

(2016) 02 DEL CK 0148
In the Delhi High Court
Case No : W.P. (C) 523, 524 and 529/2016

Micromax Informatics Limited

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 26-02-2016

Acts Referred:

Customs Act, 1962 — Section 2 (ii), Section 26, Section 27, Section 27 (1), Section 27 (1) (i), Section 27 (2), Section 27(1), Section 27(1) (a), Section 27(1) (b), Section 27(1) (i), Section 27(1) (ii), Section 27(2), Section 27(i) (ii), Section 28,

Citation : (2016) 02 DEL CK 0148

Hon'ble Judges : Dr. S. Muralidhar and Vibhu Bakhru, JJ.

Bench : Division Bench

Advocate : Tarun Gulati, Shashi Mathews, Sparsh Bhargava, Ankit Sachdeva, Rachna Yadav and Neil Hildreth, Advocates, for the Appellant; Kirtiman Singh, CGSC, Srikant Misra, Waize Ali Noor and Gyanesh Bhardwaj, Advocates, for the Respondent

Final Decision : Disposed Off

Judgement

Dr. S. Muralidhar, J.—1. These three writ petitions by Micromax Informatics Limited ("MIL") challenge three orders dated 21st December 2015 passed by the Assistant Commissioner (Refund) in the office of the Commissioner of Customs, Air Cargo Export, Refund Section, New Delhi rejecting the refund claims filed by the Petitioner in respect of the bills of entry (B/Es) filed by it for the months of August 2014, September 2014 and October 2014 respectively.

2. The facts in brief are that the Petitioner imported mobile phones on which it paid both customs duty as well as additional customs duty (commonly known as countervailing duty - CVD). The Petitioner lodged a refund claim in Form 102 under Sections 27(1) (a) / 27(1) (b) of the Customs Act, 1962 ("Act"). The reason given by the Petitioner for making the claim was that it was liable to pay only 1% CVD whereas it had paid 6% CVD. A reference was made to Serial No. 263A of Notification No. 12/2012 - CE dated 17th March 2012, as amended by Notification No. 4/2014 and further amended by Notification No. 12/2015-CE

dated 1st March 2015, applicable to mobile phones which provided for an effective rate of duty of 1% CVD for mobile phones provided that no Central Value Added Tax ("CENVAT") credit on input or capital goods have been availed. A reference was made to the decision of the Supreme Court in *M/s. SRF Industries v. Commissioner of Customs, Chennai*, 2015 (318) ELT 607 (SC) where the Supreme Court had held that for quantification of CVD in case of an article that has been imported it has to be presumed that the said imported article has been manufactured in India and then the amount of excise duty leviable thereon has to be ascertained for determining the extent of exemption from payment of CVD to which the importer would be entitled.

3. Along with the refund application, the Petitioner enclosed the details of the B/Es, the challans of payment of customs duty, the requisite certificate and affidavits of declarations etc. It is clarified by Mr. Tarun Gulati, learned counsel for the Petitioner, that although the refund claim states that the CVD had been paid under protest, there was no endorsement to that effect on the challans. Accordingly, the aforementioned refund claims should be considered to have been made on the basis that the CVD was paid in excess by the Petitioner without protest.

4. A hearing was afforded to the Petitioner by the Assistant Commissioner (Refund) and written submissions were also filed by it. According to the Petitioner, it drew the attention of the Assistant Commissioner (Refund) to the decision of this Court in *Aman Medical Products Limited v. Commissioner of Customs, Delhi*, 2010 (250) ELT 30 (Del) in which it was held that in the case of a self-assessment, a refund application could be maintained under Section 27 of the Act, as it stood prior to 8th April 2011, without having to file an appeal since there was in fact no assessment order in the first place.

5. In the impugned order while rejecting the refund claim, the Assistant Commissioner (Refund) observed that the "claimant has filed the refund of duty on the bills of entry, which are already assessed". According to the Assistant Commissioner, once the assessment order was passed, duty was payable in terms thereof and unless such assessment order was reviewed under Section 28 of the Act or modified in an appeal. Relying on the decisions of the Supreme Court in *Priya Blue Industries Ltd. v. Commissioner of Customs (Preventive)*, 2004 (172) ELT 145 (SC) and *Collector of Central Excise v. Flock (India) (P.) Ltd.*, 2000 (120) ELT 285 (SC) it was held that a refund claim contrary to the assessment order was not maintainable unless the assessment order was reviewed or modified in appeal.

6. This Court has heard the submissions of Mr. Tarun Gulati, learned counsel for the Petitioner and Mr. Satish Kumar, learned counsel for the Customs.

7. It requires to be noticed that the decision in *Priya Blue Industries Ltd. v. Commissioner of Customs (Prevention)* (supra) was rendered by the Supreme Court in respect of Section 27 of the Act as it stood prior to 8th April 2011.

Factually the said decision does not apply to the facts of the present case since the said decision notes at the outset that "the Petitioners have imported a ship for breaking purposes. They filed a Bill of Entry. The amount of duty payable was assessed." It is clear, therefore, in the facts of that case that there was an assessment order passed on the B/Es filed by the importer. In *Collector of Central Excise v. Flock (India) (P.) Ltd.* (supra) again an assessment order had been passed.

8. In *Aman Medical Products Limited v. Commissioner of Customs, Delhi* (supra), a Division Bench of this Court was considering an instance of an importer having filed B/Es, paid customs duty and thereafter claimed refund under Section 27 of the Act. The question of law framed by the Court in the appeal filed by the Assessee against an order of refusal of refund read as under:

"Whether non-filing of appeal against the assessed Bill of Entry in which there was no lis between the importer and the Revenue at the time of payment of duty will deprive the importer of his right to file refund claim under Section 27 of the Customs Act, 1962?"

9. The above question was answered in the negative. Analysing Section 27 of the Act, as it then stood, the Court noticed that it was always not necessary to have an order of assessment for a person to claim refund of duty. The initial payment of duty in terms of Section 27(1) (i) of the Act could be pursuant to "an order of assessment" or in terms of Section 27(1) (ii) of the Act could be "borne by him." The Court explained:

"The object of Section 27(i) (ii) is to cover those classes of case where the duty is paid by a person without an order of assessment, i.e. in a case like the present where the assessee pays the duty in ignorance of a notification which allows him payment of concessional rate of duty merely after filing a Bill of Entry. In fact, such a case is the present case in which there is no assessment order for being challenged in the appeal which is passed under Section 27(1) (i) of the Act because there is no contest or lis and hence no adversarial assessment order."

10. The Court in *Aman Medical Products Limited* (supra) also took note of and held that the decisions in *Collector of Central Excise v. Flock (India) (P.) Ltd.* (supra) and *Priya Blue Industries Ltd. v. Commissioner of Customs (Prevention)* (supra) would not apply since those were cases where "there is no assessment order on dispute/contest, like as is in the present case." It was held in *Aman Medical Products Limited* (supra) that the Assessee in was entitled to maintain the refund claim notwithstanding that there was no appeal filed against the assessed B/Es.

11. It is significant that with effect from 8th April 2011, the structure of Section 27 of the Act has undergone a change. The relevant portions of Section 27, as amended with effect from that date, read as under:

27. Claim for refund of duty." (1) Any person claiming refund of any duty or

interest,-

(i) paid by him; or

(ii) borne by him,

may make an application in such form and manner as may be prescribed for such refund of to the Assistant Commissioner of Customs or Deputy Commissioner of Customs, before the expiry of one year, from the date of payment of such duty or interest:

Provided that where an application for refund has been made before the date on which the Finance Bill, 2011 receives the assent of the President, such application shall be deemed to have been made under sub-section (1), as it stood before the date on which the Finance Bill, 2011 receives the assent of the President and the same shall be dealt with in accordance with the provisions of sub-section (2) :

Provided further that the limitation of one year shall not apply where any duty or interest has been paid under protest:

[Provided also that where the amount of refund claimed is less than rupees one hundred, the same shall not be refunded.]

Explanation. - For the purposes of this sub-section, "the date of payment of duty or interest" in relation to a person, other than the importer, shall be construed as "the date of purchase of goods" by such person.

(1A)....

(1B)....

(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;

(c) the [duty and interest, if any, paid on such duty] borne by the buyer, if he had not passed on the incidence of such [duty and interest, if any, paid on such duty], to any other person;

(d) the export duty as specified in section 26;

(e) drawback of duty payable under sections 74 and 75;

(f) the [duty and interest, if any, paid on such duty] borne by any other such class of applicants as the Central Government may, by notification in the Official Gazette, specify:

Provided further that no notification under clause (f) of the first proviso shall be issued unless in the opinion of the Central Government the incidence of [duty and interest, if any, paid on such duty] has not been passed on by the persons concerned to any other person."

12. An important change that has been made is that a person can now claim refund of any duty or interest as long as such duty or interest was paid or borne by such person. The conditionality of such payment having been made pursuant to an order of assessment does not exist. Secondly, once an application is made under Section 27(1) of the Act, it is incumbent on the authority concerned to make an order under Section 27 (2) determining if any duty or interest as claimed is refundable to the applicant. The proviso to Section 27(2) of the Act sets out the instances where refund should be paid to the claimant instead of being credited to the Consumer Welfare Fund. The only relevance as far as payment of duty under protest is concerned is indicated in the second proviso to sub-section (1) of Section 27 of the Act which states that the limitation of one year shall not apply in such event. In other words, whether or not the duty is paid under protest once an application for refund is made in the requisite manner and form as prescribed, it is incumbent on the authority to deal with such an application. Where there is an assessment order, the authority will take it into account in deciding the application for refund. If such assessment order has been reviewed or modified in appeal such further order will obviously be taken into account. In other words, under Section 27 of the Act, as it now stands, it is not open to an authority to refuse to consider the application for refund only because no appeal has been filed against the assessment order, if there is one.

13. As far as the present case is concerned, there was indeed no assessment order as such passed by the customs authorities. Although under Section 2 (ii) of the Act, the word "assessment" includes a self-assessment, the clearance of the goods upon filing of the B/E and payment of duty is not per se an "assessment order" in the context of Section 27 (1) (i) as it stood prior to 8th April 2011, particularly if such duty has not been paid under protest. In any event, after 8th April 2011, as noticed hereinbefore, as long as customs duty or interest has been paid or borne by a person, a claim for refund made by such person under Section 27 (1) of the Act as it now stands, will have to be entertained and an order passed thereon by the authority concerned even where an order of assessment

may not have reviewed or modified in appeal.

14. The Assistant Commissioner (Refund), in the present case, appears to have not noticed the decision of this Court in Aman Medical Products Limited (*supra*) which was rendered in the context of Section 27 of the Act as it stood prior to 8th April 2011. Further he failed to notice that the said provision has undergone a significant change with effect from 8th April 2011. The impugned order of the Assistant Commissioner (Refund) rejecting the refund claim of the Petitioner on the ground of maintainability was, for the aforementioned reasons, plainly erroneous.

15. Consequently, the Court sets aside the three impugned orders dated 21st December 2015 passed by the Assistant Commissioner (Refund) in respect of the refund claims of the Petitioner for the months of August, September and October 2014 and restores the said applications to the file of the Assistant Commissioner (Refund) for being dealt with on merits in accordance with law.

16. The Petitioner, through its authorised representative, will appear before the Assistant Commissioner (Refund) on 14th March 2016. A fresh order shall be passed by the Assistant Commissioner (Refund) on the said three refund applications, after hearing the Petitioner, within a period of two months from today.

17. The petitions are disposed of in the above terms.