
(2021) 05 CESTAT CK 0008

In the Customs, Excise And Service Tax Appellate Tribunal

Case No : Customs Appeal No. 60402 Of 2020

M/s.Ambey Sales

APPELLANT

Vs

Commissioner Of Customs,Ludhiana

RESPONDENT

Date of Decision : 13-05-2021

Acts Referred:

Customs Act, 1962 — Section 3, 3(5), 12, 14, 25(1)
Territorial Waters Continental Shelf, Exclusive Economic Zone and Other Maritime
Zones Act, 1976 — Section 6, 7
Customs Tariff Act, 1975 — Section 3(5)

Citation : (2021) 05 CESTAT CK 0008

Hon'ble Judges : Ashok Jindal, J

Bench : Single Bench

Advocate : R.K.Hasija, H.S.Brar

Final Decision : Disposed Of

Judgement

1. The appellant has filed this appeal against the impugned order wherein the refund claim filed by the appellant of special additional duty under

Notification No.102/2007-Cus dated 14.9.2007 as amended has rejected by the Commissioner (Appeals) as time barred.

2. The facts of the case are that the appellant is engaging in the business of importing and selling plastic materials such as PVC resins during 2015-16

and paid the SAD in terms of section 3 (5) of Customs Act, 1962. They filed refund claim under Notification No.102/2007- Cus dated 14.9.2007 of

SAD. The said refund claims were rejected being time barred in terms of Notification No.93/2008-Cus dated 1.8.2008. Against the said order, the

appellant is before me.

3. Ld. Counsel for the appellant submits that merely because two refund claims have been filed in the same month, the same cannot be rejected based

on the Circulars issued by the Board in terms of order of this Tribunal in the cases of Mitutoyo South Asia Pvt. Ltd vs. CC2015 (322) ELT 523 (Tri.-

Del.), Devki Nandan J.Gupta vs. CC-2015 (318) ELT 167 (Tri.) and CC vs. Kevin Impex Pvt. Limited-2016 (339) ELT 117 (Tri.-Bang.).

4. He further submits that refund claims have been rejected on the ground that the refund claims have been filed beyond one year after the payment

of SAD. He relied on the decision of the Honâ??ble Delhi High Court in the case of Sony India vs. CC-2014 (304) ELT 660 (Del.).

5. It is his submission that this Tribunal in the case of M/s. Auto Dynamic Corporation, M/s. Okaya Power Pvt.Ltd., M/s. S.G. International, M/s.

Sunnox International vs. CC, Ludhiana-2018 (12) TMI 1194 has held that where there are contrary views of Honâ??ble High Courts, the Tribunal is

at liberty to decide the issue ignoring the decisions of the High Court on merits. Therefore, relying on the earlier decisions in the cases of Gaio Mall

and Sons vs. CC, Ludhiana 2018 (10) TMI 941- CESTAT, Chandigarh, M/s. Goyal Impex & Industries Limited vs. CC-2018 (9) TMI 95- CESTAT,

Chennai, it was held that the refund claim filed by the appellants are within the time.

6. He also submits that Bangalore bench of this Tribunal in the case of CC, Bangalore vs. Octel Network Pvt.Ltd.-2019 (10) TMI 1158- CESTAT-

Bombay after noting the judgement of the Honâ??ble Bombay High Court in Purab Textile Pvt. Limited- 2019 (365) ELT 285 (Bom) has dismissed

the appeal of the department holding in favour of the importer by following the decision of this Tribunal in the case of Gulati Sales Corporation. He

also submits Delhi Bench of this Tribunal in the case CC vs. Om Traders-2019 (369) ELT 1037 (Tri.-Del.) relying upon the decision in the case of

Sony India (supra) has also held that prior to the date of sale and payment of VAT, limitation cannot start to run, even if provided wrongly by

Notification No.93/2008-Cus. The Id. Counsel also relied upon the decision of HLG vs. CC, Ludhiana-2021 (3) TMI 582 to say that the appellant is

entitled to interest on delayed refund of SAD.

7. On the other hand, Id. AR opposed the contention of the Id.Counsel and submits that the decision of Honâ??ble Delhi High Court in the case of

Sony India (supra) is not applicable to the facts of this case as in the said case the issue was that whether the Notification No.93/2008-Cus dated

1.8.2008 is applicable for refund claim filed for earlier period or not? Therefore, the said decision is not applicable to the facts of this case.

8. Moreover, he submits that in the case CMS Info Systems Limited vs. Union of India-2017 (349) ELT 236 (Bom.), Honâ??ble High Court has held

that time limit prescribed in the Notification No.93/2008-Cus dated 1.8.2008 is applicable to the facts of this case. He also relied on the decision of

Honâ??ble Bombay High Court in the case of CC vs. DSM Sinochem Pharmaceuticals (I) Pvs.Ltd.-2018 (359) ELT 509 (Bom.). He also relied on

the decision of Honâ??ble Bombay High Court in the case of CC vs. Purab Textile Pvt.Ltd.-2019 (365) ELT 285 (Bom.) and CC, New Delhi vs.

Aggarwal Trading Company-2019 (369) ELT 1196 (Tri.-Del.). Therefore, he prayed that the lower authorities have rightly rejected the refund claims

as time barred in terms of Notification No.93/2008-Cus dated 1.8.2008.

9. Heard the parties and considered the submissions.

10. On careful consideration of the submissions of both sides, I find that sole issue is whether Notification No.102/2007-Cus dated 14.9.2007 as

amended by Notification No.93/2008-Cus dated 1.8.2008, the time limit prescribed for filing refund claim is one year from the date of payment of

SAD or not ?

11. For better appreciation of facts, the legal provisions relevant to decide the issue is as under and are incorporated as under:-

25. Power to grant exemption from duty. - (1) If the Central Government is satisfied that it is necessary in the public interest so to do, it may,

by notification in the Official Gazette, exempt generally either absolutely or subject to such conditions (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 duty of customs leviable

thereon.

(2) If the Central Government is satisfied that it is necessary in the public interest so to do, it may, by special order in each case, exempt

from payment of duty, for reasons to be stated in such order, any goods, of strategic or secret nature, or for charitable purpose, on which

duty is leviable.

(2A) The Central Government may, if it considers it necessary or expedient so to do for the purpose of clarifying the scope or applicability

of any notification issued under sub-section (1) or order issued under sub-section (2), insert an explanation in such notification or order, as

the case may be, by notification in the Official Gazette, at any time within one year of issue of the notification under sub-section (1) or

under sub-section (2), and every such explanation shall have effect as if it had always been the part of the first such notification or order,

as the case may be.

(3) An exemption under sub-section (1) or sub-section (2) in respect of any goods from any part of the duty of customs leviable thereon (the

duty of customs leviable thereon being hereinafter referred to as the statutory duty) may be granted by providing for the levy of a duty on

such goods at a rate expressed in a form or method different from the form or method in which the statutory duty is leviable and any

exemption granted in relation to any goods in the manner provided in this sub-section shall have effect subject to the condition that the duty

of customs chargeable on such goods shall in no case exceed the statutory duty.

(4) Every notification issued under sub-section (1) or sub-section (2A) shall, unless otherwise provided, come into force on the date of its

issue by the Central Government for publication in the Official Gazette.

(5) ***

(6) Notwithstanding anything contained in this Act, no duty shall be collected if the amount of duty leviable is equal to, or less than, one

hundred rupees.

Explanation. - "Form or method", in relation to a rate of duty of customs, means the basis, namely, valuation, weight, number, length,

area, volume or other measure with reference to which the duty is leviable.

(7) The mineral oils (including petroleum and natural gas) extracted or produced in the continental shelf of India or exclusive economic

zone of India as referred to in section 6 and section 7, respectively, of the Territorial Waters Continental Shelf, Exclusive Economic Zone

and Other Maritime Zones Act, 1976, (80 of 1976) and imported prior to 7th day of February, 2002 shall be deemed to be and shall always

be deemed to have been exempted from the whole of duties of customs leviable on such mineral oils, and accordingly, notwithstanding

anything contained in any judgment, decree or order of any Court, tribunal or other authority, no suit or other proceedings in respect of

such mineral oils shall be maintained or continued in any Court, tribunal or other authority.

(8) Notwithstanding the exemption provided under sub-section (7), no refund of duties of customs paid in respect of the mineral oils

specified therein shall be made.â??

12. Notification No.102/2007-Cus dated 14.9.2007 reads as under:

â??Exemption from special CVD to all goods imported for subsequent sale when VAT/Sales Tax paid by importer. - In exercise of the

powers conferred by sub-section (1) of section 25 of the Customs Act, 1962 (52 of 1962), the Central Government, on being satisfied that it

is necessary in the public interest so to do, hereby exempts the goods falling within the First Schedule to the Customs Tariff Act, 1975 (51 of

1975) when imported into India for subsequent sale, from the whole of the additional duty of customs leviable thereon under sub-section (5)

of section 3 of the said Customs Tariff Act (hereinafter referred to as the said additional duty).

2. The exemption contained in this notification shall be given effect if the following conditions are fulfilled:

(a) the importer of the said goods shall pay all duties, including the said additional duty of customs leviable thereon, as applicable, at the

time of importation of the goods;

(b) the importer, while issuing the invoice for sale of the said goods, shall specifically indicate in the invoice that in respect of the goods

covered therein, no credit of the additional duty of customs levied under sub-section (5) of section 3 of the Customs Tariff Act, 1975 shall be

admissible;

(c) the importer shall file a claim for refund of the said additional duty of customs paid on the imported goods with the jurisdictional

customs officer;

(d) the importer shall pay on sale of the said goods, appropriate sales tax or value added tax, as the case may be;

(e) the importer shall, inter alia, provide copies of the following documents along with the refund claim :

- (i) document evidencing payment of the said additional duty;
- (ii) invoices of sale of the imported goods in respect of which refund of the said additional duty is claimed;
- (iii) documents evidencing payment of appropriate sales tax or value added tax, as the case may be, by the importer, on sale of such imported goods.

3. The jurisdictional customs officer shall sanction the refund on satisfying himself that the conditions referred to in para 2 above, are fulfilled.â??

13. Notification No.93/2008-Cus dated 1.8.2008 reads as under:

â??Exemption from special CVD to all goods imported for subsequent sale when VAT/Sales Tax paid by importer. - In exercise of the

powers conferred by sub-section (1) of section 25 of the Customs Act, 1962 (52 of 1962), the Central Government, on being satisfied that it

is necessary in the public interest so to do, hereby exempts the goods falling within the First Schedule to the Customs Tariff Act, 1975 (51 of

1975) when imported into India for subsequent sale, from the whole of the additional duty of customs leviable thereon under sub-section (5)

of section 3 of the said Customs Tariff Act (hereinafter referred to as the said additional duty).

2. The exemption contained in this notification shall be given effect if the following conditions are fulfilled:

(a) the importer of the said goods shall pay all duties, including the said additional duty of customs leviable thereon, as applicable, at the

time of importation of the goods;

(b) the importer, while issuing the invoice for sale of the said goods, shall specifically indicate in the invoice that in respect of the goods

covered therein, no credit of the additional duty of customs levied under sub-section (5) of section 3 of the Customs Tariff Act, 1975 shall be

admissible;

c) the importer shall file a claim for refund of the said additional duty of customs paid on the imported goods with the jurisdictional customs

officer before the expiry of one year from the date of payment of the said additional duty of customs;

(d) the importer shall pay on sale of the said goods, appropriate sales tax or value added tax, as the case may be;

(e) the importer shall, inter alia, provide copies of the following documents along with the refund claim : (i) document evidencing payment

of the said additional duty;

(ii) invoices of sale of the imported goods in respect of which refund of the said additional duty is claimed;

(iii) documents evidencing payment of appropriate sales tax or value added tax, as the case may be, by the importer, on sale of such

imported goods.

3. The jurisdictional customs officer shall sanction the refund on satisfying himself that the conditions referred to in para 2 above, are

fulfilled.â??

13. Section 3 of Customs Act, 1962 reads as under: -

â??3. Levy of additional duty equal to excise duty. - (1) Any article which is imported into India shall, in addition, be liable to a duty

(hereafter in this section referred to as the additional duty) equal to the excise duty for the time being leviable on a like article if produced

or manufactured in India and if such excise duty on a like article is leviable at any percentage of its value, the additional duty to which the

imported article shall be so liable shall be calculated at that percentage of the value of the imported article.

Explanation. - In this sub-section, the expression â??the excise duty for the time being leviable on a like article if produced or

manufactured in Indiaâ? means the excise duty for the time being in force which would be leviable on a like article if produced or

manufactured in India or, if a like article is not so produced or manufactured, which would be leviable on the class or description of

articles to which the imported article belongs and where such duty is leviable at different rates, the highest duty.

(2) For the purpose of calculating under this section, the additional duty on any imported article, where such duty is leviable at any

percentage of its value, the value of the imported article shall, notwithstanding anything contained in section 14 of the Customs Act, 1962,

be the aggregate of â?

(i) the value of the imported article determined under sub-section (1) of section 14 or the tariff value of such article fixed under sub-section

(2) of that section, as the case may be; and

(ii) any duty of customs chargeable on that article under section 12 of the Customs Act, 1962, and any sum chargeable on that article under

any law for the time being in force as an addition to, and in the same manner as, a duty of customs, but not including the duty referred to in

sub-section (1).

(3) If the Central Government is satisfied that it is necessary in the public interest to levy on any imported article [whether on such article

duty is leviable under sub-section (1) or not] such additional duty as would counterbalance the excise duty leviable on any raw materials,

components and ingredients of the same nature as, or similar to those, used in the production or manufacture of such article, it may, by

notification in the Official Gazette, direct that such imported article shall, in addition, be liable to an additional duty representing such

portion of the excise duty leviable on such raw materials, components and ingredients as, in either case, may be determined by rules made

by the Central Government in this behalf.

(4) In making any rules for the purposes of sub-section (3), the Central Government shall have regard to the average quantum of the excise

duty payable on the raw materials, components or ingredients used in the production or manufacture of such like article.

(5) The duty chargeable under this section shall be in addition to any other duty imposed under this Act or under any other law for the time

being in force.

(6) The provisions of the Customs Act, 1962 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.â??

14. After going through the above provisions and the decision of Honâ??ble Apex Court in the case of CC (Preventative) vs. M. Ambalal & Co.

reported in 2011 (2) SCC 74. The Honâ??ble Supreme Court has examined the issue and observed asunder: -

The relevant paras of the said judgement are extracted below for the purpose to decide the issue in hand:-

10. The Customs Act, 1962 is an Act to consolidate and amend the law relating to Customs. The object of the Act is to regulate the import and export of goods, into and from the shores of India, or otherwise, and determine the customs duty payable. It also attempts to fill the lacunae of the previous customs legislations viz. the Sea Customs Act and the Land Customs Act. It also aims to counter the difficulties that have emerged over the years due to the changing economic and financial conditions; amongst them it proposes to tackle the increasing problems of smuggling both in and out of the country. The Act aims to sternly and expeditiously deal with smuggled goods, and curb the dents on the revenue thus caused. In order to deal with the menace of smuggling, the authorities are enabled to detect, conduct search and seizure, and if necessary, confiscate such smuggled goods, within the territory of India.

16. It is settled law that the notification has to be read as a whole. If any of the conditions laid down in the notification is not fulfilled, the party is not entitled to the benefit of that notification. The rule regarding exemptions is that exemptions should generally be strictly interpreted but beneficial exemptions having their purpose as encouragement or promotion of certain activities should be liberally interpreted. This composite rule is not stated in any particular judgment in so many words. In fact, majority of judgments emphasize that exemptions are to be strictly interpreted while some of them insist that exemptions in fiscal Statutes are to be liberally interpreted giving an apparent impression that they are contradictory to each other. But this is only apparent. A close scrutiny will reveal that there is no real contradiction amongst the judgments at all. The synthesis of the views is quite clearly that the general rule is strict interpretation while special rule in the case of beneficial and promotional exemption is liberal interpretation. The two go very well with each other because they relate to two different sets of circumstances.

17. The notification issued by the Central Government in exercise of the powers conferred by Section 25(1) of the Act exempts the articles

enumerated in the Table annexed when imported into India from payment of duty under the Act. The language used in the notification is

plain and unambiguous. Therefore, we are required to consider the same in their ordinary sense. A construction which permits one to take

advantage of one's own wrong or to impair one's own objections under a Statute should be disregarded. The interpretation should

as far as possible be beneficial in the sense that it should suppress the mischief and advance the remedy without doing violence to the

language. From the wording of the above exemption notification, it is clear that the benefit of the exemption envisaged is for those goods

that are imported.

15. As per the said observations made by the Hon'ble Apex Court, the exemption notifications in question are to be interpreted liberally.

Notification No.93/2008-Cus prescribes that exemption from special CVD in specific is not available without VAT/Sales tax is paid by the importer.

Further mandates notification is that SAD which has been levied on the importer is to safeguard the VAT/Sales tax is to be paid by the

importer/trader at the time of sale of the goods. Therefore, if the importer sells the goods and make payment of VAT/Sales tax then the importer is

entitled to claim refund of SAD paid by them at the time of import of the goods. If the goods are not sold by the importer, the importer is not entitled

for refund of SAD paid by him. The importer shall claim refund of such additional duty of customs paid on the imported goods with the jurisdictional

Customs officer before expiry of one year from the date of payment of additional duty. Further, the importer shall pay proper Sales tax at the time of

sale of imported goods. The importer, while issuing the invoice for sale of the said goods, shall specifically indicate in the invoice that in respect of the

goods covered therein, no credit of the additional duty of customs levied under sub-section (5) of section 3 of the Customs Tariff Act, 1975 shall be

admissible. The importer shall file a claim for refund of the said additional duty of customs paid on the imported goods with the jurisdictional customs

officer before the expiry of one year from the date of payment of the said additional duty of customs. The importer shall pay on sale of the said goods,

appropriate sales tax or value added tax, as the case may be. The importer shall, inter alia, provide copies of the following documents along with the

refund claim:

(c) document evidencing payment of the said additional duty;

(d) invoices of sale of the imported goods in respect of which refund of the said additional duty is claimed;

(e) documents evidencing payment of appropriate sales tax or value added tax, as the case may be, by the importer, on sale of such imported goods.

16. Clauses (c), (d) and (e) of the said notification are contrary to each other as if within one year the importer does not sell the goods imported by

him within one year of the payment of SAD and then his claim barred by limitation. Therefore, if the refund claim is to be filed within one year, how

the importer be compelled to sell the imported goods within one year, as the importer is required to comply the condition (e) of the Notification. If in

case the importer sell the goods after one year of payment of SAD and documents as required under clauses(e) of the notification, the refund claim

shall be barred by limitation.

17. When the said notification is beneficial to the assessee by exercising of power under section 25(1) of Customs Act, 1962, the whole purpose of the

exemption granted under Sec. 25 (1) of the Act shall be defeated. In case, the imported goods could not be sold by the importer within one year of the

payment of SAD on payment of VAT/service tax, the importer is deprived to claim of the refund of SAD. The cause of action to claim refund of

SAD does not arise as per Notification No.102/07-Cus dated 14.9.2007 and Notification No.93/08-Cus dated 1.8.2008. If the SAD and VAT/Sales

tax paid on the imported goods, it will amount to double taxation on the said imported goods as condition 2(c) of the said notification bars the importer

to file refund after clearance of goods after one year of the SAD. Once the intent of the Legislature is to refund the SAD on payment of VAT/Sales-

Tax, the condition 2(c) of the Notification is against the intent of the Legislature. As it is not the intent of legislature to tax double on the imported

goods, the importer shall not compete Indian market. For example, if importer imported goods in March, 2020, after lockdown due to the Pandemic

Covid 19 in all over country, second wave of Pandemic and various parts of India is under locked down, if the importer failed to sell the imported

goods, the importer shall be put on another burden of SAD which is otherwise entitled of refund on payment of VAT/Sales tax. Further, unless and

until the goods are sold on payment of VAT/Sales tax, cause of action for refund of SAD does not arise, the said issue has not been addressed by the

Division of this Tribunal in the case of Aggarwal Trading Company (supra), the same has been addressed by the Single Member Bench of this

Tribunal on various occasions. In that circumstance, as there are contrary views of this Tribunal, then it would be in the interest of justice, the matter

needs to be referred to the Larger Bench of this Tribunal to decide the following issues:

Whether the time limit prescribed for filing refund claim of SAD paid by the importer is one year in terms of Notification No. 93/2008(Cus)

dated 01.08.2008 which has been issued in terms of section 25(1) of the Customs Act, 1962 without selling the imported goods by the

importer within one year of payment of SAD shall be applicable or not ?.

18. The Registry is directed to place the records before the Honâ??ble President for constitution of Larger Bench to decide the above issue.

(Pronounced in the open Court on 13.05.2021)