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

REGIONAL BENCH-COURT NO. 3

Customs Appeal No. 10804 of 2015- SM

(Arising out of OIA-KDL-CUSTM-000-APP-477-14-15 dated 27/02/2015 passed by Commissioner of CUSTOMS-KANDLA)

Om Prakash Satish Kumar ....**Appellant**
2, Amar Colony,
Nangloi, Delhi,

VERSUS

Commissioner of C.-Kandla ......**Respondent**
Custom House,
Near Balaji Temple,
Kandla Gujarat

APPEARANCE:
Shri Shri Manish Jain & Ms Shruti Khanna Advocate for the Appellant
Shri Sanjay Kumar Superintendent (AR) for the Respondent

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

Final Order No. 10879/2024

DATE OF HEARING: 16.02.2024
DATE OF DECISION: 15.04.2024

RAMESH NAIR

The brief facts of the case are that the appellant has claim refund in respect of special additional duty in terms of Notification No. 102/2007-Cus dated 14.09.2007 and the refund claim was sanctioned vide three orders in original dated 03.10.2008, 12.12.2008 and 26.09.2009 and against these sanctioned orders, revenue has not filed any appeal. However, subsequently an investigation was conducted and thereafter show cause notice dated 31.03.2011 was issued by Joint Director, Directorate General of Central Excise Intelligence Ahmedabad Unit whereby it was proposed to recover an amount of refund of Rs. 39,38,867/- erroneously sanctioned under section 28 (1) of Customs Act, 1962 by denying the benefit of Notification 102/2007-Cus dated 14.09.2007.

1.2 The said show cause notice has been adjudicated by the Additional Commissioner, Customs House Kandla vide Order-In- Original No. KDL/ADDL/SS/676/REM/214 dated 04.06.2014 whereby the demand for recovery of refund of Rs. 39,38,867/- was confirmed, demanded the interest under Section 28AB and imposed penalty of equal amount of Rs. 39,38,867/- under Section 114 A of Customs Act, 1962 and also ordered for appropriation of Rs. 50,00,000/- which was deposited during investigation. Being aggrieved by the said Order-In- Original the appellant filed appeal before the Commissioner (Appeals) who vide Order-In- Appeal No. KLD-CUSTM-000-APP-477-14-15 dated 27.02.2015 rejected the appeal and upheld the order of the Adjudicating Authority. Being aggrieved by the said impugned order, the present appeal filed by the appellant.

2. Shri Manish Jain, Learned Counsel along with Ms. Shruti Khanna, Advocate appearing on behalf of the Appellant submits that the ground and for denial of Notification No. 102/2007-Cus and recovery for the sanctioned refund is that the appellant have purchased the wooden logs but they have sold the said goods after processing i.e. in sawn sized. As per the department since the imported goods were not sold as such the refund is not admissible. In this regard, he submits that this issue is no longer res-integra as in various judgments it has been settled that even if the imported goods is sold after processing particularly in the case of timber log in the form of sawn timber, the benefit of Notification No. 102/2007-Cus cannot be denied. He placed reliance on the following judgments:-

- Variety Lumbers - 2018 (360) ELT 790 (SC)

- Hanuman Timber Company - 2016 (12) TMI 1367 – CESTAT Hyderabad
- CC vs. Posco India Delhi Steel Processing Centre Pvt Ltd - 2014 (299) ELT 263 (Guj.)
- Santosh Timber Trading Company Ltd- Final Order No. A/10385-10386/2024 dated 06.02.2024.
- Agarwal Timbers Pvt Ltd and Ors vs. CC, Kandla – 2010-TIOL-1378-CESTAT-Ahmedabad

2.1 He further submits that the revenue also made a ground for denial of refund that declaration in the invoice i.e. no credit of additional duty levied under Section 3(5) of Customs Tariff Act, 1975 is available has not been given on the invoice is not sustainable. In this regard, he submits that the appellant are not registered dealer who is authorized to issue cenvatable invoices. Secondly, the invoice issued by the appellants do not indicate the SAD paid therefore, the invoices issued by the appellant is not cenvatable and the objective of para 2 (b) of the Notification gets fulfilled. Merely by not making such declaration, SAD refund cannot be denied. He placed reliance on the following the judgments:-

- Commissioner vs. Kohler India Corporation Pvt. Ltd - 2012 –TIOL-182-CESTAT-BANG
- Equinox Solution Ltd vs. Commissioner – 2011 (272) ELT 310 (Tri.)
- Ruchi Acroni Industries Ltd vs. Commissioner – 2011 (372) ELT 287(Tri.)

2.2 He further submits that department has also raised objection that the appellant have violated the condition in Para 2 (e) (ii) of Notification No. 102/2007- Cus in as much as the appellant have submitted incorrect invoices, on this he submits that even as per department, the following particulars of actual sale invoice have not been altered while submitting before custom along with filing of refund claim.

a. Book No.
b. Invoice No.
c. Date
d. Quantity
e. Rate
f. CBM
g. Amount
h. Total value of timber sold
i. Buyer details
j. Value of VAT paid

2.3 He submits that according to department, the appellant have made one or more following alterations in the actual sale invoice.

a. Description of Timber
b. Endorsement on the invoice that credit of SAD is not available
c. Endorsement in respect of bill of entry number on the invoice
d. Number of pieces.

2.4 He submits that the imported timber has been sold on payment of VAT, therefore alteration in respect of Serial No. a to d of above is immaterial to the refund claim. The VAT payable was made on the sale price at which logs were sold. He submits that even if some alteration was made i.e. due to the sale of sawn timber from timber logs, there was no malafide intention. He takes support of Hon'ble Apex Court Judgment in the case of Parminder Kaur vs. State of UP reported at AIR 2010 SC 840 wherein it was held that not every interpolation or tempering with a document amounts to a forgery. He also placed reliance on the CESTAT decision in the case of Rahul Bhandari vs. Commissioner of Customs (import) Mumbai - 2012 (285) ELT 225 (Tri.- Mum).

2.5 Without prejudice to the above, he further submits that the demand is not maintainable since the adjudication order granting refund has not been challenged by the department by filing an appeal before the Commissioner (Appeals). Therefore, the sanctioned order of the refund attained finality. He placed reliance on the following judgments :-

- Priya Blue Industries Pvt Ltd vs. Commissioner – 2004 (272) ELT 145 (SC)
- Wipro Ltd vs. C.C Chennai – 2005 (189)ELT 289 (T)
- C.C., Mumbai vs. Hindustan Gas & Industries - 2006 (202) ELT 693 (T).

2.6 He further submits that Notification No. 102/2007-Cus does not provide any machinery for recovery of the erroneous refund, penalty and interest. He also submits that the demand is barred by limitation as the show cause notice has been issued on 31.03.2011 i.e. after period of more than one year from the date of actual refund by invoking the extended period of 5 years. It is submitted that the demand for the larger period can be made only when there is suppression, mis-presentation, collusion or fraud with intent to evade payment of duty. In the present case since the refund was sanctioned by the sanctioning authority after considering all the documents, it cannot be said that there is a suppression of fact on the part of the appellant. Therefore, the show cause notice is time barred. He takes support of Hon'ble Supreme Court in the case of Tamil Nadu Housing Board vs. CC, Madras – 1994 (74) ELT 9 (SC). With his above submission, he request that the impugned order be set aside and appeal be allowed with consequential relief.

3. Shri Sanjay Kumar, Learned Superintendent (AR) appearing on behalf of the Revenue reiterates the finding of the impugned order.

4. I have carefully considered the submission made by both sides and perused the records. I find that though the sanctioning authority has sanctioned the refund by passing Order-In-Original but the said order was not appealed against by the revenue before the Commissioner (Appeals). However, the present proceedings started by the independent investigation and the main issue raised in the present case is that there is mis-match between the imported goods and sale of imported goods. The major reason for that is the appellant had admittedly imported the wooden timber logs and thereafter by processing timber logs into sawn timber, sold the same. Therefore, obviously when the form of the wooden timber is changed the description and quantity will be different in the sale invoice as compared to the bill of entry. However, there is no allegation of the department that the goods sold by the appellant is not imported goods but some different goods. Therefore, so long the same

imported goods have been sold due to minor difference in the details will not jeopardise the substantial benefit of the refund to the appellant.

4.1 The main condition for granting the refund is that the importer should pay the VAT/sales tax which is not under dispute. Therefore, the SAD paid in lieu of sales tax has to be refunded. The main reason for difference of description is as stated above that the timber logs imported have undergone the process of sawing and sawn timber was sold. This issue has been raised against various importers of timber logs and in some of the cases the Tribunal has held that merely because the timber log is converted into sawn timber and the same has been sold , the benefit of the Notification No. 102/2007-Cus cannot be denied. One of the latest decision of this Tribunal in the case of Santosh Timber Trading Company Ltd- Final Order No. A/10385-10386/2024 dated 06.02.2024 following order has been passed:-

> *"This appeal has been filed by Santosh Timber Trading Co. Limited against order seeking to recover the refund already sanctioned to the appellant. The appeal has also been filed by Shri Naresh Aggarwal, Director of the appellant company against imposition of penalty.*
>
> *2. The undisputed facts are that the appellant had imported timber log and paid SAD on the same. The appellant had cut and sawed the timber logs and thereafter sold the same. In terms of Notification 102/2007, the appellants were granted the refund of SAD. Subsequently revenue raised a Show Cause Notice seeking to recover the refund already sanctioned as erroneous refund on the ground that the item imported was timber logs whereas the item sold by the appellant was saw logs. There was also some allegations of mismatch of description and procedural violations of Notification 102/2007-Cus.*
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> *3. Learned counsel has relied on the decision of Hon'ble Apex Court in the case of Variety Lumbers reported at 2018 (360) ELT 790 (SC), wherein identical matter has been considered. In the said decisions it has been held that the refund cannot be denied even if the imported logs were cut and sawn before sale.*
>
> *3.1 Learned counsel pointed out that next objection raised by the Revenue is that in terms of para 2(b) of Notification 102/2007-Cus the importer is required to issue*

invoice for sale of said goods specifically indicating that no credit of duty of customs levied under sub section (5) of Section 3 of Customs Tariff Act 175 shall be admissible. Learned counsel pointed out that the appellant is not a registered dealer or manufacturer or service provider and in those circumstances credit of any duty paid on their invoices is not admissible even otherwise. He pointed that they have paid SAD at the time of importation and they also paid sales tax/ VAT while selling these goods. He relied on the decision of Larger Bench of Tribunal in case of Chowgule & Com Pvt Ltd. 2014 (306) ELT 326 (Tri. L.B.), RKG International Pvt. Ltd. 2013 (290) ELT 253 (Tri. Del.) and Equinox Solutions 2011 (272) ELT 310 (Tri.).

3.2 He further relied on the following decision to hold that small discrepancies in the description of goods would not disentitle the appellant from refund. He relied on the following decisions:

- *CC vs Shri Ram Impex India P. Ltd. 2014 (300) ELT 126 (Tri. Chennai)*
- *Orange Overseas P Ltd. 2016 (2) TMI 206 (Tri. Del.)*
- *Overseas Polymers Pvt Ltd. 2021 (378) ELT 231 (Tri. Chennai)*
- *PP Products Ltd 2019 (367) ELT 707 (Mad)*
- *Shanti Enterprises 2016 (343) ELT 446 (Tri. Del.)*

3.3 He further raised the issue of limitation by pointing out that the show cause notice has been issued on 02.07.2012 while the refunds were sanctioned during the period 17.06.2008 to 10.06.2009. He pointed out that the demand is clearly barred by limitation.

4. Learned Authorized Representative relies on the impugned order.

5. We have considered rival submission. We find that the primary objection raised in the instant case is that the appellant have sold timber after cutting and sawing. This issue is specifically covered by the decision of Hon'ble Apex Court in the case of Variety Lumbers reported at 2018 (360) ELT 790 wherein following has been observed:

> *"We have heard the Learned Counsels for appellant-Revenue. The issue turns on an interpretation of the Notification dated 14-9-2007 which contemplates refund of additional duty of Customs paid by the importer of goods under Section 3(5) of the Customs Tariff Act, 1975. The notification in the main part contemplates that the import must be for the purpose of subsequent sale and is inter alia subject to the condition that in the invoice issued in respect of the goods sold (said goods) it is mentioned that credit of the additional duty of Customs levied under sub-section (5) of Section 3 of the Customs Tariff Act, 1975 is not admissible.*
>
> *2. The Learned Counsel for the appellant-Revenue has sought to dislodge the view taken by the Customs, Excise and Service Tax Appellate Tribunal and the High Court by contending that the subsequent sale must be in the same form in which the goods were received on import. The contention advanced on behalf of the appellantRevenue is not supported by a plain reading of the exemption notification which even if construed in the strictest terms does not permit such a view to be taken. That apart, the materials on record clearly shows that for purpose of transit of logs, the same necessarily had be reduced in size due to conditions imposed by the State for transport/movement of timber. The said fact itself would belie the stand of the Revenue. We, therefore, take the view*

> *that a mere conversion of imported logs in the Sawn Timber without loss of identity of the original product would not deprive the importer of the benefit of the exemption notification.*
>
> *3. The appeals of the Revenue, therefore, are dismissed. The orders of the Tribunal and the High Court are affirmed."*

Hon'ble Supreme Court upheld that decision of Hon'ble High Court of Gujarat reported in 2014 (302) ELT 519 (Guj.) wherein following was observed:

> *"34. It is an undisputed position that the respondents imported the goods after paying SCVD. At the time of its sale in the local market, they also paid local taxes such as sales tax or the Value Added Tax as may be applicable. Before transportation of timber, they were required to reduce its size since the RTO rules did not permit transportation of logs longer than 40 feet. If only for cutting length of the logs, which were in excess of 40 feet, sawing operations were carried out and after some cleaning and scaring was done, timber logs of smaller pieces were sold, we do not see how respondents can be stated to have breached any of the conditions of the Exemption Notification dated 14-9-2007."*

He also relied on the decisions in the following cases:

- *Hanuman Timber Co. 2016 (12) TMI 1367-CESTAT HYD*
- *CC vs Posco India Delhi Steel Processing Centre Pvt. Ltd. 2014 (299) ELT 263 (Guj.)*

We find that identical issue has also been decided in the case of Hanuman Timber Co. 2016 (12) TMI 1367-CESTAT HYD and Posco India Delhi Steel Processing Centre Pvt. Ltd. 2014 (299) ELT 263 (Guj.) therefore the ground that refund is not admissible if the imported logs are sold as cut and sawn wood is rejected.

6. The next ground raised by Revenue relates to non-endorsement of the declaration in terms of para 2(b) of Notification 102/2007-Cus dated 14.09.2007. The said para 2(b) requires the importer to mention on the invoices that no credit of additional duty of customs levied under sub section (5) of Section 3 of the Customs Tariff Act 1975 shall be admissible. Learned counsel has pointed out that they are not registered dealer or manufacturer and therefore, the question of taking credit on any invoices issued by them does not arise. Moreover, he has also relied on the decision in the case of Equinox Solution Ltd. 2011 (273) ELT 310 (Tribunal) wherein following has been observed.

> *"6. To deal the first issue, I find that as per the condition 2(b) of the Notification no. 102/07, the appellants are required to make endorsement on the invoice that the SAD has not been passed on to the buyer. The ld. advocate has contended that the assessee is to avail the credit on the strength of invoice issued under the provisions of Central Excise Law/Customs Law/Service Tax laws, as per the provisions of Rule 9 of the CENVAT Credit Rules, 2004. When there is no mention of passing on duty in the invoice, the buyer cannot take credit of the said duty (SAD) which is not mentioned in the invoice. I do agree*

with this contention of the ld. advocate when there is no duty mentioned in the invoice, buyer cannot take credit of the same. Although there is a condition in the Notification to claim refund i.e. to make endorsement on the invoice, it may be relevant for the invoices which are issued under the Central Excise Law/Customs Law/Service Tax law showing specifically the duty suffered by the supplier on the goods shown in the invoice and the buyer is entitled to take the credit of the same. As pointed out by the Hon'ble Apex Court in Malwa Industries (supra) the exemption Notification should be read liberally. In this case, compliance of condition 2(b) of the said Notification is not required of the clearance on commercial invoice. Following the ratio laid down by the Apex Court, I find the purpose of issuing the Notification is that the importer should not suffer SAD on the goods imported by them which have been imported for the purpose of resale and the proper ST/CSTA/VAT has been paid. SAD is to be paid by the importers as precaution measure to ascertain whether ST/CST/VAT has been discharge by the assessee or not. In this case, it has been clarified in the invoice which have been supported by the Chartered accountant certificate that the appellants have discharged the liability of Central Service tax. Hence as per Notification No. 102/07, the appellants are entitled for the refund claim."

We find that since the appellant is not a registered dealer, therefore the question of taking credit on the invoices issued by them does not arise.

7. Next issue raised by revenue relates to non-mention of Bills of Entry number on the invoice and mismatch of description and number of pieces on the invoices and bills of entry. In grounds of appeal it has been clearly indicated that stock requests duty certified by Chartered Accountant was produced at the time of filing refund. In the case of Overseas Polymers 2021 (378) ELT 231, in a case involving minor variations has been observed:

"5.The issue is the rejection of the refund claim alleging that there is mismatch with regard to the description of goods in the sales invoices when compared to the Bills of Entry. On perusal of the documents placed before us, we find that in page-20 the sales invoice describes the goods as "ENABLE 3505HH (LDPE)", whereas in the Bills of Entry the product is described as "ENABLE 3505HH (LLDPE)". In pages 50-74, the appellant has produced the Chartered Accountant's Certificate along with the reconciliation statement. The Chartered Accountant has verified the accounts and stated that the appellants are eligible for the refund in respect of SAD paid by them. The correlation sheet is also enclosed along with the Chartered Accountant's Certificate to show the description of the goods in the Bills of Entry and the VAT paid for the goods as evidenced by the sales invoices. The appellant has sufficiently proved and fulfilled the requirements as per the Notification No. 102/2007-Cus., dated 14-11-2007. In the decision relied by the Learned Counsel for the appellant, the Hon'ble High Court has held in favour of the appellant/importer. After perusal of the documents submitted by the appellant, we are of the considered opinion that the rejection of refund claim is without any legal or factual basis. The impugned order to the extent of rejecting the refund claim in respect of 4 Bills of Entry is set aside. The appeal is allowed with consequential reliefs, if any."

Thus minor discrepancies cannot be the reason for recovery of refund when the appellant had submitted Chartered Accountant certified stock report.

8. In view of above, we do not filed any merit in the order, the same is set aside and appeals are allowed. The appeal of the Naresh Aggarwal, Director is also consequently allowed."

4.2 In the aforesaid decision which is absolutely on identical issue involved in the present case various judgment this Tribunal, High Courts and Supreme Court have been considered and it was conclusively held that merely because the timber log imported was not sold as such but the same was sold as sawn timber, benefit of the Notification No. 102/2007 – Cus cannot be denied.

4.3 As regard other discrepancies raised by the department, I am of the view that difference in description and certain other details does not prove that the goods sold by the appellant on which Notification No. 102/2007 was availed is not for the imported goods but for some other goods. Therefore, due to minor difference of details between the invoice and bills of entry is at the most merely a procedure lapse which does affect the vital facts that the SAD was paid by the importer and against sale of the said goods the appellant has discharged the VAT/sales tax, therefore, there is no concrete reason for denial of the refund.

4.4 As regard the issue of limitation admittedly the show cause notice has been issued after one year from the date of sanction of refund. The refund was sanctioned by the sanctioning authority after due verification of all the documents and if there is any difference of description, it was found that the same is not a forgery with intention to defraud the government. Therefore, it cannot be said that the appellant have suppressed the facts or mis-represent with intention to evade payment of duty. In this fact, the judgments cited by the appellant in the case of Tamil Nadu Housing Board (Supra) directly supports their case on limitation. Accordingly, I hold that the demand is not sustainable on limitation also.

5. As per my above discussion and finding which is supported by the judgments cited above, the demand for recovery of refund already sanctioned is not sustainable. Hence, the impugned order is set aside. Appeal is allowed with consequential relief, if any, in accordance with law.

(Pronounced in the open court on 15.04.2024)

(RAMESH NAIR)
MEMBER (JUDICIAL)

Raksha