IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
WEST ZONAL BENCH, AHMEDABAD
REGIONAL BENCH - COURT NO 03

Customs Appeal No. 12252 of 2018-SMC

Arising out of OIA-MUN-CUSTM-000-APP-001-18-19
Passed by Commissioner (Appeals) Ahmedabad

Date of Hearing: 11.1.219
Date of Decision: 9.5.2019

M/s K K ENTERPRISE
SPL. SHED 430, GIDC, SHANKER TEKRI,
UDHYOG NAGAR, JAMNAGAR,
GUJARAT - 361004

Vs

COMMISSIONER OF CUSTOM, MUNDRA
OFFICE OF PRINCIPLE COMMIESSIONERATE
OF CUSTOMS, PORT USER BULD
CUSTOM HOUSE MUNDRA,
MUNDRA, KUTCH

Appellant Rep by: Shri Dipak Kumar (Cons.)
Respondent Rep by: Shri T K Sikdar (A.R.)

CORAM: Ramesh Nair, Member (J)

Cus - The assessee filed claim under Notfn No 102/2007-Cus for refund of Special Additional Duty paid at the time of clearance of goods under 5 bills of entry - Such claim was partly allowed on grounds of having been filed after one year from the date of payment of the SAD, as per Notfn No 93/2008-Cus - Hence the present appeal was filed by the assessee.

Held: If the entire notification is read harmoniously, there are many conditions such as that the goods be sold in the market & on which VAT or Sales Tax be paid - It is only

then that the assesse is entitled for refund - There is no time limit prescribed that the goods are to be sold within one year from the date of payment of Excise duty - Though Customs duty is paid but unless the goods are sold, no refund can arise - Hence on one hand a time limit is prescribed, namely one year from date of payment of SAD - But on the other hand, the assessee can claim refund only when the goods are sold and VAT or Sales Tax is paid - In light of such contradictory provisions, one year must be reckoned from the date of sale of goods, in keeping with a harmonious interpretation of the Notfn - In such circumstances and also considering the mandate of relevant judgments in this regard, the refund claim cannot be denied on account of being time-barred: CESTAT

Assessee's appeal allowed

Case laws cited:

United Chemicals Industries 2017 (356) ELT 466 (Tri.-All.)...Para 2...followed

Auto Dynamic Corporation 2018 (12) TMI 1194-CESTAT-CHAN - 2018-TIOL-3807-CESTAT-CHD ...Para 2...followed

Prim Tech General Trading Pvt. Ltd. 2018 (12) TMI 30-CESTAT-BAN....Para 2...followed

Madras Metals 2018 (11) TMI 192 - CESTAT CHENNAI - 2019-TIOL-693-CESTAT-MAD ...Para 2

Goyal Impex & Industries Ltd. 2018 (9) TMI 95 - CESTAT CHENNAI - 2018-TIOL-3791-CESTAT-MAD ...Para 2...followed

FINAL ORDER NO. A/10816/2019

Per: Ramesh Nair:

Brief facts of the case are that the appellant have filed refund claim for an amount of Rs. 12,52,776/- in terms of Notification No. 102/2007-Cus dated 14.09.2007 in respect

of special additional duty paid at the time of clearances of goods under 5 bills of entry. The refund claim was partly allowed and partly rejected on the ground that the refund claim was filed after one year from date of payment of Customs (SAD) in terms of amended Notification No. 93/2008-Cus dated 01.08.2008.

2. Sh. Deepak Kumar, Ld. Consultant appearing on behalf of the appellant submits that though the refund claim was filed after one year from the date of payment of SAD but it was filed within one year from date of sale of goods, therefore, the refund should not have been rejected on time bar. He submits that on the identical issue on limitation in respect of refund under Notification No. 102/2007-Cus dated 14.09.2007, therefore, various following judgments supporting the case of the appellants.

- United Chemicals Industries 2017 (356) ELT 466 (Tri.-All.)

- Auto Dynamic Corporation 2018 (12) TMI 1194-CESTAT-CHAN = 2018-TIOL-3807-CESTAT-CHD

- Prim Tech General Trading Pvt. Ltd. 2018 (12) TMI 30-CESTAT-BAN.

- Madras Metals 2018 (11) TMI 192 - CESTAT CHENNAI = 2019-TIOL-693-CESTAT-MAD

- Goyal Impex & Industries Ltd. 2018 (9) TMI 95 - CESTAT CHENNAI = 2018-TIOL-3791-CESTAT-MAD

3. On the other hand Sh. T.K. Sikdar, Ld. Assistant Commissioner (AR) appearing on behalf of the Revenue reiterates the findings of the impugned order.

4. I have carefully considered the submission made by both the sides and perused the records. I find that the limited issue has to be decided is that if the refund claim under Notification No. 102/2007-Cus dated 14.09.2007 was filed beyond one year from the date of payment of

custom duty but within one year from the date of sale of the goods, the appellant is entitled for the refund or otherwise. I find that if the entire notification is read harmoniously, there are various conditions such as, goods should be sold in the market VAT/ Sale tax should be paid on such sale etc. only thereafter, the appellant is entitled for refund. There is no time limit prescribed that the goods may be sold within one year from the date of payment of excise duty. Even though, the payment of custom duty is made but unless until the goods are sold, the refund does not arise, therefore, in one hand the time limit is prescribed i.e. one year from the date of payment of custom duty and in other hand, assessee is eligible to file refund claim only when the goods are sold and VAT/ Sales Tax was paid. These both conditions are contrary, therefore, considering the overall notification harmoniously, I am of the view that one year should be reckoned from the date of sale of the goods. This issue has been considered by the various Coordinate Benches of Tribunal in the case of United Chemicals Industries (supra), this Tribunal has passed following order:

"6.Having considered the rival contentions and on perusal of the facts on record, I hold that the ld. Commissioner (Appeals) have erred in rejecting the refund claim on the ground of limitation relying on the Circular No. 06/2008-Cus., dated 28-4-2008 under Section 27 of the Customs Act, 1962. I further hold that limitation has to be computed on or after 30-11-2010, being the month of November, when the goods were finally sold under the concerned Bill of Entry No. 93, dated 4-11-2009. Accordingly, the impugned order is set aside and the appeal is allowed. I further direct the Adjudicating Authority to grant the refund of the amount of Rs. 59,449/- with interest as per rules within a period of 60 days from the date of receipt of a copy of this order."

In the case of Auto Dynamic Corporation (supra) Tribunal has observed as under:

"7. On going through the arguments advanced by both the sides, I find that both sides have placed contradictory decisions of two High courts one in the case of CMS Info Systems (Supra) by the Hon'ble Bombay High Court and two decisions of the Hon'ble High Court of Delhi in the case of Sony India Pvt. Ltd. (Supra) and Gulati Sales Corporation (Supra), the latest decision is of the Hon'ble Delhi High Court in the case of Gulati Sales Corporation (Supra), before me. Moreover, when there are contrary views of the Hon'ble High Courts, in that case this Tribunal is at the liberty to decide the issue ignoring the decisions of the Hon'ble High Courts on merits of the case itself as held by this Tribunal in the case of M/s Maheshwari Solvent Extraction Ltd. Vs. Commissioner of C.EX., Nagpur-2014 (299) E.L.T. 116 (Tri. Mumbai) = 2013-TIOL-978-CESTAT-MUM, therefore, I have to examine the issue on the basis of the facts placed before me and the provisions of law. The SAD is payable by an assessee for setting off of VAT/ST/CST is payable by the appellant being a trader. Unless and until VAT/ST/CST is paid by the assessee, they cannot file refund claim, therefore, it is required to be seen on which date cause of action arose of filing the claim of refund. Admittedly, the relevant date in such a case as per Section 11B of the Central Excise Act, 1944, when is the cause of action arose i.e. the date of payment of VAT/ST/CST. From that date, within one year, the assessee required to file the refund claim. Therefore, the relevant date (in these matters) is the date of payment of VAT/ST/CST. Admittedly, in all the matters placed before me the refund claims have been filed by the appellants within one year from the date of payment of VAT/ST/CST. 8. In that circumstances, I hold that the refund claims cannot be rejected on ground of limitation, therefore, I

hold that the refund claims filed by the appellants are within time. The same view has been taken by this Tribunal, in the case of Ghaio Mall and Sons (Supra) and in the case of Goyal Impex & industries Ltd. (Supra). Therefore, relying on the decision of this Tribunal in the matters cited above, I hold that the refund claims filed by the appellants are within time and they are entitled to refund claim. In view of the above, I set aside the impugned orders and allow the appeals with consequential relief."

In the case of Prim Tech General Trading Pvt. Ltd. (supra) Tribunal has observed as follows:

"4. Being aggrieved the appellant is in appeal before this Tribunal. The learned counsel for the appellant have urged that the finding of ld. Commissioner regarding time-barred is directly in the teeth of the findings of Hon'ble Delhi High Court in Sony India Pvt. Ltd. v. Commissioner of Central Excise reported at 2014 (304) E.L.T. 660 (Delhi) = 2014-TIOL-532-HC-DEL-CUS, wherein the Hon'ble High Court upheld that limitation cannot start to run before the right to claim benefit arises or created. In the facts of the present case, admittedly, refund is allowable on resale of the imported goods subject to payment of Sales Tax. As admittedly the goods of the import consignment was sold during the period September, 2010 to November, 2010 the limitation cannot start to run prior to 30-11-2010 and from such date, the claim made on 4-3-2011, is within the limitation of one year. Accordingly, he prays for allowing the appeal with consequential benefits to the appellant.

5. Heard the ld. AR for Revenue, who relied on the impugned order.

6. Having considered the rival contentions and on perusal of the facts on record, I hold that the ld. Commissioner (Appeals) have erred in rejecting the

refund claim on the ground of limitation relying on the Circular No. 06/2008-Cus., dated 28-4-2008 under Section 27 of the Customs Act, 1962. I further hold that limitation has to be computed on or after 30-11-2010, being the month of November, when the goods were finally sold under the concerned Bill of Entry No. 93, dated 4-11-2009. Accordingly, the impugned order is set aside and the appeal is allowed. I further direct the Adjudicating Authority to grant the refund of the amount of Rs. 59,449/- with interest as per rules within a period of 60 days from the date of receipt of a copy of this order."

In the case of Madras Metals (supra) this Tribunal has passed following order:

"6.Having considered the rival contentions and on perusal of the facts on record, I hold that the ld. Commissioner (Appeals) have erred in rejecting the refund claim on the ground of limitation relying on the Circular No. 06/2008-Cus., dated 28-4-2008 under Section 27 of the Customs Act, 1962. I further hold that limitation has to be computed on or after 30-11-2010, being the month of November, when the goods were finally sold under the concerned Bill of Entry No. 93, dated 4-11-2009. Accordingly, the impugned order is set aside and the appeal is allowed. I further direct the Adjudicating Authority to grant the refund of the amount of Rs. 59,449/- with interest as per rules within a period of 60 days from the date of receipt of a copy of this order."

In an another judgment of this Tribunal on the identical issue in the case of Goyal Impex & Industries Ltd. this Tribunal has considered the issue as under:

"4. I have considered the rival contentions and have gone through various decisions relied on during the course of arguments. In terms of Notification No.102/2007, an

importer is entitled for refund of SAD that was levied at the time of import after he files necessary documents to prove that proper Sales Tax or VAT as the case may be, has been paid. As settled by various higher judicial forums, the purpose of imposing SAD is to protect and ensure collection of appropriate sales tax or VAT that is payable on imported goods, which is paid upfront at the time of imports. SAD is not credited and set off from the sales tax or VAT, which is refundable to an importer after ascertaining the appellant to appropriate Sales Tax / VAT. I note that Hon'ble Delhi High Court in the case of Gulati Sales Corporation 2017 (supra) has considered both Notifications Nos.102/2007 and 93/2008; and also considered the decision of Sony India Pvt. Ltd. (supra) and has ruled as under :-

8. We, therefore, do not find any conflict between the view expressed in Riso India (supra) and Sony India (supra). In fact, the Division Bench in Riso India (Supra) could not have taken a different view without referring the matter to a Larger Bench in case they felt that the view expressed in the former decision required reconsideration. The Division Bench in Riso India (supra) observed that in Sony India (supra) "the Court was clear that the imposition of a period of limitation for the first time through a notification `without statutory amendment' was legally impermissible." The words "without statutory amendment" were highlighted to qualify and not to be mis- understood, as if limitation period under section 27 applies. These words would not indicate and show that limitation period specified in Section 27 of the Act applies to SAD refunds. Thereafter, the appeal of the Revenue in Riso India (supra) was dismissed. 9. In terms of Notification No. 102/2007 dated 14th September, 2007, an importer is entitled to refund of SAD, which is levied at the time of importation after he files documents to show that appropriate sales tax or

value added tax has been paid. It may be noted that the purpose of imposing SAD is to protect and ensure collection of appropriate sales tax or value added tax, payable on the imported goods. This is paid upfront at the time of import. SAD is not credited and set off from the sales tax and value added tax, which are State taxes. SAD is, therefore, refundable to the importer after evidence with regard to payment of appropriate sales tax or value added tax is produced. The documents and papers have to be produced before the custom authorities, checked and verified, before refund is issued. It goes without saying that the intent is that no double duty/tax - first, in the form of SAD and secondly, in form of sales tax or value added tax, is to be paid. 10. Circular dated 28th April, 2008 quoted above specifically states the view and understanding of the Revenue that Section 27 of the Act is not made applicable to the Notification No.102/2007 and the time limit prescribed under the said Section would not be applicable. The Revenue notwithstanding the said understanding and their Circular, now seeks to contend and urge to the contrary. 11. In view of the aforesaid, we find that the impugned order being in consonance with the ratio in the case of Sony India (supra), no case for interference is made out. No substantial question of law, therefore arises. The appeal is dismissed, without any order as to costs.
5. I also find that the New Delhi Bench of CESTAT in the case of M/s. River Tradex (supra) has dismissed Revenue's appeal after following the decision of Sony India Pvt. Ltd. (supra).

6. From the above discussions, I am of the considered view that the appellant is eligible for refund, despite the fact that its claim of refund was belated (by 10 days). Following the above ratio decidendi, I set aside the impugned order and allow appellant's claim for refund; &

consequently allow the appeal with consequential benefits, if any."

5. In view of the consisting view taken by the various Coordinate Bench of this Tribunal in the above judgments, I am of the view that in the given facts of the case, the refund claim could not have been rejected on time bar. Accordingly, the impugned order is set aside and appeal is allowed.

(Pronounced in the open court on 09.5.2019)