IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 29.08.2018

PRONOUNCED ON : 18.09.2018

CORAM

THE HONOURABLE MR.JUSTICE C.SARAVANAN

W.P.Nos.26826 and 26827 of 2008

M/s.Usha International Limited,
Surya Kiran Building,
19, Kasthurba Gandhi Marg,
New Delhi - 110 001,
Rep. by its Senior Manager,
Authorized Official
A.D.Chandrasekar Petitioner in W.P.No.26826 of 2008

M/s.Jay Engineering Works Limited,
No.23, Kasturba Gandhi Marg,
New Delhi - 110 001,
(Now known as Usha International Limited)
Surya Kiran Building,
19, Kasthurba Gandhi Marg,
New Delhi - 110 001 vide
SRN A39551379 dated 20.06.2008,
Rep. by its Senior Manager and
Authorized Official
A.D.Chandrasekar
.. Petitioner in W.P.No.26827 of 2008

vs

1.The Assistant Commissioner
of Customs (Group 5A),
Customs House,
No.60, Rajaji Salai,
Chennai-600 001.

2.The Assistant Commissioner
of Customs (DEPB),
Customs House,
No.60, Rajaji Salai,
Chennai-600 001.

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3.The Commissioner of
Customs (Seaports),
Customs House,
No.60, Rajaji Salai,
Chennai-600 001. .. Respondents in both W.Ps

Prayer in W.P.No.26826 of 2008 : Writ Petition is filed under Article 226 of the Constitution of India, for issuance of a writ of Mandamus to amend the Bills of Entry Nos. (1)382018/22.01.07, (2)474338/02.06.07, (3)492234/26.06.07, (4)446176/24.04.07, (5)485811/18.06.07, (6)480138/09.06.07, (7)540020/28.08.07, (8)398439/14.02.07, (9)439437/16.04.07, (10)408997/03.03.07, (11)447863/26.04.07, (12)526195/09.08.07, (13)408366/03.03.07, (14)453074/04.05.07, (15)496260/02.07.07, (16)441015/18.04.07, (17)408917/03.03.07, (18)526191/09.08.07, (19)491477/26.06.07, (20)541360/29.08.07, (21)541093/29.08.07, (22)530469/16.08.07 and (23)453081/04.04.07 under Section 149 and 154 read with Section 17 of the Customs Act, 1962 for the purpose of re-assessment.

Prayer in W.P.No.26827 of 2008 : Writ Petition is filed under Article 226 of the Constitution of India, for issuance of a writ of Mandamus to to amend the Bills of Entry Nos. (1)382463/23.01.07, (2)382463/23.01.07 (3)408994/03.03.07, (4) 409001/03.03.07, (5)409076/03.03.07, (6)416560/13.03.07, (7) 416563/13.03.07, (8)441250/18.04.07 and (9)447859/26.04.07 under Section 149 and 154 read with Section 17 of the Customs Act, 1962 for the purpose of re-assessment.

For petitioner : Mr.B.Sathish Sundar
(in both W.Ps)

For respondents : Mr.A.P.Srinivas
(in both W.Ps)

C O M M O N O R D E R

These two writ petitions have filed to direct the respondents to reassess the Bills of Entry filed by the respective writ petitioners under Section 149 and 154 read with Section 17 of the Customs Act, 1962. The Bills of Entry Numbers are as follows:

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No.	Writ Petition	Bills of Entry No.
	W.P.No.26826 of 2008	382018/22.01.07, 474338/02.06.07, 492234/26.06.07, 446176/24.04.07, 485811/18.06.07, 480138/09.06.07, 540020/28.08.07, 398439/14.02.07, 439437/16.04.07, 408997/03.03.07, 447863/26.04.07, 526195/09.08.07, 408366/03.03.07, 453074/04.05.07, 496260/02.07.07, 441015/18.04.07, 408917/03.03.07, 526191/09.08.07, 491477/26.06.07, 541360/29.08.07, 541093/29.08.07, 530469/16.08.07 and 453081/04.04.07
	W.P.No.26827 of 2008	382463/23.01.07, 408994/03.03.07, 409001/03.03.07, 409076/03.03.07, 416560/13.03.07, 416563/13.03.07, 441250/18.04.07 and 447859/26.04.07

2. According to the petitioners' consignment of wall fans were wrongly assessed to 10% advelorem instead of 7.5% at the time of clearance based on the declarations made by them before the assessing officers.

3. Imports were made between January 2007 to August and January 2007 to April 2007 2007 by the respective petitioners. These cases pertain to the era when the assessment of customs duty was on the officers of the Department under section 17 of the Customs Act, 1962 based on the declarations filed by the importers after the time of import of the goods for clearance.

4. According to the petitioners there was a mistake in the classification adopted at the time of assessment in the respective bills of entry and therefore there was excess payment of duty to the extent of 2.5%. According to the petitioners wall fans attracted duty at 7.5% advelorem under the residuary sub-heading 8414 51 90 but at the time of assessment they were assessed to 10% duty under sub-heading 8414 51 10 on account of the mistake committed by their Custom House Agents.

5. The petitioners could not file a refund claim directly in view of the decision of the Supreme Court in Priya Blue Industries Ltd versus Commissioner of Customs 2004 (172) ELT 145 (SC).

6. The said decision follows the decision of the Supreme Court In Collector Vs. Flock (India) Private Limited 2000 (120) ELT 285 rendered in the context of refund under Rule 11 of the erstwhile Central Excise Rules, 1944.

7. As per the decision of the Supreme Court in Priya Blue industries Ltd supra once an order of assessment is passed,the

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duty would be payable as per the order and unless that order of assessment has been reviewed under Section 28 and/or modified in an appeal. The court further held that a refund claim is not an appeal proceeding.

8. In the present case the time for filing an appeal against the assessment in the Bills of Entry would have expired and therefore the petitioners made an application for reassessment of the respective bills of entry for re-classification under Section 149 read with Section 154 of the Customs Act, 1962.

9. The respondent's by their letters dated 6.11.2007 and 15.10.2007 had declined the request on the ground that neither the duty was paid "under protest" nor the assessments have been challenged and hence there is no scope for issuing a speaking order under section 17 of the Customs Act, 1962. However the first respondent advised the petitioners to approach the Appellate forum to redress their grievance.

10. Respective petitioners therefore filed appeals before the appellate Commissioner who by Order in Appeal dated 30.7.2008 bearing reference No.C3/844-886/0/2007-CA and Order in Appeal bearing reference No.C3/222-230/0/2007-CA dated 6.8.2008 dismissed the appeal of the respective petitioner on the ground of limitation.

11. Under Section 128 of the Customs Act, 1962 and appeal has to be filed within a period of 60 days from the date of passing of the order or with an application to condone delay of another 30 days during the relevant time. By the time the appeals could be filed, the statutory period had expired and therefore in terms of the provisions, the appeals were rightly rejected by the Appellate Commissioner.

12. Under these circumstances the petitioners approached the first respondent and requested the officers for amendment of the respondents of bills of entry under Section 149 read with section 154 of the Customs Act, 1962. In support of the same in their representation the petitioners relied upon several decisions.

13. These representations were followed by a reminder which however did not yield any fruitful results for the petitioners. Under these circumstances these writ petitions came to be filed for the above reliefs. The respondents have not filed their counter.

14. Heard the learned counsel Mr.Sathish Sunder for the respective petitioners and Mr.A.P.Srinivas, the learned Central Government Standing Counsel for the respondents.

15. The learned counsel for the petitioners relied on the following decisions of the Supreme Court and high Courts in support of the above writ petition:-

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i)Anchor Pressings Pvt. Ltd., Vs. Commissioner of Income-Tax, U.P. and others 1987 (27) E.L.T. 590 (S.C.)

ii)Indo Rama Synthetics (India) Ltd., Vs. Union of India 2002 (143) E.L.T. 299 (Del.)

iii)Karnataka Power Corporation Ltd., Vs. Commissioner of Customs (Appeals), Chennai 2002 (143) E.L.T. 482 (S.C.)

iv)Hero Cycles Ltd., Vs. Union of India 2009 (240) E.L.T. 490 (Bom.)

v) Bansak Alloys and Metals Pvt. Ltd., Vs. Commissioner of Customs, Amritsar 2009 (240) E.L.T. 483 (P&H)

vi)Aman Medical Products Ltd., Vs. Commissioner of Customs, Delhi 2010 (250) E.L.T. 30 (Del.)

vii)Brakes India Ltd., Vs. Commissioner of Customs, Chennai 2008 (221) E.L.T. 300 (Tri.- Chennai)

viii)Mahindra and Mahindra Ltd., Vs. Commissioner of Customs,(Import), Mumbai 2008 (230) E.L.T. 425 (Tri. - Mumbai)

ix) Steel Authority of India Ltd., Vs. Commissioner of Customs, Chennai 2016 (343) E.L.T. 602 (Tri. - Chennai)

x) Order dated 19.11.2007 in W.P.No.33620 of 2007

xi)Order dated 09.01.2015 in W.P.No.3371 of 2009

16. Per contra learned standing counsel for the respondent filed the decision of the Gujarat High in Panoli Intermediate (India) versus Union's 2015 (326) ELT 532 (Gujarat) the court while exercising jurisdiction under 226 of the Constitution of India in Panoli Intermediate (India) case supra the Court held that under extraordinary case where grave injustice or non-indifference would result in gross injustice, the court can interfere and writ petitions can be filed to challenge the order passed by the original adjudicating authority in the following circumstances:-

(A.1) the authority has passed the order without jurisdiction and by assuming jurisdiction which does not exist;

(A.2) the authority has exercised the power in excess of the jurisdiction and by overstepping or crossing the limits of jurisdiction;

(A.3) Has Acted in flagrant disregard two law or rules of procedure or acted in violation of the principles of natural justice were no procedures prescribed.

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17. The learned counsel for the petitioners submits that the mistake in adopting the correct classification for the purpose of assessment can be rectified under Section 149 read with Section 154 of the Customs Act, 1962. Section 149 of the Customs Act, 1962 a proper officer in his discretion may authorise any document to be presented. Section 149 of the Customs Act, 1962 reads as under:-

> "Amendment to Documents: Save as otherwise provided in sections 30 and 41, the proper officer may, in his discretion authorise any document, after it has been presented in the Custom House to be amended.
>
> Provided that no amendment of a bill of entry or a shipping bill or bill of export shall be so authorised to be amended after the imported goods have been cleared for home consumption or deposited in a warehouse or the export goods have been exported, except on the basis of documentary evidence which was in existence at the time the goods were cleared, deposited or exported, as the case may be."

18. In WP Nos.18891 to 8893 of 2017, this High Court by its decision dated 25.7.2017 has held that the only embargo under section 149 of the Customs Act, 1962 is that a person seeking relief cannot rely upon a documentary evidence, which came into existence after the goods were cleared, deposited or exported, as the case may be.

19. A similar view was taken in WP No.3371 of 2009 vide order dated 9.1.2015 wherein the court allowed the prayer for amendment of bill of entry under section 149 of the Customs Act, 1962 considering the fact that goods are not going to be examined again.

20. Section 154 of the Customs Act, 1962 deals with clerical error and allows correction of arithmetical mistakes in any decision or order passed by the Central Government, the Board or any officer of customs under this Act, or errors arising therein from any accidental slip or omission may, at any time, by corrected by the Central Government, the Board or such officer of customs or the successor in office of such officer, as the case may be."

21. In Priya Blue Industries Ltd power of assessesing officer to alter the assessment under Section 149 of the Customs Act,1962 was not brought to the notice of the Court. However, several decisions cited by the petitioners have allowed modification of assessment under Section 149 of the Act.

22. In the light of the decisions cited by the learned counel for the petitioners, these writ petitions are to be partly allowed by directing the respondents to consider

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amendment to the subject of Bills of Entry.

23. The respondents shall give an opportunity to the petitioners to establish their case for re-classification of the imported wall fans on the strength of existing documents on the date of the import as per the proviso to Section 149 of the Customs Act, 1962.

24. If the classification proposed by the petitioners under sub-heading 8414 51 90 of the Customs Tariff Act, 1985 is applicable to imported wall fans, the respondents shall order refund of the excess duty.

25.Ultimate refund of duty if any, will be subject to the petitioners satisfying the test of unjust enrichment under Section 27 of the Act applying the well settled principle of law starting from the decision of the Hon'ble Supreme Court in Mafatlal Industries Case reported in 1995(89) ELT 247 and other decisions of the Courts which have further clarified the position.

26. With these observation, the above writ petitions are partly allowed with a direction to the 1st respondent or any other officer authorised under the Act:

i) to pass a speaking order in respect of assessment made in the 23 and 9 bills of entries of the respective petitioner under Section 17 read with proviso to Sections 149 and 154 of the Customs Act, 1962 within a period of six month from the date of this order after giving adequate opportunity to the petitioners to establish the classification of imported wall fan under sub-heading 8414 51 90 following the principle of natural justice.

ii) Refund any will be subject to the petitioner satisfying the test of unjust enrichment.

No Costs.

Sd/-
Assistant Registrar(CS IX)

//True Copy//

Sub Assistant Registrar

kkd/ia

To

1.The Assistant Commissioner
of Customs (Group 5A),
Customs House,
No.60, Rajaji Salai,
Chennai-600 001.

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2.The Assistant Commissioner
of Customs (DEPB),
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3.The Commissioner of
Customs (Seaports),
Customs House,
No.60, Rajaji Salai,
Chennai-600 001.

+2cc to Mr.A.P.Srinivas, Advocate, S.R.No.65122 and 65123
+2cc to Mr.B.Sathish Sundar, Advocate, S.R.No.64291.

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rrs 27/09/2018

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