(2021) 12 CESTAT CK 0036

In the Customs, Excise And Service Tax Appellate Tribunal

Case No : Customs Appeal No. 50767 Of 2021

M/s Adwyn Chemical Pvt. Ltd. APPELLANT

Vs

Commissioner Of Customs RESPONDENT

Date of Decision : 10-12-2021

Acts Referred:

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

Citation : (2021) 12 CESTAT CK 0036

Hon'ble Judges : Anil Choudhary, J

Bench : Single Bench

Final Decision : Allowed

Judgement

1. The issue involved in this appeal is whether the refund claim of â??Special Additional Dutyâ?? (SAD), which is in lieu of sales tax, have been

rightly rejected as time barred, by the Court below.

2. The appellant is an importer and thereafter resells the goods. At the time of import of goods the appellant is required under the Customs Tariff Act

to deposit- (i) customs duty, (ii) additional duty (which is in lieu of Central Excise duty) and also deposit SAD (which is in lieu of sales tax by way of

equalisation levy, so as to protect the domestic industry). When an importer resells the goods, as such by way of trade, and deposits sales tax, he

becomes entitled to refund of the SAD, which has been deposited at the time of import. The procedure for such refund is provided under Notification

No. 102/2007-Cus. dated 14.09.2007. Subsequently, this notification was amended by subsequent Notification No. 93/2008-Cus dated 01.08.2008,

which amended in Condition No.(C) that â??the importer shall file a claim for refund of the â??Special Additional Dutyâ?? (SAD) of customs, paid on the import of goods with the Jurisdictional Customs Officer, before the expiry of one year from the date of payment of the â??Special Additional

Duty of Customsâ??. The Adjudicating Authority observed that the appellant had filed the refund claim on 24.05.2018 for refund of SAD of

Rs.6,48,476/-, which is in respect of eleven Bills of Entry and such claim have been filed beyond the period of one year from the date of deposit of

SAD, as per the respective bills of entry. The refund claim was rejected on the ground of limitation, as the appellant â?"importer had failed to file

refund claims within one year from the date of payment of Customs duty/ SAD. It was also observed as regards two Bills of Entry - the appellant

submitted duplicate copy of Bills of Entry.

3. Being aggrieved, the appellant preferred appeal inter alia on the ground that the â??right to claim refund of SADâ?? arises or crystallises only on

subsequent sale made of the goods in the domestic market. Prior to the subsequent sale of the goods, the limitation cannot start, as the right to claim

refund arises only on subsequent sale and deposit of Sales Tax /VAT. Reliance was placed on the following rulings:-

i) Sony India Pvt. Ltd., -2014 (304) ELT 660 (Del-HC)

ii) Purab Textile Pvt. Ltd., -2015 (330) ELT 414 (Tri. Mum.)

iii) International Refrigeration Corpn.-2016 (332) ELT (Tri.-Del.)

As regards the observation for two Bills of Entry - duplicate copy has been filed instead of original ones, the appellant has placed reliance in the case

of Commissioner of Customs and C. Ex., Noida vs. Progressive Alloys (I) Pvt. Ltd., reported at 2017 (358) ELT 699 (Tri. All.) and also raised the

ground of violation of principles of natural justice.

4. Learned Commissioner (Appeals) observed that the ruling in the case of Sony India was pronounced with respect to retrospective effect of

amendment by Notification No. 93/2008-Cus. The Delhi High Court examined the retrospective applicability of the amending notification. Hence, the

ruling of Delhi High Court in the case of Sony India (supra) is not applicable in the facts of the present case. He further placed reliance on the

following rulings:

i) CMS Info System Ltd.,-2017 (349) ELT 236 (Bom-HC.)

ii) R.M. Impex Pvt. ltd.-2020-TIOL-1271-CESTAT-Del.

iii) CC, Hyderabad vs. Surya Telecom Pvt. Ltd., (Appeal No.C/31110-31111/2017 decided on 02.07.2018).

wherein the ruling of Delhi High Court in the case of Sony India has been distinguished, and it has been held that time limit of one year from the date

of deposit of SAD will apply, as provided in Notification No. 93/2008-Cus.

5. Being aggrieved, the appellant is before this Tribunal inter alia on the ground that it is a matter of common sense, that unless right accrues to claim

refund, limitation cannot start. He also relies on the decision of Delhi High Court in Sony India and states that the views of Delhi High Court is rational

and have been followed in several decisions by this Tribunal, which are as under:-

i) Sony India Pvt. Ltd., vs. Commissioner of Customs-2014 (304) ELT 660 (Del.) maintained by Honâ??ble Supreme Court in the order as reported

in 2016 (337) ELT A102 (SC). However question of law, was kept open.

ii) Purab Textile Pvt. Ltd., -2015 (330) ELT 414 (Tri. Mum.)

iii) International Refrigeration Corpn.-2016 (332) ELT 824 (Tri. Del.)

Same view was expressed in the case of Commissioner of Customs, New Delhi vs. S. R. Traders -2020 (12) TMI 503-CESTAT, New Delhi.

Accordingly, he prays for allowing of the appeal with consequential benefits.

6. Learned Authorised Representative appearing for the Revenue relies on the impugned order.

7. Having considered the rival contentions, I find that the facts are not in dispute and admittedly, the appellant 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 Honâ??ble Delhi High Court judgement in Sony

India (supra) is based on the following specific findings â?

(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, under Notification No. 102/2007-Cus.

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

â??sofar as may be applicableâ?. Since SAD levied under Section 3(5) is refundable only on subsequent sale (i.e. the point at which sales tax/VAT liability arises), â??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 starting 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 â??so 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??counter-balance the sales tax, value added tax, local

tax or any other charges for the time being leviable on a like articleâ?; the rate of duty â?" where more than one levy exits, 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 â?" 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 72 is an authority for the proposition that the use of the phrase, â??so far as may

beâ? 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 â??to the extent possibleâ??.

(iv) Section 27(1) of the Customs Act prescribes a time limit of â??one year, 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 â??modified effectâ??. 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??so far as may be â??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.

8. The Honâ??ble Bombay High Court while disagreeing with Honâ??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 Honâ??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 â??so far as may be â?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 â??so far as may beâ??

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??.

(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.

9. From the perusal of both the judgements, I find that the Honâ??ble Bombay High Court has not distinguished the following findings of Honâ??ble

Delhi High Court in Sony India:-

(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??so far as

may beâ? applicable. The expression â??so 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??counter-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??so 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 statue 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.

10. As the aforesaid findings have not been 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 appellant is entitled to the refund, as their right to claim refund of duty (SAD) in terms of the Notification has

accrued only when the sale took place post import. 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 a part of the original notification. It was only with the

introduction of Circular No. 6/2008-Cus. and subsequent amending Notification No.93/2008 dated 01.08.2008, the department started insisting on the

limitation period (of one year) as prescribed, with effect from 1.8.2008, became applicable. The Honâ??ble High Court has clearly held that the expression â??so far as may beâ? 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.

11. Therefore, by following the judgement of the Honâ??ble Delhi High Court in Sony India (supra), the appeal filed by the appellant is allowed and

the impugned order is set aside. The appellant is entitled to consequential benefits, in accordance with law.

(Operative part of the order pronounced in open Court).

