABAD

Single Member Bench

Court – I

Customs Appeal No. 31210 of 2018

(Arising out of Order-in-Appeal No.VIZ-CUSTM-000-APP-017-18-19 dt.25.07.2018 passed by Commissioner of Customs, Visakhapatnam (Appeals))

The Andhra Sugars Limited

Venkatarayapuram, Tanuku, West Godavari District, Andhra Pradesh – 534 215 **.....Appellant**

VERSUS

Commissioner of Customs, Visakhapatnam - Cus

Customs House, Port Area, Visakhapatnam, AP – 530 035 **.....Respondent**

Appearance

Present for the Appellant: Shri N. Anand, Advocate.
Present for the Respondent: Shri A.V.L.N. Chary, Authorized Representative.

Coram:

HON'BLE MR. P. VENKATA SUBBA RAO, MEMBER (TECHNICAL)

FINAL ORDER No. 30078/2022

Date of Hearing: 21.07.2022
Date of Decision: 30.08.2022

[Order per: P.V. SUBBA RAO.]

M/s. Andhra Sugars Ltd.[1] filed these two appeals assailing the Order-in-Appeal dated 25.7.2018 passed by the Commissioner(Appeals) whereby he upheld the order of the lower authority rejecting the refund claims by the appellant.

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[1] **Appellant**

2. I have heard learned counsel for the appellant and the learned authorised representative for the Revenue and perused the records. The appellant imported sulphur in bulk and filed Bills of Entry as per the quantity indicated in the Bills of Lading and paid duty. Thereafter, according to the appellant, it found that lesser quantities of the goods were delivered by the Master of the Vessel and therefore, less duty was required to be paid. The appellant filed two refund claims on this ground which were rejected by the lower authority and such rejections were upheld in the impugned orders. Hence, these appeals.

3. Learned counsel submits that in their own case, when the goods were earlier landed short of the quantity mentioned in the Bill of Lading this bench had in **Andhra Sugars Ltd. Vs CC&ST**[2] allowed refunds. Hence, following the same order, these appeals may also be allowed.

4. Learned authorised representative for the Revenue supports the impugned orders and submits that there is no clear evidence of short landing of the goods apart from the assertion of the appellant and the Joint Survey Reports relied upon by the appellant were inconclusive and do not establish that the goods were landed short of the quantity mentioned in the Bills of Lading.

5. Having considered the submissions on both sides, I find that the following questions need to be answered in these two appeals:

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[2] **2017(352)ELT 188(Tri-Hyd)**

a) If the duty assessed in the Bill of Entry through self-assessment by the appellant is in excess, can a refund be claimed or does the Bill of Entry has to be re-assessed first before refund can be sanctioned?

b) Will change in the quantity of the goods in the Bill of Entry amount to re-assessment?

c) Do the documents relied upon by the appellant establish that lesser quantity of goods were imported than the quantity mentioned in the Bill of Lading?

d) Considering (a), (b) and (c) above, can the impugned order be sustained?

6. The definition of 'assessment' under the Customs Act was, earlier an inclusive definition and it read as follows:

> ***Section 2 Definitions***
>
> *(2) "assessment" includes provisional assessment, self-assessment, re-assessment and any assessment in which the duty assessed is nil;*

This was **substituted in 2018** with a more comprehensive definition as follows:

> ***Section 2 Definitions***
>
> *(2) "**assessment" means determination of the dutiability of any goods and the amount of duty, tax, cess or any other sum so payable, if any, under this Act** or under the Customs Tariff Act, 1975 (51 of 1975) (hereinafter referred to as the Customs Tariff Act) or under any other law for the time being in force, **with reference to-***
>
> *(a) the tariff classification of such goods as determined in accordance with the provisions of the Customs Tariff Act;*
>
> *(b) the value of such goods as determined in accordance with the provisions of this Act and the Customs Tariff Act;*
>
> *(c) exemption or concession of duty, tax, cess or any other sum, consequent upon any notification issued*

> *therefore under this Act or under the Customs Tariff Act or under any other law for the time being in force;*
>
> ***(d) the quantity, weight, volume, measurement or other specifics where such duty, tax, cess or any other sum is leviable on the basis of the quantity, weight, volume, measurement or other specifics of such goods****;*
>
> *(e) the origin of such goods determined in accordance with the provisions of the Customs Tariff Act or the rules made thereunder, if the amount of duty, tax, cess or any other sum is affected by the origin of such goods;*
>
> *(f) any other specific factor which affects the duty, tax, cess or any other sum payable on such goods, and includes provisional assessment, self-assessment, re-assessment and any assessment in which the duty assessed is nil;*

7. It is pertinent to note that the definition was substituted and not superseded in 2018 and hence, as per the established legal principles, this definition comes into effect from the commencement of the Customs Act itself and not from the date of substitution. The new definition has only elaborated as to what constitutes assessment.

8. It is the case of the appellant that the amount of duty payable in its case depended on the quantity of the goods imported and it had paid duty on a larger quantity when, in fact, a smaller quantity was imported. If that be the case, determination of the quantity of goods imported is a part of the assessment itself. Once self-assessment has been made by the appellant, unless the self-assessment is modified through an appeal, the assessment is final. Refund under section 27 of the Customs Act is a mechanical process of refunding any amount of duty paid in excess of what was assessed. The officer

sanctioning refund cannot re-open an assessment. Since there were judgments taking different views regarding cases of self-assessment on whether the refund can be sanctioned by an officer without the Bill of Entry being assailed in appeal, the matter was considered by a larger bench of the Supreme Court in the case of **ITC Ltd. Commissioner of Central Excise, Kolkata IV**[3] in a batch of matters dealing with Customs, Excise and Service Tax and it was held that no refund can be sanctioned even in cases of self-assessment unless the self-assessment so made is assailed and modified. Paragraphs 47 and 48 of this judgment are reproduced below:

> ***"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."*

9. Learned counsel for the appellant also submitted that it was entitled to remission of duty as per section 23(1) of the Customs Act. This section reads as follows:

> ***Section 23. Remission of duty on lost, destroyed or abandoned goods. -***

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[3] **2019 (368) E.L.T. 216 (S.C.)**

> *(1) Without prejudice to the provisions of section 13, where it is shown] to the satisfaction of the Assistant Commissioner of Customs or Deputy Commissioner of Customs]* ***that any imported goods have been lost (otherwise than as a result of pilferage) or destroyed, at any time before clearance for home consumption****, the* ***Assistant Commissioner of Customs or Deputy Commissioner of Customs shall remit the duty on such goods****.*
>
> *(2) The owner of any imported goods may, at any time before an order for clearance of goods for home consumption under section 47 or an order for permitting the deposit of goods in a warehouse under section 60 has been made, relinquish his title to the goods and thereupon he shall not be liable to pay the duty thereon;*
>
> *Provided that the owner of any such imported goods shall not be allowed to relinquish his title to such goods regarding which an offence appears to have been committed under this Act or any other law for the time being in force.*

10. The case of the appellant is that less quantity of goods were landed or, in other words, imported than what was indicated in the Bill of Lading. Section 23(1) deals with such cases where the goods which are imported have been lost or destroyed at any time before their clearance for home consumption. No case has been made out by the appellant that the goods have actually been imported as per the Bill of Lading and thereafter they have been destroyed at any time prior to their clearance for home consumption. Therefore, section 23(1) has no application in this case.

11. I find that this is not a case for remission of duty but is a case of application for refund on the ground that duty was paid in excess reckoning the total quantity of goods as mentioned in the Bill of Lading while lesser quantity was actually imported/landed by the vessel. The Bill of Entry, therefore, needs to be re-assessed. Cases of remission of duty under

section 23(1), are those where the goods would have been destroyed or lost (other than through pilferage) before their clearance for home consumption. Before the clearance for home consumption, the assessment of the goods under section 17 is still open and the duty can be assessed or re-assessed accordingly. Once the duty is assessed and paid and the proper officer makes an order permitting clearance of goods for home consumption under section 47, the assessment is completed, the goods cease to be 'imported goods' as per section 2(25), the goods cease to be 'dutiable goods' as per section 2(14) and the process of assessment or re-assessment under section 17 comes to an end. The definitions of dutiable goods and imported goods under section 2 are as follows:

> ***Section 2 Definitions:***
>
> > *(14) "**dutiable goods**" means any goods which are chargeable to duty and **on which duty has not been paid**;*
> >
> > *(25) "**imported goods**" means any goods brought into India from a place outside India but **does not include goods which have been cleared for home consumption;***

12. The assessment once completed attains finality and can only be appealed against before the Commissioner (Appeals) or reopened through a notice under section 28. As held by the larger bench of Supreme Court in **ITC Ltd.,** even a self assessment is an assessment and refunds can be sanctioned only if they flow from the assessment and cannot be sanctioned so as to have the effect of modifying the assessments. In this case, if the appellant claims that it has assessed the duty in

excess because goods were landed short of the quantity indicated and excess duty must be refunded to it, it requires the self assessment by the appellant to be appealed against before the Commissioner (Appeals) which has not been done in this case. I note that the case of **Andhra Sugars Ltd. Vs CC &ST**[4] relied upon by the appellant was passed much before the judgment of the Supreme Court in **ITC Ltd.** laying down that no refund can be sanctioned even in cases of self assessments without the assessments being assailed in appeal before the Commissioner (Appeals). I am fully conscious that the impugned order and also the order of the lower authority were not passed relying on **ITC Ltd.** but were, in fact, passed before the law was laid down by the Supreme Court in this case. Nevertheless, the law now laid down by the larger bench of the Supreme Court is binding on all courts and quasi-judicial authorities and I am bound to follow it.

13. Even on facts, I find that the documents relied upon by the appellant are inconclusive. In respect of MV Vinayak, for instance, the joint draught survey report is signed by the Master of the Vessel and the representatives of the two receivers- the appellant represented by Sravan Shipping Services Pvt. Ltd. and M/s. KPR Fertilisers Ltd. represented by M/s. Coromandel Shipping Agency (P) Ltd. The Master of the Vessel's remarks in the report is that entire cargo of 16,500 MT was discharged. M/s. KPR Fertilisers also confirmed that it has received its fertilizer as per the Bill of Lading. M/s. Andhra

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[4] **2017(352) ELT 188 (Trib-Hyd)**

Sugars Ltd. added remarks that it had received 147 MT short. At the request of Sravan Shipping Services, M/s. Pinnacle Marine Services Pvt Ltd. also provided a certificate that 121.670 MT was short received. Thus, there is no agreement between the person who was to hand over the goods viz., the master of the vessel and the persons who were to receive them viz., the appellant that there was shortage. The Master says that he delivered the entire quantity and the appellant or his agents or the surveyors appointed by it say that the sulphur was short landed.

14. Similarly, in the case of MV Nirman PRITI, it is indicated at the top that of the 13,200 MT BL quantity of Sulphur, only 13011.771 MT was discharged. The Master of the Vessel's remarks were that the entire quantity was discharged. So, it is a case of word of one versus the word of another. The reports are inconclusive. Therefore, even for this reason, the appellant is not entitled to a refund.

15. To sum up:

a) The self assessment of duty by the appellant has attained finality and has not been appealed against and hence no refund can be sanctioned so as to modify the assessment by reducing the quantity of goods as claimed;

b) Remission under section 23 does not apply to this case as the goods are not even claimed to have been imported and then lost or destroyed before their

clearance for home consumption and no refund could be sanctioned;

c) The draught survey report and other reports based on which the appellant claimed that there was short landing of the goods are inconclusive inasmuch as the remarks of the appellant or his representative was that goods were landed short, the remarks of the Master of the Vessel who landed the goods was that the entire Bill of Lading quantity of goods was landed.

For all the above reasons, the impugned order is correct and calls for no interference.

(Pronounced in the open court on 30.08.2022)

(P.VENKATA SUBBA RAO)
MEMBER (TECHNICAL)

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