IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, KOLKATA

EASTERN ZONAL BENCH: KOLKATA

Misc. Application No. 76233/2018 &
Appeal Nos.C/76229 & 76230/2017

(Arising out of Order-in-Appeal No. Kol/Cus/Port/AA/222-224/2017 dated 27.03.2017 passed by the Commissioner of Customs (Appeals), Kolkata)

Commissioner of Customs (Port), West Bengal, Kolkata

Applicant (s)/Appellant (s)

Vs.

M/s Enterprise International Ltd. Respondent (s)

Appearance:

Shri S.Guha, AC(AR) for the Appellant (s)
Shri S.K.Mehta, Advocate for the Respondent (s)

CORAM:
Hon'ble SHRI P.K.CHOUDHARY, Member (Judicial)
Hon'ble SHRI Bijay Kumar, Member (Technical)

Date of Hearing:- 06.07.2018

Date of Pronouncement:20.09.2018

ORDER NO.FO/76658-76659/2018

Per Shri P.K.Choudhary,

Both the appeals have been filed by the Revenue against Order-in-Appeal No. Kol/Cus/Port/AA/222-224/2017 dated 27.03.2017 passed by the Commissioner of Customs (Appeals), Kolkata.

2. Ld. DR reiterates the grounds of appeal.

3. Ld. Counsel appearing for the respondent assessee submits that the subject appeal relates to the applicability of notification no. 30 of 2004 as amended by notification no 34 of 2015 and 37 of 2015 on imported goods which has been decided by this Hon'ble Tribunal herein in favour of the respondent and against the Revenue vide order No. So/75461-75463/2016 dated 02.08.2018 (page 11 of the misc application).

4. Ld. Counsel further submits that the Revenue preferred an appeal in the Hon'ble Supreme Court. On 24.0.2017 the Hon'ble Supreme Court after considering all the relevant judgments (including HLG Trading Vs. Union of India decided on 30.10.2015 by Madras High Court) only admitted the appeal and no stay was granted. Order for issue of notice was also not made.

5. Ld. Counsel also submits that the Judgement of Madras High Court in HLG Trading Co. (331 ELT Page 561) (Madras) was delivered on 30.10.2015 when Review application of SRF was pending in Supreme Court. It dealt with Notification No. 30/2004 and vires of amendments. There is no discussion as to how amendments changed the scope of the notification No. 30/2004 or the judgment of SRF Ltd. There is no finding that notification No. 34 of 2015 or 37 of 2015 changed the course of notification no. 30 /2004 in the judgment.

6. He further submits that on the contrary this judgement of Madras High Court was overruled by the Supreme Court when the Supreme Court dismissed the appeal of the Revenue in the appellant's own case which arose from the order passed by CESTAT, Chennai Ratio in Prashray Overseas and HLG are same. In Prashray Overseas benefit of notification no. 30 of 2004 was disallowed on import. Both the judgments stood overruled and set at naught when the Supreme Court dismissed the appeal of the Revenue in the

respondent's own case by dismissing the appeal preferred there from. On facts and under the circumstances, it is improper on the part of the revenue to cite an overruled judgment. With this dismissal the issue between the parties became final and/or resjudicata and the principles of stare decisis became applicable.

It is his submission that Review application for SRF Ltd. was dismissed by the Supreme Court on 15.07.2016. This dismissal also overrules the judgement in HLG Trading Co delivered on 30.10.2015. HLG was delivered considering admission of Review Application which was pending at that time. The conclusion in the judgment that importer has to fulfil conditions of non availment of credit is contra SRF Ltd.

7. Ld. Counsel submits that the Hon'ble Supreme Court has admitted appeal from HLG Trading and Prashray Overseas Pvt. Ltd.

When the Supreme Court dismissed the appeal of the Revenue in the respondents own case (page 32). It gave finality to the order of the Tribunal in the respondent's own case. Therefore HLG Trading and Prashray Overseas laying same ratio expressly stands overruled.

8. Heard both sides and perused the appeal records.

9. We find that the amendment made by notification No. 34 of 2015 provides a condition qua payment of duty on inputs and non-availment of credit in manufacturing. Therefore, the sweep of the judgment of SRF Ltd. is not affected. The Notification No. 37 of 2015 further relaxes the condition that the nil payment of duty on input would also qualify as payment of duty.

10. We find that the Commissioner (Appeal) has considered the judgement of SRF Ltd. and the notification No. 34 of 2015 and 37 of 2015 as well as

sweep of the judgement of SRF Ltd. vis-a-vis amendments and dealt with the applicability of the amendments in paragraph 3,4,5,6,7,8 and 9 of the order under appeal.

11. We find that this Hon'ble Tribunal dismissed several appeals of the Revenue on 27.11.2017 and 21.03.2018 against the respondent by following the previous orders of the Tribunal.

(i) Order No. SO/75394/FO/75964 dated 27/11/2017

(ii) Order No. SO/75413-75428/FO 75543-75558/2018 dated 21.03.2018

No appeal has been preferred against the above two orders and limitation period has expired. The orders have attained finality.

12. We also find that the Commissioner (Appeal) has followed the order passed by this Tribunal in the case of the respondent in which the benefit of notification No. 30 of 2004, as amended by notification 34 of 2007 and 37 of 2015 were extended to the respondent. The Commissioner (Appeal) held in paragraph 8 and 9 as follows.

> *"8. Following the judgment of AIDEK Tourism Pvt. Ltd. Hon'ble Supreme Court delivered another judgment on the same grounds in case of SRF Ltd. Reported in 2015 (318) ELT 607 (S.C.). In the case of SRF Ltd. Hon'ble Apex Court further observed that the conditions which are not applicable to the importer and which the importer cannot fulfil would not be applied in case of the imported goods.*
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> *9. Therefore, I observe that both the amended Notifications being No. 34/2015 C.E. and 37/2015 C.E. in no manner restrict or impede the judgment of Hon'ble Supreme Court in SRF Ltd. It was held by Hon'ble Court that the condition which cannot be complied with would not be made applicable to the imported goods. The importer has satisfied all the conditions of the amended notifications in terms of the view taken by several*

judicial pronouncements by Hon'ble Apex Court. Hon'ble CESTAT in its recent final orders bearing No. FO/A/75702-75704/2016 dated 02.08.2016 involving identical issue in appellant's own case also affirmed that the benefit of CVD exemption is to be extended to importer also in this case CESTAT has held as under:

"1. These Stay applications and Appeal have been filed by the Revenue against OIA dated 29.10.2015 and 14.01.2016.

2. Sri S. K. Naskar, A.C. (AR) argued that First Appellate Authority has allowed the appeals by relying upon order of Hon'ble Apex Court in SRF Ltd. Vs. Commissioner of Customs, Chennai (2015 (318) ELT. 607 (S.C.)]. That department has filed a review application in Hon'ble Supreme Court against the said order, which is pending.

3. Sri S. K. Mehta (Advocate) appearing on behalf of the respondents argued that Hon'ble Apex Court by an order dated 15.07.2016 has dismissed the Review Petition No. 3441/ 2015 in Civil Appeal No. 1623/2009 filed by Revenue. In the case of M/s SRF Ltd. (Supra) Advocate also relied upon the case law of M/s Chemsilk Commerce Pvt. Ltd. Shri Aditya Sarda Vs. CC (Port), Kolkata (2015) (12) TMI 1000-CESTAT, Kolkata] under which similar benefit has been extended to the appellant.

4. After hearing both sides and perusing the case records, it is observed that only ground under which Revenue filed this appeal is that department has filed a review petition in the Apex Court in the case of M/s ARF Ltd. (Supra) which is pending in the Apex Court. In view of dismissal of the review petition of the department by Apex Court by order dated 15.07.2016, appeals filed by the department are not sustainable. The issue has also been decided by this bench in the case of M/s Chemsilk Commerce Pvt. Ltd., Shri Aditya Sarda- Vs. CC (Port), Kolkata (Supra). Accordingly, appeals filed by the Revenue are dismissed and stay applications also stand disposed of."

13. In view of the above discussions, we do not find any reasons to interfere with the impugned order and accordingly, the same is sustained. The appeal filed by the appellant Revenue are dismissed. Miscellaneous Application also gets disposed of.

(Pronounced in the open court on 20.09.2018)

S/d. S/d.

(BIJAY KUMAR) **(P. K. CHOWDHARY)**
MEMBER (TECHNICAL) **MEMBER (JUDICIAL)**

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