

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,
WEST ZONAL BENCH : AHMEDABAD**

REGIONAL BENCH - COURT NO. 3

CUSTOMS Appeal No. 79 of 2012-SM

[Arising out of Order-in-Original/Appeal No 43-44-COMMR-A-JMN-2012 dated 21.03.2012 passed by Commissioner of CUSTOMS-JAMNAGAR (PREV)]

Bharat Ship Breakers Corporation

.... Appellant

Sutarwad, Station Road,
BHAVNAGAR, GUJARAT

VERSUS

Commissioner of Customs, Jamnagar (Prev.)

.... Respondent

Sharda House, Bedi Bandar Road,
Opp. Panchavati, Jamnagar, Gujarat

WITH

CUSTOMS Appeal No. 83 of 2012-SM

[Arising out of Order-in-Original/Appeal No 66-COMMR-A-JMN-2012 dated 29.03.2012 passed by Commissioner of CUSTOMS-JAMNAGAR (PREV)]

Rishi Ship Breakers

.... Appellant

Plot No. 1501-02/C, 1st Floor,
Sarnath Compound, Ghogha Circle,
BHAVNAGAR, GUJARAT -364001

VERSUS

Commissioner of Customs, Jamnagar (Prev.)

.... Respondent

Sharda House, Bedi Bandar Road,
Opp. Panchavati, Jamnagar, Gujarat

APPEARANCE :

None for the Appellant

Shri G. Kirupanandan, Assistant Commissioner (AR) for the Revenue.

CORAM: HON'BLE MR. RAMESH NAIR, MEMBER (JUDICIAL)

DATE OF HEARING/ DECISION: 27.03.2023

FINAL ORDER NO. A/10736-10737 / 2023

RAMESH NAIR :

These appeals are directed against the order-in-appeal passed by Commissioner (Appeals) which are impugned orders in the present case. Learned Commissioner (Appeals) has upheld the rejection of refund claims under Notification No. 102/2007-Cus dated 14.09.2007 on the ground of time-bar as the refund claims were filed after one year from the date of payment of Customs duty.

2. Shri Rahul Gajera, learned Counsel appearing on behalf of the appellants submits that initially the Bills of Entry were assessed provisionally and thereafter when the bills of entry assessment was finalized, the refund claim was filed within one year of final assessment. He submits that in the case of provisional assessment the date is reckoned from the finalization of assessment and not from the date of actual payment of duty. Therefore, the refund is filed well within time. He relied upon the judgment of Principal Bench of this Tribunal in the case of *Suzuki Motorcycle India P. Limited vs. CC (Import & General), New Delhi – 2017 (348) ELT 708 (Tri. Del.)*.

3. Shri G. Kirupanandan, learned Assistant Commissioner (AR) appearing on behalf of the Revenue reiterates the findings of the impugned order. He submits that as per specific amendment in Notification No. 102/207-Cus vide Notification No. 93/2008-Cus dated 01.08.2008, there is specific provision that refund claim should be filed before expiry of one year from the date of payment of Special Additional Duty of Customs therefore, it is the date of payment from which the claim of refund is filed. He relied upon the following judgments :-

- (a) CMS Info Systems Limited vs. UOI – 2017 (349) ELT 236 (Bom.)
- (b) Tranasia Bio-Medicals Limited vs. CC (Sea), Chennai – 2021 (376) ELT 381 (Tri. Chennai)

4. I have carefully considered the submissions made by both the sides and perused the record. I do agree with the learned Authorised Representative that as per the Notification No. 102/2007-Cus as amended by Notification No. 93/2008-Cus dated 01.08.2008, the refund claim of SAD has to be filed within one year from the date of payment. However, in the present case the assessment was provisional and thereafter it was finalized

which was undisputed and accepted by the Commissioner (Appeals) in his order. The refund was filed within one year from the date of finalization of assessment. In these facts, I find that when the assessment is provisional, it cannot be said that the duty which was paid during the provisional assessment was a final payment of duty. Final payment of duty is confirmed as and when the assessment of Bills of Entry is finalized. Therefore, the date of finalization of bills of entry should be reckoned as the actual date of payment and refund filed within one year from finalization of assessment to be treated as refund claim filed within one year. This issue has been considered in the case of *Suzuki Motorcycle India P. Limited (supra)* wherein the Tribunal has passed the following order :-

“6. Notification No. 102/07-Cus., dated 14-9-2007 exempts goods by way of refund of SAD paid thereon, subject to fulfillment of certain conditions by the importer. The said notification mandates that at the time of importation of goods, the importer shall pay all duties, including SAD leviable thereon; and that on sale of such imported goods in the domestic market, the importer shall pay appropriate Sales Tax/VAT and thereafter to file the refund application before the jurisdictional Customs Officers. No time limit for filing the refund application has been specified in the said notification. However, the said notification was amended vide Notification No. 93/2008-Cus., dated 1-8-2008, providing for filing of refund application before expiry of one year from the date of payment of SAD. To clarify the position regarding applicability of time limit in case of provisional assessment, the CBEC has issued the Circular No. 23/2010-Cus., dated 29-7-2010, clarifying that refund claim has to be lodged within one year, irrespective whether the assessment is provisional or final.

7. The fact is not under dispute that the assessment of Bills of Entry in this case was provisional and the same were finalized on 15-9-2010. Thus, there was no scope or occasion for the appellant to file the refund application before the date of such finalization, in terms of Explanation-II appended to Section 27 *ibid*, providing the time limit of six months for filing refund claim, in case of provisional assessment, from the date of adjustment of duty after the final assessment thereof. However, in view of the Circular dated 29-7-2010 issued by the CBEC, the refund application was filed by the appellant on 9-9-2010 i.e. before finalization of assessment, which was admitted for consideration by the refund sanctioning authority. The refund application was dismissed on the ground that the same was filed after the prescribed time limit of one year from the date of payment of duty.

8. The applicability of Section 27 *ibid* to determine time period in the case of provisional assessment has been clarified and upheld by the Hon'ble Delhi High Court in the case of *Pioneer India Electronics (P) Ltd.* (*supra*). However, we note that the appellant filed the refund claim even before finalization of assessment, guided by CBEC Circular dated 29-7-2010 as a precautionary measure. We also note that the said circular was partly held to be not sustainable by the Hon'ble Delhi High Court in the said case, insofar as it stipulates that the provisions of Section 27 *ibid* do not apply to this

Notification. Considering the above factual position and noting that appellant did file the refund application, though before finalization of assessment, we are of the view that the claim cannot be rejected as time-barred.

9. Reliance placed by the Id. AR for Revenue on the order dated 28-7-2016 of this Tribunal is factually different inasmuch as the refund application was not filed within the period of limitation from the final assessment decided by the Hon'ble jurisdictional High Court.

10. In view of the foregoing, we set aside the impugned order, holding that rejection of refund claim on time bar issue is not legally sustainable. The original authority is directed to examine the appellant's refund claim on merits and sanction the refund, if found eligible in terms of the Notification No. 102/2007-Cus., dated 14-9-2007. Needless to say that opportunity of personal hearing shall be granted to the appellant before deciding the matter."

11. The appeal is disposed of in above terms."

From the above decision it can be seen that identical issue involved in the present case and the ratio of the above decision is clearly applicable to the present case.

5. As regards the submission of learned Authorised Representative and his reliance on the judgment of Bombay High Court in the case of CMS Info Systems Limited (supra) and Chennai bench decision in the case of Transasia Bio-Medicals Limited (supra), I find that in both the cases there was no assessment provisional and thereafter final assessment, therefore, ratio of decisions is not applicable. Accordingly, in my considered view the refund filed is well within the time as prescribed under Notification No. 102/2007-Cus and refund is not time-barred. Accordingly, the impugned orders are set-aside and the appeals are allowed.

(Dictated and pronounced in the open court)

(Ramesh Nair)
Member (Judicial)