CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
SOUTH ZONAL BENCH
BANGALORE

Appeal(s) Involved:

C/21209/2017-SM

[Arising out of Order-in-Appeal No. 11/2017 dated 28/04/2017 passed by the Commissioner of Customs, Cochin (Appeals)]

Prime Tech General Trading Pvt. Ltd.
3/627, Old No. 3/5, Kulam Bazar
Muzhappilangad
Kannur
Kerala

Appellant(s)

Versus

C.C-Cochins
Custom House
Cochin – 682 009
Kerala

Respondent(s)

Appearance:

None	For the Appellant
Shri. Madhup Sharan, Assistant Commissioner (AR)	For the Respondent

Date of Hearing: 27/11/2018
Date of Decision:29/11/2018

CORAM:
HON'BLE SHRI S.S GARG, JUDICIAL MEMBER

Final Order No. 21814 /2018

Per: S.S GARG

The present appeal is directed against the impugned order dated 28.04.2017 passed by the Commissioner (Appeals) whereby the Commissioner (Appeals) has rejected the appeal of the appellant. Briefly the facts of the present case are that the appellant filed refund application on 05.01.2017 for an amount of Rs. 1,15,324/- (Rupees One Lakh Fifteen Thousand Three Hundred and Twenty Four only) as 4% additional duty refund as per Notification No. 102/2007 Cus. against Bill of Entry No. 3723421 dated 28.12.2015. The original authority vide order No. 180/2017 dated 14.02.2017 rejected this refund claim of the appellant on the ground that the refund claim filed by the appellant is time-barred as per Customs Notification 93/2008 dated 01.08.2008 amending Notification 102/2007. Aggrieved by the said order, appellant filed appeal before the Commissioner who also rejected the appeal of the appellant. Hence the present appeal.

2. None appeared on behalf of the appellant and Shri. Madhup Sharan, AR appeared on behalf of the Revenue.

3. I have heard the learned AR and have gone through the grounds of appeal filed by the appellant. Since the issue is in a narrow compass, I proceed to decide the same on merits. As per the grounds of appeal, the appellant has submitted that no limitation period can be imposed for grant of

SAD refund because the right to claim refund only accrues to the importer once sale, an entirely market driven event is complete and hence the refund provision under the Customs Act are inapplicable to the duties under Section 3(5) of the CTA and neither Section 27 nor Notification under Section 25(1) i.e. Notification No. 93/2008-Cus. dated 01.08.2008 can be used to impose a limitation. The appellant has relied upon the law laid down by the Delhi High Court in the matter of Sony India Pvt. Ltd. Vs. Commissioner of Customs reported in 2014 (304) E.L.T. 660 wherein it was held that SAD is refundable only on subsequent sale i.e. the point at which Sales Tax/VAT liability arises, no limitation period can be imposed for filing refund claim. Further the Sony India Pvt. Ltd. decision has been upheld by the Hon'ble Supreme Court. Further the Hon'ble Delhi High Court in the case of Commissioner of Customs Vs. Gulati Sales Corporation reported in 2018 (360) E.L.T. 277 has also relied upon the decision in the case of Sony India Pvt. Ltd. and held that no time limit can be prescribed for the refund of SAD. Further I find that the Division Bench of the Delhi Tribunal in the case of Gulati Sales Corporation has relied upon the Sony India Pvt. Ltd. and has held that SAD refund filed by the assessee is not barred by limitation of time. The learned AR defended the impugned order by relying upon the following decisions:

a. *CMS Info Systems Ltd. Vs. Union of India – 2017 (349) E.L.T. 236 (Bom.)*
b. *Commr. of Cus., NS-III Vs. DSM Sinochem Pharmaceuticals (I)*

Pvt. Ltd. – 2018 (359) E.L.T. 509 (Bom.)

c. *M.S. Metals Vs. CC (Preventive), Patna – 2017 (345) E.L.T. 113 (Tri.-Kolkata)*

3.1. Learned AR further submitted that the Hon'ble Bombay High Court in the case of CMS Info Systems has distinguished the decision of the Delhi High Court in the case of Sony India Pvt. Ltd. and has held that limitation is applicable in the case of SAD refund.

4. After considering the submission of the AR and the grounds of appeal of the appellant and after going through the decision of the Hon'ble Bombay High Court as well as the Delhi High Court, I find that the learned Commissioner (Appeals) has relied upon the Single Member decision of the Tribunal in the case of M.S. Metals and has held that the limitation as prescribed in the Notification is applicable. Further I find that the decision of the Delhi High Court in the Sony India Pvt. Ltd. as well as the Gulati Sales Corporation wherein it has been held that no time limit is prescribed for claiming the refund of SAD. The said decision of the Delhi High Court was followed by the Tribunal in the case of Purab Textile Pvt. Ltd. Vs. CC reported in 2015 (330) E.L.T. 414 (Bom.) and has held that limitation as prescribed under Section 27 of the Customs Act is not applicable in the case of refund of SAD. Further I find that Division Bench of this Tribunal also in

the case of Gulati Sales Corporation relied upon the Sony India Pvt. Ltd. and has held that the limitation of one year as prescribed in Section 27 of the Customs Act is not applicable. It is pertinent to reproduce the findings of the Delhi High Court in the case of Sony India Pvt. Ltd. wherein the Hon'ble High Court has held as under:

> *"12. The provisions of the Customs Act on the rules and mechanism for refund is incorporated by reference into the CTA only "so far as may be" applicable. Since SADC levied under Section 3(5) is refundable only on subsequent sale (i.e. the point at which sales tax/VAT liability arises),' it is the opinion of this Court that no limitation period can possibly be imposed for advancing a refund claim. This is because the right to claim refund only accrues to the importer once sale, an entirely market driven event, is complete. Given the vagaries of the market, the importer has limited control over when the sale is complete. To uphold a limitation period starting from the date of payment of duty, as prescribed in the amending notification, would amount to allowing the commencement of a limitation period for refund claims before the right of refund has even accrued. To this extent, this Court is of the opinion that the refund provisions under the Customs Act are inapplicable to the duties levied under Section 3(5) of the CTA. Thus, neither Section 27 nor a notification under Section 25(1), such as the amending Notification No. 93/2008-Cus., dated 1-8-2008 can be used to impose a limitation period on the right to claim refund of additional duty of customs paid under Section 3(5). If a limitation period is sought to be imposed in respect of refund claims in a case where the importer advances a refund of SADC paid owing to having incurred sales tax/VAT liability on subsequent sale of goods, it must be introduced by legislation, given the expropriatory consequences of such a limitation period.*
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> *13. Customs duties, properly so charged, are those which every importer knows to be leviable on the importation of goods, of course subject to any exemption which may be provided. The regime under which customs duty can be recovered concerns known events and details. Several contingencies with respect to rate of duty, removal of goods, their warehousing, etc. are envisioned in the scheme of the Customs Act. However, in the case of SADC, which is a levy meant to offset any advantage, there is inherent a right to refund, once the importer shows that the goods have been sold or the other taxation*

incident, i.e. payment of VAT occurs. This duty was imposed as India's response to offset any advantage that importers might secure, by way of a non-discriminatory levy, by importation of goods at cost or prices lower than what could be obtained by domestic manufacturers. A discriminatory tax could not have been levied, given India's obligations as a participant in the WTO and having regard to its treaty obligations.

14. The expression "so far as may be" in this context, under Section 27 is significant as well as instructive. The levy under Section 3(5) is conditional upon the Central Government's opinion that it is necessary to "counter-balance the sales tax, value added lax, local lax or any other charges for the time being leviable on a like article."; the rate of duty - where more than one levy exists, would be the highest of such rates and the terms of imposition of SADC would be spelt out in the notification. In this case, the regime existing before the notification of 2008 did not specify any period of limitation - and perhaps advisedly so. Some customs authorities apparently started applying Section 27, drawing inspiration from Section 3(8) which led to confusion. In Notification No. 102/2007-Cus., dated 14-9-2007 there was no period of limitation; by Circular No. 6/2008-Cus., an amending notification providing for one year period from the date of payment of the additional duty of customs was issued, through Notification No. 93/2008-Cus., dated, 1-8-2008, amending Para 2(c) of the 2007 Notification. The net effect of these was that a one year period was insisted upon for refund applications. That period was calculable from date of payment of duty (SAD) : Dr. Partap Singh & Anr. v. Director of Enforcement, Foreign Exchange Regulation Act & Ors., 1985 (3) SCC 72 is an authority for the proposition that the use of the phrase "so far as may be" in a later statute, with reference to provisions in an earlier statute, means that the provisions of the referred (earlier) statute are to be followed "to the extent possible". The Supreme Court, in that case turned down the argument that the letter and content of Section 165 of the Code of Criminal Procedure was to be followed in Foreign Exchange Regulation Act proceedings, by virtue of Section 37(2) of that Act. It was held, crucially that:

"The submission that Section 165(1) has been incorporated by pen and ink in Section 37(2) has to be negatived in view of the positive language employed in the section that the provisions relating to searches shall so far as may be apply to searches under Section 37(1). If Section 165(1) was to be incorporated by pen and ink as sub-section (2) of Section 37, the legislative draftsmanship will leave no room for doubt by providing that the provisions of the CrPC relating to searches shall apply to the searches directed or ordered

under Section 37(1) except that the power will be exercised by the Director of Enforcement or other officer exercising his power and he will be substituted in place of the Magistrate. The provisions of sub-section (2) of Section 37 has not been cast in any such language. It merely provides that the search may he carried out according to the method prescribed in Section 165(1)."

Since the Division Bench of the Tribunal has relied upon the decision of the **Sony India Pvt. Ltd.** as also the Tribunal in the case of **Purab Textile Pvt. Ltd.** cited supra has also relied upon the decision of **Sony India Pvt. Ltd.,** therefore I am of the view that the impugned order is not sustainable in law and therefore, I set aside the impugned order by allowing the appeal of the appellant.

(Order Pronounced in Open Court on **29/11/2018**)

(S.S GARG)
JUDICIAL MEMBER

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