CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
REGIONAL BENCH AT HYDERABAD

Single Member Bench

Court - I

Application No.	Appeal No.	Appellant	Respondent	Order-in-Appeal Nos.
ST/STAY/30418/ 2018	C/30788/2018	CC, Hyderabad – Customs	OSI Systems Pvt Ltd	HYD-CUS-000-APP-157-17-18 dated 27.03.2018 passed by CCCE (Appeals), Hyderabad
ST/STAY/30419/ 2018	C/30789/2018			HYD-CUS-000-APP-158-17-18 dated 27.03.2018 passed by CCCE (Appeals), Hyderabad

Appearance

Shri A.V.L.N. Chary, Superintendent/AR for the Appellant.

Shri Y. Sreenivasa Reddy, Advocate for the Respondent.

Coram:

HON'BLE Mr. P. Venkata Subba Rao, MEMBER (TECHNICAL)

Date of Hearing: 05.11.2018
Date of Decision: 05.11.2018

FINAL ORDER No. A/31419-31420/2018

[Order per: P.V. Subba Rao.]

1. These two appeals and the connected stay applications are filed by the revenue against the Orders-in-Appeal Nos. HYD-CUS-000-APP-157-17-18 & HYD-CUS-000-APP-158-17-18 dated 27.03.2018. When the matter was called, it was found that the issue is in a short compass and hence the appeals are taken up for final disposal.

2. In the case of C/30788/2018, the original authority passed an order partly rejecting the SAD (Special Additional Duty) refund claimed by the appellant on the ground that with respect to those goods they have not fulfilled the conditions of the notification for SAD refund inasmuch as they have cleared the goods on payment of nil rate of VAT as applicable to the goods. Aggrieved by this order, the assessee appealed to the first appellate authority, who vide the impugned order modified the order of the lower authority and sanctioned the rejected part of the refund. Revenue is in appeal against this order of the first appellate authority.

3. In the case of C/30789/2018, the lower authority has sanctioned the SAD refund to the assessee. Revenue has appealed against this to the first appellate authority, who vide the impugned order rejected the revenue's appeal and upheld the order of the lower authority. This appeal is against the order of the first appellate authority rejecting the revenue's appeal and sanctioning the refund.

4. The issue in both these appeals is that the assessee(respondent herein) had imported goods paying appropriate amounts of duty including Special Additional Duty. Thereafter they claimed refund of the SAD paid in terms of Notification No. 102/2007-CUS dated 14.09.2007. In the case of C/30788/2018, the lower authority has rejected an amount of Rs.12,06,264/- on the ground that the exemption notification is available and the refund can be sanctioned only if the appropriate amount of VAT/CST has been paid. In this case, they have not paid any VAT/CST because the goods were chargeable to Zero rate of VAT. Therefore, no SAD refund is available to them. On appeal, the first appellate authority allowed this refund on the ground that this issue has been settled in the hands of the Tribunal in the case of Gazal Overseas vs. CC, New Delhi [2016 (332) ELT 767] and it has been held that nil rate of VAT is also VAT paid in terms of the notification. In the case of C/30789/2018, the lower authority himself has sanctioned the refund on the same issue relying on the order of the Tribunal in the case of Gazal Overseas (supra).

5. Learned departmental representative takes us through the facts of the case and submits that the ratio of Gazal Overseas case by the Tribunal does not apply to these cases in view of the judgment of the Hon'ble Supreme Court in the case of Dhiren Chemical Industries [2002 (139) ELT 3 (SC)] in which it was held that the appropriate amount of excise duty would not include cases where the goods are not liable to excise duty or chargeable to nil rate of excise duty. It is his assertion that same ratio would apply to the interpretation of Notification No. 102/2007-CUS. Therefore, first appellate authority has erred in

sanctioning the refund when the appropriate rate of VAT was nil. Similarly in the case of C/30789/2018, it is his assertion that first appellate authority has erred in rejecting the revenue's appeal on the same ground. He, therefore, prayed that impugned orders may be set aside to the extent that sanctioning refund/ upholding sanction of refund of SAD where the appropriate rate of VAT is nil.

6. Learned counsel submits that this issue has also been classified in the Board Circular No. 6/2008 dated 28.04.2008, wherein Para 5.3 reads as follows.

> *"5.3. The exemption contained in the said notification envisages that the importer shall file a refund claim for 4% CVD ("said additional duty of Customs") paid on imported goods and shall pay on sale of the said goods "appropriate Sales Tax or VAT as the case may be". Hence, it is clear that there is no stipulation in the notification that the exemption is available only if the rate of ST/VAT is equal to or higher than the rate of additional duty of Customs; nor is there a condition that if the rate of ST/VAT happens to be lower than 4%, the refund would be restricted to the lower amount. As such, it is clarified that it will not be appropriate to reduce the refund amount in such a situation and the entire 4% CVD, if otherwise found eligible, shall be refunded."*

7. He, therefore, asserts that it is the position of the CBEC itself that appropriate rate of VAT need not be equal to or more than 4%. Any rate of VAT would be sufficient for them to be entitled to SAD refund. Hence, nil rate of VAT has also to be accepted as VAT paid. He further relies on the case of Malhotra Imports & Exports Corporation [2018 (359) ELT 535 (Tri-Chennai)] in which the Tribunal has gone through the cases of Gazal Overseas (supra) and also Dhiren Chemical Industries (supra) and it was held that the ratio in the case of Dhiren Chemical Industries does not apply with respect to the refund of SAD and even nil rate of appropriate payment of duty would be sufficient for appropriate rate of SAD. Para 4 & 5 are reproduced below.

> *"**4.** However, it is seen that the Tribunal in the case of Kubota Agricultural India Pvt. Ltd. v. Commissioner of Customs, Chennai reported in 2017 (6) TMI 565-CESTAT, Chennai has passed a detailed order considering the said stand of the Revenue that the Gazal Overseas did not consider the Supreme Court's decision in Dhiren Chemicals (supra) and has concluded that the said decision in the case of Dhiren Chemicals (supra) is not applicable to the issue involved. As such, the Tribunal by taking note of the earlier decision of the Hon'ble Supreme Court in the case of Collector of Central Excise, Hyderabad v. Vazir Sultan Tobacco Co. Ltd. reported in 1996 (83) E.L.T. 3 (S.C.) has held that even 'nil' rate is also an appropriate*

> *payment of duty, in which case, the refund of SAD paid at the time of import of the goods is required to be refunded to the assessee on subsequent sales of such imported goods.*
>
> ***5.** Inasmuch as, the issue stands decided by the above referred decision, I set aside the impugned order and allow all the three appeals with consequential relief."*

8. I have considered the arguments on both sides and perused the records. The short point to be decided is whether SAD refund under Notification No. 102/2007 is available when goods are cleared on payment of appropriate rate of VAT and that VAT is nil. The first appellate authority has relied on the judgment of the Tribunal in the case of Gazal Overseas and held that the SAD refund is available. The appeal of the revenue is on the ground that ratio of this order of the Tribunal does not apply because in the case of Dhiren Chemical Industries, the Hon'ble Supreme Court held that nil rate of excise duty is not payment of excise duty. I find that in the case of Malhotra Imports & Exports Corporation (supra) the Tribunal has considered this argument and has, after taking into consideration the ratio of the order of the Tribunal in the case of Gazal Overseas as well as the judgment of the Hon'ble Supreme Court in the case of Dhiren Chemical Industries, come to the conclusion that SAD refund is payable even if no VAT is chargeable on the goods which were sold. I also find that the department is also of the same view as evidence by Para 5.3 of CBEC Circular No. 6/2008 dated 28.04.2008, above.

9. In view of the above, I find that the appeals by the revenue are liable to be rejected and I do so.

10. The appeals are rejected. Consequently, the stay applications are infructuous and stand disposed of.

(Dictated and pronounced in the open court)

(P.VENKATA SUBBA RAO)
MEMBER (TECHNICAL)

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