CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
MUMBAI

REGIONAL BENCH – COURT NO.5

Appeal No. C/85018/2019
(Application No. C/COD/85029/2019

[Arising out of Order-in-Appeal No.788 to 792(CRC-SAD-V)2018(JNCH)/Appeal-II, dt.27.08.2018, passed by the CC, Nhava Sheva-III]

COMMISSIONER OF CUSTOMS, ...**Appellant**
Jawaharhal Nehru Customs House,
Nhava Sheva III
Dist: Raigad - 400707

VERSUS

M/s Palava Dwellers Pvt. Ltd ......**Respondent**
Lodha Exelus, 8th Floor,
Appolo Mills Compound,
N.M. Joshi Marg, Mahalaxmi,
Mumbai -400 011

WITH

Appeal No. C/85019/2019
(Application No. C/COD/85030/2019

[Arising out of Order-in-Appeal No.805(CRC-SAD-V)2018(JNCH)/Appeal-II, dt.29.08.2018, passed by the CC, Nhava Sheva-III]

COMMISSIONER OF CUSTOMS, ...**Appellant**
Jawaharhal Nehru Customs House,
Nhava Sheva III
Dist: Raigad – 400707

VERSUS

M/s Lodha Developers ......**Respondent**
Lodha Exelus, 8th Floor,
Appolo Mills Compound,
N.M. Joshi Marg, Mahalaxmi,
Mumbai 400 011

Appearance:
Shri Manoj Kumar, Asst. Commissioner (AR) for the Appellants.
None for the Respondents.

CORAM:

HON'BLE MR. ANIL CHOUDHARY, MEMBER (JUDICIAL)

FINAL ORDER NO. A/85958 - 85959 / 2019

Date of Hearing: 08.05.2019
Date of Decision: 08.05.2019

PER: ANIL CHOUDHARY

That there is delay of about 30 days in filing of these appeals by revenue. It is explained by the Learned AR that the order in Appeal dated 27/29 August 2018 was received by Department on 6 September 2018. That time was taken in verification of the facts and the decision by the Committee of Commissioners, resulting into delay in filing the appeal. As the reason stated are plausible, the delay is condoned and the appeals are taken up for final hearing. The respondent assessee are absent on call, in spite of notice. The records are perused and the Learned AR for revenue is heard on merits.

2. For the sake of convenience, I refer to the facts Appeal No. C/85019/2019. From the order in original rejecting the refund of SAD to the respondent importer, it appears that two reasons have been assigned for rejection of the refund claim, under notification No. 102/97 – Cus. The first reason given is that the goods were imported and utilized in civil construction, as the respondent assessee is engaged in construction of buildings and selling the same to the various buyers of unit in the said building, being dwelling units. The second reason for rejection is that the adjudicator observed that the burden of passing on of SAD is not clear from the facts on record. The 3rd reason is non submission of sale invoice for resale of the imported goods.

3. From the facts on record, it appears that the respondent importer/builder filed the refund claim along with the documents namely TR 6 challans evidencing payment of SAD along with corresponding original /duplicate bill of entry, Certificate from chartered accountant certifying the final accounts for correlation of VAT payments, payment of 4% SAD amount, and on the issue of unjust enrichment, copy of Agreement made with buyers of the residential/commercial

units, Certified copy of payment of Sales tax/VAT. All the relevant documents were presented in the form of annexure, as required by public notice No. 43/2008 and notice No. 4/2009. Further respondents had declared that it is registered with the jurisdictional sales tax authority and also submitted documents evidencing payment of appropriate VAT on sale of the imported goods. Being aggrieved by the rejection of refund claim by the Assistant Commissioner, the appellant assessee preferred appeal before Commissioner (Appeals), who was pleased to observe that it is not disputed and it is a matter of fact that the appellant is in the business of construction of dwelling units and has discharged VAT liability under the composition scheme. The CA certificate filed also supports this contention, certifying that imported goods/fittings are deemed to be transferred (sold) in execution of the building work or works contract. Further the CA certificate certifies the correlation between import of the goods on which SAD has been paid and payment of sales tax thereon. CA also certifies that burden of 4% CVD/SAD has not been passed on by the importer/buyer and accordingly the requirement of unjust enrichment is fulfilled. Further the chart was also filed, showing correlation of the goods in question and it's utilisation in different dwellings units, as sold to different buyers. Further reference was made to Board Circular No. 6/2008 and 16/2008 which clarify that considering the volume of transactions and the documents involved from import to sale, it was felt that in order to fulfil the requirements of unjust enrichment, it would be expedient to allow the importer to furnish a certificate from his auditor/chartered accountant, who certify the annual accounts of the importer. That the burden of 4% CVD had not been passed on by the importer to the buyer. The Board vide the said circulars also required the importer to make a self declaration along with the refund claim to the effect that the burden of 4% CVD had not been passed on by the importer to any other person. The Adjudicator found that such certificates and self certification, as required have been done by the respondent importer. Further the CA certificate indicates that the imported goods covered under the bills of entry in question have been utilized in construction of the dwelling units, which were subsequently sold to the buyers, in terms of provisions of VAT, where a registered dealer who undertakes the construction of flats, dwelling units/buildings or premises, and transfer, them in pursuance of an agreement along with land or interest in the underlying land, under the composition scheme, have to pay 1% of the agreement amount, specified in the agreement or value specified for the purpose of stamp duty in the sale agreement. Further it is an admitted fact that under the state VAT law, the appellant have discharged its VAT liability under the composition scheme, by paying 1% of the agreement value, as provided in the relevant notifications under VAT. Further copies of such sale agreements have been filed before the adjudicator, which shows that the value of the dwelling units was arrived at after including the value of the imported goods which are utilized in construction of the dwelling units. Further under the composition scheme under VAT, the claimant dealer is not supposed to issue cenvatable tax invoice. Further as regards the issue of unjust enrichment, the importer, certified by way of self certification and also the certificate of chartered accountant, that the burden of 4% SAD have not been passed on. It was further observed that the amount of SAD is shown in the balance-sheet as an amount recoverable from customs, and have not been debited to the profit and loss account. Further it was observed that the condition No. e(ii)of para 2 of the Notification No. 102/2007–Cus, is satisfied as the immovable property so constructed have been transferred by way of conveyance deed and sales taxes paid under composition scheme, wherein no tax invoices need to be issued. Further Reliance is placed by the learned Commissioner (Appeals) on the ruling of this Tribunal. In Lodha Healthy Construction & Developers Pvt. Ltd Vs Commissioner of Central Excise, being final order No. C/30907/2016–SM dated, 07.03.2017, wherein this Tribunal under similar facts of the case has held as follows: –

> "*I have heard both sides. The main objection raised by the Department is that there is no evidence for sale of the imported goods for the reason that the imported goods are fixed in the bathroom of the apartments sold by the appellant. That there being no invoice, the condition in Notification No. 102/2007 is not fulfilled and therefore the refund cannot*

*be allowed. Undisputedly the appellants are providing construction of residential buildings and thereby engaged in execution of works contract services. Under the State VAT law, the appellants are discharging their VAT liability under composite scheme by paying 5% of the agreement value as provided in Section 4(7)(d) of State VAT Act. Appellants have furnished copies of the agreement of sale of apartment which show that the value of apartment is arrived at after including the value of imported sanitary items fixed in the bathrooms. VAT has been paid @ 5% of the agreement value under composite scheme. The Apartment is sold to customers along with the sanitary fittings and appellant has paid VAT on the material part of the Works Contract Services. The appellant is incapacitated from issuing invoices as per the provisions of composite scheme in VAT Act. While complying with one legislation, the appellant cannot be disadvantaged of the benefit which is otherwise available to them by another legislation. Thus rejecting the refund claim only on the grounds that appellants have not produced invoices to substantiate sale of the imported goods would be putting the appellant to disadvantage merely because they have complied with the VAT law. As per the Circular No.6/2008-Cus., dated 28-4-2008, in para 5.1 the Board has clarified that the certificate issued by an Auditor/Chartered Accountant who is also a person who certifies the annual statements of the company can issue a certificate for correlating the VAT as well as the SAD paid. The appellant has produced a such certificate. In the present case, the non-issuance of invoices was not a choice made by the appellant. It was a compulsion while opting for payment of composite scheme under VAT law. The second condition is that the appellant has not established that Cenvat credit has not been taken by the appellant by producing the endorsement on the invoices. Since the appellants*have not issued any invoices, there is no question of making of such endorsements. The discussion made above would apply to this requirement also. In view thereof, I find that the appellants have fulfilled the conditions to the extent of practically possible and therefore the rejection of refund claim is unjustified. The impugned order rejecting the refund claim is set aside. Appeal is allowed with consequential reliefs, if any."*

4. Accordingly the Learned Commissioner (Appeals) following the precedent order of this Tribunal held that the refund of SAD cannot be rejected on the ground that the importer could not produce the sale invoice. Observing that once no invoice can be issued, the question of endorsement on the invoice also does not arise. Accordingly the learned Commissioner (Appeals) was pleased to allow the Appeal, setting aside the order in original.

5. Being aggrieved the revenue is in appeal before this Tribunal on the grounds that the Commissioner (Appeals) have erred in stating that the requirement of invoices for the sale is satisfied under the facts and circumstances. It is further

contended that it is a case of captive consumption and not the case of the re-sale of the imported goods. Further the importer is required to state on the sale invoice that no credit of additional duty of customs levied under subsection (5) of section 3 of the customs tariff Act shall be admissible, further the requirement of unjust enrichment is not satisfied. Further 1st appellate authority have erred in accepting the difficulty, in issue of tax invoices under the VAT consumption scheme of the state government. Reliance is also placed on the rulings in Commissioner of C. Ex., Vs. Dilip Kumar – 2016 (339) E.L.T. A146 and Eagle Flask Industries Ltd. 2004 (171) ELT 296.

6. Having considered the rival contentions, I find that in the facts and circumstances, the Commissioner (Appeals) was justified in holding that in case of imported goods being used for construction of an immovable property, being a case of deemed sale or passing of the property in goods used in construction, no separate tax invoice needs to be issued, as the conveyance is done through deed of sale, duly registered before the competent authority. That in such cases, the requirement of invoice for the sale is substituted by the deed of conveyance. Secondly I find that there is no case made out of the imported goods being consumed. It is not the case of revenue that the goods are in the nature of fuel or pesticides (consumables), etc., which are not transferable after its use in the civil construction. The goods imported being tangible goods used in civil construction, are definitely deemed to be transferred to the buyer of the property, attracting the liability to sales tax, under the state VAT laws and also attracting the liability to service tax, under the central act on the service portion of such transaction. Further I find that as there is no tax invoice or any other invoice, hence there is no question of passing on of SAD to the buyer of the dwelling units/commercial units. In this view of the matter I find no merits in these appeals by revenue and the same are dismissed. The respondent's shall be entitled to benefits as per law.

7. The facts and circumstances being similar in Appeal No.C/85018/2019 with COD Application C/COD/85029/2019, and the impugned order in Appeal being pari-materia, the COD application is allowed, and the appeal is dismissed.

8. To sum-up: Both the Appeals are dismissed. CoD applications are allowed.

(Dictated and pronounced in the open court)

(Anil Choudhary)
Member (Judicial)

SG