IN THE HIGH COURT OF MADRAS

Case Tracker
SYMRISE PVT LTD Vs CC [CESTAT]

Civil Misc Appeal No.3443 of 2009
Misc Petition No.1 of 2009

COMMISSIONER OF CUSTOMS (IMPORTS)
CUSTOM HOUSE, NO.60, RAJAJI SALAI
CHENNAI-600001

Vs

1) M/s SYMRISE PVT LTD
NO 140, OLD MAHABALIPURAM ROAD
SEMMANCHERRY, CHENNAI-600119

2) CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
SOUTH ZONAL BENCH, SHASTRI BHAWAN ANNEXE
I FLOOR, NO 26, HADDOWS ROAD
CHENNAI-600006

T S Sivagnanam & V Bhavani Subbaroyan, JJ

Dated: March 07, 2019

Appellant Rep by: Mr V Sundareswaran, Sr. Standing Counsel
Respondent Rep by: Mr M Hari Radhakrishnan

Cus - The assessee-company filed a bill of entry for clearance of automatic chemicals imported & on which duty had been paid - This duty was assessed on the amount covered by 9 invoices - However, the imported goods were covered under eight invoices and the ninth invoice was covered in a separate bill of entry which was permitted to be cleared on payment of duty - The assessee claimed that on the same invoice, it paid duty twice and the balance amount is to be refunded - The assessee approached the jurisdictional Assistant Commissioner of Customs (Refund), who advised the assessee to get the assessment order pertaining to such bill of entry reviewed, through appeal to the Commr.(A) - The assessee filed a review application before the Assessing Officer in this regard - The same was dismissed on grounds that the refund claim was not maintainable since the assessee did not challenge the assessment order - The assessee approached the Commr.(A) who held that the error could not be rectified unless it had been committed by the Department - The Tribunal later held that any clerical error or arithmetical error could be rectified suo motu under Section 154 of the Act and refund could be allowed to importer as a consequence of correction of clerical error under Section 154 of the Act, when the importer had not filed refund claim under Section 27 of the Act - Hence the Revenue's appeal.

Held - Section 154 of the Act gives an impression that clerical or arithmetical error occurring in orders passed by the Government Board or any officers of that Department, or errors arising from such order due to accidental slip or omission alone can be corrected - However, as far as orders passed under the Customs Act are concerned, the power of correct the same vests only with the authorities - Section 154 does not restrict the exercise of power when a clerical or arithmetic mistake is pointed out by the importer or exporter for reasons attributable to such party - Hence the view taken by the FAA would restrict the powers u/s 154, which is impermissible - Hence in the instant case, the assessee cannot correct the order - But then as an invoice not forming part of the bill of entry was inadvertently included and assessed to tax, the same classifies as an error apparent on face of the order - Hence the simple remedy would have been to verify the bill of entry, which would have saved all the time spent in the present litigation - Hence the Tribunal's findings that the assessee is entitled to refund of Excise duty, are quashed - The matter is remanded to the AO to pass appropriate orders: HC (Para 4-8,13,15,16)

Revenue's appeal partly allowed

Case law cited -

M/s. Super Cassette Industries vs. Commissioner of Customs, 2004 (163) E.L.T. A116 (SC).....Para 6

Priya Blue Industries Limited v. Commissioner of Customs (Preventive) - 2004-TIOL-78-SC-CUS.....Para 10

Commissioner of Central Excise v. Flock India - 2002-TIOL-208-SC-CX.....Para 10

Cannon India Pvt. Ltd., vs. CC - 2006-TIOL-485-CESTAT-DEL.....Para 11

Goa Shipyard vs. CC., ACC Sahar - 2005-TIOL-1578-CESTAT-MUM.....Para 11

JUDGEMENT

Per: T S Sivagnanam:

This appeal, filed by the Revenue under Section 130 of the Customs Act, 1962 (hereinafter referred to as "the Act"), is directed against the order passed by the Customs, Excise and Service Tax Appellate Tribunal, South Zonal Bench, Chennai (for brevity "the Tribunal") in Final Order No.701/2009, dated 03.06.2009 =2009-TIOL-1619-CESTAT-MAD.

2. The above appeal was admitted on 22.12.2009, on the following substantial questions of law:-

"(i) Whether the error committed by the importer in the Bill of Entry No.303606 dated 25.09.2006 can be corrected/rectified using the provision of the Section 154 of the Customs Act, 1962? and

(ii) Even presuming that the error committed by the importer could be rectified under Section 154 ibid, is it lawful to rectify the mistake by the Refund Authority itself for the purpose of refund of excess duty without considering the law laid down by the Hon'ble Supreme Court in the case of Commissioner of Central Excise v. Flock India 2000 (120) ELT 285 SC = 2002-TIOL-208-SC-CX and of Priya Blue Industries Limited v. Commissioner of Customs (Preventing) 2004 (172) ELT 145 SC = 2004-TIOL-78-SC-CUS?"

3. Heard Mr.V.Sundareswaran, learned Senior Standing Counsel for the appellant/Revenue; and Mr.Hari Radhakrishnan, learned counsel for the first respondent/assessee.

4. The assessee filed a bill of entry on 25.09.2006 for clearance of automatic chemicals imported by them and paid duty of Rs.19,90,572/-. This duty was assessed on the amount covered by nine invoices. However, what were imported under the said bill of entry were covered only in respect of eight invoices and so far as the 9th invoice is concerned, it was erroneously included and duty has been assessed and remitted by the assessee. Insofar as the 9th invoice is concerned, it was covered in a separate bill of entry dated 27.09.2006, which was permitted to be cleared on payment of duty. Thus, the assessee claimed that for the same invoice, the assessee has paid duty twice and the balance amount requires to be refunded. In this regard, a representation was submitted on 29.09.2006 to the Assistant Commissioner of Customs (Refunds), that is, within three days from the date on which the excess duty was paid against the bill of entry dated 25.09.2006.

5. The Assistant Commissioner of Customs (Refunds) by order dated 07.11.2006, informed the assessee that they have claimed refund of excess duty paid against the said bill of entry covered under invoice dated 17.08.2006, which was wrongly included in the bill of entry and subsequently, they were cleared under another bill of entry, on payment of duty. It appears that considering the genuineness of the claim made by the assessee, the Refunds officer advised them to get the order of assessment of the bill of entry dated 25.09.2006 reviewed by the concerned apprising group or modified by way of an appeal to the Commissioner (Appeals) under Section 128 of the Act, and file a refund claim, if the review/modification is in favour of the assessee. Pursuant there to, the assessee filed an application before the Assessing Officer, viz., the Assistant Commissioner of Customs, Group 2, dated 14.12.2006.

6. We may note that assuming the assessee had filed an appeal before the Commissioner (Appeals) on the very same day, the appeal would have been within limitation. Be that as it may, the assessee chose one of the options as suggested by the Refunds officer and sought for review before the Assessing Officer, vide representation dated 14.12.2006 and requested for re-assessment of the bill of entry dated 25.09.2006. This was rejected by the Assessing Officer on the ground that the refund claim is not maintainable,

when the assessee did not challenge the assessment order. In this regard, the Assessing Officer referred to the decision of the Hon'ble Supreme court in the case of *M/s. Super Cassette Industries vs. Commissioner of Customs, 2004 (163) E.L.T. A116 (SC).*

7. The assessee filed appeal before the Commissioner (Appeals) challenging the said order. Before the first appellate authority, the assessee contended that the said invoice was erroneously included in the bill of entry, it was a clerical error which requires to be corrected by invoking the power under Section 154 of the Act and the assessee was not aware that there is a procedure to file an appeal and hence, they straight away filed the refund claim and only after the correct legal position was pointed out by the Refunds officer, they had sought for re-assessment of the bill of entry on account of the error which has occurred.

8. The first appellate authority framed three questions for consideration as to whether a refund claim can be filed under Section 27 of the Act against an order of assessment made in a bill of entry without filing an appeal against the said order; whether an error committed by the assessee would be covered under the scope of Section 154 of the Act; whether the appeal would be hit on the point of limitation.

9. The fact which was not disputed by the Revenue was that the assessee paid duty twice in respect of the same invoice. On the second time, the same invoice, which is subject matter of bill of entry, was assessed to tax and cleared by the assessee. However, neither the Assessing Officer, nor the first appellate authority made an endeavour to consider the undisputed factual position. Both the Assessing Officer and the first appellate authority were only guided by the legal principles without even looking into the factual position.

10. In our considered view, there would be no necessity for the Assessing Officer to refer to the various decisions, nor for the first appellate authority to refer to the decisions in the case of *Priya Blue Industries Limited v. Commissioner of Customs (Preventing), 2004 (172) ELT 145 (SC)* = *2004-TIOL-78-SC-CUS*; *Commissioner of Central Excise v. Flock India, 2000 (120) ELT 285 (SC)* = *2002-TIOL-208-SC-CX*; and Super Cassette Industries (supra), since all that was required to be considered by the Department was whether an error has occurred from any accidental slip or omission. Therefore, the first appellate authority held that without filing an appeal against the assessment of the bill of entry, the question of maintaining the refund claim does not arise.

11. With regard to the power under Section 154 of the Act, the first appellate authority held that unless the error is committed by the Department, the same cannot be rectified. The assessee filed appeal before the Tribunal. The Tribunal after considering the submissions made by the assessee and the Revenue, took note of Section 154 of the Act, the decision of the Delhi Tribunal in the case of *Cannon India Pvt. Ltd., vs. CC, 2006 (200) ELT 83*

(Tri.Del) = *2006-TIOL-485-CESTAT-DEL*, the decision of the Mumbai Tribunal in the case of *Goa Shipyard vs. CC., ACC Sahar, 2006 (72) RLT 479 (Tri.Mum)* = *2005-TIOL-1578-CESTAT-MUM* and held that clerical error or arithmetical error could be rectified suo motu under Section 154 of the Act and refund could be allowed to importer as a consequence of correction of clerical error under Section 154 of the Act, when the importer had not filed refund claim under Section 27 of the Act.

12. The facts of the case in Cannon India Pvt. Ltd. (supra) was taken into consideration whether excess payment was occurred due to clerical error committed by the importer and not by the authority, yet the Tribunal held that the same can be corrected. Thus, the Tribunal concluded that the interpretation given by the first appellate authority to Section 154 of the Act was incorrect. Ultimately, the Tribunal allowed the appeal and issued consequential direction to refund the excess duty paid on correction of the error in the assessment subject to scrutiny from the angle of unjust enrichment.

13. While we agree with the stand taken by the Tribunal that the scope of Section 154 of the Act should not be restricted, for which we shall assign reasons little later, we do not agree with the penultimate portion of the direction issued by the Tribunal in making a positive observation that the assessee will be entitled to refund of excess duty paid on correction of the error in the assessment subject to scrutiny from the angle of unjust enrichment.

14. With regard to the power under Section 154 of the Act, the Tribunal relied on the decisions of the Delhi and Mumbai Tribunal, yet held that, that power can be exercised suo motu. As pointed out by us earlier, the Refunds officer is aware of what was the mistake which had occurred and it is primarily a mistake committed by the assessee. Yet the assessee consciously pointed out the same to the Refunds officer, that is, within three days from the date on which the bill entry was assessed and tax was paid. The Refunds officer acted in a fair manner and informed the assessee that he should get the bill of entry reviewed or file an appeal before the Commissioner (Appeals). The assessee chose one of the options and approached the Assessing Officer, who without even going into the aspect as to whether a mistake has occurred or not, rejected the claim on the ground that the assessee has not challenged the assessment order when the fact remained that the assessee was before the Assessing Officer requesting for reassessment and this request was made well within the appealable time available to the assessee.

15. At the first instance, a reading of Section 154 of the Act gives us an impression that clerical or arithmetical error which has occurred in orders passed by the Government Board or any officers of that Department, or errors arising from such order due to accidental slip or omission alone can be corrected. However, what is to be borne in mind is the procedure prescribed for amendment of bills of entry or for amendment of export

documents which are documents originating from the exporter or importer. However, so far as the orders to be passed under the provisions of the Act is concerned, the power to correct the same can vest only with the authorities. Therefore, Section 154 of the Act specifically deals with such a power. The said provision does not in any manner restrict the exercise of power when a clerical or arithmetical mistake is pointed out by the importer or exporter for reasons attributable to the importer or exporter. Therefore, the interpretation given by the first appellate authority as well as the Revenue, before us, if given, would undoubtedly, restrict the power of Section 154 of the Act which is impermissible.

16. In the instant case, the assessee cannot correct the order, but the fact remains, an invoice which did not form part of the bill of entry was inadvertently included, assessed to tax and tax was also paid. The same invoice was subject matter of another bill of entry which was assessed to tax and tax was cleared. Therefore, the error is apparent on the face of the order. All that was required to be done was to verify the bill of entry and if that has been done, the entire time lost in this litigation could have been avoided. Therefore, in our considered view, this would be the right interpretation of Section 154 of the Act in addition to what was held by the Delhi and Mumbai Tribunals in the aforementioned decisions.

17. Thus, for the above reasons, the appeal filed by the Revenue is partly allowed, the direction, finding rendered by the Tribunal that the assessee is entitled to refund of excise duty paid is set aside and the matter is remanded to the Assessing Officer to consider the appellant's request, take note of the facts and exercise power under Section 154 of the Act and proceed to pass orders in accordance with law. Considering that the matter is of the year 2006, the Assessing Officer is directed to conclude the proceedings after affording an opportunity of personal hearing to the assessee within a period of 12 weeks' from the date on which the assessee approaches the Assessing officer with a representation along with a copy of this judgment. No costs. Consequently, connected miscellaneous petition is closed.