(2016) 08 AHC CK 0110

In the Allahabad High Court

Case No : Writ Tax No. 1089 of 2007

KBK Palscon Pvt. Ltd. APPELLANT

Vs

Union of India RESPONDENT

Date of Decision : 01-08-2016

Acts Referred:

Citation : (2016) 339 ELT 350

Hon'ble Judges : Sudhir Agarwal and Kaushal Jayendra Thaker, JJ.

Bench : Division Bench

Advocate : S/Shri Pankaj Bhatia and S.D. Singh, Advocates, for the Petitioners; S/Shri R.C. Shukla, ASGI and Zaffar Munis, Advocate, for the Respondents

Final Decision : Dismissed

Judgement

1. Heard Sri S.D. Singh, learned counsel for petitioner and Sri Ashok Mehta, learned Additional Solicitor General of India, assisted by Sri Krishna Agarwal for respondents.

2. Petitioner has sought mandamus commanding respondent authorities to pass suitable order on the refund claims filed under Section 27 of Customs Act, 1962 (hereinafter referred to as ''Act 1962'').

3. It is not in dispute that petitioner filed return admitting liability at 20 per cent and thereupon competent authority accepted the same and passed Assessment Order by accepting the claim mentioning as ''Assessed''. Thereafter petitioner realised that vide Notification No. 103/2004-Customs, dated 30-9-2004 of Union of India reduced customs duty to 15 per cent w.e.f. 1-10-2004, pursuant whereto impugned application for refund has been filed.

4. It is admitted case that assessment made by competent authority has not been amended, corrected or altered by filing modification application or in appeal or any other proceedings.

5. The question therefore, has to be considered ''whether authority considering

refund claim can sit in appeal over an assessment made by a competent officer for the purpose of refund'' when such assessment is not modified by an order of competent authority in appropriate proceeding.

6. This question has been considered in Priya Blue Industries Ltd. v. Commissioner of Customs (Preventive), 2004 (172) E.L.T. 145 (S.C.) wherein in Paras 6, 7 and 8 of judgment, Court has said as under :-

"6. We are unable to accept this submission. Just such a contention has been negatived by this Court in Flock (India)''s case (supra). Once an Order of Assessment is passed the duty would be payable as per that order. Unless that order of assessment has been reviewed under Section 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.

7. We also see no substance in the contention that provisions for a period of limitation indicates that a refund claim could be filed without filing an Appeal. Even under Rule 11 under the Excise Act the claim for refund had to be filed within a period of six months. It was still held, in Flock (India)''s case (supra), that in the absence of an Appeal having been filed no refund claim could be made.

8. 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."

(emphasis added)

7. In the present case, since assessment has not been modified in accordance with procedure prescribed in statute, therefore, in the garb of refund, officer concerned cannot take a different view so as to refund an amount paid as per assessment order. Hence in the facts and circumstances of this case so long as assessment as such continue, no refund is admissible to petitioner.

8. Writ petition lacks merit. It is accordingly dismissed.

9. However, if there is any legal remedy available to petitioner, it goes without saying that this order shall not preclude petitioner from availing such remedy.