IN THE HIGH COURT OF BOMBAY AT GOA

CUSTOM APPEAL NO. 2 OF 2010

Sesa Goa Ltd,
Met Coke Division
Sesa Ghor, 20, EDC Complex,
Patto, Panjim,
Goa-403001 .. Appellant.

Versus

Commissioner of Customs,
Panaji Minor Port,
ICE House, EDC Complex,
Patto Plaza, Panaji,
Goa 403001 .. Respondent.

Mr. R. G. Ramani, Advocate for the appellant.

Mr. C. A. Fereira, Advocate for the respondent.

CORAM :- F. M. REIS, &
K. L. WADANE, JJ

DATE : 3rd March, 2015

ORAL JUDGMENT : (Per F. M. REIS, J.)

Heard Shri R. G. Ramani, learned Counsel for the appellant and Shri. C. A. Ferreira, learned Counsel for the respondent.

2. It was pointed out by the learned Counsel for the parties that when the matter was admitted, there was no substantial question of law framed. Hence, by consent of the

learned Counsel for the parties, following substantial question of law is framed :

> "Where and admittedly there is a nil assessment order, the assessee is entitled to claim refund without making a challenge to such assessment order ?"

3. Shri Ramani, learned Counsel appearing for the appellant in support of the above appeal has pointed out that though provisional assessment order was passed in respect of two bills of entry dated 17/01/2007 and one bill of entry on 02/03/2007, nil assessment order were passed by the Proper Officer. Learned Counsel for appellant further points out that in respect of the first bill of entry dated 17/01/2007, the appellant has paid a sum of ₹ 3,01,053/-. Learned Counsel further submits that with regard to the second bill of entry dated 17/01/2007, the appellant has paid a sum of ₹ 2,24,369/-. Learned Counsel further points out that with regard to other bill of entry dated 02/03/2007, the appellant has paid a sum of ₹ 4,75,191/-. Learned Counsel further points out that all these amounts were paid by the appellant under protest. Learned Counsel further points out that by an order dated 14/12/2007 passed by the

Assistant Commissioner of Customs & Central Excise Anti Smuggling Unit, the amounts paid by the appellant under protest were ordered to be refunded to the appellant. Learned Counsel further points out that the respondent thereafter preferred an appeal against the said order before the Commissioner of Customs and Central Excise (Appeals) (Commissioner (Appeals), for short) which came to be allowed on the ground that the appellant had not challenged the earlier assessment order and as such, the question of seeking any refund would not arise. Learned Counsel further points out that the appellant thereafter, preferred an appeal before the Customs, Excise & Service Tax Appellate Tribunal (CESTAT, for short) to challenge the order of the Commissioner (Appeals) which appeal came to be rejected. Learned Counsel further points out that as such, the appellant has preferred the above Appeal to quash and set aside the orders passed by the Commissioner (Appeals) as well as CESTATE as according to him, the said orders are incongruous. Learned Counsel further points out that the Commissioner (Appeals) has relied upon the judgment of the Apex Court reported in *2005 (10) SCC 433* in the case of *Priya Blue Industries Ltd. Vs. Commissioner of Customs (Preventive)* which is not applicable to the facts of the present case. Learned Counsel further points out that the authorities have misdirected themselves to hold that the

appellant ought to have challenged the order of assessment, though according to him, such question would not arise and admittedly, the assessment was a nil assessment. Learned Counsel further points out that as the appellant was not aggrieved by the nil assessment orders passed by the Proper Officer, the question of challenging the said order would not arise. Learned Counsel also points out that the CESTAT Authorities have also taken note of the fact that in case the appellant desires to seek reasons for such assessment order, it was incumbent upon the appellant to pray for reasons for such orders. Learned Counsel further submits that the substantial question of law framed by this Court be answered in favour of the appellant.

4. Shri C. A. Fereira, learned Counsel appearing for the respondent has supported the impugned order.

5. Learned Counsel has pointed out that as the appellant has not challenged the assessment order, the question of seeking any refund would not arise. Learned Counsel further points out that the contention of Shri Ramani, learned Counsel for the appellant that there were no reasons given in the assessment order, which would force the appellant to file the appeal, cannot be accepted as according to him, in case the appellant desires to

know the reasons reasons for such assessment orders, it was incumbent upon him to pray for such reasons in terms of provisions of Section 17(5) of the Customs Act, 1962 (the Act, for short). Learned Counsel, as such, submits that the appeal be rejected.

6. We have duly considered the submissions of the learned Counsel and we have also gone through the record.

7. The contention of Shri Ferreira, learned Counsel appearing for the respondent that the appellant should have prayed for reasons from the Proper Officer with regard to the assessment orders cannot be accepted. As per the law in force at the time when the assessment order in the present case was passed, Section 17(5) of the Act reads thus :

> *"17(5). Where any re-assessment done under sub-section (4) is contrary to the self-assessment done by the importer or exporter regarding valuation of goods, classification, exemption or concessions of duty availed consequent to any notification issued therefor under this Act and in cases other than those where the importer or exporter, as the case may be, confirms his acceptance of the said re-assessment in writing, the proper officer shall pass a speaking order*

on the re-assessment, within fifteen days from the date of re-assessment of the bill of entry or the shipping bill, as the case may be."

8. A plain reading of the said provision shows that it was incumbent upon the authority to pass a speaking order giving reasons and as such, the question of seeking reason as claimed by the respondent would not arise. Hence, the contention of Shri Ferreira, learned Counsel for the respondent cannot be accepted.

9. With regard to the contention of Shri Ramani, learned Counsel for the appellant, we find that as the provisional assessment as well as the final assessment in respect of all the bills of entry were nil assessment, the question of raising a challenge to the said orders before the Appellate Authority would not arise at all. The appellant cannot be said to be aggrieved by the said orders and consequently, the question of filing any appeal would not arise. The judgment of the Apex Court relied upon by the authorities which levied duties, would not be applicable to the present case. In the cases before the Apex Court, there was an assessment order levying duty which was not challenged. This is not the situation in the present case. In the present case, the assessment order was a nil assessment and no duties were levied and as such, the appellant cannot be said to be

aggrieved by such order. In such circumstances, we find that the reliance by the Commissioner (Appeals) and CESTATE on the judgment of the Apex Court in the case of ***Priya Blue Industries Ltd.*** (supra) is not justified in the present case.

10. Shri Ramani, learned Counsel in support of his contentions also brought to our notice a judgment of the Delhi High Court reported in ***2010 (250) ELT 30 (Del.)*** in the case of ***Aman Medical Products Ltd. Vs. Commissioner of Customs.*** Upon perusal of the said judgment, we find that taking note of the said judgment in the case of ***Priya Blue Industries Ltd.*** (supra), the Delhi High Court has taken a view that once the party is not aggrieved by the assessment order, the question of preferring an appeal challenging the said order would not arise. We are in respectful agreement with the observations in paragraph 5 of the judgment which is as under :

> *"5. The Tribunal has referred to the cases of CCE, Kanpur V. Flock (India) Pvt. Ltd. MANU/SC/0484/2000 : 2000 (120) ELT 285 and Priya Blue Industries Ltd. V. Commissioner of Customs (Preventive) MANU/SC/0767/2004 : 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."

11. Considering the said observations and taking note of the facts of the present case, admittedly, the appellant cannot be said to be aggrieved with the correctness of the order of nil assessment. The order sanctioning refund passed by the Assistant Commissioner dated 14/12/2007 is accordingly justified. Consequently, the orders passed by the Commissioner (Appeals) dated 26/05/2008 and the order passed by the CESTAT dated 17/06/2009 cannot be sustained and deserve to be quashed and set aside. The substantial question of law is answered accordingly.

12. In view of the above, we pass the following

ORDER

(i) The appeal is allowed.

(ii) The impugned orders dated 26/05/2008 passed by the Commissioner (Appeals) and dated 17/06/2009 passed by the CESTAT are quashed and set aside.

(iii) The appeal stands disposed of accordingly with no order as to costs.

K. L. WADANE, J. F. M. REIS, J.

SMA