

(2013) 01 MAD CK 0167

In the Madras High Court

Case No : Writ Petition No. 31053 of 2012

Enterprise International Ltd.

APPELLANT

Vs

Commissioner of Customs and Others

RESPONDENT

Date of Decision : 21-01-2013

Acts Referred:

Customs Tariff Act, 1975 — Section 1, 3, 9A, 9A(1), 9A(2)

Citation : (2013) 295 ELT 659 : (2013) 18 GSTR 506 : (2013) WritLR 590

Hon'ble Judges : R. Sudhakar, J

Bench : Single Bench

Advocate : S. Krishnanadh, for the Appellant; Mahadevan, Central Government Standing Counsel, for the Respondent

Judgement

R. Sudhakar, J.—This writ petition is filed seeking issuance of a writ of certiorarified mandamus to call for the records of the second

respondent dated April 25, 2007 in File No. S24/10029/07-Refunds, to quash the same and to direct the said respondent to process and pay the

refund claim of the petitioner entity to the tune of Rs. 6,48,084.52 with interest. By the proceedings under challenge, the second respondent

declined to process the refund application on the ground that the original assessment order has to be lawfully modified or revised in favour of the

petitioner/importer in order to seek the refund. The brief facts of the case are as follows; The petitioner imported mulberry silk fabrics from China

under Bill of Entry No. 228652, dated May 31, 2006. The goods were assessed as per the tariff applicable and provisional anti-dumping duty was

also levied on the basis of Notification No. 52/2006-Customs, dated May 31, 2006. The above said notification was issued based on the

preliminary findings of the designated authority, namely, the Director General of

Anti-dumping. The relevant portion, of the said notification reads as under:

Notification No. 52/2006-Customs, dated May 31, 2006 Anti-dumping duty on silk fabrics of weight 20 to 100 grams per meter, originating in, or exported from People's Republic of China

Whereas in the matter of import of silk fabrics of weight 20 to 100 grams per meter falling under Heading 5007 of the First Schedule to the

Customs Tariff Act, 1975 (51 of 1975), (hereinafter referred to as the subject goods), originating in or exported from People's Republic of China

(hereinafter referred to as the subject country), the designated authority in its preliminary findings vide Notification No. 14/ 20/2004-DGAD, dated

April 27, 2006, published in the Gazette of India, Extraordinary, Part I, section 1, dated April 28, 2006, has come to the conclusion that

(i) the subject goods have been, exported to India from the subject country below their normal value;

(ii) the domestic industry has suffered material injury;

(iii) the injury has been caused by the dumped imports from the subject country;

And Whereas, the designated authority has recommended imposition of provisional anti-dumping duty, pending final determination, on all imports

of the subject goods originating in or exported from the subject country;

Now, therefore, in exercise of the powers conferred by sub-section (2) of section 9A of the said Customs Tariff Act, read with rules 13 and 20 of

the Customs Tariff (Identification, Assessment and Collection of Anti-dumping Duty on Dumped Articles and for Determination of Injury) Rules,

1995, the Central Government, on the basis of the aforesaid findings of the designated authority, hereby imposes on the goods, the, description of

which is specified in column (3) of the table below, falling under tariff items of the First Schedule to the said Customs Tariff Act as specified in the

corresponding entry in column (2), the specification of which is specified in column (4) of the said table, originating in the countries specified in the

corresponding entry in column (5), and exported from the countries specified in the corresponding entry in column (6) and produced by the

producers specified in the corresponding entry in column (7) and exported by the exporters specified in the corresponding entry in column (8), and

imported into India, an anti-dumping duty which shall be equivalent to the difference between the amount specified in the corresponding entry in

column (9), in the currency as specified in the corresponding entry in column (11) and per unit of measurement as specified in the corresponding

entry in column (10) of the said table; and the landed value of such imported goods in like currency per like unit of measurement.

(emphasis supplied).

2. Thereafter, in terms of the provisions of the Customs Tariff Act, 1975, the final anti-dumping duty was determined and Notification No.

121/2006-Customs, dated December 26/2006 was issued, which reads as under:

Notification: 121/2006-Customs, dated December 26, 2006

Anti-dumping duty on silk fabrics of weight 20 to 100 grams per meter, originating in, or exported from People's Republic of China

.... And whereas on the basis of the aforesaid findings of the designated authority, the Central Government had imposed provisional anti-dumping

duty on the subject goods, vide notification of the Government of India in the Ministry of Finance (Department of Revenue) No. 52/2006-

Customs, dated May 31, 2006, published in Part II, section 3, sub-section (i) of the Gazette of India, Extraordinary, vide G.S.R. No. 329(E),

dated May 31, 2006;

And whereas the designated authority in its final findings vide Notification No. 14/20/2004-DGAD, dated November 15, 2006, published in the

Gazette of India, Extraordinary, Part I, section 1, dated November 16, 2006, read with corrigendum No. 14/20/2004-DGAD, dated December

14, 2006, published in the Gazette of India, Extraordinary, Part I, section 1, dated 15th December, has come to the conclusion that-

(a) the subject goods have been exported to India from the subject country below its normal value;

(b) the domestic industry has suffered material injury;

(c) the injury has been caused by the dumped imports from the subject country;

and has recommended the imposition of definitive anti-dumping duty on imports of the subject goods originating in, or exported from, the subject

country;

Now, therefore, in exercise of the powers conferred by sub-section (1) of section

9A of the said Customs Tariff Act, read with sub-section (5) of the said section 9A and rules 18 and 20 of the Customs Tariff (Identification, Assessment and Collection of Anti-dumping Duty on Dumped Articles and for Determination of Injury) Rules, 1995, the Central Government, on the basis of the aforesaid final findings of the designated authority, hereby imposes on the goods, the description of which is specified in column (3) of the table below, falling under tariff items of the First Schedule to the said Customs Tariff Act as specified in the corresponding entry in column (2), the specification of which is specified in column (4) of the said Table, originating in the countries specified in the corresponding entry in column (5), and exported from the countries specified in the corresponding entry in column (6) and produced by the producers specified in the corresponding entry in column (7) and exported by the exporters specified in the corresponding entry in column (8), and imported into India, an anti-dumping duty which shall be equivalent to the difference between the amount specified in the corresponding entry in column (9), in the currency as specified in the corresponding entry in column (11) and per unit of measurement as specified in the corresponding entry in column (10) of the said table, and the landed value of such imported goods in like currency per like unit of measurement.

In the final notification, the quantum of anti-dumping duty was reduced as against the higher provisional anti-dumping duty collected on the goods cleared.

3. Based on the final notification, the petitioner made an application for refund of the excess anti-dumping duty on January 16, 2007 and that has

been rejected by the impugned letter dated April 25, 2007, which reads as under:

Please refer to your refund claim against bill of entry No. 228652/ 31-5-2006.

Your refund claim was perused and it is found that the ground for the claim is towards non-availment of notification benefit. It is seen from the

documents submitted by you that the reassessment has not been done. An order of assessment given by the competent authority (group assessing

the bill of entry) cannot be reviewed or modified by the refunds section as held by the apex court in the case of Super Cassettes Industries Ltd. v.

Commissioner of Customs [2004] 163 ELT A116 (SC) and Priya Blue Industries Ltd. Vs. Commissioner of Customs (Preventive), . The refund

will arise only if such an order is lawfully modified or revised in your favour.

In view of the above, the refund claim filed by you is not admitted being premature. You are advised to approach the appropriate authority to get

the bill of entry reassessed appropriately or an order from the appellate authority.

You will have an option of filing a fresh claim, along with original documents, after getting the assessment order lawfully modified to your benefit

whereupon the refund claims will be examined on merits.

In view of the above, your refund claim is returned herewith being premature.

and this order as above is under challenge before this court.

4. Heard Mr. S. Krishnanadh, learned counsel for the petitioner and Mr. Mahadevan, learned Central Government standing counsel appearing for the respondents.

5. Since the issue involved in this writ petition relates to the interpretation of the provisions of the Customs Tariff Act, 1975 and the Customs Act,

1962, the court is not inclined to grant further time to the respondents to file counter, as no counter is filed in spite of giving opportunity.

6. Section 9A of the Customs Tariff Act, 1975 provides for levy of antidumping duty on dumped articles. Section 9A(1) of the Customs Tariff

Act, 1975 provides for imposition of provisional anti-dumping duty; section 9A(2) of the Customs Tariff Act, 1975 provides for finalisation of the

provisional anti-dumping duty; and clause (b) of section 9A(2) of the Customs Tariff Act, 1975 provides for refund consequent to finalisation of

the antidumping duty. The provisions of the Customs Act, 1962 are made applicable u/s 9A(8) of the Customs Tariff Act, 1975 for deciding the

issue stated therein and it includes refund as well Sections 9A(1), 9A(2) and 9A(8) of the Customs Tariff Act, 1975 are as under:

9A. Anti-dumping duty on dumped articles.-(1) Where any article is exported by an exporter or producer from any country or territory (hereafter

in this section referred to as the exporting country or territory) to India at less than its normal value, then, upon the importation of such article into

India, the Central Government may, by notification in the Official Gazette, impose an anti-dumping duty not exceeding the margin of dumping in

relation to such article.

Explanation.-For the purposes of this section,-

(a) "margin of dumping" in relation to an article, means the difference between its export price and its normal value;

(b) "export price", in relation to an article, means the price of the article exported from the exporting country or territory and in cases where there

is no export price or where the export price is unreliable because of association or a compensatory arrangement between the exporter and the

importer or a third party, the export price may be constructed on the basis of the price at which the imported articles are first resold to an

independent buyer or if the article is not resold to an independent buyer, or not resold in the condition as imported, on such reasonable basis as

may be determined in accordance with the rules made under sub-section (6);

(c) "normal value", in relation to an article, means-

(i) the comparable price, in the ordinary course of trade, for the like article when destined for consumption in the exporting country or territory as

determined in accordance with the rules made under sub-section (6); or

(ii) when there are no sales of the like article in the ordinary course of trade in the domestic market of the exporting country or territory, or when

because of the particular market situation or low volume of the sales in the domestic market of the exporting country or territory, such sales do not

permit a proper comparison, the normal value shall be either-

(a) comparable representative price of the like article when exported from the exporting country or territory to an appropriate third country as

determined in accordance with the rules made under sub-section (6); or

(b) the cost of production of the said article in the country of origin along with reasonable addition for administrative, selling and general costs, and

for profits, as determined in accordance with the rules made under sub-section (6):

Provided that in the case of import of the article from a country-other than the country of origin and where the article has been merely transhipped

through the country of export or such article is not produced in the country of export or there is no comparable price in the country of export, the

normal value shall be determined with reference to its price in the country of origin.

(2) The Central Government may, pending the determination in accordance with the provisions of this section and the rules made thereunder of the

normal value and the margin, of dumping in relation to any article, impose on the importation of such article into India an anti-dumping duty on the

basis of a provisional estimate of such value and margin and if such anti-dumping duty exceeds the margin as so determined:-

(a) the Central Government shall, having regard to such determination and as soon as may be after such determination, reduce such anti-dumping

duty; and

(b) refund shall, be made of so much of the anti-dumping duty which has been collected as is in, excess of the anti-dumping duty as so reduced.

(8) The provisions of the Customs Act, 1962 (52 of 1962) and the rules and regulations made thereunder, including those relating to the date for

determination of rate of duty; assessment, non-levy, short levy, refunds, interest, appeals, offences and penalties shall, as far as may be, apply to

the duty chargeable under this section as they apply in relation to duties leviable under that Act.

On a reading of the above provision; particularly section 9A(2) of the Customs Tariff Act, 1975, consequent to final determination of anti-dumping

duty, refund of excess anti-dumping duty paid shall be made.

7. In the present case, the application for refund was filed on January 16, 2007, namely, within 17 days after the date of final notification issued u/s

9A(2) of the Customs Tariff Act, 1975. The second respondent, however, takes a different view in the matter and states that the refund claim is

premature and the appropriate authority has to reassess the bill of entry or there should be an order from the appellate authority.

8. Section 9A(1) of the Customs Tariff Act, 1975 provides for imposition of provisional anti-dumping duty and section 9A(2) of the Customs

Tariff Act, 1975 provides for determining the final anti-dumping duty on the articles imported. Clause (b) of section 9A(2) of the Customs Tariff

Act, 1975 provides for refund of the anti-dumping duty which has been collected in excess shall be made. Therefore, in terms of section 9A(8) of

the Customs Tariff Act 1975 all that the petitioner has to do is to file an application for refund. There is no question of reassessing the bill of entry

which has been assessed on the basis of provisional anti-dumping duty. What has been imposed is a provisional anti-dumping duty in terms of

section 9A(1) of the Customs Tariff Act, 1975 and the bill of entry has been

finally assessed. The refund becomes automatic after the final order is passed in terms of section 9A(2) of the Customs Tariff Act, 1975 and, therefore, the refund as contemplated under the provisions of the Customs Tariff Act, 1975 will have to be processed as such, as the duty becomes refundable if it stands reduced in the final notification as in the present case. There is no necessity for filing an appeal against the assessment or reassessment, as the importer becomes entitled to refund consequent to the final notification issued in terms of section 9A(2) of the Customs Tariff Act, 1975. All that is required to be done is claim refund of excess anti-dumping duty and it shall be made as per the mandate of section 9A(2) of the Customs Tariff Act, 1975 if and when an application for refund is made as per the procedure set out under the Customs Act, 1962.

9. The provisions of the Customs Tariff Act, 1975 provide for imposition of provisional anti-dumping duty; and for finalisation of provisional anti-dumping duty; and for consequent refund, if there is a reduction in the anti-dumping duty. The benefit, if any, will have to flow automatically. The respondent/Department cannot insist on filing an appeal to the appellate authority" or direct the petitioner/importer to approach the appropriate authority for reassessment of the order. No specific provision has been shown in the impugned proceedings as to how such a procedure is required and on what basis such a direction can be issued, The second respondent has failed to refer to any of the provisions of the Customs Act, 1962 or the Customs Tariff Act, 1975 which requires reassessment of the bill of entry or filing of the appeal before even refund is claimed consequent upon finalisation of provisional anti-dumping duty. Therefore, the impugned proceedings is contrary to the provisions of the Customs Tariff Act, 1975 and the Customs Act, 1962. A condition not authorised by law cannot be imposed for a claim for refund.

10. The second respondent, in the impugned proceedings, relied upon the decisions of the Supreme Court in *Super Cassettes Industries Ltd. v.*

Commissioner of Customs (2004) 163 ELT A116 (SC) and *Priya Blue Industries Ltd. Vs. Commissioner of Customs (Preventive)*, . The facts in

Super Cassettes Industries Ltd. case are as under:

The appellants imported one consignment of thermo plastic poly-urethane resin against bill of entry, dated August 6, 1986 and paid duty at

standard rate at 100 per cent. CBD + 40 per cent. Ayd. + 40 per cent. CV and cleared the goods for home consumption. The bill of entry was

assessed finally u/s 17 of the Act and duty was paid at the above said rate by the appellants without any protest. Later on, they filed refund claim

before the lower authority on the ground that their goods were entitled for concessional rate of duty in terms of Notification No. 345/1986-

Customs, dated June 16, 1986 by virtue of which the duty rate was to be 30 per cent. CBD + Ayd. nil + CV nil. The excess duty paid by them

was to the tune of Rs. 3,40,156.

While challenging the assessment order, the appellant therein sought the relief of refund stating that they are entitled to concessional rate of duty in

terms of a notification and that was negated on the ground that the order of assessment has not been challenged in the manner known to law. The

Tribunal held that the assessment order under which duty was paid, having not been challenged, has become final. This was upheld by the Supreme

Court in *Super Cassettes Industries Ltd. v. Commissioner of Customs* (2004) 163 ELT A116 (SC). The said issue is factually different from the

issue involved in the case on hand, as the bill of entry has been assessed based on the provisional anti-dumping duty, which was finalised by the

issuance of subsequent notification and both the Department as well as the petitioner are very clear that provisional anti-dumping duty was payable

at the time of clearance, subject to finalisation of the anti-dumping duty either way. Therefore, the facts of the present case are different from the

facts of the case in *Super Cassettes Industries Ltd. v. Commissioner of Customs* (2004) 163 ELT A116 (SC).....

11. Similarly, in *Priya Blue Industries Ltd. Vs. Commissioner of Customs* (Preventive), , the petitioner therein imported a ship for breaking

purposes. That was assessed and cleared by payment of certain duty under protest and thereafter refund was claimed on the ground that duty had

been wrongly levied. The refund was rejected and confirmed before the appellate forum. There again the Tribunal came to hold that as against the

assessment order no appeal has been filed and, therefore, the refund claimed is not maintainable. In that case, the Supreme Court has held as

follows (page 443 of 3 RC):

We are unable to accept this submission. Just such a contention has been

negated by this court in Collector of Central Excise, Kanpur Vs. Flock (India) Pvt. Ltd. C-7, Panki Industrial Area, Kanpur, Once an order of assessment is passed the duty would be payable as per that order. Unless that order of assessment has been reviewed u/s 28 and/or modified in an appeal, that order stands. So long as the order of assessment stands the duty would be payable as per that order of assessment. A refund claim is not an appeal proceeding. The officer considering a refund claim cannot sit in appeal over an assessment made by a competent officer. The officer considering the refund claim cannot also review an assessment order.

The words "in pursuance of an order of assessment" only indicate the party/person who can make a claim for refund. In other words, they enable a person who has paid duty in pursuance of an order of assessment to claim refund. These words do not lead to the conclusion that without the order of assessment having been modified in appeal or reviewed a claim for refund can be maintained.

In the case on hand, the wrong payment of duty is not sought to be refunded. The payment of provisional anti-dumping duty is subject to the finalisation, of the anti-dumping duty in terms of section 9A(2)(b) of the Customs Tariff Act, 1975 and refund becomes automatic after the final notification is issued. There is no necessity for filing an appeal or seeking modification of the order, so as to seek refund. The facts of the case before the Supreme Court in Priya Blue Industries Ltd. Vs. Commissioner of Customs (Preventive), stand entirely on a different footing. For the foregoing reasons, the writ petition is allowed and the impugned proceedings dated April 25, 2007 is set aside and the respondents are directed to process the petitioner's application for refund forthwith. No costs. Consequently, M.P. Nos. 1 of 2012 and 2 of 2013 are closed.