Customs, Excise & Service Tax Appellate Tribunal
West Zonal Bench At Ahmedabad

REGIONAL BENCH- COURT NO.3

Excise Appeal No.974 of 2012-SM

(Arising out of OIA-SRP/124/DMN/SDMN/2012-13 dated 24/09/2012 passed by Commissioner of Central Excise, CUSTOMS (Adjudication)-DAMAN)

Pimco Machines Pvt Ltd **.........Appellant**
13/8, Ringanwada,
Daman, U T Of Dadra & Nagar Haveli

VERSUS

C.C.E. & S.T.-Daman **.........Respondent**
3rd Floor...Adarsh Dham Building, Vapi-Daman Road, Vapi
Opp.Vapi Town Police Station,
Vapi, Gujarat-396191

APPEARANCE:
Shri Devashish Trivedi, Advocate for the Appellant
Shri Himanshu P Shrimali, Superintendent (AR) for the Respondent

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

Final Order No. A/10739/2023

DATE OF HEARING: 06.03.2023
DATE OF DECISION: 29.03.2023

RAMESH NAIR

This appeal is directed against Order-In-Appeal No.SRP/124/DMN/SDMN/2012-13 dated 24.09.2012 passed by Learned Commissioner (Appeals) whereby, the Order-In-Original granting the refund of duty was set aside and the appeal of the revenue was allowed.

02. Shri Devashish Trivedi, learned counsel appearing on behalf of the appellant submits that the adjudicating authority has sanctioned the refund against which the revenue had filed appeal before the Commissioner (Appeals). In the grounds of appeal before the Commissioner (Appeals), one of the ground was that the appeal of the revenue was not maintainable on the ground of limitation in as much as the review order/authorization issued by the competent authority was delayed beyond the statutory time limit of three months therefore, the revenue could not have filed appeal before the

Commissioner (Appeals). The learned Commissioner (Appeals) simply relied on the appeal memo filed by the revenue wherein, the date of communication of the order was mentioned as 24.02.2002 however, no proof of date of communication was provided. This tribunal vide order dated 02.01.2023 directed the respondent commissioner to produce the evidence of communication of the Order-In-Original to the reviewing authority but the revenue could not produce any evidence. He submits that since the order-in-original was passed on 08.11.2011, it is unbelievable that it took more than three months for communication of the order to the review authority therefore, in absence of evidence the date of communication should be taken as date of issue of order according to which the review order was passed beyond the stipulated time of three months hence, the appeal filed by the revenue before the Commissioner (Appeals) is not maintainable of limitation.

2.1 He further submits that on merit there is no dispute that the appellant have paid the duty twice on the same goods i.e. when it was cleared thereafter, the goods have come back to the factory and when it was reissued for home consumption once again duty was paid. In this undisputed fact, the appellant is entitled for refund of duty paid. He placed reliance on the following judgments:-

- COMMISSIONER OF CENTRAL EXCISE, NAGPUR Vs. LLOYDS STEEL INDIA LTD.- 2004 (170) ELT 224 (Tri.-Mumbai)
- LLOYDS STEEL INDUSTRIES LIMITED Vs. CESTAT, MUMBAI- 2018 (362) E.L.T. 743 (Bom.)
- C.C. & C.E., AURANGABAD Vs. TOSHNIWAL INSTRUMENTS (BOMBAY) LTD.- 2004 (163) E.L.T. 103 (Tri.-Mumbai)
- COMMISSIONER OF C.EX., AURANGABAD Vs. TOSHNIWAL INSTRUMENTS- 2003 (157) E.L.T. 447 (Tri.-Mumbai)

- HMT LIMITED Vs. COLLECTOR OF CENTRAL EXCISE, NAGPUR- 2002 (150) E.L.T. 928 (Tri.-Del.)
- COMMISSIONER OF CUSTOMS, KANDLA Vs. R.N. FORGING- 2013 (295) E.L.T. 722 (Tri.-Ahmd.)

03. Shri Himanshu P Shrimali, learned Superintendent (AR) appearing on behalf of the revenue reiterates the finding of the impugned order.

04. I have carefully considered the submissions made by both the sides and perused the records. First I take the issue of limitation, from the facts on record it is evident that the Order-In-Original was passed on 08.11.2011 but the review order/authorization was issued by the Commissioner of Central Excise Daman on 11.05.2012 that means the authorization was issued almost after six months from the date of order. As per the date of communication mentioned in the revenue's appeal in form EA-2 filed before the Commissioner (Appeals) issued on 24.02.2012, the learned Commissioner (Appeals) has taken this date as the correct date of communication. I find that when the appellant have seriously objected on this date of communication, it was incumbent on the Commissioner to call for the proof of actual communication of the order-in-original to the reviewing authority and from that date three months period is available for passing review order/authorization. However, the learned Commissioner (Appeals) taking the date of communication as 24.02.2012 mentioned in the appeal memo held that there is no delay in passing the review order/authorization as the same was issued on 11.05.2012. This tribunal to ascertain the actual delivery of the orders passed an interim order dated 02.01.2023 asking the respondent Commissioner to submit the proof of actual communication of the order-in-original. The Commissionerate has filed a letter addressing to the AR wherein, they have shown their inability to

produce the proof of communication and reiterated that the date of communication of order as on 24.02.2012 in column 5 of the appeal memo.

4.1 I find that it is not possible that the order dated 08.11.2011 will take more than three months time to communicate within the same department at same location to the jurisdictional Commissioner therefore, in absence of any proof, the date of issue of order has to be taken as date of communication and from the date of order i.e. 08.11.2011, the authorization issued on 11.05.2012 is much after the statutory time limit of three months provided under Section 35E(2) of Central Excise Act, 1944 therefore, the authorization is illegal and hit by limitation and consequently, the appeal filed by the revenue is also beyond jurisdiction as there is no power for Assistant Commissioner to file an appeal before the Commissioner (Appeals) when the authorization itself become infructuous being time barred. Therefore, the revenue's appeal was not maintainable before the learned Commissioner (Appeals) accordingly, I have no hesitation to hold that since the authorization itself become void and illegal, further proceeding also stand infructuous. The revenue's appeal was not maintainable before the Commissioner (Appeals) accordingly, the order passed by the learned Commissioner (Appeals) is not sustainable on this ground alone hence the same is set aside and appeal is allowed. Since I have decided the appeal on the point of limitation before the Commissioner (Appeals), I need not to go into the merit of the case which already decided by the adjudicating authority, which shall stand maintained.

05. Accordingly, the impugned order is set aside. Appeal is allowed.

(Pronounced in the open court on 29.03.2023)

(RAMESH NAIR)
MEMBER (JUDICIAL)

Mehul