

(2009) 07 P&H CK 0105
In the Punjab And Haryana At Chandigarh

Bansal Alloys and Metals (P.) Ltd.

APPELLANT

Vs

Commissioner of Customs

RESPONDENT

Date of Decision : 09-07-2009

Acts Referred:

Constitution of India, 1950 — Article 226
Customs Act, 1962 — Section 130, 149, 17, 27, 28C

Citation : (2009) 22 STT 250

Hon'ble Judges : M.M. Kumar, J;Jaswant Singh, J

Bench : Division Bench

Final Decision : Allowed

Judgement

Jaswant Singh, J.—Present appeal u/s 130 of the Customs Act, 1962 (for short "the Act") has been filed by the appellant-importer/assessee seeking quashing of the order dated 5-2-2009 (Annexure A/6) passed by Customs Excise and Service Tax Appellate Tribunal, New Delhi (for short "the Tribunal") whereby the claim of refund on excess duty paid has been declined.

2. The facts emerging out of the present appeal are that appellant-importer/assessee imported heavy melting scrap under Customs Tariff Heading No. 7204.90 of the Customs Tariff Act. Six bills of entry in respect of said import were assessed to duty on the basis of respective invoices and appellant-importer/assessee deposited duty on 7-8-2007. However, on physical examination and weighment by the Assessing Officer on 28-8-2007, the actual weight of the consignment was found short to the tune of 15.09 MT. Accordingly, the appellant-importer/assessee filed 6 refund claims on 3-11-2007 u/s 27 of the Act in respect of six bills of entry as the actual weight of imported material was less than the declared weight and appellant-importer/assessee had paid excess duty. The Assistant Commissioner of Customs allowed the said refund application of the appellant-importer/assessee vide orders dated 31 -12-2007 (Annexure A/3) on the ground that the material received was less than shown in the bills of entry and that the Superintendent Central Excise Range, Mandi Gobindgarh had

certified that the appellant-importer/assessee had availed CENVAT credit less than duty deposited by it. It was also found that the refund claims were within time and no unjust enrichment was involved.

3. The order passed by the Assessing Officer was challenged by the respondent-revenue by filing appeal before the Commissioner (Appeals) Customs and Central Excise, Chandigarh, inter alia, on the ground that once the assessment order has been passed and the goods have been cleared out of the Customs charge, the only option available to the appellant-importer/assessee was to challenge the assessment order. It was further, alleged that the Assistant Commissioner having passed the assessment order could not decide refund matter arising out of his own assessment order. The appeal filed by the respondent-revenue was contested by the appellant-importer/assessee. The learned Commissioner (Appeals) after hearing both sides vide order dated 27-6-2008 allowed the appeal filed by the respondent-revenue holding that assessment orders having neither been challenged nor reviewed nor modified in appeal, the same had attained finality and, further, that the Assistant Commissioner himself could not decide the refund matter arising out of his own assessment order. Accordingly, the appeals filed by the revenue were allowed, sanction of refunds of duty were held to be erroneous and the six Order-in- Originals passed by the Assistant Commissioner were set aside.

4. Aggrieved against the order passed by the Commissioner (Appeals) the appellant-importer/assessee preferred appeals before the learned Tribunal. The learned Tribunal, relying upon the decision of the Hon"ble Supreme Court rendered in Collector of Central Excise, Kanpur Vs. Flock (India) Pvt. Ltd. C-7, Panki Industrial Area, Kanpur, and Priya Blue Industries Ltd. Vs. Commissioner of Customs (Preventive), , dismissed the appeals filed by the appellant-importer/assessee vide impugned order dated 5-2-2009. Hence, the present appeal.

5. Heard learned Counsel for the parties and perused the paper book.

6. Learned Counsel for the appellant-importer/assessee submits that in view of the scheme of the Act and provisions of Sections 17, 27 and 149 and admitted fact that the excess duty on the imported goods had been paid and collected, the claim of the appellant for refund of excess duty cannot be declined on the basis that no challenge was made to the assessment order passed by the Assessing Officer which had attained finality or the Assessing Officer/Assistant Commissioner himself could not decide the refund matter.

7. On the other hand learned Counsel for the respondent-revenue has submitted that in view of the assessment order having become final no claim for refund could have been entertained. Reliance was placed on Priya Blue Industries Ltd."s case (supra) and Flock (India) (P.) Ltd. "s case (supra).

8. Before proceeding further in the matter, it would be appropriate to refer to relevant provisions of Sections 17, 27 and 149 of the Act, extracted here-under:

17. Assessment of duty.-(1) After an importer has entered any imported goods u/s 46 or an exporter has entered any export goods u/s 50 the imported goods or the export goods, as the case may be, or such part thereof, as may be necessary may, without undue delay, be examined and tested by the proper officer.

(2) After such examination and testing the duty, if any, leviable on such goods shall, save as otherwise provided in Section 85, be assessed

(3) For the purpose of assessing duty under Sub-section (2), the proper officer may require the importer, exporter or any other person to produce any contract, broker's note, policy of insurance, catalogue or other document whereby the duty leviable on the imported goods or export goods, as the case may be, can be ascertained, and to furnish any information required for such ascertainment which it is in his power to produce or furnish, and thereupon the importer, exporter or such other person shall produce such document and furnish such information.

(4) Notwithstanding anything contained in this section, imported goods or export goods may, prior to the examination or testing thereof, be permitted by the proper officer to be assessed to duty on the basis of the statements made in the entry relating thereto and the documents produced and the information furnished under Sub-section (3); but if it is found subsequently on examination or testing of the goods or otherwise that any statement in such entry or document or any information so furnished is not true in respect of any matter relevant to the assessment, the goods may, without prejudice to any other action which may be taken under this Act, be reassessed to duty.

27. Claim for refund of duty.-(1) Any person claiming refund of any duty:

(i) paid by him in pursuance of an order of assessment: or

(ii) borne by him,

may make an application for refund of such duty and interest, if any, paid on such duty to the Assistant Commissioner of Customs or Deputy Commissioner of Customs:

(a) **

(b) in any other case, before the expiry of six months,

from the date of payment of duty and interest, if any, paid on such duty, in such form and manner as may be specified, in the regulations made in this behalf and the application shall be accompanied by such documentary or other evidence (including the documents referred to in Section 28(C) as the applicant may furnish to establish that the amount of duty and interest, if any, paid on such duty in relation to which such refund is claimed was collected from, or paid by him and the incidence of such duty and interest, if any, paid on such duty had not been passed on by him to any other person.

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(2) If, on receipt of any such application, the Assistant Commissioner of Customs or Deputy Commissioner of Customs is satisfied that the whole or any part of the duty and interest, if any, paid on such duty paid by the applicant is refundable, he may make an order accordingly and the amount so determined shall be credited to the Fund:

Provided that the amount of duty and interest, if any, paid on such duty as determined by the Assistant Commissioner of Customs or Deputy Commissioner of Customs under the foregoing provisions of this sub-section shall, instead of being credited to the Fund, be paid to the applicant, if such amount is relatable to:

(a) the duty and interest, if any, paid on such duty, paid by the importer or the exporter, as the case may be, if he had not passed on the incidence of such duty and interest, if any, paid on such duty to any other person;

(b) the duty and interest, if any, paid on such duty, on imports made by an individual for his personal use;

149. Amendment of documents.-Save as otherwise provided in Sections 30 and 41, the proper officer may, in his discretion, authorise any document, after it has been presented in the customs house to be amended:

Provided that no amendment of a bill of entry, or shipping bill, or bill of export shall be so authorised to be amended after the imported goods have been cleared for home consumption or deposited in a warehouse, or the export goods have been exported, except on the basis of documentary evidence, which was in existence at the time the goods were cleared, deposited or exported, as the case may be.

[Emphasis supplied]

After giving our thoughtful considerations to the rival submissions and provisions of the Act, we are of the considered opinion that the present appeal deserves to be allowed.

9. It is not disputed that the appellant-importer/assessee filed Bills of Entry for import of heavy melting scrap before the Assistant Commissioner and was assessed to duty on the basis of respective invoices as per Bills of Entry prior to physical examination. In pursuance of such assessment appellant-importer/assessee deposited the assessed duty. It is also not disputed that after the deposit of duty, on physical examination of the goods by the Assistant Commissioner of Customs/Assessing Officer the weight of the imported goods was found less to the extent of 25 per cent as compared to the weight given in the Bills of Entry, as is manifestly clear from the Examination Report Annexure A-1.

10. A reading of relevant reproduced provisions of the Act reveals that, the

appellant-importer/assessee was required to present to the proper officer a Bill of Entry for home consumption containing the particulars of goods being imported based on relevant documents. As per scheme of the Act provided under Sub-section (2) of Section 17 of the Act, after the submission of Bills of Entry by the appellant-importer u/s 46, the proper officer/Asstt. Commissioner was required to examine the goods and assess the duty leviable. However, as per the provisions of Sub-section (4) of Section 17 of the Act, prior to the examination of imported goods, the appellant-importer/assessee had the option to deposit the duty ascertained on the basis of statements made in the Bills of Entry and the documents produced along with it subject to reassessment by the Assessing Officer after examination and testing of the goods. It is thus, evident from the scheme of the Act that the duty can be paid only on account of the assessment by the Assessing Officer either on the basis of the statement in the Bill of Entry and on physical examination of the goods or on the basis of particulars of the goods in the Bill of Entry subject to reassessment of duty under certain situation (when there is a discrepancy in duty leviable with regard to goods imported/assessed between the Bill of Entry and examination report) before clearance of goods u/s 47 of the Act. In any case, the duty leviable and collected is to be in accordance with law and on the goods factually imported.

11. A bare perusal of Clause (i) of Sub-section (1) of Section 27 read with Clause (b) of the Act, extracted hereinabove, reveals that any person before expiry of six months from the date of payment of duty, can claim refund of any excess duty and interest, if any, paid by him in pursuance of an order of assessment. It is further, discernible from Sub-section (2) of Section 27 of the Act that on receipt of such application, Assistant Commissioner of Customs, after satisfying himself can make a proper order of refund and, further, direct the reimbursement to the applicant if the incidence of that duty has not been passed to any other person.

12. It is further, discernible from proviso to Section 149 that after the goods imported have been cleared for home consumption, a Bill of Entry can only be amended on the basis of a documentary evidence which was in existence at the time the goods were cleared.

13. In the present case it is not disputed that the proper/Assessing Officer was Assistant Commissioner of Customs, who had assessed and collected the duty levied and had also found vide his examination report that the goods imported were less in weight than shown in the Bills of Entry. It is also not disputed that the appellant-importer/assessee had not passed on the burden of the duty to some other person and fulfilled all other conditions provided u/s 27 of the Act. It is also not disputed that the application for refund was moved by the appellant-importer/assessee before the expiry of six months and before the Assistant Commissioner, who was also the proper/Assessing Officer.

14. It was urged on behalf of appellant-importer/assessee that it was incumbent upon the proper/Assessing Officer (Assistant Commissioner of Customs) in view

of Sub-section (4) of Section 17 to reassess the duty payable on the basis of the examination report as the revenue could accept the payment only which had the authority of law. To support his argument reliance has been placed upon a recent Division Bench judgment of Bombay High Court rendered in *Hero Cycles Ltd v. Union of India* Writ Petition No. 2838 of 2009, decided on 16-6-2009.

15. In the cited case the importer/assessee had paid additional duty on the basis of Bill of Entry with regard to certain goods which were exempted from duty. The Assessing Officer levied duty on the basis of Bill of Entry without extending the benefit of admissible exemption granted under the notifications. The claim of refund was negated on the ground of non-challenge to the assessment orders and further placing reliance on the decision of the Hon'ble the Supreme Court in *Priya Blue Industries Ltd. 's case* {supra} and *Flock (India) (P.) Ltd.'s case* (supra). The question posed before the Court was "as to whether in the absence of impugning the original order of assessment by preferring a statutory appeal which was available, should the Court ought to exercise its extraordinary jurisdiction under Article 226 of the Constitution". The Division Bench by placing reliance on the ratio of judgment in the case of *State of UP v. Mohd. Nooh* AIR 1958 SC 86 and reiterated in *Champalal Binani Vs. The Commissioner of Income Tax, West Bengal and Others*, held that wherever there has been breach of fundamental principles of justice, though statutory remedy of appeal may be available, then the Court would certainly not hesitate to invoke the extraordinary jurisdiction under Article 226 of the Constitution of India. The Hon'ble Division Bench in para 8 of its judgment held as under:

8. In the instant case, the petitioners admittedly, based on the said notification were being granted benefit of the notification previous to the imports in issue and also subsequent to the imports in question. In other words, both the parties were aware of the said notification. If the petitioner on account of an inadvertent error chose not to apply for the benefit, would that result in denial of the benefits. In our opinion, that by itself would not be answer as a duty is cast on the authority to assess the goods and impose duty according to law which includes a statutory notification. If duty cannot be demanded if otherwise not payable. Once there be a power to assess there is a corresponding duty to assess according to law. The fact that the petitioner has paid the duty under mistake of law and/or in the instant case by oversight, cannot result in being assessed to duty which was otherwise not payable. In our opinion, this will be a case of manifest injustice and on the face of it erroneous.

The facts of this case being so obvious, this would be a fit case for us to exercise our extraordinary jurisdiction.

16. In *Flock (India) (P.) Ltd.'s case* (supra) the question involved was with regard to rate of duty leviable under the Central Excise Act, 1944 read with Central Excise Rules. The assessee therein claimed that product in question was wrongly classified under a particular tariff item number instead it ought to be classified under a different item number and, therefore, claimed refund of the

differential duty. The Assessing Officer under Rule 173B was required to make an inquiry as he deemed fit and approve the classification as he considered necessary and, thereafter, to make all the clearances of the goods. The case being of disputed assessment involving an adjudication process of the nature envisaged under the rules, the Hon"ble Supreme Court held that the claim for refund of the assessee could not be entertained in view of the assessment order not having been challenged despite being appealable. The Hon"ble Supreme Court in Priya Blue Industries Ltd. 's case (supra) followed the view expressed in Flock (India) (P.) Ltd. 's case (supra) although the refund claimed by the assessee was under the Customs Act, 1962. In Priya Blue Industries Ltd.'s case (supra) the importer paid the duty assessed under protest. Therefore, it was held that without assessment order having been modified in appeal or reviewed a claim for refund could not have been made.

17. In our humble opinion, keeping in view the provisions of Section 17 which does not involve the process of adjudication as envisaged under the Excise Act read with Rules under consideration in Flock (India) (P.) Ltd. 's case (supra), the ratio of the cited cases is not applicable to the facts of the present case as herein there is no dispute regarding the duty leviable. It is a case of improper exercise without the authority of law by the Assessing Officer/Assistant Commissioner. In the facts of the instant case, there being no dispute regarding duty leviable on examination of goods, it was the responsibility of the assessing/proper officer to reassess [in view of provisions of Sub-section (4) of Section 17] and correctly determine the duty leviable in accordance with law before clearing the goods for home consumption. He having failed to do so, had caused great injustice to the appellant/importer and it was open for the importer/assessee to file an application for refund u/s 27 of the Act without taking recourse to filing of an appeal. The competent authority u/s 27 of the Act, subject to fulfilment of the conditions laid therein, was fully competent to exercise its discretion and in view of provisions of Section 149 of the Act permit the amendment of Bill of Entry, on the basis of documentary evidence (examination report Ex. A/1), which was in existence at the time the goods were cleared, and order refund of excess duty paid and collected. It is apparent from the record that in the present case the proper officer/Assessing Officer who assessed the duty and was competent u/s 149 to permit the amendment in the Bill of Entry was the Assistant Commissioner of Customs, who is also the competent authority before whom the refund application is maintainable. It is further, apparent from the record that the application for refund, duly maintainable was made before the Assistant Commissioner of Customs, who vide his order dated 31-12-2007 (Annexure A/3) sanctioned the refund of excess duty. Therefore, in our considered opinion, the finding recorded by the Commissioner (Appeals) that the Assistant Commissioner was not competent to pass the refund order is not sustainable and we hold that the claim of refund of excess duty paid, by the appellant-importer/assessee was maintainable and was rightly sanctioned by the competent authority. The impugned orders passed in appeal by the Commissioner (Appeals) and the

learned Tribunal are thus not sustainable. Hence, the claim of refund of excess duty paid by the appellant importer/assessee in the facts of the case is allowed.

18. In view of the above discussion, the present appeal is allowed, the impugned order dated 5-2-2009 (Annexure A/6) passed by the learned Tribunal and the order dated 27-6-2008 (Annexure A/4) passed by the Commissioner (Appeals), Customs and Central Excise are set aside and the order dated 31-12-2007 (Annexure A/3) passed by the Assistant Commissioner of Customs, sanctioning the refund of excess duty is restored and affirmed.