CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
ALLAHABAD

REGIONAL BENCH - COURT NO.I

Customs Appeal No.70586 of 2019

(Arising out of Order-In-Appeal No-NOI-CUSTM-000-APP-05-19-20, dated - 15/04/2019 passed by Commissioner (Appeals) CGST, Noida)

M/s National Products .....**Appellant**
(C-133, Mayapuri Industrial Area
Phase-II, New Delhi)

VERSUS

Commissioner of Customs & CGST, Noida ....**Respondent**
(Noida-II)

APPEARANCE:

Shri A.P. Mathur, Advocate for the Appellant
Shri Sandeep Pandey, Authorized Representative for the Respondent

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

FINAL ORDER NO.-70507/2024

DATE OF HEARING : 22.07.2024
DATE OF DECISION : 22.07.2024

SANJIV SRIVASTAVA:

This appeal is directed against the Order-In-Appeal No. NOI-CUSTM-000-APP-05-19-20, dated 15.04.2019 passed by Commissioner (Appeals) CGST, Noida. By the impugned order Commissioner has held as follows:-

"6. I find that the Appellant imported the raw material and warehoused it in the FTWZ M/s ASCMPL and further cleared it for self-use. The DTA clearance was allowed by the Customs Officer after following the conditions as laid down by the Unit Approval Committee (UAC) in its meeting dated 12.03.2013 and the DTA Bill of Entry no. 0000137 dated 31.05.2013 was assessed accordingly. I find that the notification no. 45/2005-Cus dated

16.05.2005 as amended vide notification no. 18/2011-Cus dated 01.03.2011 exempts all goods cleared from a SEZ and brought to any place in India in accordance with the provisions of the Foreign Trade Policy 2004-2009, from whole of the additional duty of customs leviable thereon under sub-section (5) of section 3 of the Customs Tariff Act, 1975 (SAD). No such exemption was, however. applicable if such goods, when sold in domestic tariff area, were exempted by the State Government from payment of sales tax or value added tax. It is therefore evident that the exemption was available only in respect of the goods cleared from the SEZ and on which appropriate sales tax or value added tax was paid/payable. The matter regarding said exemption in respect of the goods cleared from the SEZ and used in the manufacture etc. but not sold on payment of sales tax or value added tax was further clarified vide Circular No. 44/2013- Customs dated 30.12.2013 stating that the benefit of SAD exemption on goods cleared from the SEZ/ FTWZ unit into DTA unit on stock transfer basis for self-consumption i.e. otherwise than for sale as such, was not available under notification no. 45/2005-Customs dated 16.05.2005. As the said circular was clarificatory in nature, the same was applicable retrospectively. There is not dispute that the Appellant cleared the impugned goods on stock transfer from FTWZ to the DTA unit for self-consumption i.e. otherwise than for sale as such, no sales tax/ VAT was leviable on such a transaction. Accordingly, the exemption from payment of SAD was not admissible in terms of the Notifications ibid. I also find that recovery of SAD can be made by following the procedure prescribed under Section 28 of the Act even if the department has not challenged the assessment of the Bill of Entry under Section 129D of the Act by way *of appeal for which reliance is placed on the judgement of the Hon'ble Supreme Court in the case Union of India Vs. Jain Shudh Vanaspati Ltd. as reported in 1996(86) E.L.T.460(S.C.). Under the circumstances the demand of SAD is sustainable.*

7. The Appellant has contended that he was entitled to the Cenvat credit of SAD if he was liable to pay the same. In this regard I find that the DTA Bill of Entry was assessed by the customs officers in which the Additional Duty of customs was assessed at Rs. 28.59 lakh approx. and the SAD was assessed as NIL. As the said duties were levied under Section 3 of the Customs Tariff Act in respect of which the Cenvat credit was admissible under Rule 3 of the Cenvat Credit Rules, 2004 as it existed at the material time. However, the Cenvat Credit of the SAD is not available as the relevant clause (viia) of the said Rule 3(1) of the CCR, 2004 stands omitted."

1.2 The impugned order has been passed after considering the issue on limitation in favour of the Appellant as per CESTAT Final Order No.71365 of 2018-SM dated 09.07.2018.

2.1 The Appellant have imported tin ingots vide Bill of Entry No 0000091 dated 21.05.2013, used in manufacture of their finished goods and warehoused it in the ware house of M/s Arshiya Supply Chain Management Private Ltd. (ASCMPL) a Free Trade & Warehousing Zone (FTZW) notified under the provisions of SEZ Act**.**

2.2 From the warehouse they subsequently cleared the same after final assessment of Customs duty payable by filling Bill-of-Entry No.000137 dated 31.05.2013. They claimed the benefit of Notification No.45/2015 dated 16.05.2005 as amended by

Notification No.18/2011-Cus dated 01.03.2011 which was held admissible.

2.2 Subsequently a Show Cause Notice dated 29.05.2014 was issued to the Appellant and the warehouse and asking them to show cause as to why:-

"(a) Special Additional Duty of Customs (SAD) of Rs. 10,70,668/- (Rs. Ten Lakh Seventy Thousand Six Hundred Sixty Eight only) leviable under Section 3 of Customs Tariff Act, 1975 read with Notification No. 45/2005-Cus and payable on the goods imported by the said M/s ASCMPL and M/s National Products and cleared into DTA should not be demanded and recovered from them under Section 28(1) of the Custom Act, 1962 read with Section 30 of SEZ Act, 2005 and Rule 48 of SEZ Rules, 2006; and also by enforcing the conditions of the Bond-cum-Legal Undertaking executed by M/s ASCMPL as they have violated the conditions thereof read with various provisions of the Custom Act, 1962 as discussed hereinbefore;

(b) Interest on the said amount of duty should not be demanded and recovered under Section 28AA of Custom Act, 1962 at the rates as applicable;

(c) Penalty should not be imposed upon M/s ASCMPL under Section 117 ibid for violating the conditions of the Bond-cum-Legal Undertaking and the provisions of the Custom Act, 1962 as discussed above in this Notice;"

2.3 The Show Cause Notice was adjudicated as per Order-In-Original dated 30.04.2015 holding as follows:-

ORDER

a) I order that Special Additional Duty of Rs.10,70,668/- (Rs.Ten Lakhs, Seventy Thousand, Six Hundred Sixty Eight only) be recovered from M/s National Products (noticee) and M/s Arshiya (co-noticee) under Section 28(1) of Customs

Act, 1962 read with Section 30 of SEZ Act, 2005 and Rule 48 of SEZ Rules, 2006.

b) I order that interest as applicable on above amount be recovered from noticee and co- noticee under Section 28AA of Customs Act, 1962.

c) I also impose a penalty of Rs 10,000/- (Rs Ten Thousand only) on M/s Arshiya (Co- noticee) under Section 117 of Customs Act, 1962.

2.4 The appeal filed by the Appellant was dismissed by the Commissioner (Appeals) on the ground of limitation.

2.5 The Appellant challenged the order of dismissal before the Tribunal and by the Final Order referred earlier matter was remanded back to Commissioner (Appeals) for reconsideration on the ground of limitation and also the appeal on merits.

2.6 In the remand proceedings by the impugned order, Commissioner (Appeal) held in favour of the appellant on limitation but dismissed the appeal on merits.

2.7 Hence this appeal.

3.1 We have heard Shri A.P. Mathur, Advocate for the Appellant and Shri Sandeep Pandey, Authorized Representative for the Revenue.

3.2 Arguing for the Appellant learned counsel submits that:-

- Undisputedly Appellant have cleared the goods from the warehouse after filing the Bill-of-Entry which had been assessed by the officers and after payment of assessed duty.
- They claimed the benefit of Exemption Notification No.45 of 2005 as amended and which has been allowed by the assessing officer.
- Having once assessed the Bill-of-Entry the proper course would have been by challenging the assessment order

rather than making a demand under Section 28. Reliance has been placed by the Appellate Authority on the judgement of the Hon'ble Supreme Court in the case of **Union of India V/s Jain Shudh Vanaspati Ltd. reported in 1996 (86) E.L.T. 460 (S.C.)** is on the basis of incorrect reading of the said judgment.

- The warehouse and they are unrelated entities and the Commissioner (Appeals) is incorrect in observing the goods were cleared on stock transfer basis. The benefit of Notification by them has been supported by way of Chartered Accountant's Certificate certifying that the Appellant paid the due VAT on the finished goods.
- In any case if SAD was required to be paid then the same should have been allowed as CENVAT credit to them. Accordingly, Appellant should be allowed.

3.3. Learned Authorized Representative reiterates the findings recorded in the impugned order.

4.1 We have considered the impugned order along with the submissions made in the appeal.

4.2 The Exemption Notification No.45/2005 dated 16.05.2005 provides as follows:-

> *"In exercise of the powers conferred by sub-section (1) of section 25 of the Customs Act, 1962 (52 of 1962), the Central Government, being satisfied that it is necessary manufactured in a special economic zone and brought to any other place in the public interest so to do, hereby exempts all goods produced or in India in accordance with the provisions of the Foreign Trade Policy 2004-2009, from the whole of the additional duty of customs leviable thereon under sub-section (5) of section 3 of the Customs Tariff Act, 1975 (51 of 1975):*
>
> *Provided that no such exemption shall be applicable if such goods, when sold in domestic tariff area, are*

exempted by the State Government from payment of sales tax or value added tax.

Explanation.-For the purposes of this notification, "special economic zone" means the] special economic zones notified by the Government of India, under section 76A of the Customs Act, 1962 (52 of 1962).

4.2 From the plain reading of the said Notification it is evident that the benefit of the said Exemption Notification is admissible subject to the condition that time of sale of the goods in the DTA area VAT is paid on the said goods at the time of sale of same. The fact that payment of VAT on the said goods has been duly certified by the certificate dated 23.04.2013 given by the Chartered Accountant wherein following has been stated:-

DEEPAK GULATI & ASSOCIATES
Chartered Accountants

Head Office
23, Hanuman Road, Connaught Place
New Delhi- 110001
Telefax: 011 23346616, 23367142-43

Branch Office
JCM - 1, DLF Phase - II, Gurgaon - 122002
Telefax: 0124 - 4363743

E-mail: dga@dga.in
Website: www.dga.in

CERTIFICATE

1. With regards to the imports under DTA Bill of Entry No.**0000137 dt.31-05-2013** and TR-6 challan No.**121/2013 dt.31-05-2013** wherein the Special Additional Duty has been exempted under Notification No. 45/2005 dt.16-05-2005 as amended vide Notification no. 18/2011 dt.01-03-2011 and such exemption was sought by **M/s National Products, A-32, Mayapuri Industrial Area, New Delhi** in respect of the goods cleared from Arshiya Northern FTWZ, Khurja.

2. It is certified that we are the Tax Auditor under section 44AB of the Income Tax Act, 1961 of **M/s National Products.**

3. We hereby certify that we have examined / verified the raw material register along with supporting documents / records maintained by **M/s National Products** towards consumption of the said imported goods.

4. The details of imports is as under :

S. No.	Description of goods	Quantity of imported goods	UOM
1.	TIN INGOTS	20	MTS

5. We certify that the above imported material / goods have been fully used in the manufacture of the final products at the said factory / Unit as on date and the VAT / Sales tax as applicable on such final products, shall be paid in due course.

6. This certificate has been prepared on the request of the company which is not to be used for any other purpose and is solely for your information and / or for use by the Customs Authorities.

7. The above has been verified from the books of accounts and records produced before us by the management.

For **DEEPAK GULATI & ASSOCIATES**
CHARTERED ACCOUNTANTS

NEW DELHI

(MANPREET SINGH KAPOOR)
PARTNER
M.NO.506545

PLACE : NEW DLHI
DATE : October 24, 2013

For NATIONAL PRODUCTS

Prop.

4.3. In view of the above referred certificate of Chartered Accountant which is dated prior to the date of issue of show cause notice we do not find any reason why these proceedings could have been initiated without any evidence placed on record to effect that appellant had contravened the provisions of notification by not paying VAT on the said goods. No enquiry in fact has been made in this regard.

4.4 Commissioner (Appeals) has relied upon the Circular No 44/2013-Custom dated 13.12.2013 holding that the said circular being clarificatory in nature should have retrospective effect, and shall be applicable to the clearances affected by the appellant vide Bill of Entry dated 31.05.2013. We do not find any merit in such an assertion. No conditions could have been imposed by way of a Circular to restrict the benefit available in terms of the Notification. Further, anything which imposes additional tax liability could not have retrospective effect unless and until specifically provided for by way of legislation. Such interpretation is but confiscatory in nature and needs to be rejected outright. Hon'ble Supreme Court has in case of Martin lottery Agencies [2009-TIOL-60-SC-ST] observed as follows:

> *"30. Mr. Parasaran has referred to Commissioner of Income Tax, Bombay & Ors. v. Podar Cement Pvt. Ltd. & Ors. [(1997) 5 SCC 482] = 2002-TIOL-445-SC-IT to contend that clarificatory statute would be retrospective in nature. On legal principle, there may not be any quarrel with the said proposition. Therein, however, this court was considering a case where two interpretations of Section 22 of the Income-tax Act were possible. It was opined that if one interpretation is possible and the same is clear, the next thing to be considered would be what would be the effect of the amendment. Referring to Benion's Statutory Interpretation and G.P. Singh's Principles of Statutory Interpretation, it was held:*

> *"An amending Act may be purely clarificatory to clear a meaning of a provision of the principal Act which was already implicit.*
>
> *A clarificatory amendment of this nature will have retrospective effect and, therefore, if the principal Act was existing law when the Constitution came into force, the amending Act also will be part of the existing law."*

It furthermore noticed the decision of the Constitution Bench in Keshavlal Jethalal Shah v. Mohanlal Bhagwandas and Anr. [(1968) 3 SCR 623] = 2002-TIOL-700-SC-MISC, wherein it was opined that an Explanatory Act is generally made to supply an obvious omission or to clear up doubts as to the meaning of previous Act. We are herein not concerned with such a situation. In W.P.I.L. Ltd., Ghaziabad v. Commissioner of Central Excise, Meerut, U.P. [(2005) 3 SCC 73] = 2005-TIOL-51-SC-CX-LB, whereupon again Mr. Parasaran placed strong reliance, this Court, while dealing with an exemption notification which is a piece of subordinate legislation, held:

> *"Such a notification merely clarified the position and makes explicit what was implicit. Clarificatory notifications have been issued to end the dispute between the parties."*

31. The question as to whether a Subordinate Legislation or a Parliamentary Statute would be held to be clarificatory or declaratory or not would indisputably depend upon the nature thereof as also the object it seeks to achieve. What we intend to say is that if two views are not possible, resort to clarification and/or declaration may not be permissible. This aspect of the matter has been considered by this Court in Virtual Soft Systems Ltd. v. Commissioner of Income Tax, Delhi- I [(2007) 9 SCC 665] = 2007-TIOL-18-SC-IT, holding:

"It may be noted that the amendment made to Section 271 by the Finance Act, 2002 only stated that the amended provision would come into force with effect from 1.4.2003.

The statute nowhere stated that the said amendment was either clarificatory or declaratory. On the contrary, the statue stated that the said amendment would come into effect on 1.4.2003 and therefore, would apply to only to future periods and not to any period prior to 1.4.2003 or to any assessment year prior to assessment year 2004- 2005. It is the well settled legal position that an amendment can be considered to be declaratory and clarificatory only if the statue itself expressly and unequivocally states that it is a declaratory and clarificatory provision. If there is no such clear statement in the statute itself, the amendment will not be considered to be merely declaratory or clarificatory.

Even if the statute does contain a statement to the effect that the amendment is declaratory or clarificatory, that is not the end of the matter. The Court will not regard itself as being bound by the said statement made in the statute but will proceed to analyse the nature of the amendment and then conclude whether it is in reality a clarificatory or declaratory provision or whether it is an amendment which is intended to change the law and which applies to future periods."

32. We are also not unmindful of the fact that the said decision has been overruled in Commissioner of Income Tax-I, Ahmedabad v. Gold Coin Health Foods Pvt. Ltd. [(2008) 11 SCAL E 497] = 2008-TIOL-152-SC-IT. A bare perusal of the said decision would, however, show that a Three Judge Bench of this Court noticed that the Act *intended to make the position explicit which otherwise was implicit. The Bench went back to the provisions of the Original Act to hold that the clarification issued by the Parliament was in tune with the actual interpretation of the original provision. In that view of the matter, it was held:*

> *"As noted by this Court in Commissioner of Income Tax, Bombay & Ors. v. Podar Cement Pvt. Ltd. & Ors. [(1997) 5 SCC 482] = 2002-TIOL-445-SC-IT the circumstances under which the amendment was brought in existence and the consequences of the amendment will have to be taken care of while deciding the issue as to whether the amendment was clarificatory or substantive in nature and, whether it will have retrospective effect or it was not so."*

33. We may also notice that in that judgment itself a distinction has been made with a clarificatory provision and a substantive provision to opine that Explanation 4 was clarificatory in nature and not a substantive provision.

To the same effect is the decision of this Court in SEDCO Forex International Drill. Inc. & Ors. v. Commissioner of Income, Tax, Dehradun & Anr. [(2005) 12 SCC 717] = 2005-TIOL-145-SC-IT. The explanation which was in question was added by Finance Act, 1983 with effect from 1979 was to the following effect:

> *"Explanation. -- For the removal of doubts, it is hereby declared that income of the nature referred to in this clause payable for service rendered in India shall be regarded as income earned in India."*

Similar expression is to be found in the instant case. However, in SEDCO the question which arose for consideration was interpretation of the words `off period'. While considering the question as to whether salary for the off period was taxable as arising out of services rendered in

India, this Court noticed that there was a reasonable nexus between salary earned for the off period and the services rendered in India.

34. The Gujarat High Court in CIT v. S.G. Pgnatal [(1980) 124 ITR 392 (Guj)] = 2003-TIOL-709-HC-AHM-IT held that words `earned in India' occurring in clause (ii) must be interpreted as "arising or accruing in India" and not "from service rendered in India". Opining that the High Court proceeded on an incorrect hypothesis, it was held:

> *"The High Court did not refer to the 1999 Explanation in upholding the inclusion of salary for the field break periods in the assessable income of the employees of the appellant. However the respondents have urged the point before us.*

In our view the 1999 Explanation could not apply to assessment years for the simple reason that it had not come into effect then. Prior to introducing the 1999 Explanation, the decision in CIT v. S.G. Pgnatale (supra) = 2003-TIOL-709-HC-AHM-IT was followed in 1989 by a Division Bench of the Gauhati High Court in Commissioner of Income Tax v. Goslino Mario reported in [(2002) 10 SCC 165]. It found that the 1983 Explanation had been given effect from 1.4.1979 whereas the year in question in that case was 1976- 77 and said:

> *". . . it is settled law that assessment has to be made with reference to the law which is in existence at the relevant time. The mere fact that the assessments in question has(sic) somehow remained pending on April 1, 1979, cannot be cogent reason to make the Explanation applicable to the cases of the present assessees. This fortuitous circumstance cannot take away the vested rights of the assessees at hand"."*

35. Reverting to the decision of a Kerala High Court in CIT v. S.R. Patton [(1992) 193 IT R 49 (Ker)] = 2002-TIOL-2390-SC-IT wherein Gujarat High Court's judgment was followed, this Court noticed that explanation was not held to be a declaratory one but thereby the scope of Section 9(1)(ii) of the Act was widened. The law in the aforementioned premise was laid down as under:

> *"17. As was affirmed by this Court in Goslino Mario (supra), a cardinal principle of the tax law is that the law to be applied is that which is in force in the relevant assessment year unless otherwise provided expressly or by necessary implication. [See also: Reliance Jute and Industries. v. CIT [(1980) 1 SCC 139]. An Explanation to a statutory provision may fulfil the purpose of clearing up an ambiguity in the main provision or an Explanation can add to and widen the scope of the main section (See: Sonia Bhatia v. State of U.P. [(1981) 2 SCC 585 at 598]. If it is in its nature clarificatory then the Explanation must be read into the main provision with effect from the time that the main provision came into force (See: Shyam Sunder v. Ram Kumar [(2001) 8 SCC 24 (para 44)]; Brij Mohan Laxman Das v. CIT[(1997) 1 SCC 352 at 354], CIT v. Podar Cement [(1997) 5 SCC 482 at 506]. But if it changes the law it is not presumed to be retrospective irrespective of the fact that the phrase used are 'it is declared' or 'for the removal of doubts'.*
>
> *18. There was and is no ambiguity in the main provision of Section 9(1)(ii). It includes salaries in the total income of an assessee if the assessee has earned it in India. The word "earned" had been judicially defined in S.G. Pgnatale (supra) by the High Court of Gujarat, in our view, correctly, to mean as income "arising or accruing in India". The amendment to the section by*

> *way of an Explanation in 1983 effected a change in the scope of that judicial definition so as to include with effect from 1979, "income payable for service rendered in India".*
>
> *19. When the Explanation seeks to give an artificial meaning 'earned in India' and bring about a change effectively in the existing law and in addition is stated to come into force with effect from a future date, there is no principle of interpretation which would justify reading the Explanation as operating retrospectively." (Emphasis supplied)*

36. It is, therefore, evident that by reason of an explanation, a substantive law may also be introduced. If a substantive law is introduced, it will have no retrospective effect. The notice issued to the assessee by the appellant has, thus, rightly been held to be liable to be set aside. Subject to the constitutionality of the Act, in view of the explanation appended to this, we are of the opinion that the service tax, if any, would be payable only with effect from May, 2008 and not with retrospective effect.

37. In a case of this nature, the Court must be satisfied that the Parliament did not intend to introduce a substantive change in the law. As stated hereinbefore, for the aforementioned purpose, the expressions like `for the removal of doubts' are not conclusive. The said expressions appear to have been used under assumption that organizing games of chance would be rendition of service. We are herein not concerned as to whether it was constitutionally permissible for the Parliament to do so as we are not called upon to determine the said question but for our purpose, it would be suffice to hold that the explanation is not clarificatory or declaratory in nature."

4.5 In view of the discussions as above we do not find any merits in the impugned order. As we have decided the issue on merits itself we are not rendering any findings on the other issues raised by the appellant in appeal and during the arguments.

5.1 Appeal is allowed.

(Dictated and pronounced in open court)

(P. K. CHOUDHARY)
MEMBER (JUDICIAL)

(SANJIV SRIVASTAVA)
MEMBER (TECHNICAL)

Nihal