
(2021) 04 CESTAT CK 0034

In the Customs, Excise And Service Tax Appellate Tribunal

Case No : Customs Appeal No. 20192 Of 2020

Kirloskar Ferrous Industries Ltd

APPELLANT

Vs

Commissioner Of Customs

RESPONDENT

Date of Decision : 26-04-2021

Acts Referred:

Customs Act, 1962 — Section 17, 17(4), 27, 128, 149, 154

Citation : (2021) 04 CESTAT CK 0034

Hon'ble Judges : S.S. Garg, J

Bench : Single Bench

Advocate : M.S. Nagaraja, C. V. Savitha

Final Decision : Disposed Of

Judgement

1. The present appeal is directed against the impugned order dated 31.12.2019 passed by the Commissioner of Customs (Appeals) whereby the appeal of the appellant was rejected and order passed by the Assistant Commissioner rejecting the refund claim was upheld.

2. Briefly the facts of the present case are that the appellants imported Low Ash Metallurgical Coke (LAM Coke) from China vide Bills of Entry Nos. 838162, 8384122 and 8384152 all dated 9.10.2018. While the quantities as per the Bills of Lading No.3, 4, and 5 dated 19.9.2018 were 5000, 5000 and 4140 MTs respectively (total 14,140 MTs), the quantities as per the corresponding Invoices No. IMR/2018-19/7196-1, No. IMR/2018-19/7196-2 and No.IMR/2018-19/7196-3 issued by the supplier, M/s. Metallurgical Resources AG, Switzerland, were for 4823, 4823 and 3993.444 MT of LAM Coke respectively totally amounting to 13,639.44 MT. The difference in quantity was on account of moisture.

2.1 The Anti-Dumping Duty (ADD) @ US \$ 25.20 per MT was imposed on LAM Coke originating in and exported from China vide SI No.1 of Notification No.53/2016 Cus. (ADD) dated 25.11.2016. As per the appellant, the Bill of Entry

was initially filed by the appellant for the total quantity of 13,639.44 MT of LAM Coke as mentioned in the invoices and the Customs duty including ADD @ US \$25.20 per MT was computed. However, the CHA informed the appellant that the customs department had directed payment of ADD on the basis of quantity shown in the Bill of Lading. As the appellant was in urgent requirement of LAM Coke in the factory, they paid the duty of Rs.2,65,82,969/- under protest. However, though the actual ADD payable on 13639.44 MT was only Rs.2,56,41,064/-, hence, there was an excess payment of Rs.9,41,005/-. Thereafter, the appellant vide letter dated 15.10.2018 explained the fact of excess payment of ADD under protest and requested the Deputy Commissioner of Customs, Mangalore for issue of an appealable reassessment order. The Deputy Commissioner vide his letter dated 25.10.2018 replied that the said Bill of Entry has been facilitated by RMS and that the department has not insisted on payment of ADD on the Bill of Lading quantity and rejected the request made by the appellant. Thereafter, the appellant filed an application for refund of excess ADD of Rs.9,41,005/- vide letter dated 20.11.2018 but the Assistant Commissioner of Customs vide his letter dated 7.12.2018 returned the application being premature unless there was an order challenging the assessment order. Thereafter, the appellant resubmitted its refund claim of excess ADD paid under protest. The Assistant Commissioner, thereafter, issued a show-cause notice dated 15.2.2019 and the appellant filed reply to the show-cause notice and the Assistant Commissioner, thereafter passed Order-in-Original dated 28.3.2019 rejected the claim for refund of ADD of Rs.9,41,005/- on the ground that the claimant has not challenged the assessment of Bill of Entry nor got it reassessed before or after out of charge of goods and hence, the refund claim is not maintainable. However, the Assistant Commissioner recorded in para 2 that the importer has an option to file an application for amendment of Bill of Entry under Section 149 of the Customs Act, 1962 to rectify any mistake in the Bill of Entry based on documents available at the time of importation and in case the application is allowed, thereafter importer can file application for refund. Aggrieved by the said order, appellant filed appeal before the Commissioner (A) and the Commissioner (A) vide the impugned order has rejected the appeal of the appellant mainly relying upon the judgment of the Hon'ble Supreme Court in the case of ITC Limited vs. CCE, Kolkata reported in 2019 (368) ELT 216 (SC) for the proposition that the refund claim cannot be entertained unless the order of assessment including self-assessment is challenged and modified. Hence, the present appeal.

3. Heard both the parties and perused the records.

4. Learned counsel for the appellant submitted that the impugned order passed by the learned Commissioner (A) is not sustainable in law as the same has been passed without properly appreciating the facts and the law and the binding judicial decisions. He further submitted that consistently Courts have held that with the amendment of Section 17 and Section 27 of the Customs Act, 1962 from 8.4.2011 there was no necessity of challenging the order of assessment

since self-assessment was not an order of assessment but however, the Hon'ble Supreme Court in the case of ITC Ltd. has reversed the decision. He further submitted that vide letter dated 15.10.2018, the appellant requested the Deputy Commissioner to pass an appealable speaking order for reassessment on the Bill of Entry in terms of Section 17(4) of the Customs Act, 1962 but the Assistant Commissioner did not undertake reassessment in accordance with law and instead issued show-cause notice for rejection of the refund claim. He further submitted that even in para 5 of the show-cause notice, importer was given an option to file an application for amendment of Bill of Entry under Section 149 of the Customs Act, 1962 based on the documents available at the time of importation and the adjudicating authority in para 2 of his finding has also reiterated that the importer has an option to file an application for amendment of Bill of Entry under Section 149 of the Customs Act, 1962 and the Department has not challenged the averment in the show-cause notice or the findings of the adjudicating authority that the importer has an option to file an application for amendment of Bill of Entry but the learned Commissioner in para 10 has recorded that if self-assessment was not satisfactory then an order of reassessment has to be passed under Section 17(4). Further, the learned Commissioner in para 12 of the impugned order has wrongly rejected the request for amendment of Bill of Entry as permissible under Section 149 of the Customs Act, 1962 without any time limit. He further submitted that the impugned order rejecting the option to the importer to seek amendment of the Bill of Entry under Section 149 of the Customs Act, 1962 is bad in law being beyond the scope of show-cause notice and hence, unsustainable. In support of this submission, he relied upon the following decisions:

- (i) Caprihans India Ltd. vs. CCE: 2015 (325) ELT 632 (SC)
- (ii) CC vs. Toyo Engineering India Ltd.: 2006 (201) ELT 513 (SC)
- (iii) CCE & C, Surat vs. Sun Pharmaceuticals Industries Ltd.: 2015 326) ELT 3 (SC)
- (iv) Madras Cements Ltd. vs. CCE, Trichy: 2015 (325) ELT 239 (SC)
- (v) Hindustan Polymers Co. Ltd. vs. CCE: 1999 (106) ELT 12 (SC)

4.1 He also submitted that it is well settled law that the importer may seek amendment of Bill of Entry under Section 149 and/Section 154 of the Customs Act, 1962 and thereafter claim refund of excess duty paid without any time limit. For this, he relied upon the following decisions:

- (i) Usha Industries Ltd. vs. ACC, Chennai: 2019 (365) ELT 56 (Mad.)
- (ii) CC vs. Volvo India Pvt. Ltd.: 2019 (365) ELT 803 (Mad.)
- (iii) Hero Cycles Ltd. vs. UOI: 2009 (240) ELT 490 (Bom.) maintained in Union of India vs. Hero Cycles Ltd.: 2010 (252) ELT A103.
- (iv) Calisons Fibres Pvt. Ltd. vs. CC (Imports): 2019 (370) ELT 1097 (Tri.- Mum.)

(v) Steel Authority of India vs. CC, Chennai: 2016 (343) ELT 602 (Tri.- Chennai)

(vi) Commissioner vs. Crest Chemicals: 2009 (244) ELT 361 (Tribunal)

4.2 He further referred to the decision of Calisons Fibres Pvt. Ltd. cited supra where the Tribunal has directed that the request for reassessment be treated as an application under Section 149 of the Customs Act, 1962 for amendment of Bill of Entry and directed the proper officer to pass an appropriate order in accordance with law. The learned counsel also referred to the decision of the Bombay High Court in the case of Dimension Data India Pvt. Ltd. reported in 2021-TIOL-224-HC-MUM-CUS wherein the Hon'ble High Court has distinguished the decision of the apex court in the case of ITC Ltd.

5. On the other hand, the learned Authorised Representative for the department reiterated the findings of the impugned order and submitted that as per the law settled by the Hon'ble Apex court in the case of ITC Ltd. cited supra refund cannot be granted without challenging the order of selfassessment.

6. After considering the submissions of both the parties and perusal of the material on record, I find that in the present case it is an admitted fact that the duty was paid under protest by the appellant and appellant has paid excess duty of Rs.9,41,005/- and thereafter the appellant vide his letter dated 15.10.2018 requested the Deputy Commissioner of Customs to pass an appealable reassessment order but the same was not done and thereafter, the appellant filed the refund claim which was rejected by the Order-in-Original on the ground that the appellant has not challenged the assessment of Bill of Entry not got it reassessed before or after out of charge of goods. Further, I find though the refund has been rejected by the original authority but in para 2 of the findings, the original authority has observed that the importer had an option to file an application for amendment of the Bill of Entry under Section 149 of the Customs Act, 1962 to rectify any mistake in the Bill of Entry based on the documents available at the time of importation but the learned Commissioner while passing the impugned order in para 12 denied the right of the appellant to seek amendment of Bill of Entry as permissible under Section 149 of the Customs Act, 1962. Further, I find that the Revenue has not challenged the show-cause notice as well as the Order-in-Original allowing the option to the appellant to seek an amendment in the Bill of Entry as permissible under Section 149 of the Customs Act, 1962 but the same was suo moto set aside by the learned Commissioner which is against law as held in various decisions relied upon by the appellant cited supra. Hence, the said finding of the Commissioner is not sustainable. Further, I find that the Hon'ble Bombay High Court in the case of Dimension Data India Pvt. Ltd. cited supra has distinguished the Hon'ble Apex Court's decision in the case of ITC Ltd. and has observed in para 22.1 and 22.2 as under:

22.1 . From the question itself, it is clear that the issue before the Supreme Court was not invocation of the power of re-assessment under section 17(4) or amendment of documents under section 149 or correction of clerical mistakes or

errors in the order of self-assessment made under section 17(4) by exercising power under section 154 vis-a-vis challenging an order of assessment in appeal. The issue considered by the Supreme Court was whether in the absence of any challenge to an order of assessment in appeal, any refund application against the assessed duty could be entertained. In that context Supreme Court observed in paragraph 43 as extracted above that an order of self-assessment is nonetheless an assessment order which is appealable by "any person" aggrieved thereby. It was held that the expression "any person" is an expression of wider amplitude. Not only the revenue but also an assessee could prefer an appeal under section 128. Having so held, Supreme Court opined in response to the question framed that the claim for refund cannot be entertained unless order 17 of 22 23.os.wpl.249.20.doc of assessment or self-assessment is modified in accordance with law by taking recourse to appropriate proceedings. It was in that context that Supreme Court held that in case any person is aggrieved by any order which would include an order of self-assessment, he has to get the order modified under section 128 or under other relevant provisions of the Customs Act (emphasis ours).

22.2. Therefore, in the judgment itself Supreme Court has clarified that in case any person is aggrieved by an order which would include an order of self-assessment, he has to get the order modified under section 128 or under other relevant provisions of the Customs Act before he makes a claim for refund. This is because as long as the order is not modified the order remains on record holding the field and on that basis no refund can be claimed but the moot point is Supreme Court has not confined modification of the order through the mechanism of section 128 only. Supreme Court has clarified that such modification can be done under other relevant provisions of the Customs Act also which would include section 149 and section 154 of the Customs Act.

6.1 Further, I find that an identical issue has been considered by two Division Benches of this Tribunal in the case of Calisons Fibres Pvt. Ltd. cited supra and CC, Tuticorin vs. Sakthi Sugars Ltd.: 2020 (372) ELT 577 (Tri.-Chennai). In para 5 in the case of Calisons Fibres Pvt. Ltd., the Division Bench directed that the request for reassessment be treated as application under Section 149 of Customs Act, 1962 for amendment of Bill of Entry and accordingly, directed the proper officer to consider the said application and pass appropriate order in accordance with law after granting opportunity of hearing to the appellant. Since the issue is clearly covered by the Division Bench judgment of this Tribunal, hence, by following the ratio of the said decision I am of the considered view that the impugned order is not sustainable in law and is set aside by allowing the appeal of the appellant with the direction to the original authority that the request of the appellant for reassessment be treated as an application under Section 149 of the Customs Act, 1962 for amendment of Bill of Entry and appropriate order be passed in accordance with law after giving an opportunity of hearing to the appellant.

7. Accordingly, the appeal is disposed of on above terms.

(Order was pronounced in Open Court on 26/04/2021)