CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
BANGALORE

REGIONAL BENCH - COURT NO. 1

Appeal(s) Involved:

C/20560/2019-SM

[Arising out of Order-in-Appeal No. COC-CUSTM-000-APP-103/2018-19 dated 15/03/2019 passed by the Commissioner of Customs, Cochin (Appeals)]

Vallabhdas & Co. 42/1966 (2), Elavangal House, 1st Floor, Friends Lane, St. Benidict Road Kochi – 682 018 Kerala	**Appellant(s)**

VERSUS

Commissioner of Customs Cochin Custom House, Willingdon Island Cochin – 682 009 Kerala	**Respondent(s)**

Appearance:

Mr. G. Subramanian, Advocate C/o. CENTAB, Karimpatta Road, Kochi-16 Cochin – 682 016 Kerala	For the Appellant
Mr. Rama Holla, Superintendent (AR)	For the Respondent

CORAM:

HON'BLE MR. S.S GARG, JUDICIAL MEMBER

Final Order No. 20635 / 2019

Date of Hearing: 14/08/2019
Date of Decision: 14/08/2019

Per : S.S GARG

The present appeal is directed against the impugned order dated 15.03.2019 passed by the Commissioner (Appeals) whereby the Commissioner (Appeals) has rejected the appeal of the appellant.

2. Briefly the facts of the present case are that the appellant had imported Rock Phosphate from Egypt at Cochin port during June 2016 to November 2016 and cleared these under two Bills of Entry on payment of assessed duty including the Special Additional Duty at 4%. The goods were subsequently sold locally and thereafter the appellant filed claim for refund of the SAD paid as provided under Notification 102/2007 Cus. dated 14.09.2017. Thereafter, Cochin Customs issued a show-cause notice dated 08.08.2017 proposing to reject the refund claim on the ground that the appellant had not paid any Sales Tax/VAT on the sale of the imported goods. Assistant Commissioner rejected the refund claim on the ground that the Department had not accepted the decision of the Tribunal in the appellant's own case and was in the process of filing appeal before Kerala High Court. The original authority also cited the decision of Apex Court in respect of the Notification No. 34/1998-Cus. which had denied the exemption from SAD if the goods were sold from a place where there was no sales tax for the goods. Aggrieved by the said order, appellant filed appeal before the Commissioner who also upheld the Order-in-Original.

3. Heard both the parties and perused the records.

4. Learned counsel for the appellant submitted that the impugned order is not sustainable in law as the same has been passed without

properly appreciating the facts and the law and the binding judicial precedent. He further submitted that in the appellant's own case on an identical issue, this Tribunal vide its Final Order No. 20564 - 20581/2017 has allowed the appeal of the appellant with consequential relief. He further submitted that the same Assistant commissioner in his Order (Original) No. 1160/2017 dated 13.09.2017 relating to identical cases of this appellant covered by the above Final Order of the Tribunal, given a clear finding that on the basis of the above Final Order of CESTAT, the importer is eligible for refund of 4% additional duty and the refund due was granted but the same authority in this case has denied the same without any cogent reasons for that. He further submitted that in pursuance of the earlier order of the Tribunal, the appellant has been granted the refund. He also submitted that both the authorities below have wrongly relied upon the decision of the Apex Court in the case of ***CC, Mumbai-l Vs. Seiko Brushware India reported in 2015 (323) E.L.T. 641 (S.C)*** but the said decision was with regard to the Notification 34/1998-Cus. dated 13.06.1998 and the conditions were different in that Notification. Further that Notification has been rescinded by Notification No. 58/1998-Cus. dated 01.08.1998. He further submitted that the Notification which has been rescinded will not be applicable in the appellant's case and that too in the year 2016 when the appellant imported the impugned goods. In support of his submission, he has also relied upon the following decisions:

a. *CC (Prev.), Patna Vs. Katyal Metal Agencies – 2014 (306) E.L.T. 335 (Tri.-Kolkata)*
b. *Gazal Overseas & others Vs. CC, New Delhi – 2016 (332) E.L.T. 767 (Tri.-Del.)*
c. *CC (Port), Kolkata Vs. Chemsilk Commercial Pvt. Ltd. & others – 2016 (3) TMI 562 (Tri.-Kolkata)*

d. *Illusion 4 Real Vs. CC, Jaipur – 2016 (8) TMI 527 (Tri.-N. Delhi)*

5. On the other hand the learned AR defended the impugned order.

6. After considering the submissions of both the parties and perusal of the material on record, I find that this issue is no more *res integra* and has been settled by various decisions of the Tribunal including the decision of this Tribunal in the appellant's own case wherein the Tribunal vide its Final Order Nos. 20564 – 20581/2017 has allowed all the appeals by relying upon the earlier decisions of the Tribunal. Besides this, I find that both the authorities have wrongly relied upon the decision of the Apex Court which was in respect of Notification No. 34/1998-Cus. dated 13.06.1998. Further I find that the said Notification 34/1998 has been subsequently rescinded by Notification 58/1998-Cus. dated 01.08.1998. Therefore, reliance by both the parties on a Notification which has been rescinded is not tenable in law. It is relevant to reproduce the relevant finding of the order of the Tribunal in the appellant's own case for the earlier period which is reproduced herein below:

> *"5. We find that an identical issue came up before the Tribunal in the case of* ***Gazal Overseas (Supra)*** *in which the Tribunal allowed payment on refund of SAD. We reproduce below the relevant para of the decision:*
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> *"4. We have considered the contention of ld. DR and also perused the refund papers. Notification No. 102/2007, dated 14-9-2007 as amended allowed refund of SAD subject to the condition that "the importer shall pay appropriate sales tax or VAT, as the case may be." In the present case, the appropriate sales tax or VAT being NIL the appellants cannot be said to have violated the said conditions of the said notification inasmuch as it cannot be said that they have not paid appropriate sales*

tax/VAT. In this regard, it is seen that vide Circular No. 6/2008, dated 28-4-2008 C.B.E. & C. in para 5.3 thereof clarified as under :

"5.3 The exemption contained in the said notification envisages that the importer shall file a refund claim for 4% CVD ("said additional duty of Customs") paid on imported goods and shall pay on sale of the said goods "appropriate Sales Tax or VAT as the case may be". Hence, it is clear that there is no stipulation in the notification that the exemption is available only if the rate of ST/VAT is equal to or higher than the rate of additional duty of Customs; nor is there a condition that if the rate of ST/VAT happen to be lower than 4%, the refund would be restricted to the lower amount. As such, it is clarified that it will not be appropriate to reduce the refund amount in such a situation and the entire 4% CVD, if otherwise found eligible, shall be refunded".
It is evident from the above clarification of C.B.E. & C. that even if VAT/Sales tax was less than 4%, the appellant was entitled to refund of SAD which was 4% so long as VAT/sales tax was paid. In other words, so long as appropriate VAT/Sales tax was paid, SAD refund was admissible even if the appropriate sales tax/VAT was less than SAD; if the sales tax/VAT was NIL, so be it. In other words what is required in terms of the said notification is payment of appropriate sales tax/VAT regardless of the rate thereof. It logically follows that if the appropriate rate of sales tax/VAT was NIL then the appropriate sales tax/VAT paid will also be NIL.

5. In the light of the foregoing discussions, we find that the impugned order is not sustainable. Accordingly we set aside the same and allow the appeals with consequential relief, if any."

6. In view of the above decision of the Tribunal, we hold that the present issue is no more res integra. By following the above decision, we are of the view that NIL rate of VAT in terms of the notification issued under Kerala Finance Act 2001 is to be considered as appropriate sales tax / VAT. Accordingly, we are of the view that the condition prescribed in Notification No. 102/2007 is satisfied and the appellant will be eligible for the refund of the SAD paid at the time of input. In view of the above findings, the impugned orders are set aside and all appeals are *allowed with consequential relief. Miscellaneous applications are also disposed off."*

Since the issue is squarely covered in favour of the appellant in their own case by the decision cited supra, therefore by following the ratio of the above said decision, I set aside the impugned order by allowing the appeal of the appellant.

(Operative portion of the Order was pronounced
in Open Court on **14/08/2019**)

(S.S GARG)
JUDICIAL MEMBER

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