M/S. Priya Blue Industries Ltd vs Commissioner Of Customs (Preventive) on 17 September, 2004

Equivalent citations: AIR 2004 SUPREME COURT 5115, 2005 (10) SCC 433, 2004 AIR SCW 5867, 2004 (9) SRJ 166, 2004 (8) SCALE 13, (2004) 8 JT 262 (SC), 2004 (5) SLT 849, (2004) 6 SUPREME 635, (2004) 8 SCALE 13, (2004) 172 ELT 145, (2004) 23 INDLD 74, AIRONLINE 2004 SC 758

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Bench: S.N. Variava, H. K. Sema

CASE NO.:
Review Petition (civil) 96 of 2004

PETITIONER:
M/s. Priya Blue Industries Ltd.

RESPONDENT:
Commissioner of Customs (Preventive)

DATE OF JUDGMENT: 17/09/2004

BENCH:
S.N. VARIAVA & H. K. SEMA

JUDGMENT:

J U D G M E N T In Civil Appeal No. 9045 of 2003 S. N. VARIAVA, J.

By this Review Petition, an Order dated 14th November, 2003 is sought to be reviewed.

The facts necessary for the purposes of this Order are as follows:

> The Petitioners had imported a ship for breaking purposes. They filed a Bill of Entry. The amount of duty payable was assessed. The Petitioners paid the duty under protest. They then filed a Claim for refund of Rs. 79,64,648/- on the ground that duty had been wrongly levied. Their refund was rejected on 30th August, 2000. The Appeal filed by them was rejected on 31st October, 2001. The further Appeal filed before the Customs, Excise and Gold (Control) Appellate Tribunal (CEGAT) was dismissed by the Tribunal on 28th May, 2002. The Tribunal followed the Judgment of this Court in the case of Collector of Central Excise vs. Flock (India) Pvt. Ltd. reported in (2000) 6 SCC

> 650. The Tribunal held that as no Appeal had been filed against the Assessment Order the refund claim was not maintainable. The Civil Appeal filed before this Court was dismissed by our Order dated 14th November, 2003.

As it has been contended that the provisions of the Customs Act, 1962 are not in para-materia with the provisions of the Excise Act and that the Judgment of this Court in Flock (India)'s case (supra) would not be applicable, notice was issued. We have heard parties at great length.

Under Section 27 of the Customs Act, 1962 a claim for refund can be made by any person who had (a) paid duty in pursuance of an Order of Assessment or (b) a person who had borne the duty. It has been strenuously submitted that the words "in pursuance of an Order of Assessment" necessarily imply that a claim for refund can be made without challenging the Assessment in an Appeal. It is submitted that if the assessment is not correct, a party could file a claim for refund and the correctness of the Assessment Order can be examined whilst considering the claim for refund. It was submitted that the wording of Section 27, particularly, the provisions regarding filing of a claim for refund within the period of 1 year or 6 months also showed that a claim for refund could be made even though no Appeal had been filed against the Assessment Order. It was submitted that if a claim for refund could only be made after an Appeal was filed by the party, then the provisions regarding filing of a claim within 1 year or 6 months would become redundant as the Appeal proceedings would never be over within that period. It was submitted that in the claim for refund the party could take up the contention that the Order of Assessment was not correct and could claim refund on that basis even without filing an Appeal.

We are unable to accept this submission. Just such a contention has been negatived by this Court in Flock (India)'s case (supra). Once an Order of Assessment is passed the duty would be payable as per that order. Unless that order of assessment has been reviewed under Section 28 and/or modified in an Appeal that Order stands. So long as the Order of Assessment stands the duty would be payable as per that Order of Assessment. A refund claim is not an Appeal proceeding. The Officer considering a refund claim cannot sit in Appeal over an assessment made by a competent Officer. The Officer considering the refund claim cannot also review an assessment order.

We also see no substance in the contention that provisions for a period of limitation indicates that a refund claim could be filed without filing an Appeal. Even under Rule 11 under the Excise Act the claim for refund had to be filed within a period of six months. It was still held, in Flock (India)'s case (supra), that in the absence of an Appeal having been filed no refund claim could be made. The words "in pursuance of an Order of assessment" only indicate the party/person who can make a claim for refund. In other words, they enable a person who has paid duty in pursuance of an Order of assessment to claim refund. These words do not lead to the conclusion that without the Order of assessment having been modified in Appeal or reviewed a claim for refund can be maintained. In our view, the ratio in Flock (India)'s case (supra) fully applies. We, therefore, see no substance in the Review Petition. Accordingly, the Review Petition stands dismissed with no order as to costs.