
(2021) 04 CESTAT CK 0021

In the Customs, Excise And Service Tax Appellate Tribunal

Case No : Customs Appeal No. 40519 Of 2020

M/s.Doosan Infracore Construction Equipment India Pvt. Ltd.	APPELLANT
Vs	
Commissioner Of Customs (Preventive)	RESPONDENT

Date of Decision : 05-04-2021

Acts Referred:

Customs Act, 1962 — Section 2(26)
Customs Tariff Act, 1975 — Section 3(5)

Citation : (2021) 04 CESTAT CK 0021

Hon'ble Judges : Sulekha Beevi C.S, J

Bench : Single Bench

Advocate : Harish Bindumadhavan, Rinki Arora, T. Usha Devi

Final Decision : Allowed

Judgement

1. Brief facts of the case are that appellant has filed refund applications seeking refund of 4% Additional Customs duty as per Notification No.102/2007-Cus. dated 14.9.2007. The refund claims were processed and refund was sanctioned to the appellant. Later, on verification, it was noticed by the department that with regard to 5 Bills of Entry there is difference in the name of importer in the Bill of Entry and the corresponding sale invoices. The department was of the view that the appellant is not eligible for refund as the conditions stipulated in Notification No.102/2007-Cus. is not fulfilled; that only importer is eligible to claim refund of 4% SAD paid on imported goods and since claimant is not the importer of the goods, the refund ought not to have been sanctioned. Show cause notice dt. 07.09.2017 was issued proposing to recover the erroneously sanctioned refund of Rs.9,88,526/- along with interest. After due process of law, the original authority confirmed the demand of 4% SAD amounting to Rs.9,88,526/- along with interest. Aggrieved by such order, the appellants are now before the Tribunal.

2.1 On behalf of the appellant. Ld. Counsel Shri Harish Bindumadhavan appeared and argued the matter. He submitted that the goods were imported between

January and April 2015 by Doosan Infracore India Pvt. Ltd. and they filed inbond Bill of Entry for storage of goods at the customs bonded warehouse. On 01.04.2015, a slump sale agreement was executed for sale of its Excavator Division by Doosan Infracore India Pvt.Ltd to the appellant herein, namely, Doosan Infracore Construction Equipment India Pvt. Ltd. On 13.4.2015, ex-bond bill of entry was filed by Doosan Infracore India Pvt. Ltd. for clearance of goods for home consumption by paying all applicable duty including 4% SAD on behalf of the appellant. For clearing such goods, IEC of Doosan Infracore India Pvt. Ltd. was used since the appellant M/s.Doosan Infracore Construction Equipment India Pvt. Ltd. was yet to obtain IEC. They later obtained IEC on 27.4.2015. After clearance of goods, the appellant herein filed refund claim of SAD as per the notification No.102/2007-Cus. dt. 14.9.2007. On 1.7.2016, the refund was granted. Later on 7.9.2017, the present SCN has been issued proposing to recover a portion of the sanctioned refund alleging that appellant is not the owner/importer of the goods and that therefore the condition stipulated in the notification has not been complied.

2.2 He adverted to the conditions of Notfn.102/2007-cus. dt. 14.09.2007. As per clause 2 (c) of the notification, the 'importer' has to file claim for refund of SAD. He adverted to Section 2 (26) of the Customs Act, 1962 which defines the term "importer". Prior to 2017, the definition reads as under :

(26) "importer", in relation to any goods at any time between their importation and the time when they are cleared for home consumption, includes any owner, or any person holding himself out to be the importer;

2.3 On plain reading of the above, it is clear that the definition of importer is an inclusive definition and that importer includes any person holding themselves out to be the importer after the physical importation of the goods but before the clearance for home consumption.

2.4 In the present case, only the physical import of the goods was made by Doosan Infracore India Pvt Ltd but the Appellant became the owner of goods before clearance of the impugned goods for home consumption by the event of slump sale. This is also evident from the following activities of the Appellant:

- a. The Appellant submitted the Original Copies of Bills of Entry and duty paid challan.
- b. The excavator machines imported were identified with the serial numbers and were reconciled with the import documents and also with the sales documents, which is sufficient to prove that the machineries that are imported were actually sold.

2.5 The Appellant submits that Doosan Infracore India Pvt Ltd. placed purchase order with the foreign supplier and the foreign supplier shipped the goods to India based on the purchase order. Upon its receipt at the port, Doosan Infracore India Pvt Ltd. cleared the goods for warehousing and stored the goods at bonded

warehouse.

2.6 During the period when goods were stored in the bonded warehouse, Doosan Infracore India Pvt Ltd., decided to demerge or transfer its Excavator division to the Appellant by way of slump sale. The slump sale was executed on April 01, 2015 and all the assets and liabilities of the division was transferred to the Appellant. The assets also included the impugned goods which were lying in the warehouse. Subsequent to such transfer, the Appellant became the legal/rightful owner of the goods stored in the warehouse. The title of 'importer' as per Customs Act, 1962 was shifted from Doosan Infracore India Pvt Ltd. to the Appellant due to the slump sale agreement.

2.7 The Appellant being the rightful owner was supposed to clear the goods from the warehouse by payment of duty. However, the Appellant awaited Import Export Code from the authorities and due to business needs, Appellant got the goods cleared with the help of Doosan Infracore India Pvt Ltd. Doosan Infracore India Pvt Ltd, quoted its IEC, paid the duty and cleared the goods on the directions of and on behalf of the Appellant. Subsequently, Appellant reimbursed the duty to Doosan Infracore India Pvt Ltd.

2.8 The Appellant submits that, from the above it is very clear that, the Appellant, cleared the goods for home consumption, also it is submitted that because of non-availability of IEC the Appellant couldn't clear the goods on its own by filing fresh bond and payment of duty. Nevertheless, the Appellant still continued to hold the status of importer and rightful owner of goods in the bonded warehouse.

2.9 It is also submitted by him that Doosan Infracore India Pvt. Ltd. did not file any claim for refund of SAD paid on the transaction. In the impugned order, it is observed that only the importer is entitled to claim SAD refund. From the definition itself, it is clear that the appellant is the importer. Merely because the Bill of Entry does not bear the name of the appellant, it cannot be said that the appellant is not the importer of impugned goods. Ld. Counsel also produced copy of slump sale agreement. In the said agreement definition of 'acquired assets' states that it includes refund of special additional customs duty. He prayed that the appeal may be allowed.

3. Ld. A.R Ms. T.Usha Devi supported the findings in the impugned order. She submitted that appellant has used IEC code of Doosan Infracore India Pvt. Ltd. to clear the goods. They have later filed refund claim stating that they have obtained ownership of the goods. The IEC code of Doosan Infracore India Pvt. Ltd. cannot be used by the appellant and therefore the appellant is not eligible for refund of SAD. The conditions in Notification No.102/2007 state that the importer is eligible to claim refund. Appellants having misused the IEC code of Doosan Infracore India Pvt. Ltd. cannot claim refund and therefore the order passed for recovering the erroneous refund is legal and proper. She relied upon the following decisions :

(1) Seven Hills Solvents Pvt. Ltd. Vs CCT Visakhapatnam 2018-TIOL2713-CESTAT-HYD

(2) Suri Devices India, ST Enterprise Vs CC Mumbai - 2014-TIOL-2928-CESTAT-MUM

(3) Andhra Pradesh Granite Midwest Pvt. Ltd. Vs CCT, GST Guntur - 2020-TIOL-746-CESTAT Hyderabad

4. Heard both sides.

5. The main allegation raised against the appellant is that they are not the importer of the goods and therefore not eligible for refund of SAD as per the conditions stated in Notification No.102/2007. For better appreciation, clause 2 of the said notification is reproduced as under:

"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 alongwith 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."

6. It can be seen that it is for the importer to file refund claim. The definition of "importer" as it stood prior to 2017 has been referred to by Ld. Counsel for appellant. From the definition, it can be seen that it is an inclusive definition wherein the importer includes any owner or person holding himself out to be the importer. The appellant has entered into slump sale agreement with Doosan Infracore India Pvt. Ltd. on 1.4.2015 for sale of Excavator Division. The definition

of 'Acquired Assets' as per Section 1 of the said agreement, is as under :

"Acquired assets" means all of the assets, properties and rights of Seller owned or used by Seller in connection with the Business, as such assets, properties and rights exist at the Closing, including without limitation: (i) cash and cash equivalents in an amount to be determined by the parties, (ii) accounts or notes receivable of the Business, (iii) Personal Property, (iv) the Assumed Contracts, (v) the Assumed licenses, (vi) Computer Software and Databases, (vii) all documents, books and records related to the Acquired Assets, (viii) all third party warranties and guarantee with respect to any of the Acquired Assets to the extent, if any, to which Seller shall be entitled to assign such rights without the consent of any third party; (ix) all of Seller's claims, causes of action and judgments primarily or exclusively relating to the Business, (x) all goodwill associated with the other Acquired Assets, (xi) all other assets, properties and rights of Seller owned or used by Seller in connection with the Business. The list of Acquired Assets, categorized as applicable shall be drawn up and annexed to this Agreement, which shall form part and parcel of this Agreement and (xii) All Tax benefits / receivables relating to inventory being transferred including but not limited to refund of special additional customs duty."

7. In the agreement it is stated that all assets and properties of the seller owned or used by the seller in connection with business would fall within "acquired assets" by the appellant herein. It is also stated that all tax benefits / receivables relating to inventory being transferred including but not limited to refund of SAD would be acquired assets from seller to buyer. After the slump sale agreement of the excavator division, the appellant has become the owner of the imported goods or can be said to be in the shoes of a person holding himself out to be the importer. Though IEC of Doosan Infracore India Pvt. Ltd. was used for clearance of the goods, it cannot be said that appellant is a total stranger to Doosan Infracore India Pvt. Ltd. So also, it cannot be said that the appellant does not have any ownership over the goods. The agreement is sufficient evidence to satisfy that the ownership of the goods was transferred from Doosan Infracore India Pvt. Ltd. to the appellant herein. This being the circumstances, the refund claim filed by the appellant would satisfy the condition prescribed in clause 2(c) of the Notification No.102/2007. Ld. Counsel has relied upon the decision in the case of TATA Hitachi Construction Machinery Co. Ltd. Vs C.C., Chennai - 2019 (370) ELT 1624 (Tri-Chennai) to argue that when the goods are transferred while being warehoused, the transferee is responsible for filing Bill of Entry and to pay all duties, interest and penalties. Thus, before the goods were cleared for home consumption as per slump sale agreement, the liability to pay all duties including SAD on the imported goods is on the appellant. Consequent to slump sale agreement, not only the liability to pay duty but also the right to claim SAD refund also is passed on to the appellant herein. From the above discussions, I am of the view that sanction of refund to the appellant is legal and proper. The impugned order cannot sustain.

8. Ld. A.R has placed a number of decisions before me. None of these decisions are relevant to the facts of the present case. Most of these decisions are with regard to abuse and misuse of IEC code. In the present case, there is no misuse or abuse of IEC code and the appellant being the owner of the goods has used IEC code of Doosan Infracore India Pvt. Ltd. for clearing the goods. If at all, it may be a procedural infraction. The refund cannot be denied when all conditions of the notification are fulfilled. There is no violation of condition of Notification No.102/2007 so as to deny the refund of SAD as the appellant would fit into the definition of "importer".

9. From the foregoing discussions, the impugned order is set aside. Appeal is allowed with consequential relief, if any, as per law.

(Pronounced in open Court on 05.04.2021)