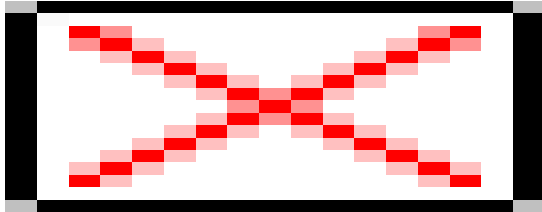


Filing of an appeal against Bill of Entry is 'mandatory'

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THE decision of the Supreme Court in the case of *ITC Ltd. v. CCE, Kolkata -IV* Civil Appeal Nos. with 293-294 of 2009 and Ors., decided on 18.09.2019 - [2019-TIOL-418-SC-CUS-LB](#)

, has finally put an end to a long-drawn battle between the Department and the Assessee principally on the issue

"whether in the absence of any challenge to the order of the assessment in appeal, any refund application against the assessed duty is maintainable".

Before we delve into the findings of the Supreme Court, the impact of the ITC decision and what could be the future course of action for assessee, it is important to consider the background of the dispute.

Background

Relevant legal provisions

It is important to note that the *ITC* decision affects the jurisprudence for the refund cases under the Customs Act, 1962 ("**Customs Act**") both pre and post 08.04.2011. That is, before and after the introduction of the self-assessment regime under the Customs Act. Before the self-assessment regime, the assessment of the Bill of Entry and Shipping Bills was undertaken by designated customs officers in each case. However, upon the introduction of the self-assessment regime, significant amendments were made to the procedure of assessment. Under self-assessment, the customs officer need not undertake an assessment of document in each case of import or export.

To understand the full impact of the ITC decision, it thus becomes important to consider the relevant provisions of the Customs Act and their interpretation pre and post the introduction of the self-assessment regime. To incorporate the concept of self-assessment under the Customs Act, significant amendments were made vide the Finance Act, 2011 to Sections 2, 17 and 27 of the Customs Act on 08.04.2011.

Section 2 (2) of the Customs Act, prior to the amendment by the Finance Act, 2011, defined assessment

"to include provisional assessment, re-assessment and any order of assessment in which duty assessed is nil".

However, by the Finance Act, 2011, the definition of assessment was amended to include

"provisional assessment, self-assessment, re-assessment and any assessment in which the duty assessed is nil."

Prior to the introduction of self-assessment, Section 17 of the Customs Act required the appraisal of imported and exported goods to be conducted under the supervision of the proper officer of customs. Once the self-assessment scheme was introduced, the onus of assessment was shifted from Customs officers to the assessee. Imports and exports were to be appraised by the proper officers of customs only in select situations, which constituted a small percentage of the total volume of import and export transactions, as mandated by the Risk Management System introduced in 2011.

Consequent to the amendments made to the assessment provisions, Section 27 of the Customs Act which dealt with refund of customs duty was also suitably modified for the self-assessment era. Section 27(1), prior to introduction of the self-assessment mechanism, provided that any person claiming refund of any duty ***"paid by him in pursuance of an order of assessment"*** or ***"borne by him"*** may make an application for refund of such duty and interest, if any, paid on such duty. Section 27 was amended by Finance Act, 2011 to

provide that any person claiming refund of any duty "**paid by him**" or "**borne by him**"

may make an application for refund of such duty and interest, if any, paid on such duty. Vide the Finance Act, 2011, the words "**in pursuance of an order of assessment**", were removed from Section 27 (1).

Judicial pronouncements before introduction of Self-assessment

It is to be noted that the questions of law sought to be answered by the Supreme Court in ITC was covered by conflicting judicial decisions prior to the ITC decision. Judicial pronouncements governing the issue before introduction of self-assessment were the decisions of Priya Blue - [2004-TIOL-78-SC-CUS](#), Flock India - [2002-TIOL-208-SC-CX](#) and Aman Medical Ltd. - [2009-TIOL-566-HC-DEL-CUS](#)

In **Flock India (supra)** and **Priya Blue Industries Ltd. (supra)**,

the Supreme Court had held that where an adjudicating authority had passed an order which is appealable under the statute and the party aggrieved did not choose to exercise the statutory right of filing an appeal, it would not be 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 the adjudicating authority had committed an error in passing its order.

The Supreme Court had noted that so long as the order of assessment stands, the duty would be payable as per the same order. Further, it was observed that a refund claim is not an appeal proceeding, and the officer of similar rank cannot sit in appeal over as assessment made by a competent officer and review the assessment order. It was also held that the words "**in pursuance of an order of assessment**" indicate which person can make a claim for a refund. It was held that the phrase would 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.

It is important to note that the decisions in Priya Blue and Flock India were passed in terms of the provisions of the unamended Section 27 of the Customs Act i.e. before 08.04.2011

. The intention of the said decisions was to curb malpractice by assesseees from attempting to use the refund mechanism as an alternate route to resolve disputes with the Customs Authorities by challenging the assessment on merits where no appeals had been filed by the assesseees.

Thereafter, the Delhi High Court in **Aman Medical (supra)** drew a distinction from the aforesaid decisions of the Supreme Court in **Priya Blue** and **Flock India**

in terms of Section 27(1)(ii) of the Customs Act which allowed assesseees a route to directly file refund claims without challenging assessments in appeal so long as the duty is 'borne' by the assessee. The basis of the distinction was rooted in factual considerations to analyse if there existed a lis (dispute) between the assessee and the Customs authority on the reason for which refund was being claimed by the assessee. In situations where it could be proven that there was no "**lis**" or "**contest**" under the assessment order, refund claims could be filed without pursuing the appellate route.

Thus, for the period prior to self-assessment, there existed a clear distinction **via** judicial precedents which permitted assesseees to directly file refund claims in select factual situations.

Judicial pronouncements after introduction of Self-assessment

For the period under the self-assessment regime, the decision of the Delhi High Court in **Micromax Informatics Ltd., v. UOI** - [2016-TIOL-978-HC-DEL-CUS](#) provided the assesseees a favourable solution. The High Court distinguished the judgment in the case of **Priya Blue (supra)**

and held that consequent to the amendment to Section 27 of the Customs Act, it is not necessary to opt for re-assessment before filing a refund claim. The High Court held that although under Section 2(2) of the Customs Act, the definition of "**assessment**" includes a self-assessment, even then, self-assessed bills of entry cannot be considered "**per se**"

an assessment order, particularly if such duty has been paid under protest. The High Court also observed that under the amended Section 27, refund officers have no basis to reject refund claims for not being challenged in appeal.

Thus, assesseees could make a claim for refund directly upon spotting an error in their self-assessed documents. If the assessee has challenged the assessment in appeal, the modified assessments would be considered by the refund department but there could be no rejection of the refund claim on the afore-said grounds.

On the basis of the jurisprudence laid down in **Micromax (supra)**,

the CESTAT and various High Courts have granted relief to the assesseees and have held that that a claim for refund would be maintainable in absence of an appeal against bills of entry. Also, consequent to the amendment (post 08.04.2011) to Section 27 of the Customs Act, it is not necessary to opt for re-assessment i.e. filing an appeal against the Bill of Entry before filing a refund claim. In many such cases, refunds have

also been credited to the assessee's accounts.

Analysis

Considering the above, the Supreme Court in ITC was tasked to resolve the debate around the requirement of an appeal as a pre-condition for maintainability of a refund application. The two questions of law framed by the Supreme Court are as under:

Whether in the absence of any challenge to the order of assessment in appeal, any refund application against the assessed duty can be entertained?"

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?

The Supreme Court in the case of ITC has specially observed that even an order of self-assessment is nonetheless an assessment order passed under the Customs Act and is appealable by either the revenue or the assessee. The cornerstone for this conclusion is reliance on a previous decision of the Supreme Court in ***Escorts Ltd.*** - [2002-TIOL-2706-SC-CX](#) wherein it was held that signing of the bill of entry itself amounted to passing an order of assessment as it signifies the approval of the appraising officer.

By application of Escorts, the Court observed that the amendment to the language of Section 27 post introduction of self-assessment does not impact the fact that self-assessed documents are also orders. The Supreme Court has noted that the proceedings under Section 27 i.e. the proceedings of refund are more or less in the nature of execution proceedings "which if at all, are to flow from the order of re-assessment post appeal. Thus, refund authorities cannot entertain claims of refund against self-assessed documents and it is not open for the authority which processes the refund to make a fresh assessment on merits and correct assessments on the basis of mistake or otherwise.

To conclude, it has been specifically noted by the Supreme Court that

claim for refund cannot be entertained unless the order of assessment or self-assessment is modified in accordance with law by taking recourse to the appropriate proceedings and it would not be within the ken of Section 27 to set aside the order of self-assessment and reassess the duty for making refund.

The Supreme Court has ended the ambiguity on the issue as to whether refund claims under Section 27 of the Customs Act can be entertained without filing an appeal. In effect, the decision of the Delhi High Courts in ***Aman Medical*** and ***Micromax*** and the reasoning adopted thereafter by various High Courts and Tribunal has been overruled.

Impact

- The assessee must note that "

refund applications shall be maintainable only if the self-assessed documents are first modified and re-assessed by the appellate route provided under Section 128 of the Customs Act."

The option availed by many assessee of filing a refund claim against a finalized bill of entry (where duty is paid under protest) without filing an appeal against the finalized bill of entry is ruled out. In fact, the question of whether duty has or has not been paid under protest will not make a difference.

- The existing refund claims filed by assessee are in jeopardy if under-lying self-assessed documents have not been challenged in appeal. Even assessments finalized under protest but not challenged in appeal will not entitle refund.

- Assessee who have received refund along with interest from Refund Section are to note that the Customs Department is likely to challenge orders granting refund or initiate recovery proceedings by issuing Show Cause Notices under Section 28(1) of Customs Act on the ground that in the light of ITC judgment, such refunds have been erroneously sanctioned. It may be noted here that Department will not be in a position to cover refund claims sanctioned beyond 2 years period. This is for the reason that in case of refunds so sanctioned, all the facts are/were within the knowledge of the Department and there can be no basis for suppression/mis-representation.

Future Course of Action

- The assesseees should immediately conduct an internal check to assess impact on outstanding refund amounts and prepare a RAG status report for all outstanding and resolved refund cases (going back till 2 years) for risk assessment.
- Take immediate steps to file appeal for self-assessed documents within a 90-day window (with condonation), wherever possible. For assessments outside the 90-day window, check for possible remedies in writ proceedings before jurisdictional High Courts.
- For refund claims successfully processed, file caveats before appellate forums. Upon receipt of a Show Cause Notice, contact external counsel for preparation of effective reply.
- Even in situations where refund applications are under litigation for other issues like unjust enrichment etc., efforts to be made to file additional submissions to limit impact of SC order.
- Payments received from Refund Sections. The Department is likely to challenge orders granting refund or initiate recovery proceedings by issuing Show Cause Notices under Section 28 of Customs Act. The assesseees will have to file replies on technical grounds as well as merits depending on a fact to fact situation.
- It is recommended that the Industry must file a representation to the Central Board of Indirect Taxes and Customs ("**CBIC**") and the Ministry of Finance for granting relief in all the cases wherein refunds have been filed without challenging the order of assessment. The relief may be in the form of a legislative amendment to the Customs Act or in the alternative, pray for a window to be provided for filing appeals in such cases against the finally assessed Bills of Entry.

To conclude, the decision of the Supreme Court has come as "**a bolt out of the blue**". The decision might result in a '**TSUNAMI**' of litigation for assesseees. The assesseees are to expect further litigation till there is "intervention" from the relevant Ministry.

[The views expressed are strictly personal]

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