CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
REGIONAL BENCH AT HYDERABAD
Single Member Bench - Court No. – I

Customs Appeal No 30283 of 2019

(Arising out of **Order-in-Original** No.24/2017-18 (Cus) (R), dated 06.09.2017 passed by Commissioner of Customs, Nellore)

Agarwal Brothers .. **APPELLANT**
15-3-18, Gowliguda,
Hyderabad,
Telangana – 500 012.

VERSUS

Commissioner of Central Tax, Visakhapatnam - GST .. **RESPONDENT**
GST Commissionerate,
Port Area, Visakhapatnam,
Andhra Pradesh – 530035.

Appearance
Shri N D Kumar, Chartered Accountant for the Appellant.
Shri N. Bhanu Kiran, Assistant Commissioner for the Respondent.

Coram: HON'BLE Mr. P.V. SUBBA RAO, MEMBER (TECHNICAL)

FINAL ORDER No. A/30655/2019

Date of Hearing:16.10.2019
Date of Decision:16.10.2019

[Order per: P.V. SUBBA RAO]

1. This appeal is filed against the Order-in-Original No.24/2017-18 (Cus) (R), dated 06.09.2017.

2. The issue is whether in a case where goods are imported by the assessee after paying Special Additional Duty (SAD) of customs at the rate of 4% and sold thereafter under a tax/VAT invoice but where the rate of VAT applicable is nil, the appellant is entitled to refund of SAD paid under Notification No. 102/2007-CUS or otherwise. Learned Counsel for the appellant submits that in their own case with respect to the earlier appeals an order was passed in their favour holding that they are entitled to refund of SAD vide Final Order No. A/30793-30796/2019 dated 03.10.2019 relying on the order of Principal Bench of CESTAT in the case of Gazal Overseas

[2016 (332) ELT 767 (Tri-Del)]. On examining the case records, I find it so. The relevant parts of the earlier order are reproduced below:

> 3. The appellant herein imported goods on payment of appropriate duties of customs including Special Additional Duty @ 4% as applicable. At this stage, it would be profitable to mention that goods which are imported into India are chargeable to a number of duties of customs. Among these is Special Additional Duty of Customs (SAD) which is levied @ 4% on some commodities in order to provide a level playing field for domestic manufacturers. Goods which are manufactured within the country and sold suffer VAT but imported goods do not. However, if the goods are imported and thereafter sold, such second transaction being a transaction within India is chargeable to VAT, the importer is entitled to claim refund of 4% SAD paid by him in terms of Notification No. 102/2007 Cus dated 14.09.2007.
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> 4. In the present case, the appellant imported goods and sold them under VAT invoices. However no VAT was paid because the goods in question were exempted from payment of VAT. In other words, the applicable rate of VAT was 'nil'. Thereafter, the appellant filed applications for refund of SAD which were sanctioned by the Assistant Commissioner after following the procedure. The aforesaid orders of the Assistant Commissioner were reviewed by the Commissioner as it was felt that in terms of the exemption notification, refund is available only if the appropriate amount of VAT was paid. It is felt by the department that when VAT is exempt, there was no question of payment of VAT and therefore the importer cannot claim refund under Notification No. 102/2007-Cus dated 14.09.2007. It is the position of the Revenue that in the case of Dhiren Chemical Industries [2002(139)ELT 3 (SC), Hon'ble Supreme Court has held that where an exemption is extended, subject to the condition that appropriate duty has been paid on the raw material then such exemption shall not be available when the raw material is not liable to excise duty or where such duty is 'nil'. CBEC has issued a Circular No. 667/58/2002-CX dated 26.09.2002 citing the above judgement of the Hon'ble Apex Court and instructing that whenever an exemption is subject to the condition that appropriate duty of excise has been paid on the inputs, the exemption will not be available if the inputs are exempted from excise duty or such duty is 'nil'. Accordingly, the Revenue filed appeals before the First Appellate Authority who, vide the impugned orders set aside the order of the lower authorities and allowed the appeals. Aggrieved by the impugned orders, the present appeals are filed.
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> 5. I have considered the arguments of the learned A.R. and perused the records. The question to be answered is where the imported goods are sold after their import and after paying appropriate amount of VAT and such VAT is 'nil' whether the importer is eligible for such refund under Notification No. 102/2007-Cus or otherwise. The department seeks to deny this refund on the ground that in respect of exemption from central excise duty in those cases where excise duty has been paid on raw materials, the Hon'ble Supreme Court has held in the case of Dhiren Chemicals Industries (supra) that 'nil' excise duty cannot be said to be payment of excise duty. The present case is not with respect to central excise duty but with respect to payment of VAT. The very purpose of imposing the special additional duty of customs @ 4% is to provide a level playing field for Indian Manufacturers whose products suffered VAT while the imported goods do not. When the imported goods are subsequently sold, such sale brings the imported goods at par with the domestic goods because both suffer the same rate of VAT. Therefore, the SAD which is levied is refundable as per the Notification No. 102/2007 Cus. This parity between the imported goods and the domestic goods when the imported goods are sold does not change with the rate of VAT. The exemption notification nowhere specifies the rate at which VAT on the imported goods to be paid when the goods are subsequently sold. While the SAD is uniformly levied at 4%, the applicable VAT on such goods could be high say, 12% or low say 0%. The notification does not make a distinction between these cases on the basis of the rate of VAT applicable on the goods. Similarly, the rate of SAD is only 4% regardless of the exact rate of VAT applicable to the goods.
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> 6. If, for instance, the appropriate rate of VAT is 12% and imported goods suffer only 4% SAD the field is not completely even. On the other hand, if the appropriate rate of VAT is 2% and SAD is levied at 4% the domestic manufacturer gets an unfair advantage to the extent of 2%. Regardless of these anomalies, the taxation law should be applied as it is drafted regardless of consequences. The refund under Notification No. 102/2007-Cus only requires the appropriate

amount of VAT to be paid after selling the goods. It does not indicate any specific rate of VAT. Therefore if the appropriate rate of VAT is 'nil' sale of goods on payment of 'nil' rate of VAT amounts to paying appropriate amount of VAT. This issue has been decided by the Principal Bench of the Tribunal in the case of Gazal Overseas Vs CC New Delhi [2016(332)ELT 767(Tri-Del)], para 4 of which is reproduced below.

"4. We have considered the contention of ld. DR and also perused the refund papers. Notification No. 102/2007, dated 14-9- 2007 as amended allowed refund of SAD subject to the condition that "the importer shall pay appropriate sales tax or VAT, as the case may be." In the present case, the appropriate sales tax or VAT being NIL the appellants cannot be said to have violated the said conditions of the said notification inasmuch as it cannot be said that they have not paid appropriate sales tax/VAT. In this regard, it is seen that vide Circular No. 6/2008, dated 28-4-2008 C.B.E. & C. in para 5.3 thereof clarified as under :

"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 happen 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".

It is evident from the above clarification of C.B.E. & C. that even if VAT/Sales tax was less than 4%, the appellant was entitled to refund of SAD which was 4% so long as VAT/sales tax was paid. In other words, so long as appropriate VAT/Sales tax was paid, SAD refund was admissible even if the appropriate sales tax/VAT was less than SAD; if the sales tax/VAT was NIL, so be it. In other words what is required in terms of the said notification is payment of appropriate sales tax/VAT regardless of the rate thereof. It logically follows that if the appropriate rate of sales tax/VAT was NIL then the appropriate sales tax/VAT paid will also be NIL."

This decision was followed by the Tribunal Chennai in the case of Malhotra Imports & Exports Corporation Vs CC Chennai [2018(359)ELT 535(Tri-Chennai)].

7. In view of the above, I find that the issue is no longer res integra and refund of SAD under Notification No. 102/2007-Cus is available even if the appropriate rate of VAT is 'nil'.

8. In view of the above appeals are allowed and the impugned orders are asset aside with consequential relief if any.

3. As a decision has already been taken on identical issue with respect to the same assessee on the same, I find no reason to deviate from the same. Accordingly, appeal is allowed and the impugned order is set aside with consequential relief.

(Order dictated and pronounced in open court)

(P.VENKATA SUBBA RAO)
MEMBER (TECHNICAL)

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