CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH - COURT NO. 1

CUSTOM APPEAL NO. 52054 OF 2019-DB

(Arising out of Order-in-Appeal No. CC(A)Cus/D-II/Export/ICD/TKD/150/2019-20 dated 09 May, 2019 passed by the Commissioner of Customs (Appeals), New Customs House, New Delhi)

Commissioner of Customs-
New Delhi (ICD TKD) ...... **Appellant**
Inland Container Depot(import),
Tughlakabad, New Delhi,
Delhi-110020

VERSUS

Radial Rubber Industries ...... **Respondent**
9Q, Abinash Chowdhury Lane,
Calcutta West Bengal, 700046

APPEARANCE:

Shri Rakesh Kumar, Authorized Representative of the Appellant
Shri Navneet Panwar, Advocate for the Respondent

CORAM : HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT
HON'BLE MR. C.L. MAHAR, MEMBER (TECHNICAL)

FINAL ORDER NO. 50378/2020

DATE OF HEARING: 22 January, 2020
DATE OF DECISION: 25 February, 2020

JUSTICE DILIP GUPTA

This Appeal has been filed by the Department to assail the order dated 9 May, 2019 passed by the Commissioner of Customs (Appeals)[1] that sanctions an amount of Rs. 1,58,137/- for the

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1 the Commissioner (Appeals)

refund claimed by Radial Rubber Industries[2], which is a respondent in this Appeal. It needs to be noted that the respondent Radial Rubber Industries had filed a refund claim of Rs. 3,67,553/- on 28 March, 2016, out of which an amount of Rs. 2,09,416/- was sanctioned in favour of the respondent by the Assistant Commissioner (Refund)[3] but the remaining amount of Rs. 1,58,137/- was not sanctioned as the refund for this amount in regard to two Bills of Entry was claimed beyond the period stipulated.

2. The respondent had paid Additional Duty of Customs[4] under section 3(5) of the Customs Tariff Act, 1975[5] that provides that if the Central Government is satisfied that it is necessary in the public interest to levy on any imported article such Additional Duty as would counter- balance the sales tax, value added tax, local tax or any other charges for the time being leviable on a like article on its sale, purchase or transportation in India, it may, by notification in the Official Gazzette, direct that such imported article shall, in addition, be liable to an Additional Duty at a rate not exceeding four per cent of the value of the imported article as specified in that notification.

3. The notification dated 14 September, 2007 issued under section 25(1) of the Customs Act, 1962[6] exempts goods falling within the First Schedule of the Tariff Act, when imported into India for subsequent sale from the whole of the Additional Duty of customs leviable under section 3(5) of the Tariff Act. However, the

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2 the respondent
3 the Assistant Commissioner
4. Additional Duty
5. the Tariff Act
6 the Customs Act

exemption contained in the notification shall be given effect to upon fulfillment of certain conditions laid down in paragraph 2 of the notification. The said notification is reproduced below:-

Notification dated 14 September,2007

> "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;
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> (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;
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> (e) the importer shall, inter alia, provide copies of the following documents alongwith the refund claim:
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> (i) document evidencing payment of the said additional duty;
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> (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."

4. The aforesaid notification dated 14 September, 2007 was amended on 1 August, 2008. Paragraph 2(c) was substituted by providing that the importer shall file a claim for refund of the said Additional Duty 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. The said notification dated 1 August, 2008 is reproduced below:-

Notification dated 1 August, 2008

"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 makes the following amendments in the notification of the Government of India in the Ministry of Finance (Department of Revenue), No. 102/2007-Customs, dated the 14th September, 2007 which was published the Gazette of India, Extraordinary, vide number G.S.R. 598(E), dated the 14th September, 2007,namely,

In the said notification, paragraph 2, for sub-paragraph (c), the following shall be substituted,

(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;".

5. The respondent filed a claim for refund of Rs. 3,67,535/- on 28 March, 2016 against payment of Additional Duty that had been paid by the respondent in regard to four Bills of Entry pursuant to the notification dated 14 September, 2007, as amended by notification dated 1 August, 2008. Details of the refund are as follows:-

S. No.	Bill of Entry No.	Bill of Entry dated	Amount of Additional Duty paid	Amount of refund claimed
1.	8653753	19.03.15	Rs. 88683/-	Rs. 88683/-
2.	8653698	19.03.15	Rs. 69454/-	Rs. 69454/-
3.	8691845	23.03.15	Rs. 135471/-	Rs. 135471/-
4.	8830344	07.04.15	Rs. 73945/-	Rs. 73945/-
Total			Rs. 3,67,553/-	Rs. 3,67,553/-

6. The Assistant Commissioner examined whether the conditions set out in the notification dated 14 September, 2007 had been fulfilled or not. It was found that the first two Bills of Entry, both dated 19 March, 2015, satisfied all the conditions,

except the condition that the refund should be claimed before the expiry of one year from the date of payment of Additional Duty. However, the remaining two Bills of Entry dated 23 March, 2015 and 7 April, 2015 were found to satisfy all the conditions. The Assistant Commissioner, accordingly, sanctioned refund of an amount of Rs. 2,09,416/- for the Bills of Entry at serial No's. 3 and 4 of the above chart and did not sanction an amount of Rs. 1,58,137/- relating to the first two bills of entry in the above chart.

7. Feeling aggrieved by that part of the order of the Assistant Commissioner refusing to sanction refund of Rs. 1,58,137/-, the respondent in the present Appeal preferred an Appeal before the Commissioner (Appeals). The Commissioner (Appeals) noticed that though the refund was received by the jurisdictional officer after one year from the date of payment of Additional Duty, but in view of the judgment of the Delhi High Court in **Sony India Pvt. Ltd. v/s Commissioner of Customs, New Delhi**[7]**,** held that Radial Rubber Industry was entitled to the refund of this amount of Rs. 1,58,137/-. The Commissioner also noticed that the aforesaid judgment of the Delhi High Court in **Sony India** was subsequently followed by the Delhi High Court in **Commissioner of Customs (Import), v/s Gulati Sales Corporation**[8]

8. Shri Rakesh Kumar, learned Authorized Representative of the Department has submitted that:-

(i) The Commissioner committed an error in relying upon the judgment of the Delhi High Court in **Sony India** in as much as in the said case the goods had been imported

7 2014 (304) ELT 660 (Del)
8 2018 (360) ELT 277 (Del)

prior to the issue of the notification dated 1 August, 2008 which had introduced the limitation of filing a refund claim within one year from the date of payment of the Additional Duty, whereas in the present case the Bills of Entry pertained to a period after 1 August, 2008;

(ii) The Special Leave Petition filed by the Department against the judgment of the Delhi High Court in **Sony India** was dismissed on the ground of limitation but the question of law was kept upon;

(iii) The Bombay High Court in **CMS Info System Ltd. v/s Union of India, Ministry of Finance and others**[9] held that the refund claim has to be filed before the expiry of one year from the date of payment of Additional Duty;

(iv) The Division Bench of the Tribunal at Delhi in **Commissioner of Customs, New Delhi (ICD TKD) (Imports) v/s J G Impex Pvt. Ltd.**[10] distinguished **Sony India** and held that the refund claim of Additional Duty paid on import of goods has to be filed before the expiry of one year from the date of payment of Additional Duty;

(v) This view was also taken by Ahmedabad Bench of the Tribunal in **Thaim Trading Co. v/s Commissioner of Customs, Mundra**[11]**;**

(vi) The exemption notification has to be strictly construed as was held by the Supreme Court in **Commissioner of**

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9 2017 (349) ELT 236 (Bom.)
10 Custom Appeal No. 52393 of 2018 decided on 25 October, 2018
11 Custom Appeal No. 11187 of 2017 decided on 10 January, 2018.

Customs (Import) Mumbai v/s M/s Dilip Kumar Company[12]; and

(vii) As the refund claim in regard to the two Bills of Entry for an amount of Rs. 1,58,137/-, was not filed within a period of one year from the date of payment of Additional Duty, the Assistant Commissioner was justified in rejecting the claim and the Commissioner (Appeals) committed an illegality in sanctioning the refund of this claim.

9. Shri Navneet Panwar, learned Counsel appearing for the Respondent has however supported the impugned order and has made following submissions.

i. The judgment of the Delhi High Court in **Sony India** that was subsequently relied upon in **Gulati Sales Corporation,** was followed by the Commissioner (Appeals) to hold that the limitation of one year provided for in the notification dated 14 September, 2007 would not be applicable. The decision of the jurisdictional Delhi High Court is binding on this Tribunal and, therefore, the decision of the Bombay High Court in **CMS Info System Ltd.** would not help the Appellant;

ii. The Division Bench of the Tribunal in **J G Impex Pvt. Ltd**., which has been relied upon by the learned Authorized Representative of the Department, would also be of no avail since it seeks to distinguish the judgment of the Delhi High Court in **Sony India** even though it was applicable to the facts of the case; and

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12 2018 TIOL 302 (S.C.)

iii. The Delhi High Court in **Pee Gee International v/s The Commissioner of Customs ICD Tughlakabad** also subsequently held, after relying upon the decision of the Delhi High Court in **Sony India,** that limitation of one year would be applicable from the date of further sale on payment of VAT and not from the date of payment of Additional Duty.

10. The submissions advanced by the learned Authorized Representative of the Department and the learned Counsel for the respondent have been considered.

11. The dispute in this Appeal relates to two Bills of Entry, both dated 19 March, 2015, for which Additional Duty to the extent of Rs. 1,58,137/- was paid by the respondent, under the provisions of section 3(5) of the Tariff Act. The respondent had claimed refund of this Additional Duty in view of the notification dated 14 September, 2007 by notificaiton. Under the said notification, exemption has been granted to the goods falling within the First Schedule of the Tariff Act, when imported into India for subsequent sale, from the whole of the Additional Duty leviable thereon under section 3(5) of the Tariff Act, subject to certain conditions. The first condition set out is that the importer shall pay all duties, including the Additional Duty leviable thereon, as applicable, at the time of importation of the goods. The second condition is that 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 levied under sub-section (5) of section 3 of

the Tariff Act, shall be admissible. The third condition is that the importer shall file the claim for refund of the Additional Duty paid on the imported goods with the jurisdictional customs officer before the expiry of one year from the date of payment of said Additional Duty of customs. The fourth condition is that the importer shall pay on the sale of the said goods, appropriate sales takes or value added tax as the case may be. The fifth condition is that the importer shall provide copies of the documents along with the refund claim. The documents that have to be submitted are documents evidencing payment of the said Additional Duty, invoices of sale of the imported goods in respect of which refund of the said Additional Duty is claimed and documents evidencing payment of appropriate sales tax or value added tax on sale of such imported goods.

12. The condition that is involved in this Appeal is the third condition that requires the claim of refund to be filed before the expiry of one year from the date of payment of Additional Duty.

13. At this stage it would be appropriate to take note of the provisions of section 3(8) of the Tariff Act as it stood at the relevant time and it is as follow:-

> "**3(8)** The provisions of the Customs Act, 1962 (52 0f 1962) and the rules and regulations made thereunder, including those relating to drawbacks, refunds and exemption from duties shall, so far as may be, apply to the duty chargeable under this section as they apply in relation to the duties leviable under that Act."

14. Section 27 of The Customs Act deals with claims for refund of duty and the relevant portion is as follows:-

> "**27. Claim for refund of duty**. –
>
> (1) Any person claiming refund of any duty or interest,-
>
> (a) paid by him; or
> (b) borne by him,
>
> may make an application in such form and manner as may be prescribed for such refund to the Assistant Commissioner of Customs or Deputy Commissioner of Customs, before the expiry of one year, from the date of payment of such duty or interest:"

15. The provisions of the notification dated 14 September, 2007 as amended on 1 August, 2008 and the aforesaid provisions of the Tariff Act and the Customs Act were examined by the Delhi High Court in **Sony India**. It was held that since Additional Duty levied under section 3(5) of the Tariff Act is refundable only on a subsequent sale, no limitation can possibly be imposed for filing a refund claim from the date of payment of such Additional Duty. The High Court further observed that neither section 27 of the Customs Act nor the provisions of amended notification dated 1 August, 2008 can impose a limitation period as such limitation can only be introduced by legislation. The High Court also noticed that the expression "so far as may be" in section 3(8) of the Tariff Act was significant and this would mean that the provisions of Customs Act would be applicable only "to the extent possible". Thus, the High Court concluded that the period of limitation contemplated under section 27 of the Customs Act would not be applicable to a refund made under the exemption notification, more particularly when the customs authority also understood that section 27(1) of the Customs Act would not be applicable. The relevant portion of the judgment of the High Court is reproduced below:-

"10. **That the importer is required to produce invoices of sale, documents evidencing payment of sales tax/VAT etc. clearly indicates that the benefit of this notification can be availed only once sale of the imported goods is complete.** The exemption is clear in its intent to allow a refund of the SADC paid under Section 3(5) of the CTA because the importer has suffered the incidence of SADC (meant to counter-balance sales tax/VAT leviable on a like article in India) on import, and then of actual sales/VAT on sale of these imported goods. In this light, it is necessary to examine the CUSAA 3/2014 applicability of any limitation period, whether under the amending notification or under section 27 of the Customs Act.

11. xxxxxxxxx

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), CUSAA 3/2014 Page 8 such as the amending notification no. 93/2008-Cus dated 1.08.2008 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.**

14. **The expression "so far as may be" in this context, under Section 27 is significant as well as instructive. The levy under CUSAA 3/2014** section 3 (5) is conditional upon the Central Government's opinion that it is necessary to "counter-balance the sales tax, value added tax, local tax 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-Customs dated 14.09.2007 there was no period of limitation; by Circular No.6/2008-Customs, 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-Customs 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) statue are to be followed "to the extent possible.
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> 15. xxxxxxx
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> 16. xxxxxxx
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> 17. Plainly, therefore, Section 27 was understood as not applying to SAD cases, even though it was in the statute book for many years. Yet, with the introduction of the circular and then the notification (No. 93), the Customs authorities started insisting that such limitation period which was prescribed with effect from 01.08.2008 (by notification) became applicable. There is a body of law that essential legislative policy aspects (period of limitation being one such aspect) cannot be formulated or prescribed by subordinate legislation. Khemka and Co. (Agencies) Private Ltd. v. State of Maharashtra, (1975) 35 STC 571 and other decisions are authority on the question that in matters which deal with substantive rights, such as imposition of penalties and other provisions that adversely affect statutory rights, the parent enactment must clearly impose such obligations; subordinate legislation or rules cannot prevail or be made, in such cases. The CUSAA 3/2014 imposition of a period of limitation for the first time, without statutory amendment, through a notification, therefore could not prevail.
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> 18. **For these reasons, this Court holds that the amending notification must be read down to the extent that it imposes a limitation period**. The question of law framed is therefore, answered in favour of the assessee and against the revenue. The appeal accordingly succeeds and is allowed without any order as to costs."
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> **(emphasis supplied)**

16. The Special Leave Petition filed by the Department to assail the aforesaid judgment of the Delhi High Court was dismissed on 23 February, 2016 on the ground of limitation but the question of law was kept open.

17. In **Pee Gee International**, the Delhi High Court following its judgment in **Sony India,** also held that the limitation of one year provided for in the notification dated 14 September, 2017 as amended on 1 August, 2018, would not be applicable. The relevant observations are as follows:-

> **"5.** This Court has recently in its judgment Sony India Pvt. Ltd. v. The Commissioner of Customs, New Delhi (CUSAA 3/2014, decided on 16-4-2014 [2014 (304) E.L.T. 660 (Del.)]) held that the expression "so far as may be" occurring in Section 3(5) of the Customs Tariff Act cannot *ipso facto* bring in or refer to the period of limitation prescribed in Section 27 of the Customs Act. It was held that the nature of the duty is unlike the regular incident of customs duty, which is definite; special additional duty is to be compensated the moment conditions for refund are fulfilled. The prevailing view of the Revenue - based upon which it issued Circulars and Notifications in 2008 that the period of limitation of one year was to be calculated based upon the date of payment of the S.A.D. and not based upon the date of further sale or payment of VAT, was held to be erroneous. In this view of the matter, it is held that the appeal, at least as far as the undisputed amounts with respect to the 5 bills of entry are concerned, requires to be allowed. So far as the 6th bill of entry is concerned, appellant asserts that the C.B.E. & C. Circular No. 16/2008 paragraph (viii) covers the aspect and that payments made by clearing or forwarding agents to satisfy VAT demands would also fall in the legitimate claim that can be pressed by importers. In these circumstances, the refund application of the appellant with respect to bill of entry dated 5-11-2007 for the sum of Rs. 82,123/- is hereby remitted to the Assistant Commissioner of Customs (Refund), ICD, Tughlakabad, New Delhi, for verification and appropriate orders."

18. **Gulati Sales Corporation** followed the judgment of the Delhi High Court in **Sony India** and **Pee Gee International**

19. It also needs to be noticed that the following Appeals filed by the Department to contend that the limitation period of one year provided for under the notification dated 14 September, 2007 as amended by notification dated 1 August, 2008 would be applicable were dismissed by the Tribunal following the judgment of the Delhi High Court in **Sony India**:

i. **Commissioner of Customs, New Delhi v/s M/s Siya Paper Mart Pvt. Ltd.**[13]

ii. **Commissioner of Customs (Export), New Delhi v/s M/s Daya Enterprises**[14]

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13 . Custom Appeal No. 51863 of 2017 decided on 27 December, 2017
14. Custom Appeal No. 51049 of 2017 decided on 16 August, 2017

iii. **Commissioner of Customs (Export), New Delhi (ICD, TKD) v/s M/s Daya Enterprises**[15]

iv. **Commissioner of Customs, New Delhi ICD TKD Export v/s Panvi Trading** [16]

20. A Division Bench of the Tribunal in **J G Impex Pvt. Ltd.,** however, attempted to distinguish the judgment of the Delhi High Court in **Sony India** on the ground than for claiming the refund of Additional Duty "nothing else has to happen or to be done by the assessee after the payment of Additional Duty" and so "to our opinion this particular fact distinguishes the present case from the case of **Sony India Pvt. Ltd."**

21. As noticed above, as the exemption granted under notification dated 14 September, 2007 requires fulfillment of certain conditions. The importer has to pay on the sale of the goods appropriate sales tax or value added tax and has to provide copies of documents with the refund claim evidencing payment of said Additional Duty, invoices of sale of the imported goods in respect of which refund of the said Additional Duty is claimed and documents evidencing payment of appropriate sales tax by the importer on the sale of such imported goods. These conditions were examined by the Delhi High Court in **Sony India** while arriving at a conclusion that the limitation provided in the notification dated 1 August, 2018 that the refund has to be made within a period of one year from the date of payment of Additional Duty, has to be read down. The decision of the Delhi High Court in

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15 Customs Appeal No. 50195 of 2018 decided on 22 February, 2018.
16 Custom Appeal No. 50345-50346 of 2018 decided on 23 March, 2018

Sony India was binding on the Tribunal but it has been distinguished for a reason that is not borne out from a plain reading of the conditions set out in the notification.

22. Learned Authorized Representative of the Department has also submitted that the judgment of the Delhi High Court in **Sony India** would not be applicable for the reason that the refund in that case was filed at a time when the amended notification dated 1 August, 2008 had not been issued.

23. This submission cannot be accepted for the simple reason that the Delhi High Court has not allowed the refund claims for the said reason. It has allowed the refund claims as the limitation of one year provided for in the amended notification dated 1 August, 2008 has to be read down in as much as the right to claim refund could accrue to an importer only when the subsequent sale is completed and given the vagaries of the market, the importer has limited control over when the sale would be complete. It is for this reason that the Delhi High Court held that to allow the limitation period to start from the date of payment of duty as prescribed under the amended notification, would allow commencement of a limitation period for refund even before the right to claim refund actually accrued. The Delhi High Court, therefore, held that neither section 27 of the Customs Act nor the amended notification dated 1 August, 2008 can impose a limitation period on the right of an importer to claim refund of Additional Duty and in any case such limitation can only be introduced by legislation.

24. Learned Authorized Representative of the Department has, however, placed much emphasis on the judgment of the Bombay

High Court in **CMS Infosys System Ltd**. This judgment was rendered in a writ petition filed under article 226 of the Constitution for quashing the condition imposed by the notification dated 1 August, 2008 fixing a time limit of one year for filing a refund claim from the date of payment of Additional Duty. The writ petitioner had placed reliance upon the judgment of Delhi High Court in **Sony India** as would be seen from the paragraphs that are reproduced:-

> "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.
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> 34. Mr. Patil would submit that the importer shall pay on sale of the said goods appropriate sales tax or value added tax, as the case may be, is equally a condition and further requirement is providing of copies of documents along with refund claim. Else, no refund is admissible. We are of the opinion that it is not possible to guess as to whether the refund application would be held to be non-maintainable purely on the grounds or for the reasons suggested. If it is made within a period of one year from the date of payment of the additional duty of customs, then, because there is no subsequent sale and the documents evidencing that, as also proof of payment of the sales tax or local taxes are required to be produced, that their production is also mandated in a particular period and within a particular time limit is not something which we are required to call upon and decide. We have before us a case of rejection of a refund application simply because it was not filed within one year from the date of payment of the additional duty of customs."

25. It would be seen from the aforesaid paragraphs of the judgment of the Bombay High Court that the contention that an importer has to pay appropriate sales tax or value added tax on the sale and also provide copies of documents with the refund claim, otherwise the refund would not be admissible was not examined by the Bombay High Court for the reason that it was not

possible to guess whether the refund application would be held non-maintainable on these grounds. The High Court also observed that this issue was not required to be decided by the High Court because High Court was dealing with a case where the refund application had been rejected because it was not filed within one year from the date of payment of Additional Duty. The Delhi High Court, on the other hand specifically dealt with such a situation and held that the limitation cannot start form the date of payment of Additional Duty since a refund application cannot be filed in the absence of a sale having subsequently taken place and the relevant documents concerning such sale were filed with the refund application.

26. In any view of the matter, the issue as to which judgment of the High Courts should be followed if conflicting views have been taken was decided by a Larger Bench (a five Member Bench) of the Tribunal in **Collector of Central Excise, Chandigarh vs. Kashmir Conductors**[17]. One issue that was addressed by the Larger Bench was what should be done when the Tribunal is faced with conflicting decisions of High Courts. The Larger Bench of the Tribunal held that if the jurisdictional High Court has taken a particular view on an interpretation or proposition of law, that view has to be followed but if the jurisdictional High Court has not expressed any view in regard to the subject matter and there are conflicting views of other High Courts, then the Tribunal will be free to formulate its own view. The relevant paragraphs of the decision of the Larger Bench are reproduced below:-

17. 1997 (96) ELT 257 (Tri)

"**10.** The question as to how the Tribunal should proceed in the face of conflicting decisions of High Courts has been considered in *M/s. Atma Steels P. Ltd. and others* v. *Collector of Central Excise, Chandigarh* reported in l984 (17) E.L.T. 331 wherein the Larger Bench consisting of five Members held that, in view of its All India jurisdiction and peculiar features, the Tribunal cannot be held bound to the view of any one of the High Courts, but has the judicial freedom, to consider the conflicting views, reflected by different High Courts, and adopt the one considered more appropriate to the facts of a given case before the Tribunal. The Tribunal also indicated that this should be so, irrespective of the fact whether one particular assessee was within the jurisdiction of a specified High Court or the original adjudicating authority was located there. The judgment of the Apex Court in the case of *M/s. East India Commercial Co. Ltd.* v. *Collector of Customs, Calcutta* reported in 1983 (13) E.L.T. 1342 (S.C.) was brought to the notice of the Larger Bench, but, was not adverted to sufficiently in the course of discussion. In the *East India Commercial Co.* case, one of the questions for consideration was whether the interpretation given by the Calcutta High Court to Section 167 of the Sea Customs Act, 1878 would be binding on authorities functioning within the jurisdiction of the High Court and the Supreme Court held that "it is implicit in the power of supervision conferred on a superior Tribunal that all the Tribunals subject to its supervision should conform to the law laid down by it. ....We, therefore, hold that the law declared by the highest Court in the State is binding on authorities or Tribunals under its superintendence.........". This decision has been followed by the Bombay High Court in *CIT* v. *Godavaridevi Saraf* reported in 1978 (2) E.L.T. (J 624).

10.1 In the case of U.P. Laminations v. Collector of Central Excise, Kanpur reported in 1988 (35) E.L.T. 398 (T), the Tribunal has followed the Supreme Court judgment in the case of East India Commercial Co. case and set aside the show cause notice issued against the appellants therein as it was in direct violation of the law laid down by the Allahabad High Court within whose jurisdiction both the manufacturer and the Collector of Central Excise were situated.

10.2 In a recent decision of the Tribunal in the case of Madura Coats v. CCE, Bangalore reported in 1996 (82) E.L.T. 512, it has been held that the decision of a particular High Court should certainly be followed by all authorities within the territorial jurisdiction of that High Court and that the authorities in another State are not bound to follow the views taken by a particular High Court in the absence of a decision by the jurisdictional High Court with regard to constitutionality of a provisions. The Tribunal has held that since the adjudication of vires of a provision of a statute or Notification is outside the jurisdiction of the Tribunal and the jurisdictional High Court i.e., the High Court having jurisdiction over the authority and the assessee, has not struck down the provision or Notification as *ultra vires*, the Tribunal has to follow the same and the assessee is entitled to take the stand that he is entitled to the benefit of the particular provision or Notification since the jurisdictional High Court has not struck it down, even

> though some other High Court may have done so. In case the conflict of decisions among High Courts does not relate to vires of any provision or Notification, it has been held that the Tribunal has to proceed in accordance with the decision in Atma *Steels P. Ltd.* in the light of the decision of Supreme Court in the *East India* Commercial Company case i.e. where the jurisdictional High Court has taken a particular view on interpretation or proposition of law, that view has to be followed in cases within such jurisdiction. If the jurisdictional High Court has not expressed any view in regard to the subject matter and there is conflict of views among other High Courts, then the Tribunal will be free to formulate its own view in the light of Atma Steels P. Ltd. case; however, there is a decision of only one High Court in regard to disputed interpretation or proposition of law, the Tribunal is bound to follow that order since it is not at liberty to disregard the solitary High Court decision."

27. Thus, in view of the decision of the Delhi High Court in **Sony India,** the Commissioner (Appeals) was justified in allowing the claim for refund of Additional Duty, even if the claim was filed beyond a period of one year from the date of payment of Additional Duty.

28. The order of the Commissioner (Appeals), therefore, does not call for any interference in this Appeal. The Appeal is accordingly, dismissed.

(Pronounced in the open Court on 25 February, 2020)

(JUSTICE DILIP GUPTA)
PRESIDENT

(C.L. MAHAR)
MEMBER (TECHNICAL)

Rekha