CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
<u>ALLAHABAD</u>

REGIONAL BENCH - COURT NO.I

Customs Appeal No.70610 of 2019

(Arising out of Order-in-Appeal No.NOI-CUSTM-000-APP-125-128-18-19 dated 28/06/2018 passed by Commissioner (Appeals) Customs & Central Taxes, Noida)

Commissioner of Customs (Preventive), Noida **.....Appellant**

(C-56/42, Renu Tower, Sector-62, Noida)

VERSUS

M/s Aadya Overseas Ltd., **....Respondent**

(12/6, Gurukul Indraprastha,

Anangpur Road, Faridabad-121003)

<u>APPEARANCE:</u>

Shri A.K. Choudhary, Authorised Representative for the Appellant
None, for the Respondent

CORAM: HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT
HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)

FINAL ORDER NO.70235/2024

DATE OF HEARING : 10 May, 2024
DATE OF DECISION : 10 May, 2024

<u>SANJIV SRIVASTAVA:</u>

This appeal filed by the revenue is directed against the Order-in-Appeal No.NOI-CUSTM-000-APP-125-128-18-19 dated 28/06/2018 passed by Commissioner (Appeals) Customs & Central Taxes, Noida. By the impugned order, the appeal filed by the revenue has been rejected holding as follows:-

> *"4.13. Considering overall facts of the case, the ratio in the judicial pronouncements, supra, the statutory provisions for sanction of refund of additional duty of customs as contained in Notification No. 102/2007-Cus dated 14.09.2007, the clarifications issued in CBEC Circular No. 6/2008-Customs dated 28-4-2008 and Circular No.18/2010-Customs dated*

8.7.2010 and the discussion and findings as above. I find that the various contentions put forth by the appellant department in the grounds of these appeals have no substance, therefore the appeals are liable to be rejected being devoid of merit. I therefore, uphold all the impugned Orders of the adjudicating authority sanctioning refunds of the additional duty of Customs (SAD) to the respondent and reject these departmental appeals."

1.2 Commissioner (Appeal) has by the impugned order disposed of seven appeals filed by revenue against four Order-In-Originals as detailed below allowing the refund claims filed by the appellant:-

S No	Order in Original No & Date	Amount
1	716/SAD REFUND/NOIDACUSTOMS/2017 dated 13.10.2017	4,38,752/-
2	739/SAD REFUND/NOIDACUSTOMS/2017 dated 26.10.2017	3,90,856/-
3	740/SAD REFUND/NOIDACUSTOMS/2017 dated 26.10.2017	1,27,807/-
4	741/SAD REFUND/NOIDACUSTOMS/2017 dated 26.10.2017	3,84,426/-

2.1 Appellant had filed the refund claims, claiming refund of SAD paid by them in terms of Notification No.102 of 2007 Customs dated 14.09.2007.

2.2 The Original Authority decided/adjudicated all the refund claims in favour of the appellant.

2.3 Aggrieved, Revenue challenged these Orders-In-Original before Commissioner (Appeals) who has vide the impugned order dismissed the appeals filed by the Revenue.

2.4 Aggrieved Revenue has filed these appeals before us stating the following grounds:

"1. The order of the Commissioner (Appeals) does not mention as to why the Addison judgment of the Supreme Court is not applicable in this case. It only mentions that Addison judgment of the Supreme Court is not applicable in the case. However, reasons for the same are not provided in

the order. It is a case of non- application of mind by the Commissioner (Appeals). The Commissioner (Appeals) in his OIA has not addressed these specific issues. It is in fact a presumptuous disposal of Revenue's appeal.

2. The Sub Section (2) of Section 27 of Customs Act, 1962 stipulates that "If, on receipt of such application (application of refund filed under Sub section (1) of the ibid), the Assistant Commissioner of Customs or Deputy Commissioner of Customs is satisfied that the whole or any part of the duty and interest, if any, paid on such duty, paid by the applicant is refundable, ***he may make an order accordingly and the amount so determined shall be credited to the fund"****. Further, proviso (2) to said Section 27 ibid, provides that" the amount of duty and interest, if any, paid on such duty as determined by the Assistant Commissioner of Customs or Deputy Commissioner of Customs under the foregoing provisions of this sub section shall,* ***instead of being credited to the fund, be paid to the applicant, if such amount is relatable to-*** *"the duty and interest, if any, paid on such duty paid by the importer, or the exporter, as the case may be,* ***if he had not passed on the incidence of such duty and interest, if any, paid on such duty to any other person."***

3. In the case of Commissioner Of Central Excise, Madras Vs Addison & Co, Ltd., 2016 (339) E.L.T. 177 (S.C.), the Additional Solicitor General of India submitted to the Hon'ble Supreme Court of India that the Act had given effect to the recommendations of the Public Accounts Committee whereby ***the refund of any duty was proposed to be made only to the person who ultimately bears the incidence of such duty.*** *He also submitted that it would be necessary for a verification to be done to find out as to who actually bore the burden of duty.* ***The refund can be granted only to the person who has paid the duty and not to anyone else. In all such cases it would be the ultimate buyer of the goods. If the ultimate consumer can not be identified, the amount would be retained in the fund and utilised for the benefit of the consumers.***

4. After duly considering the arguments of both the sides, Hon'ble Supreme Court in Para 16 of the judgement mentioned above stated that "the doctrine of unjust enrichment is a just and salutary doctrine. No person can seek to collect the duty from both ends. In other words, he cannot collect the duty from his purchaser at one end and also collect the same duty from the State on the ground that it has been collected from him contrary to law." Further at para 19 of the said judgement, the Hon'ble Supreme Court *mentioned that "the sine qua non for a claim for refund as contemplated in Section 11B of the Act is* ***that the claimant has to establish that the amount of duty of excise in relation to which such refund is claimed was paid by him and that the incidence of such duty has not been passed on by him to any other person".***

5. After duly considering the arguments of both the sides, Hon'ble Supreme Court in Para 21 of the same judgement mentioned above stated that "A consumer can make an application for refund is clear from para 99(ii) of the judgement of this court in Mafatial Industries and Others Vs Union of India and Others reported in 1997 (89) E.L.T. 247 (S.C.). We are bound by the said findings of a Larger Bench of this court. The word "buyer' in Clause (e) to proviso to Section 11B (2) of the Act ***cannot be restricted to the first buyer from the manufacturer.*** *Another submission which remains to be considered is the requirement of verification to be done for the purpose of* ***finding out who ultimately bore the burden of excise duty****. It might be difficult to identify who had actually borne the burden but such verification would definitely assist the Revenue in finding out whether the manufacturer or buyer who makes an application for refund are being unjustly enriched.* ***If it is not possible to identify the person/persons who have borne the duty, the amount of excise duty collected in excess will remain in the fund which will be utilized for the benefit of the consumers as provided in Section 12D.*** *The apex court thus set aside the High Court order for grant of refund on the ground of unjust enrichment. The statutory provisions regarding unjust enrichment are similar if not identical in the Central Excise Act, 1944 and the Customs Act, 1962. The ratio of the said Supreme Court judgement as discussed in preceding paragraphs is squarely applicable to the present applicant for grant of refund of Special Additional Duty of Customs under Customs Act, 1962 and the impugned order. In this case, the refund sanctioning authority that passed the order did not invoke the provisions of Section 27 (1A) of the Customs Act, 1962.*

6. From the discussion in the on-going para, it is amply clear that the refund of SAD can be granted to the applicant only when it is established that the incidence of Customs duty has not been. passed on to any other person and also the refund can be granted only to the person who has actually born the incidence of duty. ***In the impugned OIA, the appellate authority has failed to appreciate the contention of revenue that the importer has failed to establish that the burden of SAD has not been passed on to the buyer of the goods."***

3.1 We have heard Shri Manish Raj, Authorized Representative for the Revenue who reiterates the grounds taken in the appeal.

3.2 None appeared on behalf of the Respondent.

4.1 We have considered the impugned order along with grounds stated in the appeal memo and submissions made at the time of arguments.

4.2 Notification No.102/2007-Cus dated 14.09.2007 provides for refund of SAD to the dealer when he issues invoice for further sale of the goods charging VAT. The text of Notification is reproduced below:

> *"G.S.R. (E).- In exercise of the powers conferred by sub-section (1) of section 25 of the Customs Act, 1962 (52 of 1962), the Central Government, on being satisfied that it is necessary in the public interest so to do, hereby exempts the goods falling within the First Schedule to the Customs Tariff Act, 1975 (51 of 1975), when imported into India for subsequent sale, from the whole of the additional duty of customs leviable thereon under sub-section (5) of section 3 of the said Customs Tariff Act (hereinafter referred to as the said additional duty).*
>
> *2. The exemption contained in this notification shall be given effect if the following conditions are fulfilled:*
>
> *(a) the importer of the said goods shall pay all duties, including the said additional duty of customs leviable thereon, as applicable, at the time of importation of the goods;*
>
> *(b) the importer, while issuing the invoice for sale of the said goods, shall specifically indicate in the invoice that in respect of the goods covered therein, no credit of the additional duty of customs levied under sub-section (5) of section 3 of the Customs Tariff Act, 1975 shall be admissible;*
>
> *(c) the importer shall file a claim for refund of the said additional duty of customs paid on the imported goods with the jurisdictional customs officer;*
>
> *(d) the importer shall pay on sale of the said goods, appropriate sales tax or value added tax, as the case may be;*
>
> *(e) the importer shall, inter alia, provide copies of the following documents alongwith the refund claim:*
>
> *(i) document evidencing payment of the said additional duty;*

(ii) invoices of sale of the imported goods in respect of which refund of the said additional duty is claimed;

(iii) documents evidencing payment of appropriate sales tax or value added tax, as the case may be, by the importer, on sale of such imported goods.

3. The jurisdictional customs officer shall sanction the refund on satisfying himself that the conditions referred to in para 2 above, are fulfilled."

4.3 By Circular No 16/2008-Cus dated 13.10.2008, Board has clarified in respect of the manner for satisfaction of the requirement of unjust enrichment, in case of refunds under this notification stating as follows:-

"Subject: Clarification on refund of 4% Additional Duty of Customs (4% CVD) in pursuance of Notification No.102/2007-Customs dated 14.09.2007 - regarding.

(vii) Unjust enrichment and its Certification by Chartered Accountants: It is represented by the trade that for the purpose of satisfying the condition that burden of 4% CVD has not been passed on by the importer to any other person, a certification from an independent Chartered Accountant may be accepted by the Customs authorities.

In this regard, it is stated that the intention of the Government is not to allow the importer to recover 4% CVD from the buyer and to claim the refund from Customs as well. The only method to ensure this is to make it conditional to satisfy the principle of unjust enrichment. In this regard, in the earlier circular, it has been provided that the importer may produce a certificate from the statutory auditor/CA who certifies that Annual Accounts of the importer (under the Companies Act, 1956 or any statute) to the effect that the burden of 4% CVD has not been passed on by the importer to the buyer. The provisions contained in the various Sales Tax Laws prevailing in various States provide for Audit of the books and accounts for the purpose of ascertaining the correctness of ST/VAT payment / Input Tax Credit. Further, Section 44AB of the Income Tax Act, 1961 provides that certain persons carrying on business or profession exceeding the prescribed limit are required to get their accounts audited by "an Accountant" explained therein.

Considering these provisions, it is clarified by the Board that the 'statutory auditor / Chartered Accountant' mentioned in para 6 of the earlier Board's circular refers to "Chartered Accountant" within the meaning of section 2(1)(b) of the Chartered Accountants Act, 1949. However, it is clarified that the Customs field formations shall accept the certificate given only by such a Chartered Accountant who either certifies the importer's financial records under the

Companies Act, 1956 or any ST/VAT Act of the State Government or the Income Tax Act, 1961, in order to fulfill the requirement of the condition that the incidence of duty burden has not been passed on by the importer to any other person for the purpose of refund of 4% CVD. A certificate by any other independent Chartered Accountant would not be acceptable for this purpose."

4.4 There is no dispute about the fact that these refund claims have been filed fulfilling the conditions of the said notification and the conditions as prescribed by the above circular. The Notification and circular lay down the manner in which the refund claims are to be examined and allowed. It is provided that a certificate from an independent chartered accountant shall suffice to establish that the burden of SAD has not been passed on and the refund claim shall not be hit by the principles of unjust enrichment. While sanctioning the refund claims original authority has in each of the order observed as follows (Refer order in original No 739/SAD/Refund/Noida Customs/2017 dated 26.10.2017):

S. No	*Conditions as per Not No 102/2007-Cus dated 14.09.2007*	*Whether fulfilment by the party or not? Y/N*
8	*Whether a 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 invoice is submitted?*	*Yes a certificate dated Nil submitted by Rajiv Prakash & Co., CAS [M.No.082378] for correlating the payment of ST/VAT.*
9	*Whether a certificate from statutory auditor/ Chartered Accountant, 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*	*Yes a certificate dated Nil explaining the grounds for not passing the burden of 4%/2% Additional Duty by the importer submitted.*

	unjust enrichment explaining how the burden of same has not been passed on by the importer, is submitted?	

4.5 Thus we find that adjudicating authority has while sanctioning the refund have followed the guidelines issued by board in this regard. The issue has been settled by the decision of this Tribunal referred in the order of the Commissioner reproduced below:-

> *"4.13. I observe that the impugned appeals praying rejection of the refund on the ground of unjust enrichment is inherently wrong and contrary to the law laid down by the Hon'ble Courts and Tribunal in identical circumstances in a catena of judgments detailed as under:*
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> **(i) Commissioner of Customs Apple India Pvt Ltd 2014 (301) ELT 675 (Tri Bang):**
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> *Refund-Unjust enrichment - Assessee claimed refund of Special Additional Customs Duty (SAD) Notification No. 102/2007-Cus. Refund rejected holding assessee failed to prove that incidence of duty had not been passed on to customers Certificates in order to fulfill test of unjust enrichment HELD No dispute that all the conditions in terms of Notification has been fulfilled-B.E & C Circular Nos. 6/2008-Cus, dated 28-4-2008 and 16/2008-Cus.. dated 13-10-2008 clarified that certificates from statutory auditor/Chartered Accountant shall be acceptable in order to fulfill obligation to show that unjust enrichment is not attracted - Regular auditors have certified that burden of incidence of duty has not been passed on and assessee have taken into account this factor while determining price of traded goods CA's Certificates produced by assessee fulfill the requirement and sufficient to come to conclusion that assessee are eligible for refund-Section 27 of Customs Act. 1962. The above judgment has since been affirmed by the Hon'ble Supreme Court as reported in [Commissioner v. Apple India Pvt. Ltd.-2015 (320) E.I.Г. A 277 (S.C.)]*
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> ***(ii) Sauvee Impex Pvt Ltd CCus & ST, Bangalore 2016 (344) ELT 241 (Tri Bang)***
>
> *"Countervailing duty Exemption to all goods when imported for subsequent sale - Goods having been sold by appellant*

and VAT also being discharged, conditions of Notification No 102 2007-Cux.. dated 14-9-2007 fulfilled Chartered Engineer's certificate declaring that sale value not includes 4% additional duty of Customs sufficient to prove that duty burden not passed on and condition of unjust enrichment not applicable - Also, applicability of another notification not makes Notification No. 102/2007-Cus, as inapplicable Refund of countervailing duty paid by appellant admissible."

(iii) Equinox Solution Ltd v CC Ahmedabad-2017 (357) ELT 1041(Tri Ahmd):

"Refund of Special Additional Duty (SAD) Unjust enrichment Proof Chartered Accountant's certificate-CBE & C Circular Nos. 6/2008-Cus., dated 28-4-2008 and 18/2010- Cus, dated 8-7-2010 clarifying that certificate from Chartered Accountant who was statutory auditor of claimant company would suffice to satisfy unjust enrichment and there was no need for insisting on production of audited balance sheet and profit and loss account - Denial of refund on ground that refund amount was shown as expenses in assessee's profit und loss account and hence the burden must have been passed on to customers without any corroborative evidence untenable in law Discarding certificate of Chartered Accountant, who was also assessee's statutory Auditor, by Commissioner (Appeals) and observation that assessee had failed to prove that incidence of duty claimed as refund had not been passed on to customers, incorrect - Assessee entitled to refund - Section 27 of Customs Act. 1962.

4.6 In case of **Systronics (India) Ltd [2019 (370) ELT 945 (Tri. - Bang.)]** following was held:

"6. *After considering the submissions of both the parties and perusal of the material on record, I find that the only ground on which the SAD refund has been rejected is that the amount of refund has not been shown in the receivables in the accounts of the appellant. Further I find that as per the Notification No. 102/2007 and also the subsequent Circular No. 18/2010, dated 8-7-2010, it is not the requirement at all that the said claim should be shown as receivables in the books of account. Further I find that Board circular has clarified that field formations need not insist on the production of audited balance sheet and Profit & Loss Account and the certificate of the CA is sufficient to grant the refund claim. In the present case, the CA certificate was produced but the same was not considered. Further I find that in view of the various decisions relied upon by the appellant which clearly states that refund should not be denied merely on technical violations. In view of the above* *circumstances, I am of the view that the impugned order rejecting the refund claim is not sustainable in law and therefore I set aside the same by allowing the appeal of the appellant with consequential relief, if any."*

4.7 In case of **Gujarat Boron Derivatives Pvt. Ltd [2013 (29) S.T.R. 443 (Tri. - Ahmd.)]** following was held:-

"4. *In this case, the refund claims sanctioned by the original adjudicating authority and on an appeal filed by the Revenue, the impugned order was set aside resulting in demand for the refund amount sanctioned. Central Board of Excise and Customs issued an instruction vide Circular No. 18/2010-Cus., dated 8-7-2010 wherein the Board has stated that there is no need to look into the balance sheet and Profit & Loss A/c to ensure that there was no unjust enrichment. The claimant have to submit the Chartered Accountant's certificate certifying that the burden of SAD (4%) has not been passed on by the importer to customers to fulfil the requirement of unjust enrichment. The ld. Commissioner has reproduced the certificate issued by Chartered Accountant wherein Chartered Accountant has certified that said amount was not recovered directly or indirectly from the customers; No Cenvat credit has been taken and no unjust enrichment has been derived by claiming refund. Thereafter the ld. Commissioner has gone into a detailed examination of accounting principles and the way the amount has been accounted in the records to reach the conclusion that the certificate produced by the appellant is not sufficient to rebut the presumption that the incidence of duty has been passed on. The Circular issued by the Board clearly shows that Chartered Accountant's certificate is sufficient if it explains how the burden has not been passed on. On going through the sample invoices produced before me, I find that the invoice shows only VAT and not SAD. Further the certificate issued by the Chartered Accountant as discussed above clearly shows that appellants have not collected SAD directly or indirectly. Since the certificate has been produced by the statutory auditor it cannot be said that they were unaware of the records maintained by the appellant. For considering the accounting principles, the ld. Commissioner has explained that the instructions issued by the Board that the certificate of Chartered Accountant can be accepted is applicable only for the current financial year and for the earlier period, he was required to go into accounting method. I am unable to appreciate this logic. The Board itself says that 4% exemption is operated through a refund mechanism wherein the importer would pay the SAD at first and claim refund after showing the Government that he has paid VAT. Therefore the exemption is available if the importer is able* *to show that he has paid 4% SAD (CVD) and subsequently the same goods has been sold in the domestic market and sales tax/VAT for which has been paid. The Notification requires only these aspects to be proved by the documents. Further in view of the provisions of Section 11B, the Board has prescribed that the unjust enrichment is required to be examined and for this purpose the Chartered Accountant's certificate should be produced. Going by the documents and the Chartered Accountant certificates in this case, I find that in respect of all the refund claims the appellants have fulfilled the required conditions. I am not impressed by the detailed examination given by the Commissioner about accounting. What is required to be seen is whether there is unjust enrichment or not.*

5. *Further I also find that as submitted by the ld. Counsel, the very same issue came up before the Tribunal in respect of twelve refund claims of the very same appellant and this Tribunal vide order dated 22-9-2011 allowed the appeal filed by the appellants. Further the ld. Counsel also relied upon the decisions of the Tribunal in the case of STP Ltd. v. Commr. of Customs (Import), Mumbai reported in 2011 (267) E.L.T. 110 (Tri.-Mumbai) wherein a similar view was taken. In that case also the Tribunal took the view that the certificate from a Chartered Accountant is sufficient and in that case also the refund claim was related to the year 2007. The issue is already decided by the said two decisions and I am also convinced on the facts and circumstances of this case that appellant is eligible for refund. By refusing I to modify the order issued by this Tribunal and directing the appellant to deposit the amount I will only be creating additional work on payment of amount by the appellant under different challans and sanction of refund subsequently. Since I have already taken a view that the appellant is eligible for refund, I do not consider it necessary to require any pre-deposit from the appellant and therefore the application for modification is required to be allowed. Since while considering the modification application as discussed above, the whole issue was considered by me, it would be in the interest of justice to decide the appeals themselves finally rather than posting the matter for another hearing on another day. Accordingly, the application for modification of stay applications are allowed, pre-deposit is waived and appeals themselves are allowed with consequential relief to the appellants."*

4.8 As the issue is settled in favour of the respondent by various decisions of the Tribunal we do not find any merit in this appeal. However, before closing we would like to point out the decision in case of Commissioner of Central Excise, Madras V/s Addison & Company Ltd. is not in respect of the case where the refund of SAD has been claimed in terms of the Notification No.102/2007 which provides for the refund subject to fulfillment of this condition. In such cases payment of VAT is the only condition for refund to the dealer who has paid the SAD at the rate of 4% and that burden of the same has not been passed on to the buyer is certified by the independent chartered accountant.

5.1 Appeal filed by the Revenue is dismissed.

(Dictated and pronounced in open court)

Sd/-
(JUSTICE DILIP GUPTA)
PRESIDENT

Sd/-
(SANJIV SRIVASTAVA)
MEMBER (TECHNICAL)

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