CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL CHENNAI

REGIONAL BENCH – COURT NO. I

Customs Appeal No. 40659 of 2019

(Arising out of Order-in-Appeal No. 26/2019-TTN (CUS) dated 26.02.2019 passed by the Commissioner of G.S.T. & Central Excise (Appeals), No. 1, Williams Road, Cantonment, Tiruchirapalli – 620 001)

M/s. Wolkem India Limited, **: Appellant**
A-74, SIPCOT Industrial Area,
Gangaikondan,
Tirunelveli – 627 352

VERSUS

The Commissioner of Customs, **: Respondent**
Custom House,
Tuticorin – 628 004

APPEARANCE:

Shri. S. Ramachandran, Consultant for the Appellant

Shri. B. Balamurugan, Authorized Representative for the Respondent

CORAM:

HON'BLE MR. P. DINESHA, MEMBER (JUDICIAL)

FINAL ORDER NO. 41029 / 2019

DATE OF HEARING: 19.08.2019

DATE OF DECISION: **22.08.2019**

This appeal is filed by the assessee against the Order-in-Appeal No. 26/2019-TTN (CUS) dated 26.02.2019 passed by the Commissioner of G.S.T. and Central Excise (Appeals), Tiruchirapalli whereby the Ld. First Appellate Authority has rejected the appeal as time-barred.

2. Brief facts relevant for disposal of the present appeal *inter alia* are that the appellant had imported 6600 MT of Lime Stone from Malaysia under a Bill-of-Entry dated 28.11.2012 on payment of full duty including 5% Basic Customs Duty (BCD) which, according to the appellant, was paid without availing the benefit of differential duty (of 2% of BED) to goods imported from Malaysia (under Notification No. 46/2011-Cus. dated 01.06.2011); that thereafter, the appellant filed a refund claim on 11.03.2013 for Rs. 5,47,327/- being the difference; that the Assistant Commissioner vide communication dated 26.03.2013 insisted on obtaining re-assessment order on the Bill-of-Entry; that communications ensued, with the appellant mainly contending that in view of deletion of the words "in pursuance of an order of assessment" in Section 27 of the Customs Act, 1962 with effect from 08.04.2011, the production of assessment order was not necessary; that however, the Revenue insisted on production of assessment/re-assessment order, with communication dated 25.06.2018 being the last of such communication; that thereafter, the appellant preferred first appeal before the Commissioner (Appeals), who vide impugned order has rejected the appellant's claim as hit by limitation.

3. When the matter was taken up for hearing on 19.08.2019, Shri. S. Ramachandran, Ld. Consultant, appeared for the assessee and Shri. B. Balamurugan, Ld. AR, appeared for the Revenue.

4.1 Ld. Consultant submitted, reiterating the contentions urged before the lower authorities, that the authorities below primarily have not disposed of the application for refund in the manner prescribed under Section 27 ibid and that there is no dispute with regard to the right of the appellant for the refund as the same has not at all been negated by both the lower authorities. It is also his contention that the appellant's right to refund would not be extinguished by non-filing or late filing of the appeal or even the claim and hence, the time-limit could never be a bottleneck, as ruled by the Hon'ble jurisdictional High Court in the case of ***M/s. 3E Infotech Vs. CESTAT, Chennai reported in 2018 (18) G.S.T.L. 410 (Mad.).***

4.2 Ld. Consultant also relied on various decisions, which are as under:

(i) *Union of India Vs. ITC Ltd. – 1993 (67) E.L.T. 3 (S.C.);*

(ii) *Joshi Technologies International Vs. Union of India – 2016 (339) E.L.T. 21 (Guj.);*

(iii) *Parijat Construction Vs. C.C.E., Nashik – 2018 (359) E.L.T. 113 (Bom.);*

(iv) *C.C.E., Bangalore-III Vs. Motorola India Pvt. Ltd. – 2006 (206) E.L.T. 90 (Kar.);*

(v) *C.C.E., Bangalore Vs. KVR Construction – 2012 (26) S.T.R. 195 (Kar.);*

(vi) *Geojit BNP Paribas Financial Services Ltd. Vs. C.C.E., Cus. & S.T., Kochi – 2015 (39) S.T.R. 706 (Ker.);*

(vii) *Aman Medical Products Ltd. Vs. C.C., Delhi – 2010 (250) E.L.T. 30 (Del.);*

(viii) *Alagendran Exports (P) Ltd. Vs. C.C. (Import), Chennai – 2014 (313) E.L.T. 72 (Tri. – Chennai);*

(ix) *Akzo Nobel Coating India P. Ltd. Vs. C.C. (Sea), Chennai – 2014 (312) E.L.T. 91 (Tri. – Chennai);*

(x) *Liebheer India Pvt. Ltd. Vs. C.C. (Port), Kolkata – 2017 (358) E.L.T. 656 (Tri. – Kol.);*

(xi) *Micromax Informatics Ltd. Vs. Principal Commissioner of Cus, ACC, Chennai – 2017 (358) E.L.T. 38 (Mad.);*

(xii) *International Flavors and Fragrances India P. Ltd. Vs. Assistant Commr. of Cus., Chennai – 2019-TIOL-1020-HC-MAD-CUS;*

5.1 *Per contra*, Ld. AR, supporting the findings of the lower authorities, contended that soon after the receipt of the rejection letter the appellant should have filed an appeal, which was not done, since furnishing of re-assessment order as insisted by the lower adjudicating authority is required and hence, the findings of the appellate authority cannot be found fault with.

5.2 Ld. AR also submitted that the order of the Commissioner (Appeals) on the time-bar cannot be interfered with as the same is well beyond the condonable (ninety days) period since the Ld. First Appellate Authority has observed that there is a delay of over 400 days.

6. I have heard the rival contentions, gone through the documents/orders placed on record and have also gone through the judgements/orders relied on by the Ld. Consultant for the appellant.

7.1 Admittedly, the lower authorities have not found that the appellant is not entitled for the refund on merits and I find that the communications issued by the Assistant Commissioner, requiring the obtaining of re-assessment order, are not as per the procedure prescribed under Chapter 14 of the Customs Manual which is relating to Customs refunds, especially when an application for refund is filed under Section 27 of the Customs Act. As per Chapter 14 of the Customs Manual, Section 27 of the Customs Act, 1962 deals with such refund of duty and interest and therefore, any application filed will have to be processed and disposed of in the manner laid down under Section 27 read with the procedure under the Customs Manual.

7.2 There is no dispute that the application for refund filed vide acknowledgement dated 11.03.2013 was within the prescribed period of one year and as regards the other conditions under Section 27, I find that the same are not disputed by the Revenue. I also find that nowhere in Section 27 has it been prescribed that the claimant should obtain either an order of assessment or an order of re-assessment as a condition precedent for claiming refund. Hence, post 2011 amendment, that condition having been done away with, the Assistant Commissioner should not have insisted upon the assessee obtaining such an order.

7.3 From perusal of the documents placed on record, which mainly include series of correspondences exchanged between the assessee and the Revenue, I find that the Revenue ignored the requirement of law but kept on insisting assessment/re-assessment on the Bill-of-Entry, to which the assessee kept on requesting, also highlighting the position of law post amendment. The communication of the Assistant Commissioner, therefore, is clearly not in accordance with law which cannot be sustained. The Assistant Commissioner himself could have rectified the above mistake after the appellant pointing out the correct position of law, which was not done for a very long period until the date the Assistant Commissioner issued his final communication dated 25.06.2018 and since that communication dated 25.06.2018 was impugned, the Commissioner (Appeals) should have entertained the appeal by disposing of the same on merits. For the above reasons, the rejection by the Ld. First Appellate Authority of the appeal as time-barred cannot sustain and accordingly, the same is set aside.

8.1 Coming to the issue of refund, this Bench as well as the lower authorities are bound by the decision of the Hon'ble jurisdictional High Court of Judicature at Madras in the case of *M/s. 3E Infotech (supra)* wherein the Hon'ble High Court has categorically ruled as under :

> ***"12.*** *Further, the claim of the respondent in refusing to return the amount would go against the mandate of Article 265 of the Constitution of India, which provides that no tax shall be levied or collected except by authority of law.*
>
> ***13.*** *On an analysis of the precedents cited above, we are of the opinion, that when service tax is paid by mistake a claim for refund cannot be barred by limitation, merely because the period of limitation under Section 11B had expired. Such a position would be contrary to the law laid down by the Hon'ble Apex Court, and therefore we have no hesitation in holding that the claim of the Assessee for a sum of Rs. 4,39,683/- cannot be barred by limitation, and ought to be refunded.*
>
> ***14.*** *There is no doubt in our minds, that if the Revenue is allowed to keep the excess service tax paid, it would not be proper, and against the tenets of Article 265 of the Constitution of India. On the facts and circumstances of this case, we deem it appropriate to pass the following directions :-*

> *(a) The Application under Section 11B cannot be rejected on the ground that is barred by limitation, provided for under Section.*
>
> *(b) The claim for return of money must be considered by the authorities."*

8.2 Though the above ruling is relating to refund under Section 11B of the Central Excise Act, the principle laid down in the above decision would squarely apply. Hence, I am of the considered opinion that the appellant is entitled to refund subject to the guidelines issued by the Hon'ble jurisdictional High Court in the case of *M/s. 3E Infotech (supra).* The matter is therefore remanded to the file of the Adjudicating Authority to follow the dictum of the Hon'ble jurisdictional High Court in the above case and pass an order in conformity with the principle laid down therein.

9. The appeal is treated as allowed by way of remand.

(Order pronounced in the open court on **22.08.2019**)

Sd/-

(P. DINESHA)
MEMBER (JUDICIAL)

Sdd