

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

REGIONAL BENCH- COURT NO.3

Customs Appeal No.10523 of 2019-SM

(Arising out of OIA-100-AGU-ADT-VAD-2017-18 dated 12/09/2018 passed by Commissioner
(Appeals) Commissioner of Central Excise, Customs and Service Tax-VADODARA-I)

Suchi Fasteners Pvt Ltd

.....Appellant

74/104, Gayatri Apartments, Opp Mk High School
Alkapuri, Vadodara, Gujarat

VERSUS

C.C.E. & S.T.-Vadodara-i

.....Respondent

1st Floor...Central Excise Building,
Race Course Circle,
Vadodara, Gujarat-390007

APPEARANCE:

Shri. P. P. Jadeja, Consultant for the Appellant
Shri Sanjiv Kinker, Superintendent (AR) for the Respondent

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

Final Order No. A/ 11371 /2021

DATE OF HEARING: 21.01.2021
DATE OF DECISION: 01.04.2021

RAMESH NAIR

M/s. Suchi Fastners (P) Ltd., Special Economic Zone, Sachin Surat (hereinafter referred to as 'the Appellant') has filed this Appeal against the impugned O-I-A No. 100-AGU-ADT-VAD-2017-18 dated 12-09-2018 passed by the Commissioner (Appeals), CGST & Central Excise, Vadodara, wherein SAD refund of Rs. 54,733/- filed on 11-10-2010 and BCD Refund claim of Rs. 2,79,924/- filed on 12-11-2011 have been rejected.

2. The brief facts of case are that Appellant is a manufacturer and exporter of "Stainless Steel Washers" having manufacturing unit in Special Economic Zone, Sachin. Stainless Steel Scrap of CTH 72042190 was generated during the process of manufacture, which was cleared from SEZ unit to DTA on payment of customs duty in terms of Section 30 of the SEZ Act 2005. Appellant claims to have paid "5% BCD instead of 2.5% BCD" in respect of total 10 Bills of Entry and claims to have paid excess amount of Rs.2,79,924/- towards Basic Customs duty (BCD) and claims to have paid

4% SAD in excess in Bill of Entry No. DTA/673/2010-11 dated 27-07-2010. Refund claims of excess BCD of Rs.2,79,924/- and SAD of Rs.54,733/- were filed, which were rejected by O-I-O/O-I-A earlier on the grounds that there were no provisions and powers for allowing Refund under SEZ Act/Rules. Hence, Appellant have challenged such Order up to CESTAT twice. This CESTAT vide order No. A/11387-11388/2015 dated 05-10-2015, remanded matters to proper officer of Customs at SEZ, Sachin, Surat with directions to examine Refund claims under Customs Act 1962, following decision of Gujarat High Court in Anita Exports vs. UOI-2015 (320) ELT-743 (Guj.), and to dispose of claims on merits as per the law. Revenue rejected refunds again by second O-I-O/O-I-A on similar grounds. In the meanwhile, amendment were made in SEZ Rules on 05.08.2016, by inserting new Rule 47(5) in SEZ Rules 2006, empowering authority under Central Excise and Customs to deal with refund cases pertaining to the SEZ units. This CESTAT vide Order No. A/10714-10715/2016 dated 16-08-2016, again remanded the matter to original authority to consider Refund claims afresh. O-I-O rejected Refund claims and in an Appeal, Commissioner (Appeals) has rejected Refunds by the impugned O-I-A No. 100-AGU-ADT-VAD-2017-18 dated 12-09-2018 for two reasons i.e. (a) Appellant has failed to produce any documentary evidence in support of their claim that imported goods were of the description as mentioned in the Notification and (b) holding that no provisions exist in the SEZ Act for grant of refund. SAD Refund claim of Rs. 54,733/, has been rejected by Commissioner (Appeals) holding that SAD Refund is eligible only when the goods are imported for Re-Sale. Hence, Appellant is before this Hon'ble CESTAT in 3rd round of litigation for the same refund claims. Appeal by Appellant was taken up for regular virtual hearing on 21-01-2021 for final disposal of the Appeal.

3. Shri P.P. Jadeja, Learned Counsel appearing on behalf of Appellant, while reiterating grounds of Appeal and submissions in synopsis and made during hearing has stated that O-I-A dated 12-09-2018 has committed error in rejecting refund claims. He argued that the documentary evidences on record have established that "Stainless Steel Scrap" cleared by Appellant from SEZ unit to DTA was for the purpose of melting only and BCD exemption claimed under Entry No. 202 in Notification No. 21/2002-Customs, which had provided duty @ 2.5 % only and exemption was allowable without any conditions. Thus, excess payment of duty @ 2.5 % for total Rs. 2,79,924/- is eligible for refund. Appellant had inadvertently paid SAD of Rs. 54,733/- in Bill of Entry No. DTA/673/2010-11

dated 27-07-2010 and claimed Refund of SAD, which is available as per Notification No. 45/2005-Customs dated 16-5-2005 providing SAD Exemption 4% to all goods produced in SEZ unit and cleared to any other place in India (DTA). None of the objections by revenue are justified in facts of this case. Both the Refund claims are also filed within the permitted time limit of one year. There is no unjust enrichment and hence Refund should be released. Appellant is eligible for interest u/s 27A of Customs Act 1962 after 3 months from filling Application of SAD refund of Rs. 54,733/- on 11-10-2010 and BCD Refund Rs. 2,79,924/- on 12-11-2011. He argued that Revenue cannot retain excess duty paid in terms of Article 265 of the Constitution of India. He has relied upon decisions of the Hon'ble Supreme Court of India to support his arguments.

4. Shri. Sanjiv Kinker, Learned Superintendent (Authorised Representative) appearing on behalf of Revenue has objected this Appeal by submitting that it seems the reliefs claimed by the Appellant are untenable and accordingly may be set aside as Appellant has filed refund without challenging assessment. SDR has mainly relied upon the following decisions:-

- 2019 (368) E.L.T. 216 (S.C), ITC Ltd. Vs CCE
- 2020(371)ELT-501(DEL)- CCE vs NANGALAMAL SUGAR COMPLEX
- 2014 (305) E.L.T. 98 (Cal.) - SPS STEEL ROLLING MILLS LTD vs CESTAT

5. As against above argument by SDR, shri Jadeja has vehemently argued that it is settled law that Show Cause Notice is foundation in case of revenue, may it be matter of levy and recovery of duty or the refunds. It is settled that for building any such case, revenue has to consolidate all their points against an assessee and incorporate in Show Cause Notice and also to provide opportunity to Assessee to defend their case in compliance to principles of Natural Justice. The view not incorporated in SCN may be seen from O-I-O by the authority. The view point not pursued or argued by Revenue in SCN or O-I-O, cannot be argued in law at subsequent stage of the proceedings. It is also settled that orders beyond the scope of SCN are not sustainable in the settled law. He argued that in facts of this case, this is 3rd round of litigation before CESTAT. However, Revenue has neither issued SCN nor argued this view point in any of earlier proceedings or filed any appeal against O-I-O/O-I-A issued. Revenue's such argument cannot be allowed to be

raised for the first time, during hearing in second appeal filed by Appellant before Hon'ble CESTAT. CBEC Circular No. 24/2007-Cus dated 02-07-2007 shows that Refund applications are required to be scrutinized for completeness within 10 working days of its initial receipt. Hence, if any deficiency is found in application or any document is required, department shall inform Applicant at initial scrutiny itself within 10 working days. Having not followed this Circular and not issuing SCN, Revenue cannot be allowed to take this argument, at this stage during hearing of Appellant's Appeal in 3rd round of litigation in the same matter of the Refund claims. Shri Jadeja has relied upon following case laws to substantiate the view:-

- 1999 (113) E.L.T. 24 (SC) - Warner Hindustan Ltd vs. CCE
- 2005 (183) E.L.T. 225 (SC)- SACI ALLIED PRODUCTS LTD vs. CCE
- 2006 (201) E.L.T. 513 (S.C.) - Commissioner Of Customs, vs. Toyo Engineering India Ltd
- 2007 (215) E.L.T. 489 (S.C.) - CCE, vs. Ballarpur Industries Ltd
- 2008 (232) E.L.T. 7 (SC)- CCE vs. Gas Authority of India Ltd
- 2009 (241) ELT- 481(SC)-CCE vs. Champdany Industries Ltd
- 2016 (334) ELT-577 (SC)- Precision Rubber Industries (P) Ltd vs CCE

6. On consideration of submissions made by both sides and perusal of records, I find that Appellant is a manufacturer of "Stainless Steel was hers "in its SEZ unit. Appellant generated some stainless steel scrap of CTH 72042190 during its manufacture, and cleared the same from SEZ to DTA on payment of customs duty under section 30 of SEZ Act 2005. Appellant has claimed BCD Refund of Rs. 2,79,924/- and SAD Refund of Rs. 54,733/- along with interest u/s 27A of Customs Act 1962, for Excess BCD duty and excess SAD paid at the time of clearance of "Stainless Steel Scrap" from SEZ unit to DTA, which has been rejected by O-I-A No. 100-AGU-ADT-VAD-2017-18 dated 12-09-2018 passed by the Learned Commissioner (Appeals), CGST & Central Excise, Vadodara on two grounds (1) eligibility to Refund and (2) no powers under SEZ Act. However, in the facts and circumstances of this case, I find that findings of Commissioner (Appeals) are not correct as under Section 30 of the SEZ Act 2005, goods removed from SEZ to DTA are chargeable to customs duties. Hence, such excess duty paid as Customs duty can only be claimed as Refund under section 27 of Customs Act 1962. Customs authorities have inherent powers under Customs Act 1962 to process the Refunds. Accordingly, this Tribunal vide final orders dated 05-10-2015 and 16-08-2016, has directed to process refund claims under Customs Act 1962. The view that no provisions exist in SEZ Act for grant of

refund is incorrect. CBIC Circular No. 11/2017-Cus dated 31-3-2017 has clarified in Para 3.3, question how old cases of refund pending as on the date of coming into effect of Notification dated 05-08-2016 will be sanctioned by Customs, Central Excise or Service Tax or CGST authorities. Inserted Rule 47(5) in SEZ Rules 2006 empowers Customs officers to issue refund claims. All field officers are bound to follow directives issued by CBIC. The authorities seems to have rejected Refund claims by O-I-O and then by O-I-A dated. 12-09-2018 for one or the other unjustified & unwarranted reasons. Finding for rejecting BCD refund of Rs. 2,79,924/-are not correct and justified, as such "Stainless Steel Scrap" cleared from SEZ to DTA can be used only after melting it first, for manufacturing goods like Valve & Pumps Parts and investment casting product etc with help of using furnace in factory. Stainless Steel Scrap cleared by Appellant from SEZ unit to DTA was used for melting is also established by documentary evidences perusing copies of Central Excise Registrations, Certificates of DTA buyers and their declarations that the said stainless steel scrap was used for melting in DTA. Regarding 4 % SAD claim of Rs. 54,733/-, I also find that the Notification No. 45/2005-Cus dated 16-05-2005 provided Exemption from Additional duty of Customs, leviable under section 3(5) of Customs Tariff Act 1975, to all the goods produced in SEZ unit and cleared to any other place in India [DTA] without any condition. Exemption of SAD Rs. 54,733/- paid in Bill of Entry No. DTA/673/2010-11 dated 27-07-2010 was available to Appellant. The said Exemption claimed under Notification No. 45/2005-Cus dated 16-5-2005, has not been objected by Revenue in respect of remaining 9 Bills of Entry. Thus, findings given by the Id Commissioner (Appeals) for rejecting both BCD and SAD Refunds are not sustainable and the same are over ruled. Objection raised by Learned Authorized Representative on behalf of Revenue about "non challenge of assessment" during e hearing held on 21-01-2021, has been vehemently objected as shown in Para 5 above. I find that Revenue has neither issued any SCN nor argued this in any of earlier proceedings nor filed any appeal against O-I-O/O-I-A issued by the Revenue. Therefore, Revenue's such argument cannot be allowed to be raised for the first time, during hearing in second appeal filed by Appellant before this CESTAT. I find that the decisions of the Hon'ble Supreme Court, relied upon in Para 5 by the Appellant in this connection support Appellant's contentions.

7. I also find that Refund claims were filed in permitted time limit of one year. This is clear from the fact that section 27 amended w.e.f. 08-04-2011

has substituted the period of Six months to One year. Decisions relied upon by Appellant support this factor.

8. *On the question of "Unjust enrichment", Appellant had submitted relevant documents at the time of filling Applications for Refund, which have also not been disputed. These documents, certificates and declarations submitted by the importers, supported by certificate from Chartered Accountant indicated and established that incidence of excess duty paid was not recovered from any other person. Certificate by the Statutory Auditor of M/s Suchi Fastners PVT Ltd and Chartered Accountant M/s. AMIN PARIKH & CO. submitted by Appellant also shows that in respect of the respective said 10 Bills of Entry, though, Appellant had charged total amount of Rs.2,79,924/- and of Rs. 54,733/- in their Invoices, but they have not received/recovered the same from DTA buyers. Therefore, incidence of Rs.2,79,924/- and Rs.54,733/- paid against said 10 Bill of Entry have not been recovered from any other person or customers and has been absorbed by M/s Suchi Fastners PVT Ltd. Further, Declarations submitted by DTA importer with their CA Certificates also show that they have also not recovered excess amount of duty from any other persons. These documents are adequate to pass the hurdle of "unjust enrichment".*

9. *I find that 3 conditions [(1) eligibility to Refund (2) claim within time limit of One year and (3) unjust enrichment] for allowing refunds have been satisfied by Appellant. Hence, instead of remanding it again for processing the claim, I find it appropriate to decide case here and it would be in the interest of justice under Rule 40 and 41 of the CESTAT Procedure Rules 1982. Accordingly, I hold that the Appellant is eligible for BCD Refund of Rs, 2,79,924/- and SAD Refund of Rs. 54,733/- claimed for Excess BCD and excess SAD paid at the time of clearance of Stainless Steel Scrap from SEZ unit to DTA.*

10. There is no dispute that SAD refund of Rs. 54,733/- was filed on 11-10-2010 and BCD Refund claim of Rs. 2,79,924/- was filed on 12-11-2011. It is settled law that after filling Application for Refund, if Refund is delayed by three months, claimant also becomes eligible to get interest after three months from the date of filling refund application. This is provided in section 27A of the Customs Act 1962. Accordingly, Appellant is eligible for Interest u/s 27A of Customs Act 1962 read with the decisions in case of NEW KAMAL vs UOI - 2020 (372) E.L.T. 571 (Guj.) which has allowed interest @ 6

%Appellant is eligible for "interest" in terms of section 27A of Customs Act 1962 in terms of following decisions :-

- Commr of Cus vs L.G. Electronics India Pvt. Ltd - 2019 (370) E.L.T. 441 (Tri. - All.).
- **Ranbaxy Laboratories Ltd. vs UOI — 2011(273) ELT-3(S.C.)**, which is followed in many other reported decisions under Section 27A of Customs Act 1962.

11. In view of the above, Appeal filed by the Appellant M/s Suchi Fasteners Pvt. Ltd is allowed in above terms, with all the consequential reliefs.

(Pronounced in the open court on 01.04.2021)

(RAMESH NAIR)
MEMBER (JUDICIAL)

Prachi