IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
SOUTH ZONAL BENCH AT CHENNAI

Application No.: C/ROM/41507/2018
Appeal No.: C/40743/2018

(Arising out of Order-in-Appeal No. 63/2017 – TTN (CUS) dated 29.12.2017 passed by the Commissioner of Customs and Central Excise (Appeals), Tiruchirappalli.)

M/s. Olam Agro India Pvt. Ltd. : Appellant

Vs.

Commissioner of Customs, Tuticorin : Respondent

Appearance:-
Shri. Kashish K. Gupta, Consultant
for the Appellant

Shri. L. Nandakumar, AC (AR)
for the Respondent

CORAM:

Hon'ble Shri P Dinesha, Member (Judicial)

Date of Hearing/Decision:**20.08.2018**

Final Order No. 42421 / 2018

Both appeal as well as the ROM application are posted for hearing and Shri. Kashish K. Gupta, Ld. Consultant appeared for the appellant and Shri. L. Nandakumar, Ld. DR appeared for the Revenue.

1. On the ROM application, Ld. Consultant submitted that he is not praying for any order on this. Therefore, the appeal is taken up on merits for final disposal.

2. This is an assessee's appeal wherein the assessee has questioned the denial of refund.

3.1 Brief facts relevant are that appellant imported raw cashew nuts (under CTH 08013100) vide several Bills of Entry for subsequent sale either in the same form or in the processed form as cashew kernels (i.e., under CTH 08013100 or 08013220); that it had paid Customs Duty on import which included payment of Rs. 24,02,679/- as Special CVD (SAD) under Section 3(5) of the Customs Tariff Act, 1975; that the appellant filed applications for refund in respect of each of the Bills of Entry in terms of Notification 102/2007 on the ground that they having imported and processed, had sold 39.5528 Metric Tonnes (M.T.) of cashew kernels to various vendors after paying VAT/CST on the same in cash through challans or by utilizing input tax credit; etc. The adjudicating authority vide Order-in-Original dated 12.04.2017 granted the refund in part, proportionate to the quantity of imported goods that was sold subsequently on payment of appropriate ST/VAT/CST, which had the effect of granting refund of Rs. 18,62,280/- only. Aggrieved by the above partial rejection, the appellant filed an appeal before the Commissioner of Customs and Central Excise (Appeals), Tiruchirappalli, who vide the impugned Order dated 29.12.2017 confirmed the rejection against which the appellant has filed the present appeal.

4.1 I have heard the rival contentions and considered the documentary evidences furnished along with various case law relied on during the course of hearing. On perusal of the impugned Order, I find that the Ld. Commissioner (Appeals) has confirmed the rejection mainly on the grounds that :

(i) Part of raw cashew nuts was sold as such;

(ii) The cashew nut imported was subjected to processing and value addition which amounted to manufacture; and

(iii) That the product had undergone change as to its identity.

4.2 On considering the submissions of the Ld. Consultant and after going through the Customs Notifications referred to, I find that from the last Notification i.e., Notification No. 102/2007-Cus. dated 14.09.2007, the words 'as such' have been omitted.

4.3 Further, I also find that on the refund of SAD *vis-à-vis* the exemption Notification No. 102/2007, this very Bench of the CESTAT vide ***Final Order No. 40860-40861/2018*** dated 16.03.2018 in the case of ***M/s. Kanam Latex Industries (P) Ltd. & Anor. Vs. Commissioner of Customs, Tuticorin*** has held as under :

> *"7. Though, the Commissioner has taken note of the above decision of the Tribunal but he has not followed the same in the light of circular issued by the Board requiring that the goods should have been sold "as such". Apart from the fact that it is well settled principle of law that no extraneous conditions can be introduced in the notification which has to be interpreted on its own wordings, we also take note of the fact that though the earlier notification required the imported goods to be sold "as such", there is no such condition in the present Notification No.102/07, which only used the expression "subsequently sold". Inasmuch as, the imported gloves have been sold by the assessee as gloves and it is only by deeming fiction of law that the activities of labeling, relabeling, packing, repacking etc., has been made as amounting to manufacture, we find that there is no justification to hold that the gloves have undergone any change, as held by the Tribunal in the above referred decision of M/s. Vijirom Chem. Pvt. Ltd. As such, we find no justification for denial of the refund of SAD. According, the impugned orders are set aside and both the appeals are allowed."*

From this alone, it is evident that the present *lis* is no more *res integra* and the *ratio decidendi* needs to be adopted.

4.4 It is also very useful to refer to the decision of the Hon'ble Apex Court in the case of ***Milak Brothers Vs. Union of India – 1990 (10) T.M.I. 74 (S.C.)*** wherein the Hon'ble Supreme Court has categorically ruled as under :

> *"12. Having considered the submissions of both parties, we are of the opinion that the contention of the Revenue should prevail. To our mind, there is no difficulty or ambiguity in the interpretation of the tariff entry. Groundnut is a*

well-known commodity which is available both in shell and as kernel. In this context, 'kernel' clearly means the grain, seed or the soft matter inside the shell, whatever the use or purpose to which it is put, eating or crushing for oil or sowing. The tariff entry covers all groundnut and there is no justification for confining it to the germinating or the oil seed variety alone. On behalf of the appellant, it is emphasized that the goods exported by the assessee and groundnut oil seeds are totally different commercial commodities. It is submitted that Diwan Chand Chaman Lal's case (1977-39 S.T.C. 75) says so and that the various classification lists produced prove this. Even the acceptance of this argument does not carry the appellant's case to the desired result. Assuming that two different commercial commodities fall under the same entry, there is no reason why the entry should be restricted to only one of them. It can and should cover both unless one can say that the commodity marketed by the appellant is not 'groundnut kernel'.

13. We are not convinced that the goods exported by the assessee have ceased to be groundnuts in the ordinary acceptation of the term or that they have become a different commodity, say, a processed food (indeed, there is no such classification in the tariff entry). The decision in Diwan Chand Chaman Lal (1977-39 S.T.C. 75) turned on the description of groundnuts in Schedule C of the Punjab Sales Tax Act as a species of oil seeds and it was held that parched groundnuts constituted a different commodity. But the fact is that, though the raw groundnut kernel has undergone a drying, roasting and frying process, its identity as groundnut is not lost. Even in the market to which it is exported and where it is marketed, it is purchased as groundnuts (or peanuts, as they are called in the U.S.A.). May be there are two different commodities but both are known only as 'groundnuts'."

4.5 It is also very useful to note that both cashew nuts and cashew kernels are classified as cashew nuts under CTH 0801. At the same time, I find that it is not the case of Revenue that S.T./VAT/CST is different for cashew nuts and cashew kernel.

4.6 I therefore do not find any force in the contentions of the Ld. DR that the case laws relied on by the appellant are not on SAD refund, but on duty/taxability. The further contention of the Ld. DR that whether it was the same product that was sold subsequently is devoid of any merit, especially in the light of the decision of this Bench in the case of *M/s. Kanam Latex Industries (P) Ltd.* (*supra)* and *Milak Brothers (supra).*

5. Therefore for the above reasons, I am of the considered view that the Order of Commissioner (Appeals) cannot be sustained, for which reason I set aside the same and allow the appeal with consequential benefits, if any.

(Operative part of the order was pronounced in open Court)

(P Dinesha)
Member (Judicial)

Sdd / Vsr