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

REGIONAL BENCH – COURT NO. 03

CUSTOM Appeal No. 10125 of 2021

[Arising out of OIA-AHD-CUSTM-000-APP-399-20-21 dated 04/11/2020 passed by Commissioner of CUSTOMS-AHMEDABAD]

MS SURYA ROSHNI LTD **.....Appellant**
Padma Tower-1 Rajendra Place
New Delhi *VERSUS*

C.C.-AHMEDABAD **.....Respondent**
Custom House,
Near All India Radio Navrangpura,
Ahmedabad,
Gujarat

APPEARANCE:
Shri R.S Sharma, Advocate for the Appellant
Shri. G. Kirupanandan, Superintendent (Authorized Representative) for the Respondent

CORAM: HON'BLE MEMBER (JUDICIAL), MR. RAMESH NAIR

FINAL ORDER NO.A / 10535 /2022

DATE OF HEARING: 12.05.2022
DATE OF DECISION:20.05.2022

RAMESH NAIR

This appeal is directed against order in appeal dated 04.11.2020 passed by the Commissioner (Appeals) Ahmedabad, Whereby the Learned Commissioner (Appeals) remitted the matter to the proper officer for passing a fresh order taking into consideration the judgments on the same issue.

2. The brief facts of the case are that the appellant had filed the refund claim for Rs. 6,23,312/- of Additional Duty of Customs @ 4%, paid by them at the time of import of the goods, under Notification No. 102/2007-Cus dated 14.09.2007. The Sanctioning Authority taking a reference of Board Circular No. 27/2010-Customs dated 13.08.2010 contended that since the appellant had paid the SAD by way of debiting in their MEIS scrip, the refund was not maintainable. Accordingly, the Adjudicating Authority returned the claim as provided under para 4.2 of chapter 14 of customs manual vide

letter dated 27.04.2017. Aggrieved by the said letter the claimant had preferred an appeal before commissioner (Appeals) Ahmedabad, who vide OIA No. AHD-CUSTM-000-APP-011-18-19 dated 18.04.2018 remanded the matter back to the proper officer. The Adjudicating Authority vide order in original held that as they have paid 4% SAD by way of debit in MEIS they became ineligible for refund of 4% SAD as per Circular No. 18/2013-Custom dated 29.04.2013. The adjudicating authority on scrutiny of the invoices also found that no endorsement/rubberstamp/typed declaration " in respect of the goods covered hearin, no credit of the additional custom duty levied under Sub-section (5) of Section 3 of Custom Tariff Act, 1975 shall be admissible" has been found. On this basis the adjudicating authority vide order in original rejected the refund claim. Being aggrieved by the said Order In Original dated 04.10.2019 appellant filed an appeal before the commissioner (Appeals). The Learned Commissioner (appeals) once again remanded the matter vide the impugned order to the Adjudicating Authority against that order the appellant filed the present appeal.

3. Shri R.S Sharma, Learned Counsel appearing on behalf of the appellant submits that both the issues on which the refund was rejected were settled as per the judgments as follows:

- ALLEN DIESELS INDIA PVT. LTD. Vs. UNION OF INDIA- 2016 (334) E.L.T. 624 (Del.)
- CHOWGULE & COMPANY PVT. LTD. Vs. COMMISSIONER OF CUSTOMS & C.EX.-2014(306) E.L.T.326 (Tri.-LB)

It is his submission that since the issue was squarely covered by afore said judgments there was no reason for commissioner (appeals) to remand the matter. Therefore, he prays that this tribunal exercising the power vested therein may decide the appeal finally.

3. Shri G. Kirupanandan, Superintendent (Authorized representative) appearing on behalf of the revenue reiterates the findings of the impugned order.

4. I have carefully considered the submissions made by both the sides and perused the records. I find that the matter was twice decided by the adjudicating authority. The only ground for rejection of refund given by the adjudicating authority is (i) that the amount of SAD paid by the appellant by way of debiting in MEIS scrip (ii) No declaration was found on the sale invoice regarding non admissibility of cenvat credit of SAD. As regard the issue that whether the refund is admissible when an assessee paid the SAD by debiting MEIS has been settled in the judgment of ALLEN DIESELS INDIA PVT. LTD. (supra) wherein the Hon'ble Delhi High Court as passed the order as under:

> *"16. Although it is sought to be projected that the circulars which are subject matter of the challenge in the present petitions were issued to streamline the procedure and to remove ambiguities, in fact what the circulars seek to amend is Notification No. 102/2007-Customs itself by introducing an additional condition does not find place in notification No.102/2007-Customs. This condition is to the effect that if the payment of the SAD has in the first place not been made in cash, but by using a DEPB scrip, then the importers concerned would not be entitled to refund of SAD in cash, it is not in dispute that there is no such restriction in Notification No. 102/2007-Customs even as on date.*
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> *17. The question whether the device of circulars could be adopted for modifying a notification has come up for consideration before the Court earlier. In Sandur Micro Circuits Ltd. v. Commissioner of Central Excise, 2008 (8) TMI 3-SC = 2008 (229) ELT 641 (S.C.). It was inter alia held that:*
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> > *"A Circular cannot take away the effect of notifications statutorily issued. In fact in certain cases & has been held that the Circular cannot whittle down the exemption notification and restrict the scope of the exemption notification or hit it down. In other words it was held that by issuing a circular a new condition thereby restricting the scope of the exemption or restricting or whittling it down cannot be imposed"*
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> *18. In Modi Rubber Ltd. v. Union of India, 1978 (2) ELT (J127) (Del), a similar issue was examined and this Court held as under:*
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> *"Further, it is quite open to the Government to grant an exemption subject to conditions if the object of the Government in granting an exemption is to benefit the consumer by the reduction of the*

selling price of the goods, then the Government notification grating the exemption should itself say so For instance, notification GSR 1089, dated 29th April, 1969 expressly stated that the benefit of the exemption was to be available only to those manufacturers who produce proof to the satisfaction of the Collector that such benefit has been passed on by them to whom they have sold the goods. Such a condition has to be a part of the exemption notification. For, the notification is "law. But, after enacting the law, such a condition cannot be imposed by administrative directions, guidelines or press note. These administrative acts cannot go contrary to the statutory notification."

19. Recently in Pioneer India Electronics (P) Ltd v Union of India, 2014 (301) ELT 59

(Del) it was observed as under:

"The word "exemption" as used in sub-section (1) to Section 25 can and should include extension or increase in time but cannot be stretched and expounded to include power of the Government to, by a circular, reduce the statutory time for a claim of refund stipulated under the principal enactment, i.e, the Customs Act, 1962. That would make the circular ultra vires the statute and beyond the scope of the Act, Rules, etc. Circulars might depart from the strict tenure of the statutory provision and might mitigate rigours of law thereby granting administrative relief beyond terms of the relevant provisions of the statute, but the Central Government is not empowered to withdraw benefits or impose harsher or stricter conditions than those postulated by the statute in later cases, circulars can supplant the law but not supplement the law".

20. Therefore, the legal position as explained in the above decisions makes it clear that the Circular Nos. 8/2008, 10/2012 and 18/2013 issued by the C.B.E. & C. could not have imposed an additional restriction for availing of the exemption in terms of the Notification No. 102/2007-Cus sued under Section 25(1) of the Act. An amendment to a notification issued in exercise of the powers under Section 25(1) of the Act has to be brought about only by issuing another notification under that provision. Inasmuch as the circulars under challenge seek to impose an additional restriction for grant of refund of the SAD under Notification No. 102/2007-Customs, they are ultra vires of the Act and not be legally sustained. Consequently, it is declared that the Circular Nos. 6/2008, 10/2012 and 18/2013 issued by the C.B.E. & C., insofar as they seek to deny importers and exporters the refund of the SAD paid by using DEPB scrips, are invalid.

21. The rejection of the petitioner's refund applications by the orders dated 16th May,and 20th May, 2014,on the above grounds, is held to be bad in law and the said orders are hereby set aside. Since the petitioner has fulfilled the conditions set out in Notification No. 102/2007- Customs for availing of the refund, the Department is directed to issue orders granting refund to the petitioner, as prayed for by it in its four refund applications dated 8th October, 2013, 22nd November, 2013, 16th December, 2013 and 21st December, 2014 not later than four weeks from today. The petitioner's entitlement to interest on the amount of refund will also be considered and granted in accordance with law within the same period of four weeks from today."

From the above judgment it is clear that even if the assessee does not pay the SAD amount in cash but the same is debited in any incentive scrip, in the aforesaid case the same was debited from DEPB, the refund of SAD cannot be denied. The same analogy is applicable in the present case as the amount of SAD was debited in MEIS scrip. Therefore, the issue is clearly covered by the afore said judgment. As regard the issue that whether for not making the declaration of invoice as required in para 2(b) of Notification No. 102/2007-Cus the refund is admissible or otherwise, the Larger Bench judgment of this tribunal in the case of CHOWGULE & COMPANY PVT. LTD. has dealt with the same issue and passed the following order:

> *"5.2 Rule 9 of the CENVAT Credit Rules prescribes the documents on the strength of which CENVAT credit can be taken. An invoice issued by an importer is also one of the prescribed documents. However, for taking the CENVAT credit, under sub-rule (2) of the said Rule 9. Following particulars are required to be indicated, namely, details of the duty or service tax payable, description of the goods or taxable service, assessable value, Central Excise or Service Tax registration number of the person issuing the invoice, name and address of the factory or warehouse or premises of first or second stage dealers or provider of taxable service, etc. For taking the credit, the quantum of duty pald should be shown in the Invoices and the same should be shown separately for each type of duties. In respect of a commercial invoice, which shows no details of the duty paid, the question of taking of any credit would not arise at all. Therefore, non-declaration of the duty in the invoice issued itself is an is an affirmation that no credit would be available. Therefore, non-declaration/non-specification of the duty element as to its nature and quantum in the invoice issued would itself be a satisfaction of the condition prescribed under clause (b) of para 2 of the Notification 102/2007*
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> *5.3 In the Mangalore Chemicals and Fertilizers Ltd's case (supra), the Hon'ble Apex Court observed that a distinction, between the provisions of a statute which are of a substantive character and were built-in with certain specific objectives of policy on the one hand and those which are merely procedural and technical in nature on the other, must be clearly drawn. It was further held in the said decision that while interpreting an exemption clause, liberal construction should be imparted to the language thereof if the subject falls within the scope of the exemption. It was also held that, the need to resort to any interpretative process would arise only where the meaning is not manifest on the plain words of the statute. As held by the Hon'ble Apex Court in the New India Sugar Mills Ltd. v Commissioner of Sales Tax, Bihar [AIR 1963 S.C 1207]-"it is a recognized rule of interpretation of statutes that expressions used therein should ordinarily be understood in a sense in which they best harmonize with the object of the statute, and which effectuate the object of the Legislature". Applying the ratio of these decisions to the facts of the case before us, it can be seen that the condition relating to endorsement on the invoice was merely a procedural one and the purpose and object of such an endorsement could be achieved when the duty element itself was not specified in the invoice. Since the*

> *object and purpose of the condition is achieved by non-specification of the duty element, the mere non-making of the endorsement could not have undermined the purpose of the exemption. Thus we concur with the view taken by this Tribunal in the cases of Equinox Solution Ltd. and Nova Nordisk India Pvt. Ltd. (supra).*
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> *5.4 In view of the factual and legal analysis as above, we answer the reference made to us as follows. A trader-importer, who paid SAD on the imported good and who discharged VAT/ST liability on subsequent sale, and who issued commercial invoices without indicating any details of the duty paid, would be entitled to the benefit of exemption under Notification 102/2007-Cus notwithstanding the fact that he made no endorsement that "credit of duty is not admissible" on the commercial invoices, subject to the satisfaction of the other conditions stipulated therein. The above decision is rendered only in the facts of the case before us and shall not be interpreted to mean that conditions of an exemption notification are not required to be fulfilled for availing the exemption."*

In view of above larger bench judgment of this tribunal it is clear that even if no declaration is mad for that reason the refund cannot be denied. The aforesaid judgments on both the issue were placed before the commissioner (Appeals). However, despite refering the said judgments, the matter was once again remanded to the adjudicating authority which was absolutely not warranted on the part of the Commissioner (Appeals). Learned Commissioner (Appeals) should have decided finally as there was nothing left for the adjudicating authority to decide further.

5. As per my above discussion and findings, I am of the view that the appellant is clearly entitled for the refund. As a result the impugned order is set aside. Appeal is allowed.

(Pronounced in the open Court on 20.05.2022)

RAMESH NAIR
MEMBER (JUDICIAL)

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