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

Single Bench
Court - I

Appeal No.C/30479/2018

(Arising out of Order-in-Appeal No.HYD-CUS-000-APP-122-17-18 dt.16.1.2018 passed by CC & CT (Appeals-I), Hyderabad)

CC, Hyderabad – Customs ….. Appellant(s)

Vs.

Khazana ….. Respondent(s)

Appearance
Shri N. Bhanu Kiran, Asst. Commissioner/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: 13.02.2019
Date of Decision: 13.02.2019

FINAL ORDER No. A/30237/2019

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

1. This appeal is filed by the revenue against Order-in-Appeal No. HYD-CUS-000-APP-122-17-18 dated 16.01.2018.

2. The issue which falls for consideration in this case is whether the respondent herein is entitled to the refund of Special Additional Duty (SAD) at the rate of 4% paid at the time of import under Notification No. 102/2007-CUS dated 14.9.2007 as amended by Notification No. 93/2008-CUS dated 01.8.2008. SAD, in a nutshell, is levied to provide the level-playing field for indigenous sellers of goods. While the domestic manufacturers suffer VAT, importers do not. Therefore, SAD at the rate of 4% has been imposed on certain goods when they are imported into India. If the importer uses such goods he bears the burden of the SAD. On the other hand, if after importing he sells the goods to another party after paying VAT as applicable then he is entitled to the refund of SAD in terms of aforesaid notification subject to some conditions. This notification was

amended vide notification 93/2008-CUS dated 01.08.2008 adding an additional condition that the claim for refund must be filed within one year from the date of payment of duty. The respondent in this case have imported the goods and filed a claim for refund of SAD after a period of one year. Therefore, the lower authority in her Order-in-Original rejected the refund claim.

3. Aggrieved, the appellant appealed to the first appellate authority who, vide the impugned order held that the original authority should consider the claims of imports if otherwise eligible and set aside the limitation of time. In holding so, the first appellate authority relied on the judgment of the Hon'ble High Court of Delhi in the case of Sony India Pvt Ltd [2014 (34) ELT 660] wherein their Lordships read down the notification to the effect that the limitation of time for filing the refund claim does not apply. Learned departmental representative submits that the Hon'ble High Court of Delhi had in the aforesaid decision examined the retrospective applicability of the limitation imposed in 2008. The specific question of law framed by the Hon'ble High Court of Delhi was as follows:

> *"Can 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 goods imported prior to the issue of the amending notification."*

4. The Hon'ble High Court of Delhi answered this question in negative and in favour of the assessee. Learned departmental representative argues that the first appellate authority has relied on this judgment which is incorrect because in the present case the bills of entry were all filed after the issue of this amendment in 2008. Therefore, the question of retrospective application of the amendment notification does not arise in this case. He further submits that on the same issue for the period post 01.8.2008, in the case of CMS Info Systems Ltd [2017 (349) ELT 236 (Bom.)] the Hon'ble

High Court of Bombay held that the appellant has to file the refund claim within the time period stipulated in the notification and therefore unless the condition of this notification is met, they are not entitled to the refund. He further submits that in another case of DSM Sinochem Pharmaceuticals (I) Pvt Ltd [2018 (359) ELT 509 (Bom.)] the Hon'ble High Court of Bombay held the same view. Therefore, allowing the SAD refund when the application was filed after period of one year is not permissible. He further submits that the refund in this case arises not by virtue of legal provision but in view of a specific exemption notification. Any exemption notification should be strictly construed against the person who is claiming the benefit of the notification as has been held by the Hon'ble Apex Court in the case of Dilip Kumar & Co. and others (Civil Appeal No. 3327/2007). Therefore, the first appellate authority has clearly erred in directing the adjudicating authority to sanction refund ignoring the limitation of time. He further draws the attention of the bench to final order No. 30705/2017 in appeal C/30714/2016-SM dated 7.6.2017 on an identical issue wherein it was held that the ratio of the judgment of the Hon'ble High Court of Delhi in the case of Sony India Pvt Ltd does not apply where there is no retrospective application of notification 93/2008 in respect of goods imported prior to the amending notification. Therefore, the impugned order may be set aside.

5. Learned counsel for the respondent submits that the case of Sony India Pvt Ltd should apply in the present case because although the question formulated by the Hon'ble High Court of Delhi was retrospective application of the time limit for claiming SAD refund, operative part of the judgment only says that the notification must be read down to the extent it places limitation on the time. He further submits that the matter is now before the Supreme Court, in view of the two different views taken by the

Hon'ble High Court of Bombay in the case of CMS Info Systems Pvt Ltd and Hon'ble High Court of Delhi in the case of Sony India Pvt Ltd. The Hon'ble Supreme Court has issued a notice as reported in 2018 (361) ELT A23 (SC).

6. I have considered the arguments on both sides and perused the records. The simple point to be decided is whether the first appellate authority was correct in holding that the ratio of Sony India Pvt Ltd judgment of the Hon'ble High Court of Delhi applies in a case where the imports were made post issue of amending notification 93/2008-Cus dated 01.8.2008. The apparently conflicting judgments of Hon'ble High Court of Delhi and Bombay were discussed in this bench's final order 30705/2017 and it is evident that the question of law formulated by the Hon'ble High Court of Delhi in the case of Sony India Pvt Ltd was specifically with respect to retrospective application of the amending notification 93/2008-Cus insofar as the period of limitation is concerned. Where such is not the case, this bench had followed the judgment of the Hon'ble High Court of Bombay in the case of CMS Info Systems (supra) and hold that the limitation of time specified in the notification applies.

7. I find no reason to deviate from the above position and therefore hold that the impugned order is unsustainable and needs to be set aside and I do so.

8. The impugned order is set aside and the appeal filed by the revenue is allowed.

(Operative part of this order was pronounced in the open court
on conclusion of hearing)

(P.VENKATA SUBBA RAO)
MEMBER (TECHNICAL)

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