CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, MUMBAI
WEST ZONAL BENCH
COURT No.

Appeal No. C/85157/2013
C/CO/91018/2013

(Arising out of Order-in-Appeal No. GOA/CUS/GSK/149/2012 dated 16.10.2012 passed by Commissioner of Central Excise & Customs (Appeals), Goa)

Commissioner of Central Excise, Goa **Appellant**
ICE House, EDC Complex,
Plot No.6, Patto,
Panaji, Goa 403 001.

Vs.

Bhavana Earthmovers **Respondent**
B-3, II floor, Sapana Regency,
Above Mens Baron,
Panaji 403 001.

Appearance:

Ms. Trupti Chavan, Authorised Representative for the Appellant
None for the Respondent (adjournment request)

CORAM:

Hon'ble Dr. D.M. Misra, Member (Judicial)
Hon'ble Mr. Sanjiv Srivastava, Member (Technical)

FINAL ORDER NO. **A/85783/2019**

Date of Hearing: 22.01.2019
Date of Decision: 22.01.2019

PER: SANJIV SRIVASTAVA

This appeal filed by revenue is directed against the order in appeal No GOA.CUS/GSK/149/2012 dated 16.10.2012 of Commissioner Customs & Central Excise (Appeal) Goa. By the said order, Commissioner (Appeal) allowed the appeal filed by the respondent by setting aside the order of adjudicating authority and holding as follows:

"In view of the above the impugned order is not correct in law and hence set aside. Lower Authority directed to

process the claim, if necessary after due verification with the jurisdictional Central Excise Office, whenever felt necessary."

1.2 By his order in original, assistant Commissioner of Customs (A) Custom House Marmagoa held as follows:

"I, hereby reject the refund of 4% Special Additional Duty amounting to Rs 20,32,271/- (Rupees Twenty Lakhs Thirty Thousand Two Hundred and Seventy One) only claimed by M/s Bhavana Earthmovers"

2.1 M/s Bhavana Earthmovers, Panaji (Respondents) filed a refund claim for an amount of Rs 20,31,271/- in respect of Special Additional Duty of Customs paid against Ex Bond Bill of Entry No 06/03.03.2011 by M/s Vijai Marine Services, Rassaim, Goa. M/s Vijai Marine Services had manufactured in Custom Bond, Barge M V Aquarius and de-bonded the same for home consumption by filling the said Bill of Entry and after payment of applicable Custom Duties. Respondents filed the said refund claim on the strength of No Objection certificate issued by M/s Vijai Marine Services.

2.2 Respondents had claimed the said refund in terms of Notification No 102/2007-Cus dated 14.09.2007. The refund claim was filed on 26.12.2011.

2.3 A show cause notice objecting to sanction of the refund was issued 0n 16.03.2012 on the following ground:

i. Para 1 of the Notification is not complied as the goods i.e Barge M V Aquarius was not imported for subsequent sale but was manufacture in Customs Bond by M/s Vijai Marine Services.
ii. Condition (b) of the Notification is not satisfied as the invoice dated 15.03.2011 issued by M/s Vijai Marine Services and submitted along with refund application does not specifically indicate that *"no credit of additional duty of Customs levied under Sub*

Section (5) of Section 3 of the Customs Tariff Act, 1975 shall be admissible"

iii. Condition (c) of the Notification is not satisfied as the refund claim has been filed by person other than the importer.

2.4 The show cause notice was adjudicated rejecting the refund claim by the Assistant Commissioner as per the order referred in para 1.2 supra.

2.5 Aggrieved by the order of Assistant Commissioner, respondents preferred and appeal before Commissioner (Appeal) which was allowed as per the order in appeal referred in para 1, supra.

2.6 Aggrieved revenue has filed this appeal.

3.1 In their appeal, revenue has challenged the order of Commissioner (Appeal) stating that-

i. As per para 2(c) of the Notification No 102/2007-Cus dated 14.09.2007 (as amended) the refund claim could have been filed only by the importer. Since the claimant in present case is not the importer, the refund claim could not have been allowed in his favour.

ii. As per para 2(b) of the notification it was mandatory that invoice issued for the sale of goods by importer to indicate that "*no credit of additional duty of Customs levied under Sub Section (5) of Section 3 of the Customs Tariff Act, 1975 shall be admissible".* Since the invoice dated 15.03.2011, was issued by M/s Vijai Marine Service without making such an endorsement, this condition of Notification has not been complied with and refund application should have been rejected.

3.2 Respondents have filed reply to appeal as cross objections.

4.1 We have heard Ms Trupti Chavan, Assistant Commissioner, Authorized Representative for the revenue.

Learned Counsel who was to appear in the matter has vide his letter received on 21.01.2019 requested for adjournment.

4.2 Arguing for the revenue learned Authorized Representative, reiterated the grounds specified in the appeal filed by the revenue and stated that refund of Special Additional Duty of Customs, is in terms of Notification No 102/2007-Cus. This notification prescribes the situations and conditions subject to satisfaction of which refund claim could have been allowed. Since in the present case the conditions as specified by Notification No 102/2007-Cus have not been complied with refund claim should have been rejected.

4.3 Since the matter is in very narrow compass it has been taken up for disposal on the basis of submissions made by the learned Authorized Representative.

5.1 we have considered the submissions made in appeal/ cross objection and during the course of argument along with the impugned order.

5.2 Notification No 102/2007-Cus dated 14.09.2007 (as amended) reads as follows:

"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;*

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;*

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;*

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;*

   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.*

3. The jurisdictional customs officer shall sanction the refund on satisfying himself that the conditions referred to in para 2 above, are fulfilled."

5.3 In their appeal revenue has challenged the order of Commissioner (Appeal) allowing the refund claim, for non fulfillment of condition specified at 2(b) and 2 (c) above.

5.4 Admittedly in the present case, the invoice dated 15.03.2011 issued by the M/s Vijai Marine Services do not carry the endorsement as specified by condition 2(b) of the said Notification. The purpose of such endorsement on the invoice, is only to prevent the buyer of goods from claiming the CENVAT Credit of the Special Additional Duty (SAD) of Customs levied under Section 3(5) of Customs Tariff Act, 1975, for which this refund application has been filed. This requirement becomes more relevant if the person claiming the refund as per this notification is importer and the claimant of the CENVAT Credit is the person to whom the goods have been sold. In present case the buyer of goods himself is claiming the refund of SAD paid by the person ex-bonding the goods on payment of applicable Customs duty. In his order Commissioner (Appeal) has satisfied himself that no CENVAT Credit has been claimed in respect of the SAD paid. Observations made by the Commissioner (Appeal) are reproduced below:

"It is seen from the case records that "the Appellant submitted before the Adjudicating Authority a Certificate from their Chartered Accountant attested to the fact that the import duty was born by the Appellants (Purchaser) and confirming that this amount has not been recovered from any person or in any manner."

Further, vide Letter dated 26.12.2011 of M/s Vijai Marine Services, the Manufacturer-Importer, along with the copy of the Ledger Account of the Appellant which clearly states that though the Customs Duties and the VAT have been paid by M/s Vijai Marine Services, however, the same has been borne by M/s Bhavana Earthmovers. The letter further states that M/s Vijai Marine Services, the Manufacturer Importer, have no objection if the refund amount of Special Additional Duty is paid to M/s Bhavana Earthmovers.

In any event this fact that the Appellant who purchased the Barge M V Aquarius did not claim CENVAT Credit in respect of the Special Additional Duty (SAD) paid in terms of the provisions of Section

3(5) of the Customs Tariff Act, 1975, for the clearance of the said Barge for Home Consumption vide Bill of Entry No 06/03.03.2011 could be verified from the jurisdictional Central Excise Authorities. This is only a deficiency and would not disentitle the Appellant to get refund."

5.5 Thus from the order of Commissioner (Appeal) it is evident that he has not absolutely allowed the refund application made but has allowed it subject to the condition of verification of fact of non availment of the CENVAT Credit from the jurisdictional Central Excise Officers. In our view by building this safeguard Commissioner (Appeal) has ensured substantial compliance with the condition specified at 2(b) of the Notification No 102/2007-Cus.

5.6 Second objection raised by the revenue in their appeal, is with regards to the respondent filing the refund claim, they being not importer. Revenue has relied on condition 2(c) of the said notification for raising this objection. The word importer used in the Notification No 102/2007-Cus needs to be interpreted in terms of the said notification, and by reading the notification as whole. In terms of

- 2(a) importer of the goods shall pay all duties;
- 2(c) importer shall file a claim for refund; and
- 2(d) importer shall pay on sale of the said goods.

In the present case it is not disputed that the burden of the Custom duties as applicable and paid and that of the sales tax/ VAT as applicable and paid has been borne by the Applicant (Respondents). Since they have borne the burden of both the Customs Duty and Sales Tax/ VAT they have filed this refund claim. Commissioner (Appeal) has in his order observed as follows:

"I have examined the impugned order and submissions. The stand of the Adjudicating Authority that the Refund Claim is not maintainable as it has not been filed by the

Importer does not appear to be legally correct. In terms of Section 27(1)(b) of the Customs Act, 1962, read with its explanatory note, a refund can be claimed by a person who has borne the duty or interest. Section 27 of the Customs Act, 1962 is reproduced below:

"Section 27- Claim for refund of duty

1. *Any person claiming refund of any duty or interest,-*
    a. *Paid by him, or*
    b. *Borne by him*

    May make an application ....

    For such refund ....

Explanation- For the purpose of this sub-section "the date of payment of duty or interest" in relation to a person other than the importer shall be construed as "the date of purchase of goods".

This Section makes it abundantly clear that the refund that accrues on the Importer can be claimed by the one who has borne the payment which is sought to be refunded. Explanations to the said Section further states that for the purpose of sub-section (1)(b) "the date of payment of duty or interest" in relation to a person other than the importer shall be construed as "the date of purchase of goods" by the said person. The law is thus clear that the refund accrues on an Importer can be claimed by anyone who has borne the payment sought to ne refunded."

5.7 In case of Mafatlal Industries [1997 (89) ELT 247 (SC)] Hon'ble Apex Court has held as follows:

"89.*A major attack is mounted by the learned Counsel for petitioners-appellants on Section 11B and its allied provisions on the ground that real purpose behind them was not to benefit the consumers by refusing refund to manufacturers (on the ground of passing on the burden) but only to enable the Government to retain the illegally collected taxes. It is suggested that the creation of the*

Consumer Welfare Fund is a mere pretence and not an honest exercise. By reading the Rules framed under Section 12D, it is pointed out, even a consumer, who has really borne the burden of tax and is in a position to establish that fact, is yet not entitled to apply for refund of the duty since the Rules do not provide for such a situation. The Rules contemplate only grants being made to Consumer Welfare Societies. Even in the matter of making grants, it is submitted, the Rules are so framed as to make it highly difficult for any consumer organisation to get the grant. There is no provision in the Act, Sri Nariman submitted, to locate the person really entitled to refund and to make over the money to him. "We expect a sensitive Government not to bluff but to hand back the amounts to those entitled thereto", intoned Sri Nariman. It is a colourable device - declaimed Sri Sorabjee - "a dirty trick" and "a shabby thing". The reply of Sri Parasaran to this criticism runes thus : it ill-becomes the manufacturers/assessees to espouse the cause of consumers, when all the while they had been making a killing at their expense. No consumers' organisation had come forward to voice any grievance against the said provisions. Clause (e) of the proviso to sub-section (2) of Section 11B does provide for the buyer of the goods, to whom the burden of duty has been passed on, to apply for refund of duty to him, provided that he has not in his turn passed on the duty to others. It is, therefore, not correct to suggest that the Act does not provide for refund of duty to the person who has actually borne the burden. There is no vice in the relevant provisions of the Act. Rules cannot be relied upon to impugn the validity of an enactment, which must stand or fall on its own strength. The defect in the Rules, assuming that there is any, can always be corrected if the experience warrants it. The Court too may indicate the modifications needed in the Rules. The Government is always prepared to make the appropriate *changes in the Rules since it views the process as a "trial and error" method - says Sri Parasaran.*

90.*We agree with Sri Parasaran that so far as the provisions of the Act go, they are unexceptionable. Section 12C which creates the Consumer Welfare Fund and Section 12D which provides for making the Rules specifying the manner in which the money credited to the Fund shall be utilised cannot be faulted on any ground. Now, coming to the Rules, it is true that these Rules by themselves do not contemplate refund of any amount credited to the Fund to the consumers who may have borne the burden; the Rules only provide for "grants" being made in favour of consumer organisations for being spent on welfare of consumers. But, this is perhaps for the reason that Clause (e) of the proviso to sub-section (2) of Section 11B does provide for the purchaser of goods applying for and obtaining the refund where he can satisfy that the burden of the duty has been borne by him alone. Such a person can apply within six months of his purchase as provided in Clause (e) of Explanation-B appended to Section 11B. It is, therefore, not correct to contend that the impugned provisions do not provide for refunding the tax collected contrary to law to the person really entitled thereto. A practical difficulty is pointed out in this behalf by the learned Counsel for appellants-petitioners : it is pointed out that the manufacturer would have paid the duty at the place of "removal" or "clearance" of the said goods but the sale may have taken place elsewhere; if the purchaser wants to apply for refund - it is submitted - he has to go to the place where the duty has been paid by the manufacturer and apply there. It is also pointed out that purchasers may be spread all over India and it is not convenient or practicable for all of them to go to the place of "removal" of goods and apply for refund. True it is that there is this practical inconvenience but it must also be remembered that such claim will be filed only by* *purchasers of high priced goods where the duty component is large and not by all and sundry/small purchasers. This practical inconvenience or hardship, as it is called, cannot be a ground for holding that the provisions introduced by the 1991 (Amendment) Act are a "device" or a "ruse" to retain the taxes collected illegally and to invalidate them on that ground - assuming that such an argument is permissible in the case of a taxing enactment made by Parliament. (See R.K. Garg and other decisions cited in Paras 78 and 79)."*

5.8 In view of above we do not find any infirmity in the orders of Commissioner (Appeals).

6.1 Appeal filed by the revenue is dismissed and the cross objections also disposed of accordingly.

(Order pronounced in the open court)

(Dr. D.M. Misra)
Member (Judicial)

(Sanjiv Srivastava)
Member (Technical)

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