

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
ALLAHABAD**

REGIONAL BENCH - COURT NO.I

Customs Appeal No.70042 of 2019

(Arising out of Order-in-Appeal No.NOI-CUSTM-000-APP-159-18-19 dated 02/07/2018 passed by Commissioner (Appeals) Customs, Central Excise & Service Tax, Noida)

Commissioner of Customs (Pre.), NoidaAppellant
(Commissionerate, Greater Noida)

VERSUS

M/s Pee Gee International,Respondent

(13/15, Mandoli, Saboli, Industrial Area, Delhi-110093)

APPEARANCE:

Shri Manish Raj, Authorised Representative for the Appellant

Shri Vipin Kumar Gupta, Advocate for the Respondent

CORAM: HON'BLE MR. P.K. CHOUDHARY, MEMBER (JUDICIAL)
HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)

FINAL ORDER NO.70269/2023

DATE OF HEARING : 08 December, 2023
DATE OF DECISION : 08 December, 2023

SANJIV SRIVASTAVA:

This appeal is filed by the revenue against Order-in-Appeal No.NOI-CUSTM-000-APP-159-18-19 dated 02/07/2018 passed by Commissioner (Appeals) Customs, Central Excise & Service Tax, Noida. By the impugned order Commissioner (Appeals) has upheld the order of the Adjudicating Authority sanctioning the refund claim in favour of the respondent in the appeal filed by the revenue.

2.1 Respondent had filed a refund claim for an amount of Rs.38,821/- claiming refund of SAD levied in lieu of VAT supported by the documents such as VAT Challan, sale invoices, CA Certificate etc.

2.2 The refund claim was allowed by the Original Authority in favour of the respondent. Aggrieved revenue filed appeal before

Commissioner (Appeals) stating that the refund should have been examined on the ground of unjust enrichment. This appeal has been dismissed by the impugned order of Commissioner

Appeals). Revenue has filed the present appeal on the same grounds.

3.1 We have heard Shri Manish Raj, Authorised Representative for the revenue and Shri Vipin Kumar Gupta, Advocate for the respondent.

4.1 We have considered the impugned orders along with the submissions made in appeal and during the course of argument.

4.2 In his order, Original Authority has recorded as follows:-

Sl. No.	Conditions as per Not. No. 102/2007-Cus dated 14-9-07	Whether fulfillment by the party or not? Y/N
1.	Whether the claim has been filed within the maximum prescribed time of one year?	Yes. The party has filed claims on 06.10.2017 i.e. within one year from the date of payment of customs duty as mentioned in table above.
2.	Whether the claim has been filed for duties only in respect of quantity sold (unsold stock would not be eligible for refund)?	Yes, the refund claim is filed in respect of sold quantity of 13900 Kgs of imported goods.
3.	Whether all duties, including Additional Duty of Customs has been paid by the importer in cash. In case Additional Duty debited by DEPB, the refund is to be allowed as credit in DEPB Scrip.	Total Additional duty for Rs. 38,821/- was paid vide TR-6 Challans as detailed in table affixed hereinabove.
4.	Whether the relevant TR-6 Challans, in original, as proof of duty payment of duty (4% SAD) along with Bill of entry are submitted or in case the Additional Duty was debited by DEPB, DEPB Scrip in original is submitted?	Yes, the details are mentioned in Col. No.(B) & (F) of the above table.
5.	Whether invoices of sale of imported goods submitted Whether the importer while issuing the invoices for sale of the said	Yes, Copies of sale invoices submitted.
6.	goods, has indicated/ stamped on the face of invoices that no credit of the additional duty of customs shall be admissible?	Yes.
7.	Whether the documents evidencing	Yes, photo copy of VAT

	payment of ST/VAT, in original, duty issued by or acknowledged by the concerned ST/VAT authorities and CST in case of inter State Sales, are submitted.	challans/returns
8.	Whether certificate from statutory auditor / Chartered Accountant, who Certifies the annual accounts of the importer, correlating the payment of ST/VAT on the imported goods (in respect of which refund is claimed) with the sales invoices, is submitted?	Yes. A certificate dt 17.09.2017 submitted by P.K.Mangla & Associates, CA [M. No. 081537] for correlating the payment of ST/ VAT.
9.	Whether a certificate from statutory auditor/CA, who certifies the annual accounts of the importer, that the burden of 4% Additional duty of Customs has not been passed on by importer to the buyer to fulfill the requirement of unjust enrichment explaining with valid ground justifying how the burden of the same has not been passed on by the importer, is submitted?	Yes. Certificate dt 17.09.2017 explaining the grounds for not passing the burden of 4% Additional Duty by the importer submitted.
10.	Whether the importer has submitted a self declaration along with the refund claim to the effect that he has not passed on the incidence of 4% Additional Duty of Customs to any other person?	Yes. A self declaration dt 17.09.2017 has been filed by the importer.
11	Whether the importer/party is duly registered with ST/VAT authority?	Yes, the party is registered with ST/VAT authority under TIN No. 07250282168
12.	In case of Consignment sale, whether the importer has submitted a copy of consignment sale agreement and whether the invoices issued by the consignment agent/ stockist indicated that the sale is made on behalf of importer.	Yes. Consignment sale agreement dt 26.04.2010 , 22.08.2014 submitted.
13.	In case of Consignment sale, whether applicant has submitted a certificate from Auditor/ CA appointed by the importer to the effect that appropriate VAT has been paid by the Consignment Agent/ Stockist on behalf of the importer and importer has reimbursed the VAT to the consignment agent along with the	Yes. Certificate dated 17.09.2017 from Auditor/ CA submitted mentioning therein that appropriate VAT has been paid by the Consignment Agent and VAT has been reimbursed to the Consignment Agent/ Stockist by the importer. Correlation Chart has also

	correlation of VAT on imported goods	been submitted
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4.3 From perusal of the said table it is quite evident that while claiming the special duty levied in lieu of the sale tax, invoices and VAT Challan duly supported by the CA Certificate were produced before the original authority. Original Authority in response to question no.9 specifically recorded that certificate dated 17.09.2017 explaining the grounds for not passing the burden of 4% Additional duty by the importer submitted, once, he has examined the refund claim for applicability of unjust enrichment in order the same cannot be faulted with on the grounds stated in the appeal. Commissioner (Appeals) has also concluded the same.

4.4 It is also settled principle in law that the same findings of the fact arrived by the original and appellate authority sitting independently should not to be challenged or faulted in review filed by the revenue unless the same is shown to be perverse. No perversity has been shown in the impugned order by revenue while filing this appeal. In the case of Suresh Lataruji Ramteke Versus Sau. Sumanbai Pandurang Petkar & Ors. [2023 LiveLaw (SC) 821] following has been observed:

13. The jurisprudence on Section 100, CPC is rich and varied. Time and again this Court in numerous judgments has laid down, distilled and further clarified the requirements that must necessarily be met in order for a Second Appeal as laid down therein, to be maintainable, and thereafter be adjudicated upon. Considering the fact that numerous cases are filed before this Court which hinge on the application of this provision, we find it necessary to reiterate the principles.

13.1 The requirement, most fundamental under this section is the presence and framing of a "substantial question of law". In other words, the existence of such a question is sine qua non for exercise of this jurisdiction. [Panchugopal Barua v. Umesh Chandra Goswami and Ors. (1997) 4 SCC 713]

13.2 The jurisdiction under this section has been described by this Court in Gurdev Kaur v. Kaki¹⁰ (Two-Judge Bench) stating that post 1976 amendment, the scope of Section 100 CPC stands drastically curtailed and narrowed down to be restrictive in nature. The High Court's jurisdiction of interfering under Section 100 CPC is only in a case where substantial questions of law are involved, also clearly formulated/set out in the memorandum of appeal. It has been observed that:

"At the time of admission of the second appeal, it is the bounden duty and obligation of the High Court to formulate substantial questions of law and then only the High Court is permitted to proceed with the case to decide those questions of law. The language used in the amended section specifically incorporates the words as "substantial question of law" which is indicative of the legislative intention. It must be clearly understood that the legislative intention was very clear that legislature never wanted second appeal to become "third trial on facts" or "one more dice in the gamble". The effect of the amendment mainly, according to the amended section, was:

- (i) The High Court would be justified in admitting the second appeal only when a substantial question of law is involved;*
- (ii) The substantial question of law to precisely state such question;*
- (iii) A duty has been cast on the High Court to formulate substantial question of law before hearing the appeal;*
- (iv) Another part of the section is that the appeal shall be heard only on that question." Gurdev Kaur (supra) was referred to and relied upon in Randhir Kaur v. Prithvi Pal Singh & Ors. [(2019) 17 SCC 71]*

13.3 In Santosh Hazari v. Purushottam Tiwari [(2001) 3 SCC 179] a Bench of three Judges, held as under in regard to what constitutes a substantial question of law:-

a) Not previously settled by law of land or a binding precedent.

b) Material bearing on the decision of case; and

c) New point raised for the first time before the High Court is not a question involved in the case unless it goes to the root of the matter. Therefore, it will depend on facts of each case. Such principles stand followed in Government of Kerala v. Joseph [2023 SCC OnLine SC 961] and Chandrabhan v. Saraswati [2022 SCC OnLine SC 1273].

13.4 Non-formulation of substantial question(s) of law renders proceedings "patently illegal". This Court's decisions in Umerkhan v. Bimillabi [(2011) 9 SCC 684] and Shiv Cotex v. Tirgun Auto Plast Pvt Ltd. & Ors. [(2011) 9 SCC 678] indicate this position.

14. Substantial questions of law, as framed by the High Court must be answered in light of the contentions raised therein.

14.1 If the Court is of the view that a question framed is to be altered, deleted or a new question is to be added, then the Court must hear the parties.

14.2 For both the above principles, reference may be made to Gajaraba Bhikhubha Vadher v. Sumara Umar Amad [(2020) 11 SCC 114] where the following principles were observed: -

a) The substantial question of law framed by the High Court must be answered, with reasons. Disposing off the appeal without answering the same cannot be justified.

b) If a need is felt to modify, alter or delete a question, a hearing must be provided to the parties in respect thereof.

14.3 When the case is admitted, but upon hearing when it is found that no substantial question of law arises for consideration, reasons should be recorded in such dismissal.

15. In Kichha Sugar Co. Ltd. v. Roofrite (P) Ltd [(2009) 16 SCC 280] it was observed:

"4. Our attention is drawn by the learned counsel for the respondents to the provisions of Section 100(5) of the Civil Procedure Code where the respondent to a second appeal is permitted "to argue that the case does not involve such question" i.e. the questions formulated earlier. No doubt, but then the order on the second appeal should indicate, howsoever briefly, why the questions formulated at the earlier stage had, at the stage of final hearing, been found to be no questions of law."

16. Substantial questions should ordinarily, not be framed at a later stage. If done so, then parties must be given an opportunity to meet them. This Court in U.R. Virupakshappa v. Sarvamangala¹⁹ held :

"15. ... It, furthermore, should not ordinarily frame a substantial question of law at a subsequent stage without assigning any reason therefor and without giving a reasonable opportunity of hearing to the respondents. [See Nune Prasad v. Nune Ramakrishna [(2008) 8 SCC 258 : (2008) 10 Scale 523]; Panchugopal Barua v. Umesh Chandra Goswami [(1997) 4 SCC 713] (SCC paras 8 and 9); and Kshitish Chandra Purkait v. Santosh Kumar Purkait [(1997) 5 SCC 438] (SCC paras 10 and 12)].

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16.5 Interference on findings of fact permitted in exceptional cases, i.e., when finding is based on either inadmissible or, no evidence. This Court in Dinesh

Kumar v. Yusuf Ali [(2010) 12 SCC 740] referring to various other cases held:-

- a) It is not permissible for High Court to re-appreciate evidence as if it was the first appellate court unless findings were perverse.*
- b) Finding of fact can be interfered in exceptional circumstances as rarity, rather than a regularity.*
- c) Scrutiny of evidence in second appeal is not prohibited but has to be exercised upon proper circumspection.*

17. Jurisdiction under second appeal not to be exercised merely because an alternate view is possible. It was observed in Hamida v. Mohd. Khalil [(2001) 5 SCC 30]

"7. ...The High Court, it is well settled, while exercising jurisdiction under Section 100 CPC, cannot reverse the findings of the lower appellate court on facts merely on the ground that on the facts found by the lower appellate court another view was possible."

This position was reiterated by Avtar Singh & Ors. v. Bimla Devi & Ors. [(2021) 13 SCC 816].

17.1 In aid of such a restricted application, an essential aspect in ensuring that it does not acquire the nature of a "third appeal" is the limited possibility of appreciation of evidence and connectedly, the restriction on upturning concurrent findings of fact. However, there are certain exceptions to the rule as pointed out by this Court in Nazir Mohamed v. J. Kamala [(2020) 19 SCC 57] , as under:

"33.4. The general rule is, that the High Court will not interfere with the concurrent findings of the courts below. But it is not an absolute rule. Some of the well recognised exceptions are where: (i) the courts below have ignored material evidence or

acted on no evidence; (ii) the courts have drawn wrong inferences from proved facts by applying the law erroneously; or (iii) the courts have wrongly cast the burden of proof. A decision based on no evidence, does not refer only to cases where there is a total dearth of evidence, but also refers to case, where the evidence, taken as a whole, is not reasonably capable of supporting the finding."

17.2 The extent of the same may be underscored by the observation that:

"32. In a second appeal, the jurisdiction of the High Court being confined to substantial question of law, a finding of fact is not open to challenge in second appeal, even if the appreciation of evidence is palpably erroneous and the finding of fact incorrect as held in V. Ramachandra Ayyar v. Ramalingam Chettiar [V. Ramachandra Ayyar v. Ramalingam Chettiar, AIR 1963 SC 302]. An entirely new point, raised for the first time, before the High Court, is not a question involved in the case, unless it goes to the root of the matter." (Emphasis Supplied)

4.4 In view of the above discussion, we do not find any merits in this appeal filed by the revenue.

5.1 Appeal filed by the revenue is dismissed.

(Dictated and pronounced in open court)

Sd/-
(P.K. CHOUDHARY)
MEMBER (JUDICIAL)

Sd/-
(SANJIV SRIVASTAVA)
MEMBER (TECHNICAL)