[2016] 68 taxmann.com 254 (Bombay)

HIGH COURT OF BOMBAY

Vijal Marine Services

Vs.

Commissioner of Customs & Central Excise

F.M. REIS AND K.L. WADANE, JJ.
CUSTOMS APPEAL NO. 4 OF 2010
JANUARY 21, 2016

CASE REVIEW

Vijai Marine Services v. *CC&CE* 2010 (252) E.L.T. 378 (Tri. - Mumbai) *affirmed.*

Collector of Central Excise v. *Flock (India) (P.) Ltd.* 2000 taxmann.com 701 (SC) (para 8) and *Karan Associates* v. *Commissioner of Customs* (Import) 2009 taxmann.com 394 (Bom.) (para 9) *relied on.*

CASES REFERRED TO

Sir Chunilal V. Mehta & Sons Ltd. v. *Century Spinning & Manufacturing Co. Ltd.* AIR 1962 SC 1314 (para 5), *Collector of Central Excise* v. *Flock (India) (P.) Ltd.* 2000 taxmann.com 701 (SC) (para 8) and *Karan Associates* v. *Commissioner of Customs (Import)*2009 taxmann.com 394 (Bom.) (para 9).

G. Vijay Chandran, Advocate *for the Appellant.* **C.A. Ferreira**, Advocate *for the Respondent.*

JUDGMENT

F. M. Reis, J. - Heard Shri Vijay Chandran, learned Counsel appearing for the Appellant and Shri C. A. Ferreira, learned Counsel appearing for the Respondent.

2. The above Appeal challenges the Order dated 15.10.2009 in Appeal no. C-1140/2008 passed by the Customs Excise and Service Tax Appellate Tribunal, Mumbai. Upholding the Order dated 16.07.2008.

3. The Appeal was admitted by an Order dated 13.07.2010 on the following substantial question of law :

> "Whether the Appellate Tribunal was right in holding that the claim for refund of cost recovery charges was not maintainable as a refund claim on account of failure of the appellant to prefer a appeal against the demand inasmuch as before issuing notice of demand, there was no adjudication made by any authority as regards the liability of the appellant to pay the cost recovery charges?"

4. Briefly, the facts of the case are that the Appellants are engaged in the manufacture of sea-going vessels and imported capital goods/equipments like gear boxes, steering system and navigational, life and sound equipments for use in the manufacturing process and were granted licence bearing no. 01/04 dated 27.01.2004 which was renewed up to 31.12.2007 under Sections 58 and 66 of the

Customs Act, 1962 for deposit of the imported dutiable goods in a private bonded warehouse and utilization of such goods in terms of Regulation 5 of the Manufacture and other Operations in Warehouse 1966 on execution of the bond, and the sanction was accorded to the Appellants to carry out manufacturing process and other operations. In terms of Regulation 6 of the said Regulation, the Assistant Commissioner of Customs or Deputy Commissioner of Customs, Officers of the Custom were posted at the bonded warehouse of the Appellants and the manufacturing activity was carried out under their supervision. The Department later raised a claim of Rs.10,84,450/- for the period from 22.09.2004 to 04.11.2007 against which an amount of Rs.6,89,096/- was paid under protest. Accordingly, a letter was issued by the Respondents at the request of the Appellants for de- bonding of the vessel. An application filed by the Appellants to refund of the amount paid was rejected by the Assistant Commissioner vide letter dated 03.03.2008. Being aggrieved by the said refusal for the refund, the Appellants preferred an Appeal before the Commissioner of Appeals which was dismissed by an Order dated 16.07.2008. Being aggrieved by the Order of the Commissioner, the Appellants preferred an Appeal before the Appellate Tribunal which came to be dismissed by an Order dated 15.10.2009.

5. Shri Vijay Chandran, learned Counsel appearing for Appellants, has pointed out that as there was no adjudication by the authorities of the amounts payable by the Appellants, the question of preferring an Appeal to challenge such Order would not arise. Learned Counsel further pointed out that though a notice was received by the Appellants for recovery of the amounts and the reply thereto was sent by the Appellants, nevertheless, there was no decision arrived at by the competent authorities fixing the amount payable by the Appellants. Learned Counsel as such pointed out that the Appellants were entitled to seek the refunds of the amounts which the Appellants were not liable to pay from the concerned authorities. Learned Counsel has thereafter taken us through the impugned Orders passed by the authorities as well as by the Appellate Tribunal to point out that this aspect has not at all been correctly considered by the authorities below to come to the conclusion that the claim for refund filed by the Appellant deserves to be rejected. Learned Counsel has thereafter extensively taken us through the Judgment of the Tribunal to point out that the learned Tribunal has erroneously assessed the material on record to come to an erroneous conclusion. Learned Counsel has thereafter taken us through the relevant provisions of the Customs Act to point out that the application for refund was maintainable as there was no speaking Order assessing the amounts payable by the Appellants. Learned Counsel has relied upon the Judgment of the Apex Court in AIR 1962 SC 1314 in the case of *Sir Chunilal V. Mehta & Sons Ltd.* v. *Century Spg. & Mfg. Co. Ltd.* AIR 1962 SC 1314 Learned Counsel has further submitted that the Appellants sent a letter, inter alia, stating that the excessive amounts were paid towards the cost recovery based on a demand by the Respondents which the Assistant Commissioner by Order dated 03.03.2008 came to the conclusion that the cost recovery charges were rightly paid. Learned Counsel further pointed out that the said Order was challenged under Section 128 of the Customs Act, 1962 wherein the learned Commissioner found that the Appellant has a strong case on merits as no costs recovery was due for the period when no Officer was posted at the warehouse, but, however, rejected the Appeal since the Appellants had not challenged the Order demanding costs recovery charges. Learned Counsel further pointed out that these findings of the authorities below are totally erroneous and, as such deserves to be quashed and set aside. Learned Counsel further pointed out that on these technical grounds, the refunds which the Appellants are entitled should not be refused and, as such, the impugned Order be quashed and set aside.

6. On the other hand, Shri C. A. Ferreira, learned Counsel appearing for the Respondent, has supported the impugned Orders. Learned Counsel has pointed out that the demand was made after an

adjudication and, as such, unless such demand is challenged, the question of seeking refund would not arise. Learned Counsel further submits that the application for refund filed by the Appellants was not maintainable and, as such, the authorities below were justified to come to such conclusion. Learned Counsel further submits that the authorities below have relied upon the Judgments of this Court to come to such conclusion as, according to him, even a demand without a speaking Order is an Order which has to be challenged.

7. We have carefully considered the submissions of the learned Counsel and we have also gone through the records. In the present case, it cannot be disputed that a demand was raised by the Assistant Commissioner for the payment of cost recovery charges. Section 128 of the Customs Act, reads thus :

> "Section 128: Appeals to Commissioner(Appeals)-(1) Any person aggrieved by any decision or order passed under this Act by an Officer of customs lower in rank than a Commissioner of Customs may appeal to the Commissioner(Appeals) within sixty days from the date of the communication to him of such decision or order:
>
> Provided that the Commissioner (Appeals) may, if he is satisfied that the appellant was prevented by sufficient cause from presenting the appeal within a further period of thirty days. The Commissioner (Appeals) may, if sufficient cause is shown, at any stage of hearing of an appeal, grant time, from time to time, to the parties or any of them and adjourn the hearing of the appeal for reasons to be recorded in writing:
>
> Provided that no such adjournment shall be granted more than three times to a party during hearing of the appeal.
>
> (2) Every appeal under this section shall be in such form and shall be verified in such manner as may be specified by rules made in this behalf."

8. On plain reading of the said provisions, a decision or Order passed under the Act, can be challenged by filing an Appeal before the Commissioner of Appeals. When such an Appeal is preferred, the ground for challenge is quite vast as both the questions of law and facts can be examined in such substantial Appeals which is provided under the statute. Unless and until such Order is set aside, it would be in operation as it is not the case of the Appellants that such Order is void ab initio. The Judgment of the Apex Court in the case of *Collector of Central Excise* v. *Flock (India) (P.) Ltd.* 2000 taxmann.com 701, observes at para 10 thus :

> "10. Coming to the question that is raised there is little scope for doubt that in a case where an adjudicating authority has passed an order which is appealable under the statute and the party aggrieved did not choose to exercise the statutory right of filing an appeal, it is not open to the party to question the correctness of the order of the adjudicating authority subsequently by filing a claim for refund on the ground that the adjudicating authority had committed an error in passing his order. If this position is accepted then the provisions for adjudication in the Act and the Rules, the provision for appeal in the Act and the Rules will lose their relevance and the entire exercise will be rendered redundant. This position, in our view, will run counter to the scheme of the Act and will introduce an element of uncertainty in the entire process of levy and collection of excise duty. Such a position cannot be countenanced. The view taken by us also gain support from the provision in Sub-rule (3) of Rule 11 wherein it is laid down that where as a result of any order passed in appeal or revision under the Act, refund of any duty becomes due to any person, the

proper officer, may refund the amount to such person without his having to make any claim in that behalf. The provision indicates the importance attached to an order of the appellate or revisional authority under the Act. Therefore, an order which is appealable under the Act is not challenged then the order is not liable to be questioned and the matter is not to be reopened in a proceeding for refund which, if we may term it so, is in the nature of execution of a decree/order. In the case at hand it was specifically mentioned in the order of the Assistant Collector that the assessee may file appeal against the order before the Collector (Appeals) if so advised."

9. The Division Bench of this Court in a Judgment in the case of *Karan Associates* v. *Commissioner of Customs* (import) 2009 taxmann.com 394 (Bom.), has held at Paras 7, 8, 9 and 11 thus :

"7. In the present case, admittedly, the appellant had cleared the imported goods on 30/1/2003 on payment of duty as assessed without any protest. Though the appellant by a letter dated 11/2/2003 requested the assessing officer to pass a reasoned order, it appears that a speaking order has not been passed in the matter. However, the fact that the assessing officer has failed to pass a speaking order would not invalidate the assessment order so as to file refund claim on 10/4/2003 and seek refund of duty paid on the enhanced value as per the assessment order. In other words, pendency of the application seeking a speaking order would not entitle the appellant to seek refund of duty paid as per the assessment order. It is well settled by the decisions of the Apex Court in the case of *Flock (India) Pvt. Ltd.* (*supra*) and *Priya Blue Industries Ltd.* (*supra*) that so long as the assessment order stands the question of granting refund does not arise at all.

8. The argument of the appellant that unless an appealable speaking order is passed, the importer cannot file an appeal against the assessment order is without any merit. Assessment order passed on the bill of entry is an appealable order and the same can be challenged even in the absence of a speaking order. In other words, in the absence of a speaking order, it cannot be said that the assessment order is not appealable. Where an assessment order is passed without giving reasons and in spite of repeated requests reasoned order is not passed, proceedings can be initiated for setting aside the assessment order passed on the bill of entry. In the present case, save and accept writing letters no proceedings have been initiated for setting aside the assessment order. Therefore, the fact that the assessing officer has not passed a speaking order would not entitle the appellant to claim partial refund of duty paid as per the assessment order.

9. Strong reliance was placed by the Counsel for the appellant on the decision of the Apex Court in the case of *Karnataka Power Corporation Ltd.* v. *Commr. Of Cus.* (Appeals), Chennai reported in MANU/SC/0633/2002: 2002(143)ELT482(SC) followed by the Tribunal in the case of *Telco Ltd.* (*supra*). Both the aforesaid decisions have no relevance to the facts of the present case, because, in both the above cases, the Apex Court as well as Tribunal have remanded the matter back to the adjudicating authority to consider the application of the importer regarding the reclassification of the goods as well as the refund flowing therefrom. In the present case, the question raised is, where reasoned assessment order is not passed, whether the ratio laid down by the Apex Court in the case of the *Priya Blue Industries Ltd.* (*supra*) would be applicable. The Tribunal has rightly held in the affirmative. In both the aforesaid cases relied upon by the appellant, the importer had sought reclassification of the imported goods and the consequential refund. In that context, the matters were remanded for decision on merits regarding reclassification and consequential refund, if any. In the present case, during the pendency of the application filed on 11/2/2003 seeking reasoned order, the appellant had filed refund claim on 10/4/2003. The said refund application dated 10/4/2003 was disposed off in the light of the decisions of the Apex Court in

Priya Blue Industries Ltd. (*supra*). Thus, the aforesaid two decisions relied upon by the Tribunal are distinguishable on facts.

10. ...

11. By inserting Section 17(5) into the Customs Act, 1962 with effect from 13/7/2006 the legislature has made it mandatory for the assessing officer to pass a speaking order within the time stipulated therein. Even before the insertion of the above provisions, the assessing officer was bound to pass a speaking order wherever demanded. However, the fact that a speaking order is not passed would not entitle the importer to claim refund of duty paid as per the assessment order. Therefore, the decision of the authorities below in rejecting the refund claim of the appellant by relying upon the decision of the Apex Court in the case of *Priya Blue Industries Ltd.* (*supra*) cannot be faulted."

10. In the present case, learned Counsel appearing for the Appellants has not disputed that there was no statutory Appeal filed from the demand for bonding costs claimed by the competent authority upon assessment. As no Appeal has been preferred against such adjudication, the question of filing an application for refund of the amount would not arise at all. The learned Tribunal as such was justified to come to the conclusion that the claim of refund could not be entertained as there was no challenge to the adjudication of the amounts by the competent authorities. The substantial question of law is answered accordingly.

11. The Appeal stands accordingly rejected.