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

COURT NO.1

Appeal(s) Involved:

C/20842/2019-SM

[Arising out of No. 75&76/2019 dated 10/05/2019 passed by Commissioner of CUSTOMS , BANGALORE-I(Appeal)]

C.C-Bangalore-cus
C.R. BUILDING,QUEENS ROAD,
P.B.NO. 5400,
BANGALORE
KARNATAKA
560001

Appellant(s)

Versus

Octel Networks Pvt Ltd
11th Main Hal Ii Stage Indiranagar
BENGALURU
KARNATAKA
560008

Respondent(s)

Appearance:

Shri Madhupsharan, Asst. Commissioner(AR) — For the Appellant

Shri Arun Chandran, Consultant — For the Respondent

Date of Hearing: 17/10/2019
Date of Decision:25/10/2019

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

Final Order No. 20884 /2019

Per : S.S GARG

The present appeal filed by the Revenue is directed against the impugned order dt. 10/05/2019 passed by the Commissioner(Appeals) whereby the Commissioner(Appeals) has rejected the appeal of the Department and upheld the Order-in-Original.

2. Briefly the facts of the present case are that the

respondents M/s. Octel Networks Pvt. Ltd. filed two refund claims towards the Additional Duty of Customs leviable under sub-section 5 of Section 3 of the Customs Tariff Act paid on imported goods which were subsequently sold in the domestic market on payment of sales tax/VAT. The refund was sanctioned partially, rejecting the rest on the ground of time bar, excess claim and non-production of records. On the respondent's appeal, the Commissioner(Appeals) remanded the matter back to the adjudicating authority to pass fresh orders taking into consideration the documents submitted by the party and the time limit for filing the refund to be considered from the time of sale of goods and not from the time of payment of the duty. At this stage, the respondent approached the adjudicating authority for refund and the Department filed appeal before the CESTAT against the Order-in-Appeal on the issue of time bar. Adjudicating authority following the Order-in-Appeal, granted refund. Department further filed appeal against the Order-in-Original on the ground of time bar. In the meantime, Tribunal has dismissed the appeals of the Department on the ground of monetary limits. Further the Commissioner(Appeals) vide the impugned order has set aside the Department's appeals on the ground that the time limit for filing the refund claim is to be considered from the time of sale of goods and not from the time of payment of duty.

3. Heard both sides and perused the records.

4. Learned AR appearing for the Revenue submitted that the impugned order dismissing the appeal of the Revenue and upholding the Order-in-Original is not sustainable in law. He further submitted that the Commissioner(Appeals) has wrongly relied upon the Notification No.102/2007 and wrongly held that Section 27 is not applicable. He further submitted that Commissioner(Appeals) has relied upon the decision of the Tribunal in the case of Purab Textiles Pvt. Ltd. Vs. CC(Imports) [2015(330) ELT 414 (Tri. Mum.)] but the

said decision has been set aside by the Hon'ble Bombay High Court which is reported in 2019(365) ELT 285. He further submitted that on the same issue, the Bombay High Court in the case of CMS Info Systems Ltd. Vs. UOI [2017(349) ELT 236 (Bom.)] has elaborated the provisions of refund, power to grant the same and distinguished the Delhi High Court judgment in the case of Sony India Pvt. Ltd. [2014(304) ELT 660 (Del.)].

5. On the other hand, the learned consultant for the respondent submitted that the issue has been settled by the Delhi high Court in the case of Sony India Pvt. Ltd. cited supra wherein it was held that SAD is leviable only on subsequent sale only on the point of sales tax / VAT liability arises and no limitation period can be imposed for filing the refund claims. He further submitted that subsequently, the Delhi High Court in the case of CC Vs. Gulati Sales Corporation [2018(360) ELT 277] has also relied upon the decision of Sony India Pvt. Ltd. and held that no time limit can be prescribed for refund of SAD. The learned consultant further relied upon the decision of the Division Bench of the Delhi Tribunal in the case of Gulati Sales Corporation which was upheld by the Delhi High Court cited supra.

6. After considering the submissions of both the parties and perusal of the material on record and after going through the decision of the Hon'ble Bombay High Court as well as the Delhi High Court, I find that the Commissioner(Appeals) has rightly dismissed the appeal of the Revenue. It is pertinent to refer the relevant finding of the Delhi High Court in the case of Sony India Pvt. Ltd. wherein the 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.

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)."

7. Since the Division Bench of the Tribunal in the case of Gulati Sales Corporation has relied upon the decision of the Delhi High Court's decision in Sony India Pvt. Ltd., by following the ratio of the said decision, I do not find any infirmity in the impugned order which is upheld by dismissing the appeal of the Revenue.

(Order was pronounced
in Open Court on **25/10/2019**)

S.S GARG
JUDICIAL MEMBER

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