(2013) 07 OHC CK 0019

In the Orissa High Court

Case No : O.T.A.P.L. No. 2 of 2013

Visa Steel Ltd. APPELLANT

Vs

Commissioner of Central Excise, Customs and Service Tax RESPONDENT

Date of Decision : 24-07-2013

Acts Referred:

Citation : (2013) 298 ELT 323 : (2013) 23 GSTR 228

Hon'ble Judges : I. Mahanty, J;B.N. Mahapatra, J

Bench : Division Bench

Advocate : S.K. Mohanty, J. Mohanty and P. Rath, for the Appellant; Mrinalini Padhi, for the Respondent

Judgement

B.N. Mahapatra, J.—The present appeal has been directed u/s 130 of the Customs Act, 1962 (in short, "the Act, 1962") against the order dated July 5, 2012 passed by the Customs, Excise and Service Tax Appellate Tribunal (for short, "CESTAT"), East Zonal Bench, Kolkata in Customs Appeal No. C/174/2011 2012 (192) ECR 304). The appellant''s case in a nut-shell is that the appellant carries on business in manufacturing iron, steel and allied products. Low ash meteorological coke (in short, "LAM coke") is used as raw material for manufacture of the above finished products. To manufacture the said LAM coke, the appellant had installed coke oven plant inside its factory premises. Coking coal is used as raw material for manufacture of LAM coke, which the appellant procures mostly from imported sources. According to the appellant, coking coal is classified under Tariff Item "2701 19 10" of the Customs Tariff Act, 1975 (for short, "Tariff Act, 1975"). The tariff rate of duty is five per cent. ad valorem. However, it is exempted from payment of customs duty vide Notification No. 21/2002-Customs, dated March 1, 2002. On September 26, 2008 the appellant had entered into a contract with an overseas supplier for purchase of 50,000 M.T. of century PCI coal (century semi-soft coking coal). Upon arrival of the vessel at the destination port, i.e., Paradeep, the appellant filed the bill of entry on October 10, 2008 for assessment and clearance of imported consignment for home consumption. In the said bill of entry, the rate of customs duty was claimed as "nil" in terms of the above notification dated March 1, 2002. Pending submission of original documents, demurrage details and the BRC, the bill of entry was assessed provisionally by the Customs House, Paradeep. While provisionally assessing the bill of entry, the Superintendent of Customs has suo motu changed the classification of imported goods from "2701 19 10" to "2701 19 90" and also the duty liability from "nil" to "five per cent." without extending the benefit under the notification dated March 1, 2002 and without considering the explanation furnished by the appellant vide its letters dated October 22, 2008 and October 27, 2008. In order to clear the imported goods from customs custody for the intended purpose, the appellant had no option, but to pay the provisionally assessed duty under protest on November 4, 2008. Subsequent to payment of the duty under protest, the appellant has lodged the refund claim. In the application for refund, detailed justifications were furnished in favour of classification of imported coking coal under Chapter 2701 19 10 instead of 2701 19 90. The said refund application was returned by the Customs Department under the cover letter dated February 4, 2009 stating that the bill of entry has not been received in the refund section after final assessment and accordingly, the appellant was requested to re-submit the application after final assessment of the bill of entry. After lapse of more than one and half years from the date of payment of duty under protest, the Customs Superintendent (Import) vide the letter dated March 10, 2010 had informed the appellant that the bill of entry has been assessed finally. Consequent upon re-submission of the refund application, the Assistant Commissioner of Customs has issued a show-cause notice dated August 2, 2010, proposing for rejection of the refund application. The refund application filed by the appellant has been rejected vide the refund order dated September 24, 2010. Hence the present appeal.

2. Mr. S.K. Mohanty, learned counsel appearing for the appellant vehemently argued that the learned Tribunal has rejected the refund claim relying on a decision of the hon''ble Supreme Court in the case of Priya Blue Industries Ltd. Vs. Commissioner of Customs (Preventive), wherein it is held that if assessment finalised in the bill of entry is not challenged by filing an appeal, the claim for refund made u/s 27 of the Act, 1962 would not be maintainable. Mr. Mohanty further submitted that since no assessment order has been communicated to the appellant there is no scope for filing an appeal before the Commissioner (Appeals) in terms of section 128 of the Act, 1962. The letter dated March 10, 2010 of the Superintendent (Import), Customs House, Paradeep is a mere communication, informing the appellant that the bill of entry has been finally assessed by the Deputy Commissioner. The said letter cannot be construed as a "decision" or "order", because he has not taken any decision or passed any order of his own in finalising the assessment, which can be challenged by the appellant in terms of section 128 of the Act, 1962.

3. Mr. Mohanty further submitted that no speaking order has been issued to the appellant in terms of section 17(5) of the Act, 1962, despite the fact that the

customs duty has been paid by the appellant under protest and the classification of imported cargo was in dispute right from the beginning. It was further submitted that the decisions of the hon''ble Supreme Court in the case of Priya Blue Industries Ltd. Vs. Commissioner of Customs (Preventive), and the Bombay High Court in the case of Karan Associates Vs. Commissioner of Customs (Import), , relying upon which the appellant''s refund claim application was rejected, have no application to the fact of the present case. The finalization of bill of entry without considering the submission of the appellant and affording any opportunity of personal hearing is against the cardinal principles of natural justice.

4. Per contra, Mrs. M. Padhi, learned counsel appearing for the respondent vehemently argued that as per customs Notification No. 1/1987, dated February 10, 1987, the Superintendent is the "proper officer" as provided u/s 2(34) of the Act, 1962 for making assessment of duty. Section 17(5) of the Act, 1962 has no relevance to the present case, the goods being provisionally assessed u/s 18(1)(a) of the Act as some documents were wanting. Thereafter, it has been finally assessed u/s 18(2) of the Act, 1962. Placing reliance on the order and entries made on different dates, Mrs. Padhi submitted that the Deputy Commissioner has taken a decision on the basis of the materials available on record. The Superintendent has been reporting to the Deputy Commissioner for his approval at every step. The change of classification was made by the Deputy Commissioner himself as proper and competent officer and all the nothings were placed before him for his approval. Mrs. Padhi further referring to section 17 of the Act submitted that u/s 17(5) of the Act, 1962 when the testing or examination u/s 17(2) is contrary to the claim of the importer regarding valuation, classification, exemption and the importer does not confirm his acceptance of the said assessment in writing, the proper officer shall pass a speaking order. It is further submitted that section 18 of the Act, 1962 provides for the procedure of provisional assessment of duty. Where the proper officer is satisfied that an importer is unable to produce any document/information necessary for the assessment of duty, he may direct that the duty leviable on such goods may be assessed provisionally, if the importer furnishes such security as the proper officer deems fit for payment of the deficiency between the finally assessed and the provisionally assessed duty. If the amount paid is less, the importer shall pay the deficiency and if the amount paid is excess of the duty finally assessed, the importer shall be entitled to a refund. Mrs. Padhi further submitted that in the instant case duty has been assessed provisionally pending submission of some documents thereby attracting section 18(1)(a). Thereafter, u/s 18(2), the importer is only to be informed about the quantum of duty finally assessed whether there is any deficiency or refund, as the case may be. The appellant was informed under annexure 11 that duty having been finally assessed, the Deputy Commissioner has redeemed the P.D. bond. Hence there is no excess payment by the importer to claim refund u/s 27 of the Act. u/s 18(2), the importer is to be informed about the finally assessed duty and therefore

probably there is no mention of any "proper officer" or "speaking order". Under the provisional assessment, the party has already explained the classification to the satisfaction of the proper officer.

5. Mrs. Padhi further submitted that to claim refund, the importer has to apply as per Form 102. A bare perusal of the said document shows that a copy of the bill of entry has to be submitted as documents. The order of provisional assessment was never challenged. After verification of records the note for final assessment was put up by the Superintendent on March 10, 2010, vide annexure 5. Referring to some of the averments made in paragraphs 2.8, 2.9, 2.10 and the prayer made in appeal before the CESTAT, Mrs. Padhi submitted that the appellant accepted the fact that final assessment has been done. It is further submitted that in a refund application the validity and legality of an assessment order cannot be challenged. The appellant filed refund application even after realising that the duty amount remained unchallenged after final assessment. The appellant wanted a reassessment or change in the assessment through a refund application which is not permissible under law in view of the judgment of the hon''ble Supreme Court in Priya Blue Industries Ltd. Vs. Commissioner of Customs (Preventive), In support of her contentions, Mrs. Padhi also relied upon a decision of the hon''ble Supreme Court in the case of Collector of Central Excise, Kanpur Vs. Flock (India) Pvt. Ltd. C-7, Panki Industrial Area, Kanpur, It was further submitted that the order-sheet goes to reveal that the proper officer, i.e., the Deputy Commissioner after perusal of the relevant documents and on being satisfied endorsed the note of the Superintendent. Hence, the letter of the Superintendent, who is an officer of the customs and the proper officer for assessment of duty, on March 10, 2010 communicated the decision of the Deputy Commissioner regarding final assessment u/s 18(2) of the Act. A refund application is not maintainable without challenging the provisional assessment or the final assessment in appeal. The scope under refund application or on an appeal arising out of a refund application is limited. The refund granting authority cannot sit in appeal on the validity and legality of an assessment order, be it provisional or final. He can only examine whether any refund is due from an assessment or not. Concluding her arguments Mrs. Padhi prayed for dismissal of the appeal.

6. On the rival contentions of both parties, the following questions fall for consideration by this court:

(i) Whether the communication dated March 10, 2010 passed by the order under annexure 5 by the Superintendent (Import) Customs House, Paradeep is an order of assessment in terms of section 17(2) read with section 17(5) of the Customs Act, 1962, which is appealable u/s 128 of the Customs Act?

(ii) Whether section 18(2) of the Act contemplates passing of any final assessment order as stated in communication dated March 10, 2010 (annexure 5)?

(iii) Whether the proper officer of the customs is obliged under law to pass a speaking order of assessment in terms of section 17(2) read with section 17(5) of the Customs Act, 1962 when the classification of imported cargo was in dispute right from the beginning despite the fact that the customs duty has been paid by the importer under protest?

(iv) Whether finalisation of bill of entry without considering the objection raised by the appellant against levy of duty and also without affording any opportunity of hearing amounts to violation of cardinal principles of natural justice?

(v) Whether the order passed by the CESTAT in rejecting the appellant''s refund application is just and proper in the facts and circumstances of the case?

(vi) Whether the refund application is maintainable without challenging in appeal the provisional assessment order or final assessment order?

(vii) What order?

7. Questions (i), (ii) and (iii) being interlinked, they are dealt with together.

8. Sections 17 and 18(1) of the Customs Act, 1962 deal with the assessment:

Under sub-section (1) of section 17 that 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. Sub-section (2) provides that after such examination and testing the duty, if any, leviable on such goods shall, save as otherwise provided in section 85, be assessed. Sub-section (3) empowers the proper officer to 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. The proper officer may also require importer or exporter or any other person to furnish any information required for such ascertainment which is his power to produce or furnish and thereupon the importer, exporter or such other person shall produce such document and furnish such information. Sub-section (4) provides that 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). However 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 relating to the assessment, the goods may, without prejudice to any other action which may be taken under this Act, be reassessed to duty. Sub-section (5), provides that where any assessment done under sub-section (2) is contrary to the claim of the importer or exporter regarding valuation of goods, classification, exemption or concessions of duty availed consequent to any notification therefore under this Act, and in cases other than those where the importer or the exporter, as the case may be confirms his acceptance of the said assessment in writing, the proper officer shall pass a speaking order within fifteen days from the date of assessment of the bill of entry or the shipping bill, as the case may be.

Sub-section (1) of section 18 speaks of provisional assessment of duty under certain contingencies stated in the said section. Provisional assessment of duty is directed by the proper officer if the importer or the exporter, as the case may be, furnishes such security as the proper officer deems fit or for the payment of the deficiency, if any between the duty as may be finally assessed or reassessed as the case may be and duty provisionally assessed.

9. Undisputedly in the present case, the claim of the appellant from the very beginning is that coking coal is classified under Tariff Item 2701 19 10 of the Customs Tariff Act, 1975. The tariff rate of duty is five per cent. ad valorem. However, the appellant''s claim was that the same is exempted from payment of customs duty vide Notification No. 21/2002. Upon arrival of the vessel at the destination port, i.e., Paradeep, the appellant filed the bill of entry on October 14, 2008 for assessment and clearance of imported consignment for home consumption. In the said bill of entry, the rate of customs duty was claimed as "nil" in terms of notification dated March 1, 2002. In support of its claim that the imported cargo is coking coal, the appellant in the letters dated October 22, 2008 and October 27, 2008 had enclosed the certificate issued by the overseas supplier. A perusal of letter dated October 22, 2008 addressed to the Superintendent of Customs, Custom House, Paradeep by the appellant reveals that the appellant has attached a literature on properties of coal caking properties of coals and manufacture of coke where the raw material is coking coal. It was further indicated in the said letter that if the crucible swelling index of the coal is 0-3, then the same coal is having caking behaviour, i.e., coking coal. Besides the same, the shipper M/s. Millennium Coal Pvt. Ltd., Australia has also issued a certificate, where they have declared that the type of coal supplied by them is to be used as a blend component in the coking process. However, pending submission of original documents, demurrage details and the BRCD, the bill of entry was assessed provisionally by the Customs House, Paradeep. While provisionally assessing the bill of entry, the classification of imported goods has been changed from 2701 19 10 to 2701 19 90 and the duty liability from "nil" to "five per cent.". As it appears the benefit of notification dated March 1, 2002 as claimed by the appellant has not been extended to it.

10. It is not the case of the respondent-Department that after completion of the provisional assessment order, any regular/final assessment order has been passed as provided u/s 17 of the Act. On the contrary, referring to letter dated March 10, 2013, Mrs. Padhi submitted that bill of entry No. 666757, dated October 14, 2008 previously assessed provisionally pending submission of original documents, demurrage certificates, bank signed invoices and test result and has been assessed finally u/s 18(2) of the Customs Act, 1962. This further

shows that no regular/final assessment as provided u/s 17 of the Act has been passed. Section 18(2) does not contemplate of passing any final order of assessment by the Department. Section 18(2) envisages that when the duty leviable on the imported goods or export goods is assessed finally by the proper officer, the importer or exporter is informed as the case may be, in the case of goods cleared for home consumption or exportation the amount paid shall be adjusted against the duty finally assessed and if the amount so paid fall short of or is in excess of the duty finally assessed the importer or exporter of the goods shall pay the deficiency or be entitled to a refund. The use of expression "assessed" finally in sub-section (2) of section 18 refers to the assessment made u/s 17 of the Act. Therefore, only after the final assessment is made u/s 17, the provisions of sub-section (2) of section 18 come into play for the purpose enumerated therein.

11. From the letter dated March 10, 2010, it is amply clear that no final assessment u/s 17 has been passed much less any speaking order has been made indicating as to why the benefit claimed by the appellant, i.e., exemption from payment of the custom duty vide Notification No. 21/2002, dated March 1, 2002 has been denied to it. It is nobody''s case that the importer confirms its acceptance of the assessment in writing. On the contrary, from the very beginning, the appellant''s claim is that it is exempted from payment of customs duty on the imported cargo in question vide Notification No. 21/2002, dated March 1, 2002. Therefore, as contemplated u/s 17, the proper officer is obliged to pass a speaking order of assessment, which has not been done in the instant case.

12. Question (iv) is whether finalisation of bill of entry without considering the objection raised by the appellant against levy of duty and also without affording any opportunity of hearing amounts to violation of the cardinal principle of natural justice. Needless to say that reason is the heartbeat of every conclusion. It introduces clarity in an order and without the same it becomes lifeless. (See Raj Kishore Jha Vs. State of Bihar and Others,). One of the cardinal principles is that nobody should be condemned unheard. The very principle has been embodied under sub-section (5) of section 17 of the Act. Any order passed without complying with the provisions of sub-section (5) of section 17 is vitiated in law.

13. Being asked to produce the final assessment order, Mrs. Padhi drew our attention to the letter dated February 29, 2012/March 2, 2012 addressed to one Mr. B.B. Agrawal, Commissioner (authorised representative), CESTAT, Central Excise, East Regional Bench wherein it is stated that bill of entry No. 000757, dated October 14, 2008 was finally assessed on March 9, 2010 and was also communicated to the party on March 10, 2010. Photocopy of the said bill of entry and the communication letter to the party are enclosed to the said letter. For proper appreciation of the case, it is necessary to reproduce the said letter:

Government of India Ministry of Finance, Department of Revenue, Office of the

Deputy Commissioner, Customs, Customs House, Paradeep.

C. No. VIII-CUS-48 (12) PDP/2009, dated March 10, 2010

To,

M/s. Visa Steel Limited,

11, Edamra Kanan, Nayapalli,

Bhubaneswar-751 015.

Dear sir(s),

This is to hereby inform you that bill of entry No. 000757, dated October 14, 2008 previously assessed provisionally, pending submission of original documents, demurrage certificates, bank signed invoice and test result has been assessed finally u/s 18(2) of the Customs Act, 1962. Consequent upon finalisation of the under mentioned bill of entry, the Deputy Commissioner, has been pleased to redeem the related P.D.-cum-test bond and finalise the said bill of entry as detailed below:

This is for your information please.

Yours faithfully, (Sd.) J. Tudu, Superintendent (Import), Customs House, Paradeep.

From the aforesaid letter, it appears that the letter has been issued to the appellant under the seal and signature of the Superintendent (Import), Customs House, Paradeep. It further appears that bill of entry No. 000757, dated October 14, 2008 previously assessed provisionally pending submission of original documents, demurrage certificates, bank signed invoice has been assessed finally u/s 18(2) of the Act, 1962. Consequent upon the finalisation of the bill of entry, the D.C. has been pleased to redeem the related P.D.-cum-test bond and finalise the said bill of entry as per details given therein. This letter is claimed to be the final assessment order by the Department.

14. We have already held that sub-section (2) of section 18 does not contemplate passing of any final assessment order. Moreover, a perusal of the order dated March 10, 2010 as well as the bill of entry does not reveal any reason as to why the claim of the appellant, i.e., exemption from paying the customs duty vide Notification No. 21/2002, dated March 1, 2002 has been rejected. It also does not reveal that any opportunity of hearing has been given to the appellant before rejecting its claim of exemption. As stated above, no other order of assessment passed in terms of section 17 of the Act has been brought to our notice.

15. Questions (v) and (vi) being interlinked, they are also dealt with together. There is no dispute over the legal proposition settled by the hon''ble Supreme Court in the case of Priya Blue Industries Ltd. Vs. Commissioner of Customs (Preventive), . It goes without saying that refund flows from an order. So long as

an order of assessment stands, the duty assessed would be payable as per the said order of assessment. If that order is not challenged, no refund can be claimed. The officer empowered to consider different claims for refund cannot review the order of assessment for which right of appeal has been created under the statute. In the instant case, as held above, no order of assessment as contemplated u/s 17(2) read with section 17(5) has been passed. Therefore, there is no question of filing any appeal challenging the order of assessment.

16. Section 128 of the Act, 1962 envisages for filing of appeal before the Commissioner (Appeals) by any person aggrieved by any decision or order passed under the Customs Act by any officer of customs lower in rank than a Commissioner of Customs within 60 days from the date of communication to him of such decision or order. In the present case, no speaking order as contemplated u/s 17(2) read with section 17(5) of the Act assessing the appellant finally has been passed and communicated to the appellant. In the absence of such order, there is no question of filing any appeal challenging the assessment order in terms of section 128 of the Act Consequently, the appellant is deprived of the statutory right of filing an appeal as provided in section 128 against the collection of duty from it without passing a final order of assessment as contemplated u/s 17(5) of the Act.

17. Assuming that the petitioner has not filed any appeal challenging the provisional assessment order, he cannot be deprived of his statutory right to challenge a final assessment order.

18. In view of the above, we do not find any infirmity or illegality in the order of the Appellate Tribunal holding that when an assessee is aggrieved by the assessment order, the recourse open to him is to file an appeal before the appellate forum instead of asking for refund directly by short-circuiting the process of appeal prescribed to be followed under the Act, before the appropriate authority.

19. In the peculiar facts and circumstances of the case, we direct the proper officer to pass a speaking order in terms of section 17(2) read with section 17(5) of the Act, 1962 after giving an opportunity of hearing to the appellant. We direct the proper officer to complete the entire exercise within a period of three months from today. We make it clear that we have not expressed any opinion on the merit of the appellant''s claim that it is exempted from payment of customs duty vide Notification No. 21/2002, dated March 1, 2002. On receipt of the assessment order it is open to the appellant to avail of any remedy/benefit permissible under law. The appeal is accordingly disposed of with the above observations and directions.

I. Mahanty, J.

I agree.

