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Refund Claims Under Customs Law: An 'Un'appealing Conundrum?

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“As obvious it might be, some are still oblivious”

The recent Supreme Court judgment on the filing of refund claims under Customs law is a prime example of the obvious becoming oblivious under the garb of legal interpretation. In the case of **ITC Ltd. v Commissioner of Central Excise, Kolkata, 2019-VIL-32-SC-CU**, (‘ITC Case’) the Apex Court has upheld the supremacy of order of self-assessment (Bill of Entry) under the Customs law. As per the Court, a refund claim contrary to the assessment order is not maintainable unless the assessment order is reviewed or modified in appeal.

This article attempts to critically analyse the above precedent laid down by the Supreme Court.

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Relevant legal provisions

Section 17 of the Customs Act, 1962 (‘Customs Act’) deals with the assessment of duty and Section 27 deals with a claim of refund of duty. Both these provisions had undergone significant amendments in 2011.

The scheme of assessment (pre-amendment) was that Section 17 mandated the proper officer to pass an order of assessment on filing of the bill of entry post due examination and testing of the imported goods. Accordingly, it was incumbent on a proper officer to pass an order of assessment under Section 17. Further, as per unamended Section 27, any person who paid duty in pursuance of an order of assessment and a person who had borne the duty, could claim refund.
Post April 8, 2011, Section 17 allows bill of entry to be self-assessed by an importer subject to verification by the proper officer. Further, the proper officer has discretion to reassess duty and pass a speaking order within fifteen days from the date of reassessment. Notable that the existence of assessment order for claiming duty refund is no more a pre-condition under Section 27

The judgment: A bird’s eye view

In ITC case, the Apex Court was dealing with the refund proceedings that were not an assessment / reassessment but mere proceedings for a refund of duty. The Court has relied on the decisions of the Supreme Court in the cases of ***Priya Blue Industries Ltd. v. Commissioner of Customs (Preventive) 2004 (172) ELT 145 (SC) (‘Priya Blue Case’) and Collector of Central Excise v. Flock (India) (P.) Ltd. 2000 (120) ELT 285 (SC)*** (‘Flock India Case’) wherein it was held that a refund claim contrary to the assessment order, was not maintainable unless the assessment order was reviewed or modified in appeal.

The Court’s conclusion was on the premise that Section 128 of the Customs Act allows appeal to be filed against ‘any’ order which includes a self-assessment order as well. The Court considered a bill of entry as a type of ‘order.’ The Court held that in case an adjudicating authority passes an appealable order and the taxpayer does not challenge its correctness by filing an appeal; the taxpayer cannot question the correctness of the same order subsequently by filing a refund claim. The Court concluded that if such refund claim is entertained, the Scheme of the Act will become otiose.

An analysis

Sometimes the obvious is that it is never seen until someone expresses it simply! In this context, the authors beg to differ with the view adopted by the Apex Court.

Section 17 and Section 27 of the Customs Act and the amendments made in 2011, need to be read together to understand the legislative intent. A bare perusal of the Customs Act shows that a proper officer passes an order only in the case of reassessment done under Section 17(4) of the Customs Act. Thus, the verification of self-assessment is now optional. If no order of assessment is passed in a self-assessment case, even then a refund application can lie.

It is pertinent to note that Section 27 of the Customs Act is a complete code in itself as far as refund of duty is concerned. This provision will always prevail over general provisions as far as refund claims are concerned. An application for refund of duty and the requirement of order of assessment was a prerequisite before 2011, was expressly done away with in 2011. It is settled legal principle that whenever legislature amends a statute, it is done with a purpose.

As per the amended provisions, it is not necessary for the proper officer to pass an order of reassessment

or speaking order. Thus, in a self-assessment case, a refund of duty paid in excess can always be claimed without filing an appeal. In such an event, the concerned officer needs to look into the matter if the claim for refund was justified or not. The tax provisions cannot be interpreted so liberally to deny the refund claim which is not adjudicated when the bill of entry is self-assessed. Assessment of an order is no longer a pre-requisite for maintainability of a refund claim, nor Section 27 contains any express condition that refund can be filed only after the Bill of Entry is subject to an appeal. In the absence of a statutory requirement, imposition of an extraneous restriction on refund is bad in law.

Notable that the decision in Priya Blue Case and Flock India Case is based upon the unamended provisions of the Customs Act and has no application as on date. Thus, the same cannot be relied upon to interpret the amended provisions.

If this judgment of the Apex Court is taken into consideration, the converse will also be true. It would imply that where an importer does not deposit full customs duty, the revenue can issue a show-cause notice to the taxpayer under Section 28 of the Customs Act for short payment of duty only if the revenue has challenged the bill of entry. This would mean the disposal of all show-cause notices issued by the revenue till date in favour of the taxpayers since the revenue would not have challenged the relevant bills of entry. This would never have been the intent of the legislature.

To sum up, the judgment will have far-reaching implications on businesses and definitely needs a re-look. As of now, in the context of ITC judgment, one can clearly understand the irony in the statement of Sir Arthur Conan Doyle that there is nothing more deceptive than an obvious fact!