

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 11.08.2018

CORAM:

THE HONOURABLE MR.JUSTICE S.MANIKUMAR
and
THE HONOURABLE MR.JUSTICE SUBRAMONIAM PRASAD

C.M.A.No.2208 of 2009

The Commissioner of Customs (Port-Imports),
Custom House,
No.60, Rajaji Salai,
Chennai 600 001.

Appellant

versus

1. M/s.Volvo India Pvt. Ltd.,
Yelakhehalli Village,
Tavarekare Post,
Hoskote Taluk,
Bangalore 562 122.
2. The Customs, Excise & Service Tax Appellate Tribunal,
South Zonal Bench, Shastri Bhavan Annexe,
1st Floor, No.26, Haddows Road,
Chennai 600 006.

Respondents

Prayer:

Civil Miscellaneous Appeal is filed under Section 130(1) of the Customs Act, 1962, against the Final Order No.43 of 2009, dated 07.01.2009, on the file of Customs, Excise and Service Tax Appellate Tribunal (CESTAT), South Zonal Bench, Chennai 600 006.

For Appellant : Mr.A.P.Srinivas

For 1st respondent : Mr.P.Sridharan
for M/s.Lakshmi Kumaran

JUDGMENT

(Judgement of this Court was made by S.MANIKUMAR, J.)

Civil Miscellaneous Appeal is directed against the Final Order No.43 of 2009, dated 07.01.2009, on the file of Customs, Excise and Service Tax Appellate Tribunal (CESTAT), South Zonal Bench, Chennai 600 006, declining to entertain the appeal, as time barred.

2. Short facts leading to the appeal are that M/s. Volvo India Pvt. Ltd., Bangalore (Volvo), 1st respondent herein, is an importer of automobile components, through Chennai Port. Assessment of these consignments was made, in terms of Section 18 of the Customs Act, pending completion of investigation by the Special Valuation Branch (SVB), into the nature of the transactions, between the supplier and the 1st respondent-Importer. According to the 1st respondent, they cleared a consignment of automobile components, under the Bill of Entry No.985545, dated 22.03.06. The supplier had put an extra zero by mistake in the figure, representing freight, in the related invoice, dated 10.03.06. Accordingly, the Bill of Entry was assessed, in accordance with the declaration, regarding the freight amount. The 1st respondent paid the duty assessed, without any protest. Thereafter, the 1st respondent pointed out the mistake to the supplier and that the supplier issued a certificate, dated 06.04.2006, clarifying the error and also issued a credit note, in favor of Volvo, for the excess freight charged, in the invoice. Presenting the same, the 1st respondent sought for permission of the authorities, to correct the error, in the Bill of Entry, in terms of Section 154 of the Act and refund of the excess duty paid of Rs.3,79,637/-. The lower authority denied permission.

3. Against which, the 1st respondent has filed an appeal before the Commissioner (Appeals) and vide Order-in-Appeal, dated 06.09.2006, the appellate authority held that the 1st respondent could claim refund of the excess duty paid, erroneously, only at the time of finalization of the provisional assessment, and therefore, the claim for refund was premature. Order made by the Commissioner (Appeals) is as follows:

"6. This is a case of excess duty collection that has arisen out of what is apparently a typographical error on the part of the suppliers, who have inadvertently charged SEK 199450 (Rs. 11,36,865/-) whereas the actual freight incurred was only SEK 19945/- (Rs. 1,13,686.50). This averment appears to be correct as the goods have been sent in two containers from Singapore, and the approx. freight for each container from Singapore works out to Rs.56,843/-, which is in keeping with the trend of container freight from Singapore. Thus the wrong freight figure has been included in the CIF, as seen from the break up figures available on the invoice itself. It is seen that the supplier has admitted to having committed this mistake and they have given a Credit Note for the difference involved. The Appraiser who was present in the personal hearing was shown the split values appearing in the invoice and has admitted that there could have been a mistake in the assessment, which was

due to the wrong figures given by the appellant. Thus an excess amount of duty has been collected on account of the wrong freight amount being included in the CIF value.

7. It is however seen from the copy of the bill of entry that the said assessment was a provisional one, i.e. made provisional pending finalization of the Special Valuation Branch investigation on the value of goods supplied by the supplier to the appellants, who are related parties in terms of Section 14 of the Customs Act, 62 and the Valuation Rules. Assessment means determination of the tax liability as set out by the legislature, in the Act provided for the same. The Executive cannot levy tax; it can only collect tax as provided for by the Act. The assessment process includes determining the import permissibility in terms of the EXIM Policy and any other laws regulating imports/exports, determining the classification and duties leviable on the goods in import - (Basic, Additional, Anti dumping, Safeguards, etc., permissibility of various benefits of duty free clearances under different schemes or applicability of any exemption notification benefits - where claimed is also checked and decided), and checking the quantity and value of the goods (where the duties are assessable" on value basis), to determine the duty liability, which is required to be paid by the importer. Assessment is hence the "procedure whereby the duty leviable on the imported goods can be ascertained. In this connection, it is pertinent to draw attention to the case of COLLECTOR OF CENTRAL EXCISE, MADRAS Vs INDIA TYRE & RUBBER CO. LTD. 1997 (94) E.L.T. 495 (Mad.)- where it was held that once an assessment is provisional, it is provisional for all purposes and not necessarily provisional in respect of the particular ground considered. The relevant portions of the order are as follows:

4. We find that the issue that has been referred to for our consideration is no longer res integra and the matter is covered by more than one decision of the Apex Court and the larger bench of the Tribunal constituted under the Act. In the light of the judgment of the Apex Court reported in Samrat International (P) Ltd. v. Collector of Central Excise - 1992 (58) E.L.T. 561 and the subsequent decision 1991 (55) E.L.T. 592 which came to be rendered by the Larger Bench of the Tribunal under the Act after considering not only the decision of the Apex Court noticed supra, but also several other judgments, We have to answer the question referred to us in the

negative and hold that the provisional assessment made should for all purposes to be treated as provisional and not necessarily provisional in respect of the particular ground considered. No costs."

8. This view has been upheld in the case of COLLECTOR OF CENTRAL EXCISE, MADRAS Versus INDIAN OIL CORPORATION LTD 2002 (141) E.L.T. 334 (Mad.); GODREJ CONSUMER PRODUCTS Versus COMMISSIONER OF C. EX., INDORE 2005 (191) E.L.T. 359 (Tri. - Mumbai); DENSO HARYANA PVT. LTD. Versus COMMISSIONER OF CUSTOMS, NEW DELHI 2004 (176) E.L.T. 548 (Tri. - Del.). In the case of GLENCORE INDIA LTD. Versus COMMISSIONER OF CUSTOMS, KHAVA SHEVA 2004 (170) E.L.T. 309 (Tri. - Mumbai) it was held;

'Once an assessment is provisional it is provisional for all purposes not necessarily provisional in respect of the particular ground considered at the time of provisional assessment'

9. Therefore the issue is still live and the provisional assessment has not yet been finalized. Hence there can be no question of re-assessing the bill of entry provisionally again and then finalizing it again once the valuation issue has been decided. Therefore although the contentions of the appellant may well be correct, the appeal for refund of the same and for re assessing the bill of entry taking the lower freight figure is premature. The appellants may therefore await the determination of value by the SVB, and thereafter, they may bring the above issue to the notice of the department for reduction in the excess duty-paid and file a refund claim if found eligible for the same.

10. In view of the above discussion, I dismiss the appeal as pre mature. The case is disposed off as above."

4. Being aggrieved by the dismissal of the appeal, as premature, the 1st respondent has filed an appeal to the CESTAT, Chennai. Placing reliance on a decision in CC, New Delhi v. Hero Honda Motors Ltd., [2008 (227) ELT 482 (Tri-Del.)], before the Tribunal, learned counsel for the 1st respondent has submitted that errors and accidental slips, committed by the importer, could be corrected under the provisions of Section 154 of the Customs Act, 1962. After hearing both sides, the CESTAT, Chennai, vide order, dated 07.01.2009, allowed the appeal of the 1st respondent, as hereunder:

"4. On a careful consideration of the facts of the case and the submissions by both sides, I find that the lower appellate authority had denied the claim for refund of the excess duty paid erroneously

on the sole ground that the assessment of the subject consignment was provisional. There is consensus between parties as regards the excess payment of the amount claimed. The Commissioner (Appeals) held that refund of the excess duty paid by mistake could not be allowed before finalizing the provisional assessment. I find that in the case of Brakes India Ltd., v. CC, Chennai [2008 (221) ELT 300 (Tri.- Chen.)] case, the Tribunal held that the 'right of an importer to seek amendments in the Bills of Entry under Section 149 of the Act was not altered by the judgments of the apex Court in the case of CCE, Kanpur v. Flock (India) Pvt. Ltd., - 2000 (120) ELT 285 (S.C.), (supra) and Priya Blue Industries Ltd., v. CC (Preventive) - 2004 (172) ELT 145 (S.C.). In that case facts were that the appellants had sought amendment of several Bills of Entry enabling them to pay the CVD in cash. The liability to CVD had been met by adjustment of credit in the DEPB book at the time of clearance of the goods involved. Rejecting the argument of the revenue that the assessment of the Bills of Entry involved had become final and that the same could be modified only by recourse to appeal proceedings or review under Section 28 of the Act as held by the Apex Court in the case of CCE, Kanpur v. Flock (India) Pvt. Ltd., - 2000 (120) ELT 285 (S.C.), the Tribunal held that the right of an importer to seek amendments in the Bills of Entry under Section 149 of the Act was not lost or whittled down by the judgments of the apex Court in the case of CCE, Kanpur v. Flock (India) Pvt. Ltd., - 2000 (120) ELT 285 (S.C.), (supra) and Priya Blue Industries Ltd., v. CC (Preventive) - 2004 (172) ELT 145 (S.C.) and directed the authorities to permit the amendment of the Bills of Entry sought. I find that the appellants have rightly relied on the decision of the Tribunal in the case of CC, Mangalore v. Elf Gas India (P) Ltd., - 2006 (77) RLT 388, in support of the plea that no legal provision barred the appellants from seeking remedy by filing an appeal against a provisional assessment. I find that in a case of conspicuous short payment or excess payment of duty by mistake outside the dispute leading to provisional assessment, it will be legal and proper for the department to recover the short paid duty or the assessee seeking refund of the excess duty during provisional assessment. In either case the parties cannot be held to suffer prejudice. The assessee has to pay interest for short levy for the delay in making good the same with reference to the date of clearance of the goods. Revenue cannot claim any right to retain

the excess amount paid by error.4.1 Section 154 of the Act reads as follows:

"SECTION 154. Correction of clerical errors, etc. Clerical or 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, be 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."

In the CC, New Delhi v. Hero Honda Motors Ltd., (supra), the Tribunal had held that the errors in a decision of the authorities occasioned by the mistake of an assessee could be corrected under Section 154 of the Act. I find that the Section provides for correcting errors of the nature involved in the instant case 'at any time'. No provision in the Act prohibits rectification of the errors in the provisional assessment under Section 154 and allowing the importer consequential relief. Grant of refund arising out of such rectification shall be subject to the provisions of Section 27 (2) of the Act prescribing test of unjust enrichment. The assessing authority shall allow the appellants to correct the error in the Bill of Entry under Section 154 of the Act and the consequential refund. The appeal is allowed. "

5. Being aggrieved by the Final Order of the Customs, Excise and Service Tax Appellate Tribunal (CESTAT), South Zonal Bench, Chennai, the instant Civil Miscellaneous Appeal is filed by the Commissioner of Customs (Port-Imports), on the following substantial questions of law,

"(1) Whether the clerical errors committed by the importer on the documents presented for clearance of import can be corrected under Section 154 of Customs Act, 1962, by way of a reassessment?

(2) Whether the provisionally assessed Bill of Entry can be reassessed more than once by the competent authority for correcting a clerical error committed by the importer?

Heard the learned counsel appearing for the parties and perused the materials available on record.

6. Section 154 of the Customs Act, 1962 deals with the situation where there is a clerical or arithmetical mistakes, in any decision or errors arising therein, from any accidental slip or omission, at the time of assessing the Bill of Entry and same can be corrected by the proper officer. The said Section is

already extracted.

7. In *Union of India v. Aluminium Industries Ltd.*, reported in 1996 (83) ELT 41 (Ker.), Kerala High Court, while dealing with the issues therein, held that,

"Four types of errors are mentioned in the section for invoking power under it : (1) clerical mistakes (2) arithmetical mistakes (3) errors arising from accidental slips and (4) errors arising from accidental omissions. If any one of the above types of errors has crept in, then the corrective power mentioned in the section can justifiably be used. In this case, the error happened due to the omission to know of the new rates of import duty which has resulted in the assessment made at the first instance. When the error was brought to the notice of the authorities they corrected it and imposed a duty of Rs.11,99,211/- in accordance with the rate applicable to the goods. The principle underlying in Section 154 of the Act is that records relating to customs duty are maintained properly and correctly and that such records should represent the correct state of affairs. Almost a similar power can be found conferred on the Civil Court by Section 152 of the Code of Civil Procedure. All the four categories of errors enumerated by us above are mentioned in Section 152 CPC also."

8. In *Commissioner of Income Tax, Rajkot v. Saurashtra Kutch Stock Exchange Ltd.*, reported in 2008 (230) ELT 385 (S.C.), Honble Apex Court held that an error apparent would mean that an error which strikes, on mere looking and does not need the long drawn out process of reasoning.

9. In *Hero Cycles vs. Union of India* reported in 2009 (240) ELT 490 (Bom), the Bombay High Court, held that the mere fact that there was an inadvertent error, on the part of the importer, in not claiming benefit of exemption notification, cannot result in denial of the said benefit. Bombay High Court held that a duty is cast on the authorities, to assess the goods and impose duty, in accordance with law. Bombay High Court also held that, duty cannot be demanded, if it is otherwise not payable. Said Court has held that once there is a power to assess, there is a corresponding duty, to assess, in accordance with law. Against this order, the Revenue preferred an appeal before the Hon'ble Apex court, and that the same was rejected in *Union of India v. Hero Cycles* reported in 2010 (252) ELT A103 (SC).

10. In the case on hand, from the material on records, we could see that apparently, there was a error, on the part of the supplier, who has inadvertently charged SEK 199450 (Rs.11,36,865/-), whereas, the actual freight incurred was only SEK 19945 (Rs.1,13,686.50). Even the supplier has admitted the mistake and they have given a credit note, for the difference involved. Appraiser, who was present in the personal hearing, before the Original Authority, has shown that the split values appearing in the invoice, and admitted that there could have been a mistake in the assessment, due to the wrong figures given by the 1st respondent, and placing on record the above, the Commissioner (Appeals) has observed that excess amount of duty, has been collected, on account of wrong freight amount, being included in CIF value. But the Commissioner (Appeals), has rejected the appeal, by observing that it is premature. CESTAT, Chennai, while allowing further appeal, filed by the 1st respondent, held that the assessing authority, shall allow the 1st respondent to correct the error in the Bill of Entry, under Section 154 of the Act and seek for consequential refund.

11. Section 154 of the Customs Act, 1962, provides that "such clerical error/accidental slip or omission, can be corrected at any time". Therefore, the question of filing any appeal against the assessment order, would not arise. The assessing authority can amend an order of assessment, insofar as clerical slips/errors is concerned. On making of such correction under Section 154 of the Act, the consequential return of amount of duty of customs, would be available to an importer.

12. Admittedly, even according to the Commissioner (Appeals), excess duty collection, has arisen due to typographical error, on the part of the supplier and that therefore, Section 154 of the Act, is applicable. Section 154 of the Customs Act, 1962, postulates the intention of the legislature, and any correction could be made "at any time" and therefore, there is no need for preferring any separate appeal to the effect, corrections in the decision or the claim for refund. Section 27 of the Act does not provide for denial of refund on any such hypothetical conclusions. Tribunal has held that grant of refund arising out of such rectification, shall be subject to the provisions of Section 27(2) of the Act, which prescribes the test of unjust enrichment.

13. Upon considering the above provisions in the Customs Act, 1962 and the submissions of the learned counsel for the parties, we do not find that there is any manifest illegality or irregularity in the order impugned in the instant Civil Miscellaneous Appeal. Substantial questions of law are answered against the revenue.

14. In view of the above, the Civil Miscellaneous Appeal is dismissed. No costs.

Sd/-
Assistant Registrar(CS V)

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Sub Assistant Registrar

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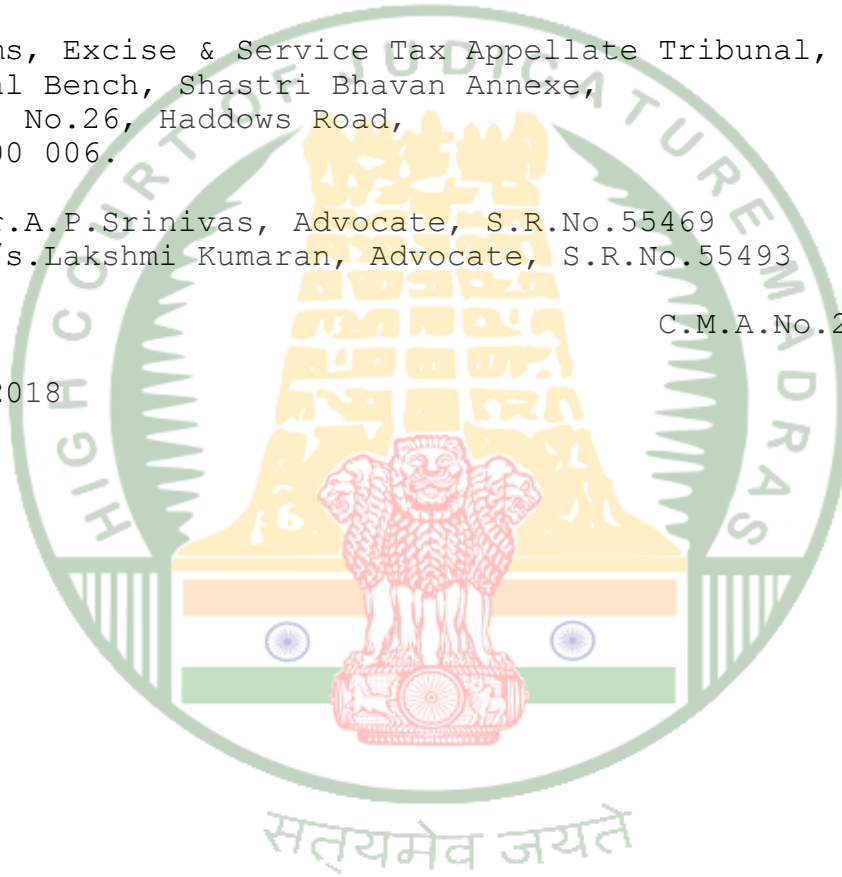
To

The Customs, Excise & Service Tax Appellate Tribunal,
South Zonal Bench, Shastri Bhavan Annexe,
1st Floor, No.26, Haddows Road,
Chennai 600 006.

+1cc to Mr.A.P.Srinivas, Advocate, S.R.No.55469
+1cc to M/s.Lakshmi Kumaran, Advocate, S.R.No.55493

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