

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE
TRIBUNAL, KOLKATA
EASTERN ZONAL BENCH : KOLKATA
REGIONAL BENCH - COURT NO.1**

Customs Appeal No.76669 of 2014

(Arising out of Order-in-Appeal No.844-856/Pat/Cus/Appeal/2014 dated 24.09.2014 passed by Commissioner(Appeals), Customs, Central Excise & Service Tax, Patna.)

M/s. Katyal Metal Agencies

(9611/13, Sadar Thana Road, Paharganj, New Delhi-55.)

...Appellant

VERSUS

Commissioner of Customs, Patna

.....Respondent

(Central Revenue Building, Veer Chand Patel Path, Patna-800001.)

WITH

(i) Customs Appeal No.76670 of 2014 (M/s. Katyal Metal Agencies vs. Commissioner of Customs, Patna); (ii) Customs Appeal No.76671 of 2014 (M/s. Katyal Metal Agencies vs. Commissioner of Customs, Patna); (iii) Customs Appeal No.76672 of 2014 (M/s. Katyal Metal Agencies vs. Commissioner of Customs, Patna); (iv) Customs Appeal No.76673 of 2014 (M/s. Katyal Metal Agencies vs. Commissioner of Customs, Patna); (v) Customs Appeal No.76674 of 2014 (M/s. Katyal Metal Agencies vs. Commissioner of Customs, Patna); (vi) Customs Appeal No.76675 of 2014 (M/s. Katyal Metal Agencies vs. Commissioner of Customs, Patna); (vii) Customs Appeal No.76676 of 2014 (M/s. Katyal Metal Agencies vs. Commissioner of Customs, Patna); (viii) Customs Appeal No.76677 of 2014 (M/s. Katyal Metal Agencies vs. Commissioner of Customs, Patna); (ix) Customs Appeal No.76678 of 2014 (M/s. Katyal Metal Agencies vs. Commissioner of Customs, Patna); (x) Customs Appeal No.76679 of 2014 (M/s. Katyal Metal Agencies vs. Commissioner of Customs, Patna); (xi) Customs Appeal No.76680 of 2014 (M/s. Katyal Metal Agencies vs. Commissioner of Customs, Patna); (xii) Customs Appeal No.76681 of 2014 (M/s. Katyal Metal Agencies vs. Commissioner of Customs, Patna);

(Arising out of Order-in-Appeal No.844-856/Pat/Cus/Appeal/2014 dated 24.09.2014 passed by Commissioner(Appeals), Customs, Central Excise & Service Tax, Patna.)

APPEARANCE

Shri N.K.Sharma & Shri G.C. Saini, both Advocates for the Appellant (s)

Shri S.Debnath, Authorized Representative for the Revenue

**CORAM: HON'BLE SHRI ASHOK JINDAL, MEMBER(JUDICIAL)
HON'BLE SHRI RAJEEV TANDON, MEMBER(TECHNICAL)
FINAL ORDER NO. 77350-77362/2023**

DATE OF HEARING : 16 October 2023

DATE OF DECISION : 16 October 2023

Per : ASHOK JINDAL :

This is second round of litigation.

2. The facts of the case are that the appellant is an importer and imported shoes. At the time of importation, the appellant paid the appropriate duty. After importation, the appellant filed various refund claims on 08.06.2010 under Notification No.102/2007 dated 14.09.2007 for refund of SAD paid at the time of importation. Pursuant to the refund claims, a show cause notice dated 18.11.2010 was issued to the appellant alleging that as per Para 2(d) of the Notification No.102/2007-CUS dated 14.09.2007, the importer shall pay on sale of the said goods appropriate Sales Tax/VAT as the case may be. Therefore, the appellant was required to pay appropriate Sales Tax/VAT along with payment of Additional Customs Duty to be eligible for the sanction of the refund under the said Notification. As the appellant did not pay VAT/Sales Tax while selling the goods in the domestic market, therefore, why their refund claim would not be rejected? The adjudicating authority initially rejected their refund claim, but the Ld.Commissioner(Appeals) vide order dated 18.04.2011 allowed the refund claim of the appellant. The Revenue challenged the said order before this Tribunal and this Tribunal vide order dated 25.03.2012 dismissed the stay application filed by the Revenue. The appellant again approached to the adjudicating authority for sanctioning of the refund claim. The said refund claims were rejected by the adjudicating authority as the said refund claims have not been filed within time as prescribed under Notification No.102/2007-CUS dated 14.09.2007. The said order was challenged before the Ld.Commissioner(Appeals) and by way of the impugned order, the Ld.Commissioner(Appeals) rejected their appeals on two grounds – (A) on merit, that they are not entitled for the refund claim as the same has not fulfilled the conditions as

stipulated in the Notification No.102/2007 dated 14.09.2007 and (B) their appeal is barred by limitation as they have filed the appeal beyond the period of limitation as prescribed under section 128 of the Customs Act, 1962. Against the said order, the appellant is before us.

3. The Ld.Counsel appearing on behalf of the appellant submits that in the earlier proceedings the show cause notice was issued to the appellant on 18.11.2010 alleging that as the appellant has not paid Sales Tax/VAT, therefore, they are not entitled for refund claim of SAD in terms of Notification No.102/2007 dated 14.09.2007 and it was not alleged in the show cause notice that the refund claims filed by the appellant are time barred. Therefore, the adjudicating authority cannot go beyond the allegation in the show cause notice in subsequent proceedings. In that circumstances, the impugned order is to be set aside.

4. He further submitted that the Ld.Commissioner(Appeals) has rejected their appeal holding that the same is barred by limitation as the adjudication order dated 31.03.2014, dispatched through Speed Post on 02.04.2014. In response to these orders, a letter dated 09.04.2014 has been received by the Assistant Commissioner from the appellant informing that due to the health problem their authorized person is not coming to office to collect the cheque. It proves that the adjudication order has been received by the appellant before 09.04.2014 and the appeal was filed before the Ld.Commissioner(Appeals) on 19.08.2014, which is highly time barred in terms of Section 128 of the Customs Act, 1962.

5. It is his submission that the appellant sought reply under the Right to Information Act (RTI). In reply to the RTI, it has been stated that the order has been received by Shri Puroshattam Giri on 01.04.2014, but the Ld.Commissioner(Appeals) recorded that the order was dispatched on 02.04.2014, therefore, there is contrary stand of the department itself. It is further contended by the appellant that the letter which has been discussed by the Ld.Commissioner in the impugned order is dated 09.06.2014 and the

Ld.Commissioner(Appeals) has wrongly recorded as 09.04.2014. Therefore, the Ld.Commissioner(Appeals) has wrongly recorded the date of letter of the appellant as 09.04.2014 and found that the appeals are filed beyond the period of limitation.. In fact the appellant has written letter on 09.06.2014 and to that effect the appellant has filed an affidavit stating that they have received the impugned order on 09.06.2014 and they have filed appeal before the Ld.Commissiner(Appeals) on 19.08.2014, which is well within the condonable period by the Ld.Commissioner(Appeals). Therefore, on that ground also the appeal cannot be dismissed.

6. On the other hand, the Ld.AR for the department supported the impugned order.

7. Heard the parties, considered the submissions.

8. We find that in earlier round of litigation on merits this Tribunal dismissed the stay applications filed by the revenue. The operative part of the order is extracted below:-

"4. We find that the Special CVD is as per sub-section 5 of Section 3 of CETA, 1985. The Special CVD is levied for counter-balancing for Sales Tax/VAT. Undisputedly, the Sales Tax/VAT is exempted in this case. In this regard, learned Commissioner(Appeals) has found that the element of CVD is a tax in lieu of Sales Tax/VAT and that once the Importer fulfills the obligation of paying both the CVD and the Sales Tax/VAT, then he is entitled to refund of the CVD he had paid. The relevant portion of the Commissioner(Appeals') Order is reproduced hereunder:-

"On my observation of the facts o the case, I have come to the conclusion that the element of CVD is a tax in lieu of Sales Tax/VAT and that once the Importer fulfills the obligation of paying both the CVD and the Sales Tax/VAT, then he is entitled to refund of the CVD he had paid. Now in this peculiar circumstance the fact remains that there is no Sales Tax on the Item (subject goods) imported as the same has come under the list of exempted List of Commodities, inserted vide Notification No.F3(77)Fin.(T&E) 2005-06/1424-1433 Kha dated 14-03-2006 w.e.f. 14th March, 2006 of the First Schedule to Delhi VAT

(Section 6). It therefore goes without saying that when the subject goods is exempted from payment of Sales Tax there is no question of asking him whether he has paid the Sales Tax. The very fact that he has produced the Exemption Notification is sufficient enough to admit the refund claim. In other word, when the subject goods is exempted from Sales Tax, it necessary follows that he is not required to pay the CVD. When the item imported is exempted from Sales Tax/VAT, the same should have also been exempted from CVD. This would have simplified the matter."

5. It is pertinent to mention here that what is abated cannot be taken away indirectly. In these circumstances, we do not find any reason to stay the operation of the impugned Orders-in-Appeal. Stay Petitions are dismissed."

9. As we find that show cause notice dated 18.11.2010 alleging that the appellant is not entitled for refund claim as they have not paid Sales Tax/VAT and on merits this Tribunal has decided the issue in favour of the appellant, but while sanctioning the refund claim in second round of litigation, the adjudicating authority held that the refund claims are barred by limitation. The said rejection of refund claim is not sustainable in the eyes of law as the same has not been alleged in the show cause notice, when it was issued after filing the refund applications by the appellant.

10. Further, the Ld.Commissioner(Appeals) dismissed the appeal filed by the appellant on merits as well as on limitation.

11. On limitation the Ld.Commissioner(Appeals) observed that the adjudication order was dispatched on 02.04.2014 through Speed Post whereas in reply to the RTI, it is stated by the department that the adjudication order has been received by one Shri Puroshattam Giri on 01.04.2014. In that circumstances, there is contrary observations made by the Ld.Commissioner(Appeals). Moreover, the Ld.Commissioner(Appeals) mentioned the letter dated 09.06.2014 as 09.04.2014 and to that effect the appellant has filed an affidavit before this Tribunal stating that Shri Puroshattam Giri neither an employee of

the appellant nor the appellant has authorized any person to collect the adjudication order and that affidavit is filed on oath, therefore, the benefit of doubt goes in favour of the appellant that they have received the adjudication order on 09.06.2014 as claimed and against the said order the appeal has been filed before the Ld.Commissioner(Appeals) on 19.08.2014, which is well within the condonable period in terms of Section 28 of the Customs Act, 1962. Therefore, we hold that the appeal filed by the appellant before the Ld.Commissioner(Appeals) is not time barred. On that ground the appellant succeeds.

12. We further find that the Ld.Commissioner(Appeals) has held that the refund claims are not maintainable on merits, as the same are time barred. We find that there is no allegation in the show cause notice issued to the appellant that why not the refund claims be rejected as time barred.

13. In that circumstances, the adjudicating authority as well as the Ld.Commissioner(Appeals) has gone beyond the allegation in the show cause notice, which is not permissible in law, therefore, on merit also, the refund claim cannot be rejected as time barred as there is no allegation in the show cause notice. In that circumstances, on this ground also the appeal succeeds.

In view of the above observation, we set aside the impugned orders and allow the appeals filed by the appellant with consequential relief.

(Operative part of the order was pronounced in the open Court.)

Sd/
(ASHOK JINDAL)
MEMBER (JUDICIAL)

Sd/
(RAJEEV TANDON)
MEMBER (TECHNICAL)