

**(2009) 12 MAD CK 0191**

**Madras High Court**

**Case No:** Writ Petition No. 18362 of 2009

Delta Power Solutions Pvt. Ltd.

APPELLANT

Vs

Commissioner of Customs

RESPONDENT

**Date of Decision:** Dec. 2, 2009

**Acts Referred:**

- Customs Act, 1962 - Section 14, 18, 27

**Citation:** (2010) 252 ELT 54

**Hon'ble Judges:** Chitra Venkataraman, J

**Bench:** Single Bench

**Advocate:** Joseph Prabakar, for the Appellant; Mallika Srinivasan, for the Respondent

### **Judgement**

@JUDGMENTTAG-ORDER

Chitra Venkataraman, J.

The petitioner has sought for an issuance of a writ of certiorarified mandamus to quash the order of the second respondent dated 17-6-2009 and to direct the second respondent to refund the EDD of Rs. 1,95,275/- along with interest from 6-6-2008.

2. The petitioner herein engaged in the manufacture of Power Rectifier System. The petitioner company imports goods from its Parent company. The import transactions of the petitioner company from "related persons" namely from parent company and group companies were examined u/s 14 of the Customs Act, 1962 read with Customs Valuation (Determination of Value of Export Goods) Rules, 2007 by the Special Valuation Branch (SVB) of the Customs Department at New Delhi. Dealing with the import from related persons under Circular No. 11/01, dated 23-2-2001, the Central Board of Excise and Customs instructed that the SVB (Special Value Branch) shall hold enquiry wherever there is a *prima facie* justification for conducting the enquiry in case of imports where the transaction is between related persons in accordance with Rule 2(2) of the Valuation Rules, 1988. Further the EDD collected at 1% shall be increased to 5% wherever there is a delay in the reply by the

importer till the date of receipt of reply by the Department. The investigation and finalisation of the provisional assessment made must be completed within four weeks from the date of reply. If no decision is taken within four months, the EDD should be discontinued and the concerned Deputy Commissioner /Assistant Commissioner shall be held responsible for the delay in finalisation of the provisional assessment of the petitioner as per Circular No. 268/07. The Assistant Commissioner of Customs, SVB held that pending verification of the agreements between the supplier and the importer and the books of account, their imports from the suppliers, Delta Electronics, Thailand, are ordered to be assessed provisionally with EDD at 1% on the assessable value of the goods in addition to the duty payable by them in accordance with Circular No. 11/01. After examining the transactions, the Assistant Commissioner of Customs, Special Valuation Branch, passed an order on 6-6-2008 accepting the value quoted by the petitioner as transaction value in terms of Rule 3(3)(b)(i) of the Valuation Rules that all pending assessments be finalised. The copy of the order was sent to the second respondent. In respect of certain bills of entry dated 13th December, 2007, 12th February 2008, 27th February, 2008 and 17th March 2008, the respondents collected 1% EDD. In terms of circular dated 23-2-2001 in Circular No. 11/2001, the petitioner entertained the impression that considering the collection of EDD, the assessment was by way of provisional assessment. When the petitioner took steps to claim the refund of 1% EDD paid under the imports from related persons pursuant to the order passed on 6-6-2008, the petitioner was informed by the respondents vide letter dated 17-6-2009 that the assessment was treated as final. In the circumstances, the petitioner represented on 22nd May, 2009 before the second respondent to treat these bills as provisionally assessed since they had paid 1% EDD for the four bills of entry dated 13-12-2007, 12-2-2008, 27-2-2008 and 17-3-2008. The second respondent, however, rejected the said plea in his order dated 17-6-2009 on the ground that the said bills of entry were more than six months old. Aggrieved by the said view of the second respondent, the petitioner has come before this Court. The respondents have filed their counter affidavit.

3. The grievance of the petitioner is that by reason of collection of 1% EDD from the four bills referred to above, although the caption shown was final assessment, he was under the impression that the assessment was, in fact, provisional assessment only. Learned Counsel for the petitioner pointed out that in terms of Circular No. 268/2007 SVB (for Provisional Duty Assessment) issued dated 11th December 2007, pending verification of the agreement between the supplier and the importer and their books of accounts, their imports from the said suppliers were ordered to be assessed provisionally with Extra Duty Deposit of 1% on the assessable value of the goods in addition to the duty payable by them as per the Board's circular dated 23-2-2001. Hence, going by the above circulars, the EDD at 1% collected is only by way of provisional assessment, which is to be followed by a final assessment as per the order dated 6-6-2008. As the department accepts the "transaction value" of the

importer, then EDD originally collected by the Department would have to be refunded to the importer upon issue of SVB assessment order.

4. Learned standing counsel appearing for the respondents pointed out that since the bills of entries are finally assessed, the question of claim for refund would have to be made within the time frame prescribed under the Act. The respondent pointed out that as far as the collection of 1% EDD is concerned, the claim for refund had been made beyond the six months, hence, it has to be rejected. Consequently, as the petitioner has not made any claim for refund within the stipulated period, the question of refund of the amount does not arise. Learned standing counsel appearing for the respondents further submitted that the petitioner had been finally assessed and had paid extra duty deposit of 1%. The question of refund has to be considered only in accordance with the provisions of the Act by the proper authority. The respondents submit that since the petitioner failed to file the application for refund of claim within the time frame, the question of claiming refund of duty is unsustainable in law. In this, learned standing counsel for the respondents placed heavy reliance on Section 27 of the Customs Act which deals with claim for refund of duty.

5. Heard learned Counsel for the petitioner and the learned Counsel for the respondents.

6. A perusal of the circular dated 10-12-2007 issued by the respondents discloses that in respect of imports made from related person, pending verification of the agreements between the supplier and the importers and their books of accounts, the imports from the suppliers were ordered to be assessed provisionally with Extra Duty Deposit of 1% on the assessable value of goods in addition to the duty payable by them as per the Board's circular No. 11/2001 dated 23-2-2001. On the enquiry completed as given under Circular dated 23-2-2001, final assessment is to be made within a period of four months from the date of reply obtained from the importer. Thus, in terms of this circular dated 10th December, 2007, when the petitioner filed bills of entry of 13th December, 2007, 12th February, 2008, 27th February, 2008 and 17th March, 2008, the goods were all cleared with EDD of 1% apart from the normal duty payable. It is no doubt true that the second respondent has passed an order of assessment on 6-6-2008, wherein it is observed that the imports were related to foreign suppliers as per Rule 2(2) of the Valuation Rules and the prices declared by the importer for assessment of the imported goods to duty are not influenced by the relationship. Paragraph 12 of the order directed that all pending assessments be finalised accordingly. The order passed is stated to be the subject to occasional review a final review after a period of three years which means, as regards the imports done during this period, so long as invoice entries remained the same, the value declared by the importer for assessment of the imported goods is accepted as it is. The said order of the second respondent dated 6-6-2008 is binding on the petitioner as well as on the respondents. So far as this aspect is concerned, there is

no dispute between the petitioner and the respondents. The grievance of the petitioner arises only on account of the fact that in the background of the order made long after the import, the respondents should have either made a final assessment without the demand for 1% EDD or alternatively with 1% EDD, it could only be a provisional assessment. Hence, with the collection of 1% EDD, the contention of the respondents that it is the final assessment clearly goes against the order dated 6-6-2008. In the circumstances, the collection of 1% EDD is totally unjustified. Hence, the petitioner has to be granted the refund of the said amount in terms of the order dated 6-6-2008 Circular 268/07 dated 10-12-2007 within the time frame as referred to in the provisions of the Act or otherwise pass the assessment and grant the refund to the petitioner.

7. I agree with the submissions of the petitioner. As per Explanation II of Section 27 of the Customs Act, where any duty is paid provisionally u/s 18, the claim has to be made within the period of one year or six months, as the case may be from the date of adjustment of duty after the final assessment thereof is made.

A reading of the documents placed before this Court, however, gives no idea as to whether the petitioner had been given the adjustment of the tax payment of 1% under EDD on final assessment keeping in mind the order passed on 6-6-2008. Paragraph 12 states that all pending assessments be finalised accordingly. The contention of the respondents herein is that the petitioner is not entitled to the refund of the amount paid at 1% EDD as the petitioner had not filed its claim for refund within the period of six months, cannot be accepted for the simple reason that the 1% EDD collected clearly makes the assessment a provisional one in terms of the order passed on 6-6-2008. Treating the assessment as final and retaining 1% EDD without adjustment practically is against the very tenor of the order dated 6-6-2008 and the circular dated 10-12-2007 and hence, unsustainable. Consequently, I have no hesitation in setting aside the order impugned herein thereby directing the respondents to finalise the assessment in terms of the order passed on 6-6-2008 within a period of six weeks from the date of receipt of a copy of this order, so that the petitioner may work out his remedies in accordance with law.

8. With the above observation, the writ petition is disposed of. No costs.