

**IN THE CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL
WEST ZONAL BENCH AT MUMBAI**

Appeal No. C/86792, 86795/2018

(Arising out Order-in- Appeal No. MUM-CUSTOM-SMP-
343 & 344-17-18 dated 23.03.2018 passed by the
Commissioner of Customs (Appeals), Mumbai I)

M/s. Divi's Laboratories Ltd.

Appellant

Vs.

Commissioner of Customs (Import-II),
Mumbai

Respondent

Appearance:

Shri P. Dwarkanath, Consultant for the appellant
Shri R. Kumar, (AR) for the respondent

CORAM:

Hon'ble Dr. Suwendu Kumar Pati, Member (Judicial)

Date of hearing : 31.07.2018

Date of decision : 03.08.2018

O R D E R No: A/87032-87033 / 2018

Refusal of refund claim by the Asstt. Commissioner of Customs (Import), Mumbai on ground of jurisdiction being held proper by the Commissioner of Customs (Appeals), NCH, Mumbai is under challenge before this appellate Tribunal in this appeal without complying to their direction to resubmit the claim application, returned by the Asst. Commissioner, before the appropriate jurisdictional customs authorities.

2. The fact in nutshell is that appellant is a SEZ unit manufacturing bulk drugs in which methylene chloride is being used. It imported two consignments through Mumbai port, filed appropriate bills of entry dated 23.10.2013 and 12.12.2013 for warehousing, transit warehoused goods to their SEZ unit situated in Vishakhapatnam, Andhra Pradesh, rewarehoused the same, filed bill of entry again in their SEZ unit for home consumption before the specified officer who assessed the same, noted shortage of goods imported and sent the shipping bill with such noting to the port of importation i.e. Mumbai. On the basis of rewarehousing certificate issued, the Asst. Commissioner- Import Bond of the office of Commissioner of Customs- Import Mumbai issued notice under Section 72(1) of the Customs Act, demanding differential customs duty to the tune of `51,471/- and `54,344/- for short receipt of 1820 kgs. And 1900 against bill of entry mentioned quantity of 209 tons and 128 tons respectively. Payment was made by appellant vide challan dated 07.08.2014 and 18.08.2014 respectively under protest and as short landing was lesser than 1% of which no differential duty should have been demanded in view of CBEC circular dated 03.02.2016, it sought for refund of the same. Vide letter dated 07.05.2015 the Asst. Commissioner of Customs Bond, Mumbai returned the refund claim on the ground that differential duty was paid

vide challan raised at Vishakhapatnam and instructed the appellant to file refund claim before the appropriate authority of SEZ, Chippada and not in the NCH, Mumbai.

3. Relying on the decision of the Hon'ble High Court of Gujarat in the case of *Anita Exports vs. UOI* reported in 2015 (320) ELT 743 (Guj), the appellant requested the Asst. Commissioner to reconsider the request for refund and simultaneously approached specified authority i.e. Asst. Commissioner of Customs, VSEZ, Chippada for such refund of `1,21,767/- in total, as the same was not payable but the latter declined to entertain such claim on the ground that no authority relating to refund was then available with him and reconsideration and resubmission of refund claim before the Asst. Commissioner of Customs, Mumbai met the same fate of rejection. In his order, the AC referred to Rule 2(1) of the Customs Refund Application (Form) Regulation 1995 and gave his finding that refund has to be sought from the authority where the duty of customs was paid. Being aggrieved by the said order, appeal was preferred by the appellant before the Commissioner of Customs, Mumbai who also gave his finding that Commissioner of Customs, Mumbai did not have administrative control over SEZ, Vishakhapatnam district for which he disposed of the appeal directing the appellant for resubmission of refund claim before the appropriate jurisdictional customs authority.

Appeal before this Tribunal is against the order passed by the Commissioner of Appeals.

4. In his appeal memo and during course of hearing of the appeal, Id. Counsel for the appellant Shri P. Dwarkanath, Consultant, placing reliance on the *Anita Exports* cited supra and on other case laws including the case of *Roxul Rockwool Insulation India Pvt. Ltd.* [2016 (334) ELT 412 (Guj)] submitted that the approach of the Asst. Commissioner was incorrect in refusing to entertain refund application since he himself had accepted shipping bills, cleared raw materials without payment of duty at the port of importation, allowed warehousing at Mumbai, transshipment and rewarehousing at SEZ and demanded differential duty in respect of bill of entry filed at Mumbai port, which was paid on protest by the appellant and claim file was closed by the Asst. Commissioner Bond Mumbai. He further submitted that the Asst. Commissioner of Customs, Mumbai Customs House is the proper officer in terms of Section 27 of the Customs Act and not the authorised officer in Vishakhapatnam and contended that Rule 2(1) of Customs Refund Application (Form) Regulation 1995, on which AC had placed his reliance, is not relevant to his case for which confirmation of such order by the Commissioner of Customs (Appeals) is not proper and therefore he sought intervention of the Tribunal, instead of

complying to their direction to file refund claim before the SEZ jurisdictional officer.

5. In response, Id. AR Shri R. Kumar for the department contended that prior to 05.08.2016, vide which date amendment was introduced to SEZ Rules 2006 incorporating sub-rule (5) to Rule 47, no provision for refund was available for SEZ units and Board vide circular no. 11/2017 dated 31.03.2017 had clarified that such circular only has prospective effect and therefore no irregularity can be found from the order of the first adjudicating authority or the appellate authority since Rule 2 of the Customs Refund Application (Form) Regulation 1995 clearly prescribes that an application for refund shall be made to the Asstt. Commissioner of Customs or Dy. Commissioner having jurisdiction over the **customs port** and in the instant case since goods were released at Vishakhapatnam port, Mumbai Customs port has no jurisdiction to entertain such a claim for which he prays for rejection of the appeal.

6. Heard both sides at length and perused the case record along with relevant rules, Notifications and case laws cited by the parties. At the outset it has to be made clear that refund has been claimed in respect of short landing of goods at Vishakhapatnam which intimation was communicated to the AC- Bond Mumbai, who accordingly

raised the demand against the appellant and the same was paid on protest despite the fact that short receipt as described in the narration of fact of the case above, was marginally above 1% (1.4%) for the first import and 0.84% for the second import and bringing both to the whole number, it will be within the prescribed limit of 1%. In such an event, the Board circular dated 03.02.1996 is applicable to the appellant since evaporation and other natural causes might have caused such loss in transit. Therefore it has nothing to do with SEZ unit. Further, the goods were imported to Mumbai port and warehoused there for which Mumbai customs port as defined in Rule 2 of Regulation 1995 should be considered as the **port of import**. Any subsequent transit of goods are of inland transit for which further submission of bill of entry at Vishakhapatnam was uncalled for. This being the factual position, the finding of Asst. Commissioner Import Mumbai to refuse refund claim on grounds of jurisdiction holding that the Mumbai customs have no authority is erroneous and such finding should not have found support of the Commissioner (Appeals) in his order. More importantly the amended Rule 47(5) brought by the department of commerce vide Notification dated 05.08.2016 has not excluded the jurisdiction of the Commissioner of Customs in respect of refund case of incident of the past since point no. 3.3 has clearly indicated

that refund cases of past, which are otherwise in order, should be issued by the customs officer and in the instant case, there is no denial of the fact that the Asst. Commissioner Customs-Bond, Mumbai is appropriate authority since he has got jurisdiction over customs port i.e. Mumbai where imports have taken place.

7. In view of the observation made above, I am of the considered view that Asst. Commissioner of Customs- bond Mumbai has the jurisdiction to decide the refund application submitted by the appellant. Hence the order –

8. The appeal is allowed and the matter is remanded back to the adjudicating authority to dispose of the refund application of the appellant already filed before it.

(Pronounced in Court on 03.08.2018)

Dr. Suvendu Kumar Pati
Member (Judicial)