

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

REGIONAL BENCH - COURT NO. 02

Customs Miscellaneous Application No. 86347 of 2018

(on behalf of Appellant)

in

Customs Appeal No. 86128 of 2018

(Arising out of Order-in-Appeal No. MUM-CUSTOMS-SXP-217/2017-18 dated 26.12.2017 passed by Commissioner of Customs (Appeals), Mumbai - I)

M/s Lanvin Synthetics Pvt. Ltd.

.....Appellant

101/2A, Mittal Industries Estate,
Andheri Kurla Road, Andheri (East),
Mumbai-400059

VERSUS

**Commissioner of Central Excise,
Mumbai-I (Appeal)**

.....Respondent

115 Central Ex Bldg, Maharshi Karvi Road,
Churchgate, Mumbai - 400059

Appearance:

Shri D. B. Shroff, Sr. Advocate for the Appellant

Shri K.M. Mondal, Special Representative for the Respondent

CORAM:

HON'BLE MR. S.K. MOHANTY, MEMBER (JUDICIAL)

HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)

FINAL ORDER NO. A/88592 / 2018

Date of Hearing: 10.12.2018

Date of Decision: 10.12.2018

Per: S.K. MOHANTY

Briefly stated, the facts of the case leading to this appeal, are as under:

1.1 The appellant herein had obtained the Advance Licences from the office of DGFT, with the condition that it would achieve the export obligation in respect of Fabrics. However, during the course of investigation, the department found that the appellant

had furnished incorrect information with regard to quantities/weight/composition of the exported goods and thereby contravened the provisions of Export & Import policy. As informed by the department, the appellant had deposited an amount of Rs.2,07,57,074/- into the Government exchequer under protest. Such deposit was made during the period May' 1996. Thereafter, the department initiated show cause proceedings against the appellant, seeking for recovery of the Customs duty amount for alleged fraudulent use of the Advance Licences. Since the matter arising out of the show cause notice dated 13.03.1997 was not adjudicated for over 17 years, the appellant had filed the Writ Petition before the Hon'ble Bombay High Court, which was disposed of vide order dated 15.07.2015 in favour of the appellant. While allowing the Writ Petition, The Hon'ble High Court had quashed the show cause notice and prohibited the department in passing any adjudication order in response to such notice. Further, the Hon'ble High Court had also granted liberty to the appellant herein to institute proceedings permissible under law for recovery of the amount deposited by it, with accrued interest.

1.2 As a consequence of favorable order passed by the Hon'ble High Court, the appellant vide its letter dated 04.09.2015 had claimed refund of amount deposited during the course of investigation. The matter was adjudicated vide order dated 22.12.2015, wherein the aforementioned amount deposited by the appellant together with interest amount of Rs.3,51,79,535/- was sanctioned by the department, in response to the order dated 15.07.2015 passed by the Hon'ble High Court. The learned Refund Sanctioning Authority had specifically mentioned in the order dated 22.12.2015 that the department had accepted the order dated 15.07.2015 passed by the Hon'ble High Court and no appeal was filed against the said order. However, the order dated 22.12.2015 was reviewed by the Commissioner of

Customs under Section 129D(2) of the Customs Act, 1962 and the jurisdictional Assistant Commissioner was directed to file appeal against the order dated 22.12.2015 before the Commissioner (Appeals). Appeal filed by the department was disposed of vide the impugned order dated 26.12.2017 passed by the Commissioner (Appeals), holding that the respondent (appellant herein) should be entitled for interest amount for the period from 15.10.2015 to 22.12.2015. He has not accepted the claim of appellant that the interest amount should be computed from May 1986 (date of deposit) till the date of its actual refund on 22.12.2015.

1.3 Feeling aggrieved with the impugned order, the appellant has preferred this appeal before the Tribunal.

2. Shri D.B. Shroff, learned Senior Advocate appearing for the appellant submitted that the amount in question deposited by the appellant during the course of investigation was neither a duty of Customs nor pre-deposit made pursuant to any order passed by the department. He submitted that the said amount was claimed as refund pursuant to the order dated 15.07.2015 passed by the Hon'ble High Court. The learned Senior Advocate further submitted that the order of review under Section 129D(2) of the Act is erroneous and not maintainable inasmuch as the order dated 22.12.2015 passed by the Assistant Commissioner, which was reviewed under the above statutory provision was not an order passed under the Customs Act, 1962.

3. On the other hand, Shri K.M. Mondal, the learned Special Counsel for Revenue, at the outset, submitted that appeal filed by the appellant before the Tribunal is not maintainable since, the same does not involve any customs duty or penalty. He further submitted that the grounds urged by the appellant before the Tribunal were not raised in the appeal filed by Revenue

before the Commissioner (Appeals). Thus, he submitted that the stand taken by the appellant entirely on new set of facts before the Tribunal cannot be maintained or entertained. In this context, he has placed reliance on the judgment of Hon'ble Supreme Court in the case of C.C.E., Vadodara Vs. Steelco Gujarat Ltd., reported in 2009 (242) ELT 161 (S.C.) and Warner Hindustan Ltd. Vs. C.C.E., Hyderabad, reported in 1999 (113) ELT 24 (S.C.).

4. Heard both sides and examined the case records.

5. In this case, the appellant through letter dated 04.09.2015 addressed to the jurisdictional customs authorities, had claimed return of the amount deposited by it during the course of investigation into the matter by the department. Such amount was claimed by the appellant, pursuant to the order dated 15.07.2015 passed by the Hon'ble Bombay High Court in the Writ Petition No. 1536 of 2015. The relevant findings recorded in the said order are quoted herein below:

"14. As a result of the above discussion, we make the Rule absolute in terms of prayer clause (a). We quash the show cause notice and we prohibit the respondents from passing any adjudication order in furtherance thereof.

15. However, finding some merit in the objection raised but not expressing any opinion thereon, we grant liberty to the petitioners to institute such proceedings as are permissible in law for recovery of sums deposited with accrued interest. We clarify that all objections with regard to the jurisdiction of the forum where the proceedings may be instituted and maintainability thereof, of both sides are kept open."

6. The application in question filed by the appellant in the form of a simple letter cannot be considered as a refund application filed under the provisions of Section 27 of the Customs Act, 1962 inasmuch as the amount deposited during the course of investigation was neither the duty of customs nor

pre-deposit. This fact is evident from the show cause notice dated 13.03.1997, wherein at paragraph 55 (a) and (b), the learned Commissioner of Customs had sought to confirm the customs duty demand under the *proviso* to Section 28 of the Act and also to adjust the 'amount' deposited by the appellant towards the duty liability to be ascertained at a future date. In other words, till the date of issuance of the show cause notice, the amount deposited by the appellant was kept in the suspense account as 'mere deposit' and not posted in the appropriate Heads of Account as 'deposit of the customs duty amount'. Further, the learned Commissioner (Appeals) at paragraph 6.3 in the impugned order dated 26.12.2017 had also endorsed the fact that the deposit made by the respondent (appellant herein) is neither duty nor pre-deposit and the same can only be considered as deposit only. We find that none of the provisions in the Customs Act, 1962 have dealt with the situation or prescribed any conditions or limitation for claim of such deposit amount along with interest for delayed refund of such principal amount by the claimant.

7. In this case, the department is not contesting the refund of principal amount sanctioned and paid to the appellant. Part of the interest amount paid to the appellant is also not in dispute. However, the contention of Revenue is that the appellant should be entitled for interest on the delayed refund for the period from 15.10.2015 to 22.12.2015 (i.e. the period between expiry of three months from the date of passing of the order by the Hon'ble Bombay High Court and the date of sanction of the refund amount by the department). On the contrary, the appellant claims that it should be entitled for interest from the date of deposit of the principal amount in May' 1986, till its actual date of refund by the department on 22.12.2015. The above view point of Revenue was accepted by the learned Commissioner (Appeals) and in support, the impugned order has

relied upon the judgment of Hon'ble Supreme Court in the case of Commissioner of Central Excise Vs. ITC Limited, reported in 2005 (179) ELT 15 (S.C.). The date of accrual of the interest amount, discussed in the impugned order is quoted below:

"9. In view of the above, the impugned Order-in-Original No. No.763/CAC/AC (E-II)/KB/2015 dated 22.12.2015 passed by the Asstt. Commissioner of Customs, Export-II, New Custom House, Mumbai, is modified to the extent that interest on refund of deposits made during the investigation is payable from the expiry of three months of the order of the Hon'ble Bombay High Court i.e. from 15.10.2015 to the payment of refund."

8. The above judgment relied upon in the impugned order is distinguishable from the facts of the present case inasmuch as the issue involved in the said case for decision was, whether pre-deposit made as a pre-condition for hearing of appeal under the Central Excise Act, 1944 was required to be refunded along with interest, when the assessee ultimately succeeds in appeal. Whereas, in the case of the present appellant, both the authorities below have accepted the fact that the amount deposited by the appellant cannot be considered as 'pre-deposit'. Further, such amount has also not been deposited by the appellant as a pre-condition for filing or hearing of any appeal before the authorities functioning under the statute. Furthermore, it is an admitted that on record that the matter arising out of the show cause notice dated 13.03.1997 has never been adjudicated, in view of the fact that the said notice was quashed by the Hon'ble Bombay High Court vide order dated 15.07.2015, in prohibiting the department from passing any adjudication order. Thus, it cannot be said that the dispute was resolved or settled in any appellate forum.

9. It is also an un-disputed fact on record that the order dated 15.07.2015 of the Hon'ble Bombay High Court was accepted by the department in its entirety inasmuch as no

appeal was preferred by Revenue against such order in the higher appellate forum. Since the Hon'ble High Court vide paragraph 15 in the said order had granted liberty to the appellant for initiation of proceedings for recovery of the sum deposited with accrued interest, we are of the considered view that claim of principal amount along with interest by the appellant and sanctioned by the original authority is in conformity and in compliance with the findings recorded by the Hon'ble Court. The order dated 15.07.2015 is very clear / explicit and thus, different interpretation cannot be placed to twist the same, in order to deny the interest benefit as claimed by the appellant. Thus, we are of the firm view that the appellant should be entitled for interest benefit from the date of deposit of the principal amount in May' 1996 till 22.12.2015, when such deposited amount was sanctioned and paid by the department.

10. The aforementioned stand taken by Shri K.M. Mondal on behalf of Revenue is not in conformity with the statutory provisions. The appellant in this case, has assailed the impugned order before the learned Commissioner (Appeals), which was disposed of under Section 128 of the Act. Insofar as filing of appeal before the Appellate Tribunal is concerned, Section 129A of the Act mandates that an order passed by the Commissioner (Appeals) under Section 128A of the Act can be appealed against before the Tribunal. Thus, the appellant has correctly filed the present appeal before the Tribunal. Shri Mondal has expressed his view point that the appellant has raised altogether the new ground before the Tribunal, which was not urged at the first appellate stage and thus, the appeal is not maintainable before the Tribunal. We are not in agreement with such submissions made by the learned Special Counsel inasmuch as the issue dealt with by the learned Commissioner (Appeals) in the impugned order concerning the period for entitlement of the interest amount was only agitated by the appellant through this present

appeal. Thus, the ratio of Judgment relied upon by Revenue is not applicable to the facts of the present case. Even otherwise, in terms of Rule 10 of the CESTAT (Procedure) Rules, 1982, the Tribunal is empowered to consider new plea or grounds involving question of law urged at the time of hearing of appeal. In this context, the Hon'ble Supreme Court in the case of Assistant Collector of C.Ex. Vs. Ramdev Tobacco Company, reported in 1991 (51) ELT 631 (S.C.) have ruled that a pure question of law can be entertained at appellate stage, even if not raised before the lower court.

11. In view of above, we do not find any merits in the impugned order dated 26.12.2017, insofar as it has held that the interest amount is payable from the expiry of three months of the order of Hon'ble Bombay High Court i.e. from 15.10.2015 to the payment of refund. Accordingly, the appeal is allowed in favour of the appellant, holding that it should be entitled for the interest amount from May' 1986 to 22.12.2015 as quantified by the Original authority. The miscellaneous application filed by the applicant/appellant is disposed of.

(Operative part of the order pronounced in the open court)

(S.K.Mohanty)
Member (Judicial)

(Sanjiv Srivastava)
Member (Technical)

Per : Sanjiv Srivastava

I have perused the order prepared by the Hon'ble Member (Judicial) and I concur with the order recorded therein to the effect that appeal filed by the Appellants need to be allowed. However I would record my reasons for arriving at the said order in the following paragraphs.

2.0 This claim for refund along with accrued interest has been made by the appellants in terms of the order dated 15th July 2015 of Honourable Bombay High Court in writ petition no 1536/2014. The relevant extracts from the said order of the Hon'ble High Court are reproduced below:

"3. The petitioners complain that the first petitioner procured yarn and grey fabric from the local market which was sent to different dyeing firms for processing. After processing, the fabrics were cut and packed for export under the DEEC scheme or the Drawback scheme. The exports were handled by one export house agent known as M/s.Amol Shipping Agency. The first petitioner obtained 33 advance licences on the condition that the fabrics would be exported. The claim of the petitioners is that this obligation was completed and fulfilled. The licences were made freely transferable. The licences were, then, sold to various independent parties in the market. The parties obtaining the licences utilized them by importing materials without payment of duty. An investigation was carried out sometime in August,1995. The second petitioner was arrested but directed to be released on bail on 4.9.1995. During this period, many accused in similar cases were detained vide detention orders under the COFEPOSA. Since the petitioners were apprehending arrest of the second petitioner, they deposited a sum of Rs.2,07,57,074/- under protest between 13.5.1996 to 27.5.1996. The second respondent eventually issued a show cause notice dated 13.3.1997 alleging that the first petitioner had been issued advance licences with the condition that they would export polyester / viscose blended fabrics. It was alleged that the second petitioner in collusion with Ashok Pokharkar of M/s.Amol Shipping Agency furnished copies showing incorrect/manipulated or false information

regarding quantities, weight, composition of export goods. Thus, they wrongfully availed of the benefits of the licences by claiming fulfillment of export obligation. They secured a bond waiver and further obtained endorsement in respect of 33 advance licences making them freely transferable. Since these advance licenses were sold to various parties who imported goods from several countries without payment of duty, there was a loss caused to the exchequer and that is why a show cause notice was issued demanding a sum of Rs.2,83,59,851/- and to be adjusted against the deposit.

4. The complaint of the petitioners is that this show cause notice a copy of which is at 'Exhibit D' was never adjudicated though the petitioners approached the department between April,1997 and January,2000. There are several letters during this period and the copies of some of the letters are at 'Annexures E and F'. The petitioners complained that finally by a letter dated 7.4.2014 the second respondent was requested to adjudicate upon the show cause notice. There is no reply to this letter at 'Annexure G' nor is any compliance made with the requisitions contained therein. The petitioners relied upon the information obtained under the Right to Information Act,2005, disclosing that the office of the second respondent could not trace any document or file and therefore, nothing can be intimated to the petitioners.

5. The petitioners, therefore, complained that if for seventeen long years the matter has remained unadjudicated, then, retention of money paid under protest or deposited without prejudice, would violate the mandate of Articles 14, 19(1)(g), 265 and 300A of the Constitution of India. It is in such circumstances that this Writ Petition has been filed.

...

12. After hearing both sides, we are of the view that there is no denial of the fact that the investigations were carried out in this case way back in the year 1995. If the investigations were carried out in August,1995, the show cause notice came to be issued on the conclusion thereof in March,1997, then, we do not see any reason for the Revenue / Department not passing an adjudication order for 17

long years. The petitioners cannot be faulted for having approached this Court belatedly as is the contention of the Revenue. In the present case, it is the petitioners who brought to the notice of the department and repeatedly that the show cause notice is pending adjudication and that the department has retained the sum deposited. It is the petitioners who sought information by making an application under the Right to Information Act, 2005. The records were not available and there was no information available with regard to this show cause notice. The admitted position today is that the concerned Commissionerate is unable to trace the file and locate the record. It has given no explanation as to why show cause notice was not adjudicated for 17 long years. The explanation now placed on affidavit does not inspire confidence. We do not countenance the submission and as made belatedly that the department with the assistance of the petitioners will pass an adjudication order within a time frame and it deserves that opportunity. We do not find that the statements made on affidavit are enough to grant such opportunity. If the law postulates early end to such proceedings and there is no period of limitation prescribed, does not mean that the proceedings initiated could be concluded at the sweet will and fancies of the department. The department should not have blamed the petitioners for having approached this Court belatedly, but the department must appreciate that the petitioners are seeking two reliefs one is for quashing of proceedings and secondly, a direction to the department forthwith refund the deposit and with interest.

13. We can take note of the department's objection with regard to the petitioner's approaching this Court after a lapse of several years for return of money but certainly we cannot refuse any relief to the petitioners of quashing of the proceedings of the show cause notice once the legal principles are well settled. The period that has been taken in this case for adjudication of the show cause notice cannot be said to be reasonable. If within a reasonable time the proceedings have to be concluded then in the present case 17 years can never be said to be a reasonable period or time. The department and going by the settled legal principles, cannot pass an adjudication order on the show cause notice and as requested by Mr. Jetly.

14. As a result of the above discussion, we make the Rule absolute in terms of prayer clause (a). We quash the show cause notice and we prohibit the respondents from passing any adjudication order in furtherance thereof.

15. However, finding some merit in the objection raised but not expressing any opinion thereon, we grant liberty to the petitioners to institute such proceedings as are permissible in law for recovery of sums deposited with accrued interest. We clarify that all objections with regard to the jurisdiction of the forum where the proceedings may be instituted and maintainability thereof, of both sides are kept open."

3.0 From the facts as recorded by the Hon'ble High Court, it is quite evident that the appellants in the present case made certain deposits under protest prior to issue of the show cause notice. Though the show cause after completion of investigations was issued in the year 1997 the same was never adjudicated confirming the demand made in show cause notice. This show cause notice has been quashed by the Hon'ble Bombay High Court vide its above referred order, and revenue authorities have been barred from undertaking adjudication in the matter for the reason of delay of about seventeen years in the adjudication. While deciding the writ petition filed by the petitioners (appellant) in the matter high court has directed for institution of proceedings by the petitioner for the refund of the amounts deposited by them (to be adjusted against any duty demand confirmed against them by that show cause notice) along with the accrued interest before the appropriate authorities. (Refer para 15 of the order of Honourable High Court).

4.0 In terms of the directions contained in para 15 of the order, petitioners approached the jurisdictional authorities for the refund of amounts deposited by them along with the accrued interest. The Jurisdictional Assistant Commissioner allowed the request made and granted the refund of the amount deposited

along with the accrued interest from the date of deposit to the date of refund. Against this order revenue filed the appeal before the Commissioner (Appeals). This appeal was allowed by the Commissioner (Appeal) by the impugned order, restricting the amount of interest from the date of the order of Honourable High Court to the date of refund.

5.0 Admittedly in the present case the show cause notice issued by the revenue authorities in the year 1997 was never adjudicated by the concerned Commissioner, and has been quashed by the Honourable High Court. The amounts deposited by the appellants herein were never adjudged as duty under the Customs Act, 1962 and hence the order refund of the said amount along with the interest cannot be considered to be a refund made under Section 27 of the Customs Act, 1962. Since this order allowing the refund along with the accrued interest is not an order made under any of the provisions of the Customs Act, 1962, hence could not have been subjected to review as per Section 129D (2) of Customs Act, 1962 for directing the appeal before Commissioner (Appeals). The provisions of Section 129 D(2) are reproduced below:

*“(2) The Principal Commissioner of Customs or Commissioner of Customs may, of his own motion, call for and examine the record of any proceeding in which an **adjudicating authority subordinate to him has passed any decision or order under this Act for the purpose of satisfying himself as to the legality or propriety of any such decision or order** and may, by order, direct such authority or any officer of Customs subordinate to him to apply to the Commissioner (Appeals) for the determination of such points arising out of the decision or order as may be specified by the Principal Commissioner of Customs or Commissioner of Customs in his order.”*

6.0 Thus in view of the order of the Honourable High Court, the proper course for challenge to the order of jurisdictional Assistant Commissioner, refunding the amounts deposited along with the accrued interest was to be determined and order

challenged before appropriate forum. Since this order is not an order under the Customs Act, 1962, the challenge could not have been before the Commissioner (Appeals). Thus in my view the order of the Commissioner (Appeal) allowing the appeal filed by the revenue and restricting the interest from the date of decision of Bombay High Court is without jurisdiction and needs to be set aside on this count only.

7.0 In view of the discussions as above I allow the appeal filed by the appellants and set aside the impugned order, as has been held by the Honourable Member (Judicial).

S. Srivastava

Sanjiv Srivastava
Member (Technical)