CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL
1st Floor, WTC Building, FKCCI Complex, K. G. Road,
BANGLORE-560009

COURT - I

Customs Appeal No. 1335 of 2010

[Arising out of the Order-in-Appeal No.57/2010 dated 26.03.2010 passed by the Commissioner of Customs (Appeals), Bangalore.]

The Commissioner of Customs **....Applicants**
No. 1, Queen's Road
Bangalore – 560 001.

Vs.

M/s. Kohler India Corporation Pvt Ltd **....Respondents**
1st Floor, No.136/6, 6th Cross,
RMV Extension, Sadashivanagar,
Bangalore – 560 080.

Appearance:

Mr. K. A. Jathin, Dy. Com. (AR) **....For Applicants**
Ms. Neetu James, Advocate **... For respondents**

CORAM:

HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT
HON'BLE MRS. R. BHAGYA DEVI, MEMBER (TECHNICAL)

Date of Hearing : 26.06.2023
Date of Decision : 26.06.2023

FINAL ORDER NO. 20633 /2023

Per: R. BHAGYA DEVI

This appeal filed by the Department against impugned Order-in-Appeal No.57/2010 dated 26.03.2010 passed by the Commissioner of Customs (Appeals), Bangalore.

2. M/s Kohler India Corporation Pvt Ltd, Bangalore (Respondent) had imported various goods (viz, Elements/Generator parts) vide 21 Bills of Entry and had paid Special additional duty (SAD) @ 4% vide various TR 6 Challans. The Respondent filed 4 refund

applications for the refund of SAD paid vide said 21 Bills of entry as provided in terms of Notification No. 102/2007-Cus dated 14.09.2007.

3. The Original authority vide Order-in-Original No.196/2006 dated 28.9.2006 rejected the refund claims on the ground that the respondent had not complied with para 2(b) of the Notification No.102/2007-Cus, dated 14.09.2007. The respondent filed an appeal against the above order and the Commissioner (A) vide Order-in-Appeal No.57/2010 dated 26.3.2010 set aside the Order-in-Original on the ground that the respondent was not registered dealer or trader and they were not registered with Central Excise, therefore, there is no opportunity for them to pass on the cenvat credit. It is also held that the purchaser will not be allowed to take cenvat credit unless the invoice mentions the Central Excise registration. Since all the conditions of the Notification No.102/2007-Cus, have been followed except clause 2(b), the refund claims filed by the respondent was found to be eligible and accordingly sanctioned the refunds.

4. The learned Authorised Representative submits that the condition of clause 2(b) of the Notification No.102/2007-Cus. dated 14.09.2007 has not been satisfied and moreover, the Board vide Circular No.16/2008 dated 13.10.2008 has categorically held at para (iv) that :

> ***"(iv) Declaration for non-admission of Cenvat Credit :***
>
> In terms of condition 2(b) of the Notification No. 102/2007-Customs, the importer who wishes to avail the refund of 4% CVD, is also required to make a specific declaration in the sale invoice

> that no Cenvat credit would be admissible in respect of 4% CVD. This ensures that there is no double benefit on account of refund to the importer and Cenvat Credit to the purchaser. Hence, the request for dispensation of such declaration by certain importers who are not registered with Central Excise authorities and to allow 4% CVD refund to these importers on the basis of their status of registration with Central Excise, as non-registered dealer is not found to be acceptable."

Hence, the view taken by the learned Commissioner (A) was not legally correct, therefore, needs to be rejected and Department's appeal to be allowed.

5. On the other hand the learned counsel appearing for the respondent countering the arguments of the learned Authorised Representative for Revenue has claimed that they are not registered with the Central Excise, hence, the question of passing on the credit does not arise and this requirement being a procedural one, the question of rejecting the refund also does not arise. They also rely on Larger Bench decision in the case of **Chowgule & Company Pvt. Ltd. vs. Commissioner of Customs and Central Excise**[1], wherein in para 5.4 it has been held as under:

> **"5.4** In view of the factual and legal analysis as above, we answer the reference made to us as follows. A trader-importer, who paid SAD on the imported .good and who discharged VAT/ST liability on subsequent sale, and who issued commercial invoices without indicating any details of the duty paid, would be entitled to the benefit of exemption under Notification 102/2007-Cus., notwithstanding the fact that he made no endorsement that "credit of duty is not admissible" on the commercial invoices, subject to the satisfaction of the other conditions stipulated therein. The above decision is rendered only in the facts of the case before us and shall not be interpreted to mean that conditions of an exemption notification are not required to be fulfilled for availing the exemption."

1. 2014 (306) E.L.T. 326 (Tri.-LB)

6. They also relied on jurisdictional Karnataka High Court's decision in the case of **Commissioner of Customs & Service Tax, Bangalore vs. Schneider Electric IT Business**[2] wherein in paragraphs 5 and 6, it has been held as under:

> **"5.** It is, indeed, trite to state that Rule 9 of the Cenvat Credit Rules prescribes the documents on the strength of which Cenvat credit can be taken. An invoice issued by an importer is also one of the prescribed documents. However, for taking the Cenvat credit, under sub-rule (2) of the said Rule 9, following particulars are required to be indicated, namely, details of the duty or Service Tax payable, description of the goods or taxable service, assessable value, Central Excise or Service Tax registration number of the person issuing the invoice, name and address of the factory or warehouse or premise of first or second stage dealers or provider of taxable service, etc. For taking the credit, the quantum of duty paid should be shown in the invoices and the same should be shown separately for each type of duties. In respect of a commercial invoice, which shows no details of the duty paid, the question of taking of any credit would not arise at all. Therefore, non-declaration of the duty in the invoice issued itself is an affirmation that no credit would be available. Therefore, non-declaration/non-specification of the duty element as to its nature and quantum in the invoice issued would itself be a satisfaction of the condition prescribed under clause (b) of para 2 of the Notification 102/2007.
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> **6.** Although the notification may have prescribed the words which should be included in an invoice, but the words are not magical in their scope since it is a procedural condition, as long as the intention is made clear, even by the use of other words, the assessee cannot be denied the benefit of the refund of SAD."

7. Heard both sides.

8. The limited question to be decided in this appeal is whether the respondent who had filed a refund claim for an amount of Rs.2,68,000/- being Special Additional Duty (SAD) were eligible for refund. The Notification No.102/2007-cus dated 14.9.2007 reads as follows:

> **"Special CVD — Exemption to all goods when imported for subsequent sale**
>
> 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

2. 2018 (361) E.L.T. 607 (Kar.)

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.

[Notification No. 102/2007-Cus., dated 14-9-2007]"

9. The question arises whether non-satisfaction of the condition 2(b) of the Notification No.102/97-cus dated 14.09.2007 would disallow the refund claim of SAD. The Larger Bench's decision referred supra and the jurisdiction Karnataka High Court have categorically held that the condition is a procedural one. It was further held that though there is a condition that 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, non-declaration of the same will not make the importer ineligible for the refund claims.

10. The fact that cenvat credit cannot be availed unless the importers are registered with the Central Excise authorities and mentioning of central excise registration number on the invoice for availing credit is not disputed, therefore, non-compliance of condition 2(b) of Notification No.102/2007-Cus. dated 14.09.2007 by itself cannot be a factor to deny the benefit of refund of SAD. Therefore, in view of the observations and the decisions of the Larger Bench and jurisdictional Karnataka High Court, the appeal is dismissed, with consequential relief to the respondent, if any.

(Order pronounced in Open Court)

(JUSTICE DILIP GUPTA)
PRESIDENT

(R. BHAGYA DEVI)
MEMBER (TECHNICAL)

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