

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
BANGALORE**

REGIONAL BENCH - COURT NO. 1

Customs Appeal No. 21092 of 2019

[Arising out of Order-in-Appeal No. COC-CUSTM-000-APP-89/2019-20 dated 26/11/2019 passed by Commissioner of CUSTOMS(Appeals), COCHIN]

John's Cashew Company

II/444 Mukkoodu Po Karipurram Kundara
KOLLAM
KERALA
691503

Appellant(s)

VERSUS

Commissioner of Customs,

CUSTOM HOUSE, WILLINGDON ISLAND
COCHIN
KERALA
682009

Respondent(s)

Appearance:

Shri M BALAGOPAL ADVOCATE
#A5, HIG AVENUE, GANDHI
NAGAR ROAD, KADAVANTHARA
COCHIN
KERALA
682020

For the Appellant

Shri P. Gopakumar, Addl. Commissioner(AR) for the Respondent

CORAM:

HON'BLE SHRI P DINESHA, JUDICIAL MEMBER

Final Order No. 20792 /2021

Date of Hearing: 12/10/2021

Date of Decision:18/10/2021

Per : P DINESHA

The short point for consideration in this case is the eligibility of the appellant for refund of 4% of Special Additional Duty (SAD) in terms of Notification No.102/2007-Cus dt. 14/09/2007. The appellant made the above claim for refund and after due adjudication, vide the Order-in-Original dt. 04/08/2018, the Assistant Commissioner rejected 4% SAD of Rs.40,81,240/- being time barred in terms of the above

Notification. The Commissioner of Customs(Appeals), Cochin, vide the impugned Order-in-Appeal dt. 26/11/2018 upheld the rejection against which, the present appeal has been filed before this forum.

2. Heard Shri M. Balagopal, learned advocate for the appellant and Shri P. Gopakumar, Additional Commissioner, learned AR for the Revenue. The appellant's claim for refund is on the strength of the following decisions:-

- i. Sony India Pvt. Ltd. Vs. CC, New Delhi [2014(304) ELT 660 (Del.)]
- ii. CC(Import) Vs. Gulati Sales Corporation [2018(360) ELT 277 (Del.)]
- iii. United Chemicals Industries Vs. CC, Kanpur [2017(356) ELT 466 (Tri. Al..)]
- iv. CC, New Delhi Vs. Siya Paper Mart Pvt. Ltd. [2018(364) ELT 809 (Tri. Del.)]
- v. CCE, Pune-II Vs. Mercedes Benz (I) Pvt. Ltd. [2018(11) GSTL 389 (Tri. Mum.)]
- vi. Pee Pee International Vs. CC(ICD), Tughlakabad, New Delhi [2016(343) ELT 72 (Del.)]
- vii. CC, Bangalore vs. Octel Networks Pvt. Ltd. [Final Order No.20884/2019 dt. 25/10/2019, CESTAT, Bangalore]
- viii. Shandong Heavy Industries India P. Ltd. Vs. CC, JNPT, Nhava Sheva-II, Raigad [2019(370) ELT 275 (Tri. Mum.)]
- ix. Bitumen Corporation I Ltd. Vs. CC, Nhava Sheva-II [2019(369) ELT 833 (Tri. Mumbai)]

3. The learned advocate taking support of the above decisions/orders also contended that neither the statute nor the original notification prescribed any limitation for claiming the refund of SAD and hence, imposition of time restriction by an Amending notification is clearly bad in law. Per contra, Shri P. Gopakumar supported the findings of the lower authorities. He also relied on an order of Chandigarh Bench to contend that the learned Single Member Bench in the case of Ambey Sales Vs. CC, Ludhiana [2021 (5) TMI 483 – CESTAT, Chandigarh] has referred the matter to Larger Bench of the Tribunal.

4. Having heard the rival contentions, I am of the opinion that the appellant was correct in claiming refund of 4% SAD which was in terms with the settled position.

5. Learned Representatives fairly agree that the above issue in appeal is subject-matter of difference of opinion by Hon'ble non-jurisdictional High Courts and that we do not have the benefit of guidance by Hon'ble jurisdictional High Court. There can be no dispute on the proposition that irrespective of whether or not the judgments of Hon'ble non-jurisdictional High Courts are binding on me, these judgments deserve utmost respect which implies that, at the minimum, these judgments are to be considered reasonable interpretations of the related legal and factual situation.

6. Doctrine of precedence only mandates that it is the ratio in the decision of higher courts to be followed, and not conclusions. Further, I do not see anything in the order of Ld. Chandigarh bench precluding me from following the *ratio decidendi* of high courts, which are followed by many benches of CESTAT as well. In any case, even a larger bench of CESTAT cannot sit in judgment over the decisions of High courts as it can never say which decision is correct and which is not. In my humble understanding of the legal position and of the propriety, it will be wholly inappropriate for me to choose views of one of the High Courts based on perceptions about reasonableness of the respective viewpoints, as such an exercise will de facto amount to sitting in judgment over the views of the Hon'ble High Courts-something diametrically opposed to the very basic principles of hierarchical judicial system.

7. Viewed thus, when there is a reasonable interpretation of a legal and factual situation, which is favourable to the assessee, such an interpretation is to be adopted. In other words, Hon'ble non-

jurisdictional High Court's judgment in favour of the assessee, in the light of this legal principle laid down by Supreme Court, is to be preferred over the Hon'ble non-jurisdictional High Court not favourable to the assessee. I find guidance from the judgment of Supreme Court in the matter of *CIT v. Vegetable Products Ltd.* [1973] 88 ITR 192. Supreme Court has laid down a principle that "if two reasonable constructions of a taxing provision are possible, that construction which favours the assessee must be adopted." Although this principle so laid down was in the context of penalty, and Their Lordships specifically stated so in so many words, it has been consistently followed for the interpretation about the statutory provisions as well. In another Supreme Court judgment reported as *Petron Engg. Construction (P.) Ltd. v. CBDT* [1989] 175 ITR 523/[1988] 41 Taxman 294, the above principle of law has been reiterated.

8. In view of the above, the denial of refund is bad in law and hence not sustainable. The impugned order is, therefore, set aside and the appeal is allowed with consequential benefits, if any, as per law.

(Order pronounced in the
Open Court on **18/10/2021**)

(P DINESHA)
JUDICIAL MEMBER

Raja...