CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
MUMBAI

WEST ZONAL BENCH, MUMBAI

Customs Appeal No. 85908 of 2019

(Arising out of Order-in-Appeal No. MUM-CUSTM-GEN-APP-842/2018-19 dated 13.12.2018 passed by the Commissioner of Customs (Appeals), Mumbai-III.)

M/s Technova Imaging Systems Pvt. Ltd. .....Appellant
Plot No. E/1/2/3, MIDC,
Taloja, Dist.- Raigad,
Maharashtra – 410 208

VERSUS

Commissioner of Customs, ACC Mumbai .....Respondent
Air Cargo Complex Sahar,
Andheri (E), Mumbai,
Maharashtra – 400 099

APPERANCE:

Shri Prashant Patankar, Consultant for the Appellant
Shri Bhushan Kamble, Assistant Commissioner, Authorised Representative for the Respondent

CORAM:

HON'BLE DR. SUVENDU KUMAR PATI, MEMBER (JUDICIAL)

FINAL ORDER NO. A/85593/2022

Date of Hearing: 18.05.2022
Date of Decision: 23.06.2022

Refusal of SAD to the Appellant-importer by the Refund Sanctioning Authority that has received concurrence of the Commissioner (Appeals) in the second round of litigation is assailed in this appeal.

2. Facts of the case, in a nutshell, is that Appellant-importer had filed application for refund of SAD @4% in pursuance of Notification No. 102/2007 against 28 Bills of entry for an amount of Rs.24,87,171/- before the Refund Sanctioning Authority and vide Order-in-Original dated 08.08.2012 refund was sanctioned against 22 Bills of entry but rejected against 6 Bills of entry amounting to Rs.10,53,922/- on the sole ground that Audit objected those 6 Bills of entry as allegedly not tallying with the sale invoices. Appellant got a favourable order from the Commissioner (Appeals) who had given a categorical finding that the refund claim survives and directed the Appellant to produce requisite documents before the adjudicating authority to substantiate its claim for refund. Appellant participated in the limited remand proceeding and being unsuccessful both before the adjudicating authority and the Commissioner of Customs (Appeals), Mumbai, Zone-III, it has approached this forum for necessary relief.

3. I have heard submissions from both the sides and perused the written note of the Appellant, relevant circulars as well as relied upon case laws submitted by both the parties. At the outset, it is imperative to have a look at the findings of the Commissioner (Appeals) recorded on dated 02.07.2015 during the first round of litigation. Its para 6, 7 and 8 are relevant and therefore reproduced hereunder:

> *"6. I find force in the contention of the appellant that the imported equipment has been sold in the local market with a different brand name but its item code and item description was not changed and even the manufacturer-*

supplier had labelled the same brand name on the equipment as per requirement of the appellant.

7. It is not in dispute that the appellant, while selling the imported goods has discharged sales tax/VAT liability and, therefore, if he is made to bear the burden of SAD also, it would defeat the very object of the exemption notification 102/2007. I find that the Apex Court in Mangalore Chemicals and Fertilizers Ltd vs. Deputy Commissioner 1991 (55) ELT437 (SC) has held that an exemption cannot be denied when there is an infraction of a procedural condition of a technical nature.

8. In view of above, I set aside the impugned order not being correct and proper. The refund claim survives. The adjudicating authority is directed to give a reasonable opportunity to the appellant to substantiate their claim of refund with requisite documents and pass appropriate order consistent with the legal provisions and due verification."

4. The gist of the above order is that goods imported and goods sold, though are of different brand names are one and same which is verifiable from the item code and item description and such infraction of procedural technically cannot defeat the very object and purpose of exemption Notification [reliance was placed on the judgment of Hon'ble Supreme Court in *Mangalore Chemicals & Fertilisers Ltd. vs. Deputy Commissioner of Commercial Taxes & Ors. reported in 1991 (55) ELT 437 (SC)]*. Further, he had asked the adjudicating authority to verify the claim of refund with reference to requisite documents and pass an appropriate order.

5. With this limited purpose matter went back to the adjudicating authority once again, whose primary duty was to verify if through documentary proof concerning import and sale of imported goods in the local market could be established and then sanction the refund

as per Notification No. 102/2007. However, he had exceeded his jurisdiction in starting a *de novo* proceeding, which can be inferred from the 4th paragraph of his order, extracted below:-

> *"4. I have gone through all the material facts on record as well as the oral and written submissions made by the importer. The issue on hand is regarding admissibility of 4% of SAD refunds for non-fulfilment of the requirement of subsequent sale specified in the Notification No. 102/2007-Cus dated 14.09.2007 read with Board Circular No. 15/2010-Cus dated 29.06.2010."*

As could be inferred from the above paragraph, he had gone into the admissibility of the CENVAT credit to the Appellant and the eligibility requirement as per Notification No. 102/2007 read with Board Circular No. 15/2010-Cus dated 29.06.2010 which was issued primarily to check fraudulent claim of SAD by unscrupulous importers in the wake of import of "timber logs". The same is beyond the purview of adjudicating authority. Though Appellant claims that even there is no change of description of the goods imported and goods sold in the local market, which it has substantiated demonstratively during hearing of this case through documents annexed to the appeal memo from page 80 to page 95 and beyond. Further, as could be noticed from the adjudicating authority's order that unless imported goods are sold in the same condition, benefit of exemption Notification would be denied to the importer and change in the nature of goods would disentitle the importer from seeking SAD refund (para 9.1 of his order). On perusal of Notification No. 102/2007 no such conditionality is noticeable.

6. Refund of SAD is primarily governed by Notification No. 102/2007 and guided by its clarificatory Circular issued from time to time. Learned Commissioner (Appeals) in the first round of litigation had already given a finding that claim of refund of applicant survives and thereafter review of the said order by the adjudicating authority in the limited remand for verification of documents so as to ascertain that the same is in conformity to law, is beyond the power of the adjudicating authority, as it can only be exercised by the appellate authority. Further endorsement of such adjudication order by way of dismissal of appeal preferred before the Commissioner (Appeals) cannot be said to be a reasoned decision apart from the fact that certificates of co-relation of imported goods and goods sold in the local market were presented to both the adjudicating authority and the Commissioner (Appeals), which as per Circular No. 06/2008-Cus. dated 28.04.2008 would meet the purpose of proof for sanction of SAD refund. Relevant portion of it reads:

> *"5.1. Notification No.102/2007-Customs dated 14.9.2007 prescribes the documents that shall be enclosed along with the refund claim. In order to ensure sanction of refund properly, it is clarified that the document evidencing payment of ST/VAT (in original) duly issued by or acknowledged by the concerned ST/VAT authorities shall be submitted by the importer. A certificate from a Chartered Accountant or any other independent authority certifying payment of ST/VAT would not be acceptable in lieu of the original documents. <u>However, a certificate from the statutory auditor / Chartered Accountant, who certifies the importer's annual financial accounts under the Companies Act or any statute, correlating the payment of ST/VAT on the imported goods (in respect of which refund is claimed) with the invoices of sale, would be required along with the original tax / duty payment documents as proof of payment of appropriate ST/VAT</u>*

for the purpose of para 2(d) & (e) of the said notification."

(underlined to emphasise)

7. Judicial president has been set by the Hon'ble Madras High Court in the case of *Johnson Lifts Pvt. Ltd. Vs. Assistant Commissioner of Customs (Refund), Chennai* reported in *2020 (374) ELT 519 (Mad.)* in which it was clearly stipulated that the respondent-department is bound to accept the description of goods in the import documents as well as sale invoice to be one and the same, on the strength of the certificate/correlation statement issued by the Statutory Auditor (Chartered Accountant) (Para 10 of the last line of order). In conformity to the judicial precedent set by this Tribunal, the following order is passed.

THE ORDER

8. The appeal is allowed and the order passed by the Commissioner of Customs (Appeals), Mumbai-III vide Order-in-Appeal No. MUM-CUSTM-GEN-APP-842/2018-19 dated 13.12.2018 is hereby set aside. Appellant is entitled to get a refund of Rs.10,53,922/- alongwith applicable interest towards refund of SAD paid against 6 Bills of entry and the Respondent-Department is directed to pay the same within two months of communication of this order.

(Order pronounced in the open court on 23.06.2022)

(Dr. Suvendu Kumar Pati)
Member (Judicial)

Prasad