(2021) 03 CESTAT CK 0029

In the Customs, Excise And Service Tax Appellate Tribunal

Case No : Customs Appeal No. 20084 Of 2020

Vallabhdas And Co — APPELLANT

Vs

Commissioner Of Customs — RESPONDENT

Date of Decision : 18-03-2021

Acts Referred:

Citation : (2021) 03 CESTAT CK 0029

Hon'ble Judges : S.S. Garg, J

Bench : Single Bench

Advocate : Subramanian, G, K.B. Nanaiah

Final Decision : Allowed

Judgement

1. The present appeal is directed against the impugned order dt. 19/11/2019 passed by the Commissioner of Customs (Appeals) whereby the Commissioner (Appeals) has rejected the appeal of the appellant and upheld the Order-in-Original.

2. Briefly, the facts of present case are that the appellant had imported Rock Phosphate from Egypt at Cochin Port during February 2017 and June 2017 and cleared them under four Bills of Entry on payment of assessed duty including Special Additional Duty (SAD) at 4%. The goods imported were subsequently sold. Thereafter the appellant filed refund claim of SAD paid amounting to Rs.1,57,679/- as provided under Notification No.102/2007-Cus dt. 14/09/2007. Thereafter a show-cause notice dt. 26/12/2017 was issued to the appellant. After following due process, the original authority rejected part of the claim amounting to Rs.76,707/- relating to sales during pre-GST period but sanctioned refund of Rs.80,973/- in respect of sales post-GST period vide Order-in-Original dt. 30/07/2018. Aggrieved by the partial rejection of refund claim, appellant filed appeal before the Commissioner (Appeals) who rejected the appeal. Hence the present appeal.

3. Heard both sides and perused the records.

4. Learned counsel for the appellant submitted that the impugned order is not sustainable in law as the same has been passed without appreciating the facts and the law. He further submitted that the Assistant Commissioner while rejecting the refund claim of Rs.76,706/- has relied upon the decision of the Supreme Court in the case of CC, Mumbai Vs. Seiko Brushware India but the said decision is in respect of Notification No.34/1998-Cus. dt. 13/06/1998 wherein the proviso disallows exemption from SAD if the goods are sold from a place where there is no sales tax on the goods. But in the present case, the appellant has claimed the refund of SAD on the basis of Notification No.102/2007-Cus dt. 14/09/2007 which only specifies that "appropriate sales tax should be paid". He further submitted that Notification No.34/1998-Cus has been rescinded vide Notification No.58/1998-Cus dt. 01/08/1998. He also submitted that when the goods in question were imported and cleared during February 2017 and June 2017, Notification No.102/2007-Cus. only was in force which allowed the refund of SAD if appropriate sales tax has been paid. He further submitted that this issue is no more res integra and has been settled in favour of the appellant in his own case vide Final Order No.20564 to 20581/2017 dt. 27/04/2017 and vide Final order No.20635/2019-SM dt. 14/08/2019.

5. On the other hand, the learned AR defended the impugned order.

6. After considering the submissions of both the parties and perusal of the material on record, I find that this issue is no more res integra and has been settled by various decisions of the Tribunal including the decision of this Tribunal in the appellant's own case wherein the Tribunal vide its Final Order Nos. 20564 - 20581/2017 has allowed all the appeals by relying upon the earlier decisions of the Tribunal. Besides this, I find that both the authorities have wrongly relied upon the decision of the Apex Court which was in respect of Notification No. 34/1998-Cus. dated 13.06.1998. Further I find that the said Notification 34/1998 has been subsequently rescinded by Notification 58/1998-Cus. dated 01.08.1998. Therefore, reliance by both the parties on a Notification which has been rescinded is not tenable in law. It is relevant to reproduce the relevant finding of the order of the Tribunal in the appellant's own case for the earlier period which is reproduced herein below:

"5. We find that an identical issue came up before the Tribunal in the case of Gazal Overseas (Supra) in which the Tribunal allowed payment on refund of SAD. We reproduce below the relevant para of the decision:

"4. We have considered the contention of ld. DR and also perused the refund papers. Notification No. 102/2007, dated 14-9-2007 as amended allowed refund of SAD subject to the condition that "the importer shall pay appropriate sales tax or VAT, as the case may be." In the present case, the appropriate sales tax or VAT being NIL the appellants cannot be said to have violated the said conditions of the said notification inasmuch as it cannot be said that they have not paid appropriate sales tax/VAT. In this regard, it is seen that vide Circular No. 6/2008, dated 28-4-2008 C.B.E. & C. in para 5.3 thereof clarified as under:

"5.3 The exemption contained in the said notification envisages that the importer shall file a refund claim for 4% CVD ("said additional duty of Customs") paid on imported goods and shall pay on sale of the said goods "appropriate Sales Tax or VAT as the case may be". Hence, it is clear that there is no stipulation in the notification that the exemption is available only if the rate of ST/VAT is equal to or higher than the rate of additional duty of Customs; nor is there a condition that if the rate of ST/VAT happen to be lower than 4%, the refund would be restricted to the lower amount. As such, it is clarified that it will not be appropriate to reduce the refund amount in such a situation and the entire 4% CVD, if otherwise found eligible, shall be refunded". It is evident from the above clarification of C.B.E. & C. that even if VAT/Sales tax was less than 4%, the appellant was entitled to refund of SAD which was 4% so long as VAT/sales tax was paid. In other words, so long as appropriate VAT/Sales tax was paid, SAD refund was admissible even if the appropriate sales tax/VAT was less than SAD; if the sales tax/VAT was NIL, so be it. In other words what is required in terms of the said notification is payment of appropriate sales tax/VAT regardless of the rate thereof. It logically follows that if the appropriate rate of sales tax/VAT was NIL then the appropriate sales tax/VAT paid will also be NIL.

5. In the light of the foregoing discussions, we find that the impugned order is not sustainable. Accordingly we set aside the same and allow the appeals with consequential relief, if any."

6. In view of the above decision of the Tribunal, we hold that the present issue is no more res integra. By following the above decision, we are of the view that NIL rate of VAT in terms of the notification issued under Kerala Finance Act 2001 is to be considered as appropriate sales tax / VAT. Accordingly, we are of the view that the condition prescribed in Notification No. 102/2007 is satisfied and the appellant will be eligible for the refund of the SAD paid at the time of input. In view of the above findings, the impugned orders are set aside and all appeals are allowed with consequential relief. Miscellaneous applications are also disposed off."

7. Since the issue is squarely covered in favour of the appellant in their own case by the decisions cited supra, therefore by following the ratio of the above said decisions, I set aside the impugned order by allowing the appeal of the appellant.

(Order was pronounced in Open Court on 18/03/2021)