CUSTOMS, EXCISE AND SERVICE TAXAPPELLATE TRIBUNAL CHENNAI

Regional Bench – Court No. III

Customs Appeal No.42343 of 2014

(Arising out of Order-in-Appeal C.Cus.No.1311/2014 dated 30.07.2014 passed by the Commissioner of Customs (Appeals), Chennai)

M/s. Honda Siel Power Products Ltd. : **Appellant**
Plot No.5, Sector-41 (Kansa)
Greater Noida Indl.Dev. Area,
Dist.Gautam Budh Nagar
U.P. 201310.

VERSUS

The Commissioner of Customs (Port- Exports) : **Respondent**
60, Rajaji Salai, Custom House,
Chennai 600 001.

WITH

(i) Customs Appeal No. 42344 of 2014 (M/s. Honda Siel Power Products Ltd.)

(Arising out of Order-in-Appeal C.Cus.No.1313/2014 dated 30.07.2014 passed by the Commissioner of Customs (Appeals), Chennai)

(ii) Customs Appeal No. 42345 of 2014 (M/s. Honda Siel Power Products Ltd.)

(Arising out of Order-in-Appeal C.Cus.No.1702/2014 dated 18.09.2014 passed by the Commissioner of Customs (Appeals), Chennai)

(iii) Customs Appeal No. 40688 of 2015 (M/s. Honda Siel Power Products Ltd.)

(Arising out of Order-in-Appeal C.Cus. II No.287/2014 dated 24.12.2014 passed by the Commissioner of Customs (Appeals-II) Chennai)

APPEARANCE:

Shri S. Murugappan, Advocate for the Appellant

Shri B. Balamurugan, AC (AR) for the Respondent

CORAM:

HON'BLE MR. P. VENKATA SUBBA RAO, MEMBER (TECHNICAL)

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

FINAL ORDER NOs. 41140-41143 / 2019

DATE OF HEARING: 29.07.2019

DATE OF DECISION: 26.09.2019

PER : P. VENKATA SUBBA RAO

Heard both sides and perused the records. All these appeals involve the same issue and hence are being disposed of together.

2. The appellants herein had imported goods and paid Special Additional Duty @ 4% as applicable to the goods. In terms of Notification No.102/2007-Cus. dt. 14.09.2007 read with Notification No.93/2008 dt. 01.08.2008, the assessees are entitled to refund of Special Additional Duty (SAD) paid if the imported goods are thereafter sold by them on payment of VAT subject to the conditions mentioned in the notification. One of the conditions mentioned in the notification as applicable during the relevant time was that the refund claim must be filed within one year. Undisputedly, the appellants have filed all these refund claims after the period of one year. Therefore, all the refund claims were rejected by the original authorities and such rejections were upheld by the first appellate authority vide the impugned orders. Hence these appeals.

3. It is the case of the appellants that once the they are entitled to benefit of refund of SAD, they should not be denied the same on the ground that they have filed the refund claim after the period of one year indicated in the exemption notification. They rely upon the judgement of the Hon'ble High Court of Delhi in the case of *Sony*

India Pvt. Ltd. Vs CC reported in 2014 (304) ELT 660 (Del.) in which the Hon'ble High Court has held that the limitation of one year should not apply in case of SAD refunds. The same ratio was followed by the Hon'ble High Court of Delhi in 2017 in the case of *Gulati Sales Corporation* reported in 2018 (360) ELT 277 in a case dealing with imports after the amendment to the notification.

4. Per contra, the Ld. D.R reiterates the findings of the lower authorities and asserts that if the exemption is claimed, all the conditions therein must apply in full force and therefore if the application is filed after one year, the appellants are not entitled to refund. Therefore, there is no force in the appeals and therefore they may be rejected. Ld. D.R relies on the judgment of Hon'ble High Court of Bombay with respect to SAD refunds in W.P. No.388 of 2016 in the case of *CMS INFO Systems Ltd. Vs Union of India* - 2017 (349) ELT 236 (Bom.) in which the Hon'ble High Court of Bombay has held that the importer has no vested right of refund and it flows only from the exemption notification and therefore all conditions of the exemption notification apply. Hence a refund claim filed after the period of one year is not admissible.

5. Both sides fairly submit that there is no decision of the jurisdictional High Court of this Bench. Both the aforesaid judgments have been appealed against before the Supreme Court. Revenue challenged the judgment of the High Court of Delhi in the case of *Sony India Pvt. Ltd.* (supra) and the Hon'ble Supreme Court has dismissed the appeal on grounds of delay leaving the question of law open. The importer appealed against the judgment of the Hon'ble

High Court of Bombay in the case of *CMS INFO Systems Ltd.* (supra) which has been admitted by the Hon'ble Apex Court but not stayed.

6. Before proceeding to decide the matter, it would be profitable to examine the relevant legal provisions. Duties of Customs are levied under Section 12 of the Customs Act, 1962 at such rates as may be specified under the Customs Tariff Act, 1975 on the goods imported into or exported from India. Such levy can be based on quantity of the goods (specific rate of duty) or their value (advalorem) as indicated in the tariff. The Customs Tariff Act, 1975 itself provides for levy of various types of customs duties such as Basic Customs Duty, Additional Duty of Customs, Countervailing Duty as well as Special Additional Duty which is the duty in dispute. The duty so leviable under the Customs Tariff must be read along with any exemption notifications which are issued under Section 25 of the Customs Act, 1962. This section empowers the Central Government to grant exemption notifications either fully or partially and either conditionally or unconditionally. Thus, if goods are imported into India or exported from it, Customs duties are leviable as per the Schedules to the Customs Tariff Act, 1975 read with any applicable exemption notifications.

7. Exemption notifications, either full or partial, will apply to all imports / exports, if they are unconditional. If the exemption notification is conditional it applies to such imports / exports where the conditions for exemptions are fulfilled and not otherwise. Usually, the fulfillment of conditions of the exemption notification can be ascertained at the time of imports itself. There are other

notifications where the conditions may have to be fulfilled post-importation. Wherever the conditions have to be fulfilled post-importation, some mechanism is laid down in the notification itself to ensure that the conditions are fulfilled such as execution of a bond, production of end-user certificates, verification by the Central Excise officers, etc. In this particular exemption notification No.102/97 (as amended), the mechanism which has been laid down is that after importing the goods on payment of applicable duties including the Special Additional Duty of Customs, if the importer sells the goods after paying appropriate amount of VAT to the State Government, they are entitled to refund of SAD. For the period 14.09.2007 upto 01.08.2008 no time limit within which an application for refund can be filed was prescribed. An amendment was made vide Notification 93/2008 dt. 1.8.2008 introducing a time limit of one year from the payment of Special Additional Duty of Customs to file refund claims. The relevant exemption notifications before and after this period are as below :

{Notification No. 102/2007-Cus., dated 14-9-2007}

"**Exemption from special CVD to all goods imported for subsequent sale when VAT/Sales Tax paid by importer.** - In exercise of the powers conferred by sub-section (1) of section 25 of the Customs Act, 1962 (52 of 1962), the Central Government, on being satisfied that it is necessary in the public interest so to do, hereby exempts the goods falling within the First Schedule to the Customs Tariff Act, 1975 (51 of 1975) when imported into India for subsequent sale, from the whole of the additional duty of customs leviable thereon under sub-section (5) of section 3 of the said Customs Tariff Act (hereinafter referred to as the said additional duty).

2. The exemption contained in this notification shall be given effect if the following conditions are fulfilled :

(a) the importer of the said goods shall pay all duties, including the said additional duty of customs leviable thereon, as applicable, at the time of importation of the goods;

(b) the importer, while issuing the invoice for sale of the said goods, shall specifically indicate in the invoice that in respect of the goods covered therein, no credit of the additional duty of customs levied under sub-section (5) of section 3 of the Customs Tariff Act, 1975 shall be admissible;

(c) the importer shall file a claim for refund of the said additional duty of customs paid on the imported goods with the jurisdictional customs officer;

(d) the importer shall pay on sale of the said goods, appropriate sales tax or value added tax, as the case may be;

(e) the importer shall, *inter alia*, provide copies of the following documents along with the refund claim :

⇒ (i) document evidencing payment of the said additional duty;

⇒ (ii) invoices of sale of the imported goods in respect of which refund of the said additional duty is claimed;

⇒ (iii) documents evidencing payment of appropriate sales tax or value added tax, as the case may be, by the importer, on sale of such imported goods.

3. The jurisdictional customs officer shall sanction the refund on satisfying himself that the conditions referred to in para 2 above, are fulfilled.

{Notification No. 102/2007-Cus., dated 14-9-2007}

{Notification No. 102/2007-Cus., dated 14-9-2007 as amended by Notification No. 93/2008-Cus., dated 1-8-2008}

"Exemption from special CVD to all goods imported for subsequent sale when VAT/Sales Tax paid by importer. - In exercise of the powers conferred by sub-section (1) of section 25 of the Customs Act, 1962 (52 of 1962), the Central Government, on being satisfied that it is necessary in the public interest so to do, hereby exempts the goods falling within the First Schedule to the Customs Tariff Act, 1975 (51 of 1975) when imported into India for subsequent sale, from the whole of the additional duty of customs leviable thereon under sub-section (5) of section 3 of the said Customs Tariff Act (hereinafter referred to as the said additional duty).

2. The exemption contained in this notification shall be given effect if the following conditions are fulfilled :

(a) the importer of the said goods shall pay all duties, including the said additional duty of customs leviable thereon, as applicable, at the time of importation of the goods;

(b) the importer, while issuing the invoice for sale of the said goods, shall specifically indicate in the invoice that in respect of the goods covered therein, no credit of the additional duty of customs levied under sub-section (5) of section 3 of the Customs Tariff Act, 1975 shall be admissible;

> (c) the importer shall file a claim for refund of the said additional duty of customs paid on the imported goods with the jurisdictional customs officer before the expiry of one year from the date of payment of the said additional duty of customs;
>
> (d) the importer shall pay on sale of the said goods, appropriate sales tax or value added tax, as the case may be;
>
> (e) the importer shall, *inter alia*, provide copies of the following documents along with the refund claim :
>
> ⇒ (i) document evidencing payment of the said additional duty;
>
> ⇒ (ii) invoices of sale of the imported goods in respect of which refund of the said additional duty is claimed;
>
> ⇒ (iii) documents evidencing payment of appropriate sales tax or value added tax, as the case may be, by the importer, on sale of such imported goods.
>
> 3. The jurisdictional customs officer shall sanction the refund on satisfying himself that the conditions referred to in para 2 above, are fulfilled.
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> {Notification No. 102/2007-Cus., dated 14-9-2007 as amended by Notification No. 93/2008-Cus., dated 1-8-2008}."

8. The Customs Act, 1962 itself also provides for a mechanism for refund of Customs duties paid in excess. Any person who claims refund of duty of customs will have to follow the procedure prescribed under Section 27 of the Customs Act, 1962 which also has a time limit of one year for claiming refund of customs duties.

9. In the case of *Sony India Pvt. Ltd.* (supra), the Hon'ble High Court of Delhi framed the question of law as follows :

> "The question of law that arises for determination in this appeal is can the period of limitation for preferring refund claims specified in the amending notification No.93/2008-Cus. be made applicable with retrospective effect, in absence of a limitation period in the original Notification No.102/2007-Cus. in respect of the goods imported prior to the issue of the amending notification".

10. After examining the question of law framed the Hon'ble High Court of Delhi answered it in favour of the assessee and against the Revenue and allowed the appeal. Though the question of law framed was only with respect to such consignments which were imported prior to the amending Notification No.93/2008-Cus. and sold after that date and refund claims filed, the Hon'ble High Court of Delhi has also held that provisions of Section 27 (including limitation therein) of the Customs Act, in relation to refund do not apply to SAD cases. Further, the Hon'ble High Court of Delhi has also observed that w.e.f. 1.8.2008, the amending notification has introduced a time limit for claiming refund and that limitation cannot be inserted through a subordinate legislation because it is question of substantive rights of the importer and a statutory amendment is required for that purpose.

11. The Hon'ble High Court of Bombay in the case of *CMS INFO Systems Ltd.* (supra) considered the above judgment of the Hon'ble High Court of Delhi and differed from it. The Hon'ble High Court of Bombay observed that in terms of Section 3 (5) of the Customs Tariff Act, the provisions of Customs Act and the rules and mechanisms for refund apply to any claim of refund of SAD. Therefore, Section 27 of the Customs Act, 1962 including the time limit of one year applies. Further, the amended notification has also introduced a limitation for seeking refund. Particularly, the Hon'ble Bombay High Court also held that this is an exemption granted and it is conditional. The exemption being conditional, it is not permissible to pick and choose the convenient conditions of the exemption notification and leave out those which are onerous and excessive. The Hon'ble High Court further held that but for the exemption notification, there is no right

of refund vested with the importer. Para-33 of this judgment is reproduced below :

> **“33.** It is submitted that the Hon’ble High Court of Delhi has clearly opined and held that the provisions of the Customs Act on the rules and mechanism for refund are incorporated by reference in Section 3(5) of the CTA only “so far as may be” applicable. Since SADC is levied under Section 3(5) and that is refundable only on subsequent sale, then, no limitation period can possibly be imposed for advancing a refund claim. We have carefully perused the above observations and in the light of the analysis of the statutory provisions and the scheme of refund by us, with greatest respect, we are unable to agree with the High Court of Delhi on this point. The Rules and Regulations under the provisions of the Customs Act, 1962, including those relating to drawback, refund and exemption shall so far as may be applied and this reveals that for the purposes of making an application seeking refund, its consideration, that Customs Act and its provisions are made applicable even to the Tariff Act and the duties mentioned thereunder. Therefore, a provision for drawback, refund and exemption from such duties can be made by relying on the Customs Act, 1962. The power to refund is to be found in Section 27 of the Customs Act, 1962, and that was always there. The amendment to the notification introducing a limitation for seeking refund apart, Section 27 with its condition of a limitation period was throughout on the statute book. That is the only provision enabling granting refund of any duty is undisputed. The notification granting exemption and under consideration in the case, enables claiming a refund of duty (SAD) but the power to grant it is in the substantive law. Precisely, that is the case herein. Further, we find that there is an exemption granted and which is conditional. The exemption being conditional, it is not permissible to pick and choose convenient conditions of the exemption notification and leave out those which to parties like the petitioners, appear to be onerous and excessive. We do not see how in the teeth of a clear provision in the exemption notification can the assessee/petitioners before us contend that the exemption notification is valid for everything else but when it comes to period of limitation therein, that is excessive or unfair, unjust and arbitrary. Once the exemption is conditional, then, all the conditions therein have to be complied with. If that provides for refund, but the application in that behalf is to be made within a specified period, then, that cannot be said to be excessive and arbitrary, far from being unfair, unjust and unreasonable. It cannot be termed illegal as well for the simple reason that sub-section (1) of Section 27 of the Customs Act, 1962, which enables claiming of refund by making an application itself speaks of one year outer limit. That is never challenged, including in the present proceedings. That the period of one year commences from the payment of the duty. If that is how Section 27 is worded and every duty is included in its ambit and scope, then, an application seeking refund of the same has to abide by it, including the bar of limitation contained therein. That is how consistent with that provision even the special exemption notification carries the same stipulation or condition. We do not see how insistence on complying with it can be said to be imposing an unreasonable, unfair and unjust restriction. Once the nature of the right is considered, then, all the more we are unable to agree with Mr. Patil. There is no vested, much less absolute right in the petitioners to seek refund. Even a refund must be within the framework of the statute and admissible on the terms thereof. We are not inclined to agree with him that compliance with this period is calling upon the

> petitioner to do or perform something which is impossible. The exemption notification does not impose any new condition as has been read into it. It grants the exemption from payment of duty conditionally. The exemption can be availed of provided the goods which are imported are subject to payment of duties which include all the duties that are referred to in both the enactment and the notification. If the import is for subsequent sale, then, that invoice must carry a stipulation that no credit for the additional duty of customs shall be admissible. The importer thereafter can file a claim for refund of the additional duty of customs paid on the imported goods before the expiry of one year from the date of payment of additional duty of customs."

At this stage, it may also be pointed that the Hon'ble High Court of Bombay was dealing in the aforesaid case with imports post-amendment vide Notification No.93/2008-Cus. as opposed to the case of *Sony India* dealt with by Hon'ble High Court of Delhi in which imports were made prior to the amendment.

12. In view of the above legal position and factual matrix, Ld. Counsel for the appellants submits that the position of law enunciated by the Hon'ble High Court of Delhi in the case of *Sony India Pvt. Ltd.* (supra) is correct and proper and must be applied and therefore they are entitled to refund of SAD paid by them even though they filed the refund claims after limitation period of one year and all these cases pertain to post-amendment to the notification. He asserts that the legal position enunciated by the Hon'ble High Court of Bombay is not correct. He also points out that in the case of *Gulati Sales Corporation* [2018 (360) ELT 277 (Del.)], the Hon'ble High Court of Delhi dealt with a case of importation post amendment of Notification No.102/2007-Cus. and still held that the limitation of time of one year for filing the refunds does not apply.

13. Per contra, Ld. D.R asserts that an exemption notification must be read as it has been drafted with no intendments or modifications. He further submits that in the case of *Sony India* (supra), the Hon'ble

High Court of Delhi was dealing with a case, as may be seen from the question of law framed, whether the goods were imported prior to introduction of the limitation for refund but the refund claim was filed after introduction of the limitations. The present cases are similar to the cases dealt with by the Hon'ble High Court of Bombay in *CMS INFO Systems Ltd.* (supra) as all imports were done after the introduction of the limitation period. He further asserts that even if the limitation of one year under the amended notification is read down as held by the Hon'ble High Court of Delhi then in terms of Section 3 (5) of the Customs Tariff Act, 1975 all provisions of Customs Act will apply including provisions of refund under Section 27. Therefore, no refund can be sanctioned beyond the period of one year. Lastly, he argued that the entire question is one of interpretation and application of the exemption notification with respect to the imported goods. In this particular exemption notification, the exemption is made available by way of refund after ensuring that the required conditions are met. Hence it is one of interpreting the exemption notification. The Hon'ble High Court of Delhi has taken a more liberal, purposive interpretation of the exemption notification and held that its benefit cannot be denied simply because the importer is not able to complete his subsequent sale and avail the exemption notification within the time period prescribed. On the other hand, the Hon'ble High Court of Bombay has constructed the exemption notification strictly and held that a conditional exemption notification must be viewed along with all the conditions therein and it is not open for the importer to pick and choose which conditions they would fulfill and which they would not.

So the root of the case is one of interpretation of an exemption notification.

14. He fairly submits that a large number of decisions by various judicial fora including the Hon'ble Apex Court taking both liberal and strict interpretation in different judgments. In view of the conflicting judgments, the matter was referred to a Five-Judge Constitutional Bench of the Supreme Court in the case of *Commissioner of Customs (Import) Mumbai Vs Dilip Kumar & Company* reported in 2018 (361) ELT 577 (SC). Para 52 & 53 of the this judgement were as follows :

> **"52.** To sum up, we answer the reference holding as under -
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> (1) Exemption notification should be interpreted strictly; the burden of proving applicability would be on the assessee to show that his case comes within the parameters of the exemption clause or exemption notification.
>
> (2) When there is ambiguity in exemption notification which is subject to strict interpretation, the benefit of such ambiguity cannot be claimed by the subject/assessee and it must be interpreted in favour of the revenue.
>
> (3) The ratio in *Sun Export* case (supra) is not correct and all the decisions which took similar view as in *Sun Export* case (supra) stands overruled.
>
> **53.** The instant civil appeal may now be placed before appropriate Bench for considering the case on merits after obtaining orders from the Hon'ble Chief Justice of India."

15. He would assert that the Hon'ble Apex Court has finally put to rest the question of interpretation of exemption notification. It is now the law of the land that exemption notifications should be interpreted strictly and the burden of proving applicability would be on the

assessee to show that his goods comes within the parameters of the exemption notification and in case of any ambiguity, the matter must be decided in favour of the Revenue and against the assesse. He would further draw the attention of the Bench that the judgment of Hon'ble High Court of Delhi in the case of *Sony India Pvt. Ltd.* (supra) was delivered on 16.04.2014 while the judgment of Hon'ble High Court of Mumbai was delivered on 19.12.2016. The judgment of the Constitutional Bench of the Hon'ble Apex Court in the case of *Dilip Kumar & Company* (supra) finally laying down the law was passed on 30.07.2018. Therefore, this judgment prevails over earlier decisions of the Hon'ble High Court of Delhi.

16. We have considered the arguments on both sides and perused the records. The provisions for refund of Customs duty available under the Customs Act is under Section 27. The Hon'ble High Court of Delhi in the case of *Sony India Pvt. Ltd.* (supra) held that this section should not apply to refund of SAD because the refund is as per the Notification. The Hon'ble High Court of Delhi was dealing with a situation where there was no limitation in the exemption notifications for filing the refund claim at the time of import but which was introduced by the time refund claim was filed. The Hon'ble High Court of Bombay, on the other hand, was dealing with a case such as the present one, where the imports have taken place after the amending notification. The Hon'ble High Court of Bombay also held that the limitation under Section 27 also applies. We find that the Hon'ble High Court of Delhi framed the question of law only with respect to retrospective application of the amendment but also held that the amending notification must be read down to the extent it

imposes a time limit for filing the refund claim. Evidently, if an importer resells the goods and files the refund claim within the period, they will be put to loss as he will be bearing both the burden of SAD and the VAT which he would pay while selling the goods. The Hon'ble High Court of Bombay on the other hand held that it is not open for the importer to pick and choose parts of the exemption notification that suits while ignoring those that don't. The Hon'ble High Court of Bombay also held that Special Additional Duty of Customs is also in the nature of customs duty and it is not a duty on sale of goods. It further held that the importer does not have any vested, let alone absolute right, for refund of the SAD. We also note that the Hon'ble High Court of Bombay has considered the judgment of the Hon'ble Delhi High Court in the case of *Sony India Pvt. Ltd.* (supra) and differed from it. Further, in the case of *Gulati Sales Corporation* [2018 (360) ELT 277 (Del.)] decided by the Hon'ble High Court of Delhi on 07.11.2017, the ratio of *Sony India* (supra) was followed even when the imports were made after amendment to the notification. Nevertheless the undisputed position is that this is a case of a refund arising out of a conditional notification.

17. To sum up, we find that the Hon'ble High Court of Delhi has taken a liberal view on interpreting the exemption notification and held that since the purpose of availing the SAD is to provide level playing field between the imported goods and the domestic goods, when the imported goods are resold on payment of VAT to the State Government, the exemption notification provides for refund of SAD. It may or may not be always possible for the importer to resell the goods and file the refund claim within time depending on his market

conditions. Taking a liberal view, the Hon'ble High Court held that refund is available without the limitation of one year indicated in the exemption Notification 102/97 after amendment. On the other hand, the Hon'ble Bombay High Court has constructed the exemption notification strictly and held that all conditions including the time limit within which the refund claim has to be filed must be fulfilled. We also find that there is no order of the jurisdictional High Court of Madras. However, the question of strict versus liberal interpretations of the exemption notifications has now finally been settled by the judgment of the Constitutional Bench of the Hon'ble Apex Court on 30th July 2018 in the case of *Dilip Kumar & Company* (supra), any exemption notification must be strictly interpreted and any benefit of doubt must go in favour of the Revenue and against the assesse. Contrary decisions such as those in the case of *Sun Export Corporation VS Collector* [1997 (93) ELT 641 (SC)] have been overruled by the aforesaid Five-Judge Constitutional Bench. Judicial discipline requires us to follow the judgment of the Apex Court and interpret the exemption notification strictly as it has been drafted including the time limit within which refund applications have to be filed. We find that the judgment of the Hon'ble High Court of Bombay in the case of *CMS INFO System* (supra) is consistent and appropriate, syncs well with the ratio of *Dilip Kumar's* case (supra), which is required to be followed.

18. Consequently, the refund applications of the importer beyond the time limit have been correctly rejected by the lower authorities. The impugned orders rejecting such refund claims are correct in law

and call for no interference. The appeals are rejected and impugned orders are upheld.

(Order pronounced in open court on 26.09.2019)

(P. VENKATA SUBBA RAO)
MEMBER (TECHNICAL)

(P.DINESHA)
MEMBER (JUDICIAL)

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