CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL

NEW DELHI

PRINCIPAL BENCH

Customs Appeal No. 50770 of 2020 [SM]

[Arising out of Order-in-Appeal No.CC(A) CUS/D-II/ ICD PPG / 1408 / 2019-20 dated 26.02.2020 passed by the Commissioner of Customs (Appeals), New Delhi].

M/s. S.K. Enterprises **...Appellant**
(Through its Partner – Shri Manav Malik)
H. No.32, VPO Kundli,
Distt. – Sonipat,
Haryana.

VERSUS

Commissioner of Customs
New Customs House, New Delhi **...Respondent**

WITH

Customs Appeal No. 50771 of 2020 [SM]

[Arising out of Order-in-Appeal No.CC(A) CUS/D-II/ ICD TKD/ IMP/ 1413-1414 / 2019-20 dated 02.03.2020 passed by the Commissioner of Customs (Appeals), New Delhi].

M/s.S.K. Enterprises **...Appellant**
(Through its Partner – Shri Manav Malik)
H. No.32, VPO Kundli,
Distt. – Sonipat,
Haryana.

VERSUS

Commissioner of Customs
New Customs House, New Delhi **...Respondent**

AND

Customs Appeal No. 50772 of 2020 [SM]

[Arising out of Order-in-Appeal No.CC(A) CUS/D-II/ ICD TKD/ IMP/ 1413-1414/ 2019-20 dated 02.03.2020 passed by the Commissioner of Customs (Appeals), New Delhi].

M/s.S.K. Enterprises **...Appellant**
(Through its Partner – Shri Manav Malik)
H. No.32, VPO Kundli,
Distt. – Sonipat,
Haryana.

VERSUS

Commissioner of Customs
New Customs House, New Delhi **...Respondent**

APPEARANCE:

Mr. Priyadarshi Manish & Ms.Devasha Shukla Advocates for the Appellant
Mr.Pradeep Gupta, Authorised Representative for the Respondent

Coram: HON'BLE MRS. RACHNA GUPTA, MEMBER (JUDICIAL)

DATE OF HEARING:18/08/2021
PRONOUNCED ON: 28/10/2021

FINAL ORDER No. 51906-51908/2021

RACHNA GUPTA

Appellant imported polyster non-textured lining fabric from China vide three Bills of Entry No. 6654610 dated 03.09.2016, 7413402 dated 10.11.2016 and 6654130 dated 08.09.2016. At the time of import appellants paid the applicable 4% Special Additional Duty of Customs (SAD). It is there after that under Notification No.102/2007-Cus dated 14.09.2007, the appellant filed their refund claim of said SAD vide their application dated 19.03.2018 claiming the refund of Rs.2,40,562/-. On scrutiny, certain discrepancies were noticed accordingly a deficiency memo dated 09.04.2018 was issued pointing out the following discrepancies:-

1. Three of the claims were alleged to be time barred.
2. Sale invoices submitted on support of the refund claim were alleged to not to be self certified.
3. VAT/CST was noticed NIL in most of the sale invoices.

4. VAT returns for the relevant period were not been submitted.

2. It is when party failed to submit any reply to the said Deficiency Memo that another Deficiency Memo of 03.07.2018 was served upon the appellants, who still failed to file any reply. It is thereafter that the Show Cause Notice No. 1869/2017/16097 dated 27.07.2018 was served upon the appellant proposing the rejection of the said refund claim. The proposal was initially accepted vide three separate Orders-in-Original bearing numbers 1896 dated 11.09.2018, 8323/2018 dated 31.03.2018 & 3041/SC/18 dated 24.10.2018. The appeals thereof have been rejected vide two separate Orders-in-Appeal bearing numbers 4792 dated 26.02.2020 & 4931 dated 02.03.2020. Being aggrieved, the appellant is before this Tribunal.

3. I have heard Mr. Priyadarshi Manish & Ms.Devasha Shukla, learned Counsels for the appellant and Mr.Pradeep Gupta, Authorized Representative for the Department.

4. It is submitted on behalf of the appellant that the refund claim has wrongly been rejected on the ground of limitation. It is mentioned that the Commissioner (Appeals) has failed to observe the decision of Hon'ble High Court of Delhi in the case of **Sony India Pvt. Ltd. vs. Commissioner of Customs, New Delhi reported in 2014 (304) ELT 660 Delhi**.

5. It is further submitted that the SLP filed by Revenue before Hon'ble Supreme Court against the said decision has also been dismissed. The order, accordingly, is mentioned to have been passed in ignorance of judicial protocol. Accordingly, is prayed to be set aside. Appeal is prayed to be allowed.

6. Per-contra, it is submitted by the learned D.R. that Hon'ble Apex Court has dismissed the appeal merely on the ground of limitation. However, the question of law has been kept open for decision by Hon'ble Apex Court. It is impressed upon that due to this reason the judgment of Delhi High Court in **Soni India (supra**) case cannot be relied upon in isolation for deciding the limitation aspect for claim of SAD return. Ld. D.R. has impressed upon Notification No.93/2008-Cus. dated 1st August, 2008 which is an amendment to Notification No.102/2007 wherein specifically a period of one year from the date of payment of SAD has been prescribed for filing the refund thereof. Since there is no denial for the impugned refund claims to have been filed beyond one year of the said date, there is no infirmity in the order under challenge. Appeal is, accordingly, prayed to be dismissed.

7. After hearing the rival contentions, perusing the case law relied upon and the record of the present appeals, I observe and hold as follows:-

The impugned claim have been filed under Notification No.102/ 2007 –Cus. dated 14.09.2007 which exempts the goods falling within the First Schedule to the Customs Tariff Act, 1975 when imported into India for subsequent sale from the whole of the Additional Duty of Customs leviable thereof under Sub-section 3 of said Customs Tariff Act (CTA). Section 3 (5) of CTA indicates that SAD is the duty in the nature of sales /VAT. The intent of legislature about such duties seeking to countervailance / Sales/ VAT etc. leviable on like goods sold in India is to counterbalance the duties borne by like goods produced indigenously in India. The exemption provided in the Notification issued in exercise of the power under section 25 (1) of the Customs Act is conditional upon subsequent sale, as can been seen from the conditions required to be fulfilled in order for an importer to avail the benefit of this exemption:

> *"(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 ease 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."*

8. This clearly indicates that benefit of this Notification can be availed only once the sale of imported goods is complete. Hence, the question of applying for refund of SAD does not arise unless and until the sale of those imported goods for which the said SAD has been paid is complete.

9. Resultantly, the limitation fixed by amending the Notification No.102 in Notification No.93/2008 (as impressed upon by ld. D.R.) is absolutely meaningless. This has actually been appreciated by Hon'ble High Court of Delhi in **Sony India (Supra**) case. This Tribunal being falling under the jurisdiction of the said High Court has no reason to go beyond the said decision in the case of similar facts and circumstances. Otherwise also it was not merely limitation but there were three other discrepancies as were noticed by the Department with respect to three of the refund claims in question, as are mentioned above. It is also apparent that the appellant had opted to not to give any satisfactory reply to do away those deficiencies neither at the stage of issuance of deficiency memos nor at the subsequent stage of Show Cause Notice being served upon the appellants. Appellants rather opted

to not to appear before the Investigating Officers despite opportunities being given to them. They also failed to appear before the Adjudicating Authorities below.

10. In the given circumstances, I hold that though the issue of limitation is not applicable to the present refund claims and the refund claim of SAD cannot be held to be barred by limitation calculating the period of one year from the date of payment of said SAD. However, owing to the other two discrepancies, the refund claim has been held to have been rightly rejected. The order of rejection, therefore, is upheld, however, for the different reasons as mentioned above. The appeal stands, accordingly, disposed of.

[Order pronounced in the open Court on 28.10.2021]

(RACHNA GUPTA)
MEMBER (JUDICIAL)

Anita