



* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **C.U.S. A.C. No.11/2008**

September 16, 2009

AMAN MEDICAL PRODUCTS LTD. ...Appellant

Through: Ms. Pankhuri Shrivastava, Advocate

VERSUS

COMMISSIONER OF CUSTOMS, DELHIRespondent

Through: Mr. Mukesh Anand, Advocate with Mr.
R.C.S. Bhadoria and Mr. Sailesh Tiwari,
Advocate.

CORAM:

HON'BLE MR. JUSTICE A. K. SIKRI

HON'BLE MR. JUSTICE VALMIKI J. MEHTA

1. Whether the Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not? Yes
3. Whether the judgment should be reported in the Digest? Yes

%

VALMIKI J. MEHTA, J

1. The only issue which arises for consideration in this present appeal is whether an assessee who is entitled for concessional rate of duty pays the higher duty by inadvertence is not entitled to grant of refund of the excess duty paid



unless he had filed an appeal against the ‘order’ by which he had deposited t
duty on filing of the bill of entry. In other words, the assessee contends that in
the present case no ‘order’ has been passed because the assessee simply filed
the bill of entry and paid the customs duty in mistake without taking the benefit
of the notification No. 6/2002 dated 1.3.2002 due to ignorance. The Customs
Excise and Service Tax Appellate Tribunal (CESTAT) has passed an order
holding that ‘in pursuance to an order of assessment’ necessarily implies that a
payment of duty must be pursuant to an assessment order before a refund in
appeal can be asked for under Section 27 of the Customs Act, 1962 (hereinafter
referred to as ‘the Act’)

2. We have therefore admitted the appeal and framed the following
questions of law:

“ Whether non-filing of appeal against the assessed Bill of Entry in
which there was no lis between the importer and the revenue at the time of
payment of duty will deprive the importer of his right to file refund claim under
section 27 of the Customs Act, 1962?”

3. Before we proceed to decide the issue, it would be necessary to reproduce
the relevant part of the relevant provision, namely, Section 27 of the Customs
Act, 1962 which is as under:

“27. Claim for refund of duty.- (1) Any person claiming
refund of any duty-
(i) paid by him in pursuance of an order of assessment; **or**
(ii) borne by him,
may make an application for refund of such [duty and interest,



if any, paid on such duty] to the [Assistant Commissioner of Customs or Deputy Commissioner of Customs]-

(a) in the case of any import made by any individual for his personal use or by Government or by any educational, research or charitable institution or hospital, before the expiry of one year;

(b) in any other case, before the expiry of six months, from the date of payment of [duty and interest, if any, paid on such duty] [in such form and manner] as may be specified in the regulations made in this behalf and the application shall be accompanied by such documentary or other evidence (including the documents referred to in section 28C) as the applicant may furnish to establish that the amount of [duty and interest, if any, paid on such duty] in relation to which such refund is claimed was collected from, or paid by, him and the incidence of such [duty and interest, if any, paid on such duty] had not been passed on by him to any other person:

Provided that where an application for refund has been made before the commencement of the Central Excise and Customs Laws (Amendment) Act, 1991, such application shall be deemed with in accordance with the provisions of sub-section (2)”

4. If therefore we refer to language of Section 27, it is more than clear that the duty which is paid is not necessarily pursuant to an order of assessment but can also be ‘borne by him’. Clause (i) and (ii) of sub-section (1) of Section 27 are clearly in the alternative as the expression ‘or’ is found in between clauses (i) and (ii). The object of Section 27(i)(ii) is to cover those classes of case where the duty is paid by a person without an order of assessment, i.e. in a case like the present where the assessee pays the duty in ignorance of a notification which allows him payment of concessional rate of duty merely after filing a Bill of Entry. In fact, such a case is the present case in which there is no assessment order for being challenged in the appeal which is passed under Section 27(1)(i)



of the Act because there is no contest or lis and hence no adversarial assessment order.

5. The Tribunal has referred to the cases of *CCE, Kanpur Vs. Flock (India) Pvt. Ltd. [2000(120) ELT 285]* and *Priya Blue Industries Ltd. Vs. Commissioner of Customs (Preventive) 2004 (172) ELT 145 (SC)*. In both these cases, referred to by the Tribunal there was an assessment order which was passed and consequently it was held that where an adjudicating authority passed an order which is appealable and the party did not choose to exercise the statutory right of 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 adjudicating authority had committed an error in passing his order. These judgments will therefore not apply when there is no assessment order on dispute/contest, like as is in the facts of the present case.

6. We, therefore, answer the question framed by holding that the refund claim of the appellant was maintainable under Section 27 of the Customs Act and the non-filing of the appeal against the assessed bill of entry does not deprive the appellant to file its claim for refund under Section 27 of the Customs Act, 1962 and which claim will fall under clause (ii) of sub section (1) of Section 27.

7. We accordingly set aside the impugned order dated 3.4.2008 of the CESTAT and uphold the order of the Commissioner of Customs Appeal dated 28.1.2005 and remand of the matter to the original authority viz Deputy



Commissioner of Customs (Refund) to examine the merits of the matter
accordance with law after providing due opportunity to the appellant.

VALMIKI J.MEHTA, J

A.K. SIKRI, J

September 16 , 2009
Ne