CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL HYDERABAD

REGIONAL BENCH - COURT NO. – I

Customs Appeal No. 30305 of 2018
(Arising out of **Order-in-Appeal** No.VIZ-CUSTM-000-APP-057-17-18 dated 31.01.2018 passed by Commissioner of Central Tax & Customs (Appeals), Guntur)

M/s Olam Agro India Pvt Ltd., .. **APPELLANT**
10-50-58/1, 4th Floor,
R K Estates, Waltair Main Raod,
Ram Nagar, Visakhapatnam,
Andhra Pradesh – 530 002.

VERSUS

Commissioner of Customs Visakhapatnam– Customs .. **RESPONDENT**
GST Commissionerate,
Port Area, Visakhapatnam,
Andhra Pradesh – 530 035.

APPEARANCE:
Shri N.K. Gupta, Advocate for the Appellant.
Shri A Rangadham, Authorised Representative for the Respondent.

CORAM: **HON'BLE Mr. A.K. JYOTISHI, MEMBER (TECHNICAL)**
HON'BLE Mr. ANGAD PRASAD, MEMBER (JUDICIAL)

FINAL ORDER No. A/30010/2025

Date of Hearing:22.11.2024
Date of Decision:15.01.2025

[ORDER PER: A.K. JYOTISHI]

M/s Olam Agro India Pvt Ltd., (hereinafter referred to as appellant) are in appeal against the Order-in-Appeal No. CUSTM-000-APP-057-17-18 dated 31.01.2018 (impugned order). Vide the said impugned order, the Commissioner (Appeals) rejected their appeal and upheld the impugned Order-in-Original No. 372/2017 dated 24.07.2017 whereby refund claims were rejected by Original Refund Sanctioning Authority.

2. The facts, in brief, are that the appellants had imported 'raw cashew nuts' in shell from the countries like Mozambique, Tanzania and Mali under different Bill of Entries and at the time of clearance, interalia, they paid 4% SAD. Thereafter, they filed for refund in respect of said payment of SAD in

accordance with Notification No. 102/2007-Cus, dated 14.09.2007. They have also informed that from the imported raw cashew nuts, they manufactured cashew kernel and sold to various vendors, on which applicable VAT/CST was also paid. However, on going through the documents submitted along with the refund claims, it was observed by the Department that the description of the imported goods and sold goods were not tallying and therefore relying on the CBEC Circular No. 15/2010 dated 29.06.2010, a show cause notice was issued proposing denial of refund and subsequently vide Order-in-Original dated 24.07.2017 the refund was rejected.

3. It is an admitted fact that the appellants were engaged in two activities namely import of raw cashew nuts and selling it as such and also import of raw cashew nut and converting it into cashew kernel and selling manufactured cashew kernel. While, in the case of first category, the refund of SAD was fully allowed by Department, whereas, in the case of second category, it was felt that as raw cashew nut and cashew kernel are classifiable under two different headings namely 08013100 and 08013210/ 08013220 and since the imported goods and goods sold after processing/manufacturing were not the same, the conditions of Notification No. 102/2007-Cus were not met and in view of the same, the refunds were rejected.

4. In the impugned order, Commissioner (Appeals) has examined the provisions of Notification No. 102/2007-Cus and also Circular No. 15/2010-Cus dated 29.06.2010 and Circular No. 34/2010-Cus dated 15.09.2010 and came to the conclusion based on data of cashew nut processing mainly available on internet site of UNIDO, that the cashew nut imported was being processed through various stages to obtain the end product i.e. cashew

kernel and therefore, it would tantamount to processing. It is also an admitted fact that what was imported was inedible cashew nut and after that there has been a value addition to the imported raw cashew nut to make it fit for instant human consumption. Therefore, essentially the goods sold were not the same good as imported and therefore were not sold as such and thus the appellant would not be eligible for refund.

5. Learned Advocate has mainly contested on the grounds that refund is permissible even when process of manufacture is involved. He has relied on the judgment in the case of Vijirom Chem Pvt Ltd., Vs CC, Bangalore [2006 (199) ELT 751 (Tri-Bang)], which was in respect of Notification No. 56/98 and also in the case of the judgment of Hon'ble High Court of Karnataka in the case of Lipton India Ltd., Vs State of Karnataka [1994 (095) STC 0225 W (KAR)]. He also emphasises that since the word "as such" has not been used in the exemption Notification No. 102/2007-Cus, a liberal interpretation has to be given and therefore the refund should be allowed even where the manufacturing process has been carried out, which does not change the nature of the product. In this regard, he has relied on the judgment of Hon'ble Telangana and Andhra Pradesh High Court in the case of Commissioner of Customs Vs Gayatri Timbers Pvt Ltd., [2017 (10) TMI 719] where, interalia, the Hon'ble High Court held that the requirement to sell the imported good as such in the local market is not one of the condition stipulated in exemption notification. He also clarifies that though there is a change in sub-heading, but the heading of both imported as well as the item sold are one and the same i.e. 0801. He has give details as to the nature of processes undertaken for converting raw cashew nut into cashew kernel. The conversion process involves steaming of nut shell cashew under pressure and thereafter subjected to shelling, drying and pealing in order to make cashew edible. He has also relied on the judgment in the case of

Gayatri Timbers Pvt Ltd., where vide para 24, the Hon'ble High Court had observed that "as a matter of fact Circular No. 15/2010 dated 29.06.2010 has virtually amended the exemption notification. It was also stated that by a Circular / instruction, an exemption notification issued in exercise of Statutory Authority, cannot be amended". Hence, the reliance placed upon the Circular is misplaced and not tenable. Further, he submits that the Department is providing clarification beyond its jurisdiction, and therefore in view of the judgment of Hon'ble High Court of Telangana, the refund is admissible even when there is a change in CTH and the imported goods are not sold as such and that the product does not lose its essential character.

6. Learned Advocate has also relied, interalia, on the order passed by Co-ordinate Bench in their own case [2018 TMI 1099 (Cestat-Chennai)] wherein the Bench held that they would be eligible for refund.

7. Per contra, Learned AR, apart from reiterating the grounds taken in the impugned order, submits that since the appellants are seeking notificational benefit, it has to be strictly interpreted in view of the judgment of Hon'ble Supreme Court in the case of Commissioner of Customs (Import), Mumbai Vs M/s Dilip Kumar and Company & Others [2018 (7) TMI 1826 – SC]. He has also relied on the following judgments in support that the benefit of Notification No. 102/2007-Cus would not be admissible in the facts of the case:

i) Proflex System Vs Commissioner of Customs [2017 (3) TMI 216 – Gujarat HC] as upheld by Supreme Court [2017 (8) TMI 93 – SC]

ii) Seven Hills Solvents Pvt Ltd., Vs CCT, Visakhapatnam [2018 (7) TMI 350 Cestat-Hyderabad)]

8. Learned AR also goes to a great length in explaining that considering the manufacturing/processing involved in converting raw cashew nut into edible kernel and the fact that they are classifiable under two different sub-headings, it cannot be said that they are one and the same. In fact, the Hon'ble Supreme Court in the case of Vijayalaxmi Cashew Company and Others Vs Deputy Commercial Tax Officer and Another (and other appeals) [1995 (12) TMI 295 (SC)] has, interalia, held that raw cashew nuts and edible kernels are not same goods and that there is a transformation of goods. In the case of Dinod Cashew Corporation Vs The Deputy Commercial Tax Officer and Another [1984 (12) TMI 290 – Madras HC], after going through the detailed process for obtaining graded cashew nut kernel, interalia, observed that the graded cashew nut kernel is a new article which is also being commercially recognised as being different from the cashew nut. Learned AR also points out that the decision of the CESTAT relied upon by the appellant in their own case is "per-incuriam", as it did not take into account the decision of Apex Court in the case of Vijaya Laxmi Cashew Company and Others (supra).

9. Heard both the sides and perused the records.

10. The issue to be decided is whether in the given facts of the case, the appellants were entitled to get refund of the SAD paid on the imported goods or otherwise. The admitted facts in the case are that they have imported "raw cashew nut/cashew nuts in shell" and they have manufactured/processed the same to obtain "cashew kernels" and these were sold on payment of applicable VAT/CST. It is also an admitted position that wherever they have imported cashew nut and sold as such, they have been allowed the refund of SAD. The main ground taken by the Department is that in view of Notification No. 102/2007-Cus read with Circular No.

15/2010 dated 29.06.2010, since the imported goods have not been sold as such and were actually sold only after carrying out certain process and therefore conditions of the notification is not met. Reference has also made to Circular No. 34/2010 dated 15.09.2010 which made it clear that condition regarding payment of state VAT on imported inputs cannot be fulfilled in a situation where inputs are consumed and not sold as such.

11. Before proceeding further, we need to peruse the Notification No. 102/2007-Cus, which is reproduced below for the ease of reference:

i) **Notification No. 102/2007-Customs Dated 14.09.2007**: Special CVD – Exemption to all goods when imported for subsequent sale.

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; (emphasis supplied)

(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; (emphasis supplied)

(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; (emphasis supplied)

(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; (emphasis supplied)

(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. (emphasis supplied)

On perusal of the notification, it is observed that there are certain conditions which are required to be satisfied for getting refund. On perusal of these conditions it would indicate that time and again reference has been made to "said goods", which in this context would indicate 'imported goods'. The documents required also, interalia, requires them to produce documents evidencing payment of appropriate sales tax or VAT as the case may be by the importer **"on sale of such imported goods" (emphasis supplied).** Therefore, notification is exempting all the goods when they are imported for subsequent sale and subject to following various conditions including payment of VAT in respect of said goods. Therefore, if the wordings used in notification are read conjointly, it would be obvious that the notification is applicable only when the imported goods itself is sold and at the time of said sale appropriate sales tax are also paid. Admittedly, the word "as such" has not been mentioned in the notification, but strict interpretation of this notification having regard to the wordings used would indicate that the exemption is available only when the goods are sold as such and not after certain processing. The circular referred in show cause notice or impugned order has only clarified this position, which is otherwise apparent on plain reading of notification itself. This was in the backdrop of some fraudulent attempt to claim refund by manipulating the facts of the imported goods being sold as such and the modus operandi was brought to the notice of the field formations highlighting that there is distinguished difference in timber logs and "sole/ cut logs". Similarly, Circular No. 34/2010 also clarifies certain position with regard to Notification No. 102/2007, which are also otherwise apparent on plain reading. Therefore, Department has not solely relied on circulars per se but has analysed the provisions contained in the relevant notification under which refund has been claimed by the appellant.

12. Coming to the judgments relied upon by the Learned Advocate, We find that in the order in their own case by the CESTAT Co-ordinate Bench, Chennai, the Tribunal has mainly relied on M/s Kanam Latex Industries (P) Ltd., Final Order No. 40860-40861/2018 dated 16.03.2018 and Anothers as also on judgment in the case of Milak Brothers Vs Union of India [1990 (10) TMI 74 (SC)] and also observed that both cashew nut and cashew kernels are classified under the same headings 0801. As pointed out by Learned AR, this judgment has not taken into consideration, the judgment of the Hon'ble Supreme Court in the case of Vijaya Laxmi Cashew Company (supra), where a clear distinction has been made between raw cashew and cashew kernels. In Milak Brothers case, which appellants are relying to support their argument that both imported goods and sold goods are one and the same. The facts and issues considered are different. Hon'ble Supreme Court was examining the export tariff and submission of Revenue that due to wider latitude in Export Tariff, the entry was capable of taking both edible as well as oil seed variety of ground nut. The Hon'ble Supreme Court upheld the stand of the Revenue. In Agarwal Timber Pvt Ltd., case, in a given factual matrix, it was held that cutting of log/timber into smaller pieces does not bring into account any new product nor identity of original timber has underwent any fundamental change. They also took into account that as per the Statutory conditions, the importer/transporter cannot carry the logs of length more than 40 feet and therefore having regards to these submissions,

a view was taken. These facts are clearly distinguished in the present appeal.

13. The Learned Advocate for the appellant has also relied on the Hon'ble Supreme Court judgment in the case of State of Karnataka Vs Azad Coach Builders Pvt Ltd., [2010 (9) TMI 879 (SC)]. However, on going through the cited case law, it is noticed that Hon'ble Supreme Court was examining the scope of Section 5(3) of the CST Act inrelation to whether the transactions between the assessee is inextricably connected with the export of the goods or otherwise and held that when the transaction between the assessee and the exporter, and the transaction between the exporter and foreign buyer are inextricably connected with each other, the same goods theory has no application. This is clearly distinguished as the facts are quite different in the present appeal. In fact, in the same judgment, they have also referred to the judgment in the case of Vijaya Laxmi Cashew Company that in the said case, based on the facts brought to the notice of the Court it came to the conclusion that the kernels were not same as a raw cashews purchased by dealers and what was exported were edible kernels and were purchased for the purpose of raw cashew needs.

14. On the other hand, we find that the ratio of Proflex System Vs CC (supra), which considered various judgments including Agarwal Timbers Pvt Ltd., Vijirom Chem Pvt Ltd., etc., are applicable. Hence, the Hon'ble High Court after going through the facts of the case, where the identical notification i.e. 102/2007-Cus was involved, held at para 6.1 that for claiming refund under said notification, the importer has to specify that Value Added Tax/ Service Tax as the case may be has been paid on the goods imported and only those goods imported are sold and the VAT is paid

on such imported goods. Reliance is also placed on Seven Hills Solvents Pvt Ltd., Vs CCT (supra) by CESTAT, Hyderabad.

15. Learned Advocate has also tried to raise certain additional issues regarding liberal interpretation and that State cannot be enriched at the cost of manufacturers by way of taxation etc. We do not find these arguments tenable, in view of the fact in the scheme of things, as is also apparent from the Hon’ble Finance Minister’s speech before the introduction of the notification, that the SAD was intended to be imposed for level playing field between importer and local seller. Therefore, when the goods were imported for re-sale on which the VAT has been paid, earlier CVD/SAD collected at the time of import were returned by way of refund, to avoid double taxation. However, when the same were used in manufacture and then sold, then the manufacturer could have taken the Cenvat Credit of CVD paid at import stage and utilise it for payment of duty at the time of sale of manufactured goods out of such imported goods. In the present case, as discussed in foregoing paras, imported goods and the goods sold are clearly distinguishable on various grounds and in fact are also exempted and therefore the Cenvat Credit could not have been availed in terms of the provisions under Cenvat Credit Rules and appellants are therefore feeling aggrieved. However, a notification has to be interpreted strictly as held in catena of judgments of Hon’ble Supreme Court and in fact in the case of Dilip Kumar and Company (supra), it was, interalia, observed that in case there is any ambiguity in the notification, the benefit should go to the Revenue. In this case, though the word “as such” has not been used in Notification No. 102/2007, the reading of the detail notification would collectively indicate that it was only intended for goods sold as such and not after manufacture/process.

16. Therefore, relying on the judgment of Dilip Kumar (supra), we find that this notification is an exemption notification and it has to be construed strictly and in case of any ambiguity, it should be in favour of Revenue. We also find that the ratio of judgment relied upon by the Department in the case of M/s Proflex System (supra), which was further upheld by Supreme Court, are applicable. Therefore, in the given factual matrix, we find that the appellant would not be entitled for the benefit of notification no. 102/2007-cus and as a consequence would not be entitled for refund. Therefore, we do not find that there is any infirmity in the impugned order, and hence no interference with the same is required.

17. Appeal dismissed.

(Order Pronounced in open court on 15.01.2025)

(A.K. JYOTISHI)
MEMBER (TECHNICAL)

(ANGAD PRASAD)
MEMBER (JUDICIAL)

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