
(2020) 12 CESTAT CK 0004

Customs, Excise And Service Tax Appellate Tribunal Principal Bench, New Delhi

Case No: Customs Appeal No. 50945 Of 2019

Commissioner Of Customs

APPELLANT

Vs

S.R. Traders

RESPONDENT

Date of Decision: Dec. 8, 2020

Acts Referred:

- Customs Tariff Act, 1975 - Section 3(5), 3(6), 3(8)
- Customs Act, 1962 - Section 25(1), 26, 27, 27(1), 27(1)(B)

Hon'ble Judges: Anil Choudhary, J

Bench: Single Bench

Advocate: Tamnna Alam, Sunil Kumar

Final Decision: Dismissed

Judgement

S.No.,B/E No. and date,TR-6 Dated,Amount of SAD paid,"Amount of refund claimed

1.,"9635301

dt.20.06.2015",23.06.2015,100290.60,100290.6

2.,"2206249

dt.11.08.2015",11.08.2015,100352.20,100352.20

3.,"2220996

dt.12.08.2015",13.08.2015,33631.60,33631.60

Total,,,234274.40,234274.49

is to counter-balance the sales tax/VAT, etc. leviable on like goods when sold in India so as to protect the domestic industry." ,,,,

13. It is further urged that Section 25(1) of the Customs Act enables the Central Government is satisfied that it is necessary in the public interest, may" ,,,,

by notification in the official gazette, exempt generally either absolutely or subject to such condition (to be fulfilled before or after clearance), as may" ,,,,

be specified in the notification, goods of any specified description from the whole or any part of the duty of customs leviable thereon. The exemption" ,,,,

provided on SAD under notification no.102/2007 is conditional, being upon the subsequent sales and sales tax/VAT levied. The importer of the goods" ,,,,

is required to pay SAD at the time of clearance and further required to produce evidence being invoices for sale with documents evidencing payment, ,,,,

of sales tax/VAT. Thus, evidently, the benefit of exemption under the notification by way of refund can be availed only on sales of the imported" ,,,,

goods. The amending notification no.93/2008 imposes the time limit of filing the refund claim for SAD, within one year of payment of duty /SAD." ,,,,

14. The Honâ€™ble Delhi High Court in the case of Sony India Ltd. (supra) observed that limitation can not start to run prior to the right to claim, ,,,,

refund accruing to the importer, and further observed that if a limitation period is sought to be imposed for SAD pursuant to resale, and the importer" ,,,,

having incurred sales tax/VAT liability on the subsequent sale of goods, it must be introduced by legislation giving the ex-proprietary consequences of" ,,,,

such a limitation period. The High Court was of the view that in case of SAD, which is the levy meant to offset an advantage, there is inherent right to" ,,,,

refund, once the importer shows that the goods being sold and sales tax/VAT has been paid on such transactions. This duty was imposed as" ,,,,

Indiaâ€™s response to offset any advantage, which the importer might secure by way of non- discriminatory levy while importation of goods, at cost" ,,,,

or prices lower than could be obtained by a domestic manufacturer. A discriminatory tax could not have been levied giving Indiaâ€™s obligation as a ,,,,

participant in WTO & having regard to its treaty obligation. ,,,,

15. It is further urged that pursuant to Sony Indiaâ€™s Judgement of Delhi High Court, the Honâ€™ble Bombay High Court in C MS Infosystems" ,,,,

Ltd. Vs. Union of India - 2017 (349) ELT 236 has taken a different view after considering various rulings including in the case of Sony India (supra), ,,,,

by Delhi High Court. The Bombay High Court have opined that Rules and Regulations under the Customs Act including those relating to refund and,,,,

exemption are made applicable even to the Tariff Act, and the duties mentioned thereunder. Therefore, a provision for refund and exemption from",,,,,

such duties, can be made by relying on the provisions of the Customs Act. The procedure for refund is given in Section 26 of the Customs Act,",,,,

wherein it is provided that any person claiming refund of any duty or interest paid or borne by him, may make an application in such form and manner,",,,,

as may be prescribed before the expiry of "one year" from the date of payment of such duty or interest. It is further provided that limitation of,,,,

one year shall not apply, where any duty or interest has been paid under protest. Further, vide an Explanation, it is provided that the date of payment of",,,,,

duty or interest in relation to a person other than the importer shall be construed as the date of purchase of goods by such person. Further, subsection",,,,,

(1)(B) to Section 27 provides that for the manner of computation of the period of limitation of one year, wherein if the refund is contingent upon",,,,,

certain future events like Appellate order or judgements or where the duty is paid provisionally, the limitation of one year shall be computed from the",,,,,

date of adjustment of duty after the final assessments or re-assessment, from such date.",,,,

16. Ld. Authorised Representative further urges that the limitation of one year introduced vide notification no.93/2008"Customs, was always there",,,,,

under Section 27 of the Customs Act. It is further urged that the condition of an exemption notification have to be accepted in full and it cannot be,,,,

construed differently as regard to the period of limitation that the same is excessive or unfair, unjust or arbitrary. Further, the Hon"ble Bombay",,,,,

High Court in CMS Infosystems Ltd. " 2017 (349) ELT 236 (Bombay) (in writ petition) observed that such condition therein (limitation) cannot be,,,,

declared ultra vires because the party desires to brush it aside. Merely because a condition is imposed to file a refund application, and which is in the",,,,,

nature of a time bar or limitation, that cannot be held to be onerous, excessive and, therefore ultra vires.",,,,

17. Ld. Departmental Representative further relies on the rulings of the Hon"ble Supreme Court in the case of C CE Vs. Dilip Kumar and Co. " ,,,,,

2018 TIOL 302 (SC) wherein it has been held that "when there is ambiguity in exemption notification, which is subject to strict importation, the",,,

benefit of such ambiguity cannot be claimed by the subject "assessee" and it must be interpreted in favour of Revenue. The Id. Authorised,,,

Representative has also relied on the Division Bench ruling of this Tribunal in the case of CCE, Import Vs. JG Impex Pvt. Ltd. wherein vide final",,,

order no.C/A/53157/2018 " CU(DB) dated 25.10.2018, after considering the ruling of Delhi High Court in Sony India (supra), the limitation period of",,,

"one year"™ from the date of payment of SAD has been upheld. Accordingly, prays for allowing the appeal of the Revenue and setting aside the",,,

impugned order.,,,

18. Opposing the appeal, Id. Counsel, Shri Sunil Kumar urges that the final order of this Tribunal in JG Impex (supra) is erroneous, as the Tribunal has",,,

wrongly based its findings on the erroneous opinion that for claiming the refund of SAD, nothing else is to happen or to be done by the",,,

assessee/importer after the payment of SAD and thus, no reliance can be placed on the same. He further urges that the principle laid down by the",,,

Hon™ble Delhi High Court in Sony India Ltd. (supra) is that limitation cannot start to run before the date when the right to refund claim crystallises.,,,

Such right to refund crystallises or arises only on sale of the goods subsequent to import. Under Notification No.102/2007 for granting refund of SAD,",,,

the two essential conditions to be fulfilled by the importer are sale/resale of the goods on which VAT /ST has been paid. Thus, as rightly held by the",,,

Hon™ble Delhi High Court, limitation cannot start to run prior to the sale of the imported goods. He further states that SAD is admittedly collected",,,

in lieu of service tax/VAT and it is not the customs duty for all practical purpose. Accordingly, the general limitation of one year prescribed under",,,

Section 27 of the Customs Act is not applicable. He further points out that ruling of Sony India Ltd. (supra) of Delhi High Court has been consistently,,,

followed in the subsequent decisions in CCE, Import Vs. Gulati Sales Corporation - 2018 (360) ELT 277 & In PE GEE International Vs. CCE, New",,,

Delhi. It is further pointed out that no stay has been granted by the Hon™ble Supreme Court in favour of Revenue while admitting the appeal,,,

against the order of Delhi High Court in the case of Commissioner Vs. Wilhelm Textiles India Pvt. Ltd. (supra). He further urges that the other,,,,

Division Benches of this Tribunal has been consistently following the ruling of Sony India Ltd. (supra) in several rulings for examples " in CC, New",,,,,

Delhi Vs. Siya Paper Mart Pvt. Ltd. " 2018 (364) ELT 809 (Tribunal-Delhi) etc. Thus, ruling of this Tribunal in JG Impex Pvt.Ltd. (supra) is also",,,,,

bad for taking a different view ignoring the earlier Division Bench orders, which had a binding nature on the subject Division Bench. Further, order of",,,,,

Delhi High Court is binding on this Tribunal. Accordingly, he prays for dismissing the appeal of the Revenue upholding the impugned order.",,,,,

19. Having considered the rival contentions, I find that the facts are not in dispute and admittedly, the respondent importer has filed refund claim after",,,,,

more than one year or may be by few days more from the date of payment of SAD. I find that the Honable Delhi High Court judgement in Sony,,,,

India (supra) is based on the following specific findings " ,,,,,

(i) The exemption provided in the original notification issued in exercise of the power under Section 25 (1) of the Customs Act is conditional -upon,,,,

subsequent sale, as can be seen from the conditions required to be fulfilled in order for an importer to avail the benefit of the exemption.",,,,,

(ii) The provisions of the Customs Act or the rules, and mechanism for refund is incorporated by reference into the Customs Tariff Act only "sofar",,,,,

as may be applicable. Since SAD levied under Section 3(5) is refundable only on subsequent sale (i.e. the point at which sales tax/VAT liability,,,,

arises), "it is the opinion of this court (High Court) that no limitation period can possibly be imposed for advancing a refund claim. This is because",,,,,

the right to claim refund only accrues to the importer on sale, an entirely market driven event, is complete. Given the vagaries of the market, the",,,,,

importer has limited control over when the sale is complete. To uphold a limitation period staring from the date of payment of duty, as prescribed in the",,,,,

amending notification, would amount to allowing the commencement of a limitation period for refund claims before the right of refund has even",,,,,

accrued. To this extent, the Court is of the opinion that the refund provisions under the Customs Act are inapplicable to the duties levied under Section",,,,,

3(5) of the CTA. Thus, neither Section 27 nor a notification under Section 25(1), such as the amending Notification No.93/2008-Customs dated",,,,,

1.8.2008, can be used to impose a limitation period on the right to claim refund of additional duty of customs paid under Section 3(5). If a limitation",,,,,

period is sought to be imposed in respect of refund claims in a case where the importer advances a refund of SAD paid, owing to having incurred",,,,,

sales tax/VAT liability on subsequent sale of goods, it must be introduced by legislation, given the ex propriatory consequences of such a limitation",,,,,

period.,,,,,

(iii) The expression "so far as may be" in this context, under Section 27 is significant as well as instructive. The levy under Section 3(5) is",,,,,

conditional upon the Central Government's opinion that it is necessary to "counter-balance the sales tax, value added tax, local tax or any other",,,,,

charges for the time being leviable on a like article"; the rate of duty "where more than one levy exists, would be the highest of such rates and the",,,,,

terms of imposition of SAD would be spelt out in the notification. In this case, the regime existing before the notification of 2008, did not specify any",,,,,

period of limitation " and perhaps advisedly so. Some customs authorities apparently started applying Section 27, drawing inspiration from Section",,,,,

3(8) of the Tariff Act, which led to confusion. In Notification No.102/2007-Customs, dated 14.09.2007, there was no period of limitation; by Circular",,,,,

No.6/2008-Customs, an amending notification providing for one year period from the date of payment of the Additional duty of Customs was issued",,,,,

later through Notification No.93/2008-Customs, dated 1.8.2008, amending Para 2(c) of the 2007 Notification. The net effect of these was that a one",,,,,

year period was insisted upon for refund applications. The period was calculable from the date of payment of duty (SAD): Dr. Pratap Singh & Anr.,,,,,

Vs. Director of Enforcement, foreign Exchange Regulation Act & Ors., 1985 (3) SCC 7 2 is an authority for the proposition that the use of the phrase",,,,,

"so far as may be" in a later statute, with reference to provisions in an earlier statute, means that the provisions of the referred (earlier) statute",,,,,

are to be followed "to the extent possible".,,,,

(iv) Section 27(1) of the Customs Act prescribes a time limit of "one year, from the date of payment of such duty or interest.....". Section 27(1B)",,,,,

lists out three contingencies when the one year limit applies with "modified effect". That provision has the effect of shifting the date from which the,

refund claim is to be reckoned. All that can be inferred from the term "so far as may be" would be that specific provisions relating to the,

mechanism applicable for refund, in the Customs Act, applied; not the period of limitation. The Customs Authorities had never understood Section,

27(1) as to mean that a one year period of limitation was applicable. (v) Section 27 was understood as not applying to SAD refund cases, even though,

it was in the statute book for many years. Yet, with the introduction of the circular and then the notification (No.93), the Customs authorities started,

insisting that such limitation period which was prescribed with effect from 1.8.2008 (by notification) became applicable.,,

20. The Hon'ble Bombay High Court while disagreeing with Hon'ble Delhi High Court has based its judgement of the following specific,

findings:-,

(i) By sub-section (6) of Section 3 of CTA, it is clarified that the provisions of the said Act and the Rules and Regulations made thereunder, including,

those relating to drawbacks, refunds and exemption from duties shall, so far as may be, apply to the duty chargeable under this Section as they apply,

in relation to the duties leviable under that Act.,,

(ii) Though the CTA enables the levy of the Additional duty equal to excise duty, sales tax, etc., eventually, it is an Act to consolidate and amend the,

law relating to customs duty. The duties which are levied have then to be specified and for effective and proper recovery. Even when there is any,

claim made for drawback, refund and exemption, it is the substantive law, namely, the Customs Act, 1962, which would govern the field. Else no,

refund can be claimed.,,

(iii) The decision of the Hon'ble High Court of Delhi holding that the provisions of the Customs Act or the rules and mechanism for refund are,

incorporated by reference to Section 3(5) of the CTA only "so far as may be" applicable and since SAD is levied under Section 3(5), and that is,

refundable only on subsequent sale, then, no limitation period can possibly be imposed for advancing a refund claim, cannot be agreed with in the light,

of the analysis of the statutory provisions and the scheme of refund. The Rules and Regulations under the provisions of the Customs Act, 1962," ,,,

including those relating to drawback, refund and exemption shall "so far as may be" applied, and this reveals that for the purposes of making an" ,,,

application seeking refund, its consideration, that Customs Act and its provisions are made applicable even to the Tariff Act and the duties mentioned" ,,,

thereunder. Therefore, a provision for drawback, refund and exemption from such duties can be made by relying on the Customs Act, 1962. The" ,,,

power to refund is to be found in Section 27 of the Customs Act, 1962, and that was always there. The amendment to the notification introducing a" ,,,

limitation for seeking refund was part of Section 27 with its condition of a limitation period was throughout on the statute book. That is the only" ,,,

provision enabling granting refund of any duty, is undisputed. The notification granting exemption and under consideration in the case, enables claiming" ,,,

a refund of duty (SAD), but the power to grant it is in the substantive law. Precisely, that is the case herein. Further, that there is an exemption" ,,,

granted and which is conditional. The exemption being conditional, it is not permissible to pick and choose convenient conditions of the exemption" ,,,

notifications and leave out those which to parties like the petitioners, appear to be onerous and excessive. How in the teeth of a clear provision in the" ,,,

exemption notification can the assessee/petitioners contend that the exemption notification is valid for everything else but when it comes to period of" ,,,

limitation therein, that is excessive or unfair, unjust and arbitrary. Once the exemption is conditional, then all the conditions therein have to be complied" ,,,

with. If that provides for refund, but the application in that behalf is to be made within a specific period, then, that cannot be said to be excessive and" ,,,

arbitrary, far from being unfair, unjust and unreasonable. It cannot be termed illegal as well for the simple reason, that sub-section (1) of Section 27 of" ,,,

the Customs Act, 1962, which enables claiming of refund by making an application itself speaks of one year outer limit. That is never challenged," ,,,

including in the present proceedings. That the period of one year commences from the payment of the duty. If that is how Section 27 is worded and" ,,,

every duty is included in its ambit and scope, then, an application seeking refund of the same has to abide by it, including the bar of limitation contained" ,,,

therein. That is consistent with that provision, even the special exemption notification (as amended) carries the same stipulation or condition. The",,,,,

insistence on complying with it cannot be said to be imposing an unreasonable, unfair and unjust restriction. Once the nature of the right is considered,",,,,

the submissions made by Mr. Patil/petitioner cannot be agreed with. There is no vested, much less absolute right in the petitioners to seek refund.",,,,

Even a refund must be within the framework of the statute and admissible on the terms thereof. The submission of Mr. Patil that compliance with this,,,,

period is calling upon the petitioner to do or perform something which is impossible, cannot be agreed with. The exemption notification does not impose",,,,

any new condition as has been read into it. It grants the exemption from payment of duty conditionally. The exemption can be availed or provided the,,,,

goods which are imported are subject to payment of duties which include all the duties that are referred to in both the enactment and the notification.,,,,,

If the import is for subsequent sale, then, that invoice must carry a stipulation that no credit for the additional duty of customs shall be admissible. The",,,,

importer thereafter can file a claim for refund of the special additional duty of customs paid on the imported goods, before the expiry of one year from",,,,

the date of payment of additional duty of customsâ€œ.,,,,,

(iv) With reference to the submission of Mr. Patil that the importer shall pay on sale of the said goods appropriate sales tax or value added tax, as the",,,,

case may be, is equally a condition and further, requirement is providing of copies of documents along with refund claim or else, no refund is",,,,

admissible, the finding of the Honâ€™ble Delhi High Court is that it is not possible to guess as to whether the refund application would be held to be",,,,

non-maintainable purely on the grounds, or for the reasons suggested. If it is made within a period of one year from the date of payment of additional",,,,

duty of customs, then, because there is no subsequent sale and the documents evidencing that, as also proof of payment of the sales tax or local taxes",,,,

are required to be produced, that their production is also mandated in a particular period and within a particular time limit, is not something which we",,,,

are required to call upon and decide. The case before the High Court is a case of rejection of a refund application simply because it was not filed,,,,

within one year from the date of payment of the additional duty of customs. In such circumstances and when that stipulation is challenged, the view",,,,

taken by the Honâ€™ble High Court of Delhi cannot be agreed with.,,,,

21. From the perusal of both the judgements, I find that the Honâ€™ble Bombay High Court has not disturbed or distinguished the following findings" ,,,,

of Honâ€™ble Delhi High Court:-,,,

(1) Right to claim refund of duty in terms of Notification accrues to the importer only when the sale take place. Therefore, the exemption provided in",,,,

the Notification is conditional on subsequent sale.,,,,

(2) The provisions of the customs Act or the rules and mechanism for refund is incorporated by reference into the CTA only â€œso far as may beâ€",,,,

applicable. The expression â€œso far as may beâ€in this context, under Section 27 is significant as well as instructive. The levy under Section 3(5) is",,,,

conditional upon the Central Governmentâ€™s opinion that it is necessary to â€œcounter-balance the sales tax, value added tax, local tax or any other",,,,

charges for the time being leviable on a like article,â€ ; the rate of duty â€ where the terms of imposition of SAD would be spelt out in the",,,,

notification. The regime existing before the notification of 2008, did not specify any period of limitation â€ and perhaps advisedly so. Some customs",,,,

authorities apparently started applying Section 27, drawing inspiration from Section 3(8) of Tariff Act, which lead to confusion. In Notification No.",,,,

102/2007-Cus., dated 14.09.2007, there was no prescribed period of limitation; by Circular No. 6/2008-Cus., period of one year was insisted and",,,,

thereafter an amending notification providing for one year period from the date of payment of the additional duty of customs was issued, through",,,,

Notification No. 93/2008-Cus., dated 1.8.2008, amending Para 2(c) of the 2007 Notification. The net effect of these was that a one year period was",,,,

insisted upon for refund applications.,,,,

(3) Section 27(1) of the Customs Act prescribes time limit of expiry of â€one yearâ€™, from the date of payment of such duty or interest...â€.",,,,

Section 27(1B) lists out three contingencies when the one year limit applies with modified effect. That provision has the effect of shifting the date,,,

from which the refund claim is to be reckoned. All that can be inferred from the term â€œso far as may beâ€ , would be that specific provisions",,,,

relating to the mechanism applicable for refund, in the Customs Act, applied; not the period of limitation. The Customs authorities had never",,,,

understood Section 27(1) as to mean that a one year period of limitation was applicable for SAD refund.,,,,

(4) Section 27 was understood as not applying to SAD cases, even though it was in the statute book for many years. Yet, with the introduction of the",,,,

circular and then the notification (No. 93), the Customs authorities started insisting that such limitation period which was prescribed with effect from",,,,

1.8.2008 (by notification) became applicable.,,,,

22. As the aforesaid findings have not been disturbed or distinguished by the Honâ€™ble High Court of Bombay, I am following the decision of the",,,,

Honâ€™ble High Court of Delhi and hold that the respondent is entitled to the refund as their right to claim refund of duty in terms of Notification has",,,,

accrued only when the sale took place. The findings of the Honâ€™ble high Court clearly show understanding of the department with regard to clause",,,,

of limitation provided in the Notification. The condition of limitation was not the part of the original notification. It was only with the introduction of",,,,

Circular No.6/2008-Cus. and Notification No.93/2008, the department started insisting on the limitation period (of one year) prescribed with effect",,,,

from 1.8.2008, became applicable. The Honâ€™ble High Court has clearly held that the expression "so far as may be" used in the sub-section (6)",,,,

of Section 3 of CTA has to be followed to the extent possible. Merely because Section 27 of the Customs Act provides for a period of limitation for",,,,

filing refund claim, it cannot be held that even for the purposes of claiming refund in terms of the Notification, the same limitation has to be applied.",,,,

The Honâ€™ble Delhi High Court has also held that in the matters which deal with substantive rights, such as imposition of penalties and other",,,,

provisions that adversely affect statutory rights, the parent enactment must clearly impose such obligations; subordinate legislation or rules cannot",,,,

prevail or be made, in such case.",,,,

23. Therefore, by following the judgement of the Honâ€™ble Delhi High Court in Sony India (supra), the appeal of Revenue is dismissed and the",,,,

impugned order is upheld.,,,,

[Order pronounced on 08.12.2020.],,,,