

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI.**

PRINCIPAL BENCH - COURT NO. II

Custom Appeal No. 50933 of 2021-SM

(Arising out of Order-in-Appeal No.CC(A)/CUSTOMS/D-I/ACC/IMP/408-409/2019-20 dated 31.10.2019 passed by the Commissioner of Customs (Appeals), New Delhi).

**M/s Dell International Services
India Pvt Ltd**

Divyashree Greens No. 12/1, 12/2A &13/1A
Koramangala Inner Ring Road
Domlur Post
Bengaluru-560 071

Appellant

VERSUS

**Commissioner , Customs (Import)
New Delhi (Import)**

New IGI Airport
New Delhi-110 037

Respondent

APPEARANCE:

Miss. Reena Rawat, Advocate for the appellant
Shri Ishwar Charan, Authorised Representative for the respondent

CORAM:

HON'BLE SHRI ANIL CHOUDHARY, MEMBER (JUDICIAL)

FINAL ORDER No. 50957 / 2022

DATE OF HEARING: 29.09.2022
DATE OF DECISION: 29.09.2022

ANIL CHOUDHARY:

The Appellant is an importer-trader. They import computers and resale the same. The appellant is admittedly not registered under the provisions of Central Excise on Service Tax. At the time of import, the appellant paid 4% SAD (Special Additional Duty) which is levied in lieu of sales tax, by way of equalisation levy under the Customs Tariff Act. In order to avoid the double taxation on the importers, where the importers have resold the goods on payment of VAT/sales tax, refund mechanism is provided *vide* Notification No. 102/2007-Cus, for refund

of the SAD paid at the time of import. The conditions prescribed in para 2 of the notification for refund are as follows:

"The exemption contained in this notification shall be given effect if the following condition 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."

2. The appellant filed refund claim for a total amount of Rs. 7,75,216/- with respect to 70 Bills of Entry as mentioned in the body of the Order-in-Original. The refund claim was rejected *vide* OIO only on the ground that appellant have not complied with condition no. 2(b) of the said Notification r/w CBEC Circular No. 6/2008-CUS & Circular No. 16/2008-CUS.

3. Being aggrieved the appellant preferred appeal before the Commissioner (Appeals), who *inter alia* on the grounds, that they have resold the goods on commercial invoice on payment of VAT, they are not a registered dealer under the Central Excise provisions, hence they cannot pass on SAD to their buyer and hence, the endorsement as contemplated in terms of para 2(b) of the notification is merely procedural in nature, having no material consequences in the facts and

circumstances. Hence, in absence of declaration on the invoice-‘no credit of additional duty of customs levied under sub Section 5 of Section 3 of the Customs Tariff Act, 1975 shall be admissible’, has no bearing in the facts and circumstances. However, the appeal was rejected agreeing with the order of the Adjudicating Authority.

4. Learned Counsel for the appellant assailing the impugned order urges that the issue is no longer *res integra*. Similar issue was referred to Larger Bench of this Tribunal in the case of **Chowgule & Company Pvt Ltd. Vs. CCE 2014 306 ELT 326 (Tri. Larger Bench)** wherein the question referred was:

“Whether to avail the benefit of Notification No. 102/2007, the condition 2(b) of the notification is mandatory for compliance, being a trader who cleared the goods on the strength of commercial invoices.”

5. Earlier two Division Benches of this Tribunal had taken contrary view. In the case of **Equinox Solutions Ltd and Novo Nodes Pvt. Ltd.**, the Tribunal under the facts that the import was made by a trader who issued commercial invoice without making the endorsement as stipulated in para 2(b) of the notification, and quantum of SAD paid is not specifically mentioned in the invoices, held that refund of SAD paid should not be denied merely because the required endorsement was not made as that would constitute only a technical infraction. The purpose of Clause 2(b) of the notification is to prevent availing of double benefit, that is the buyer of the goods takes the credit of SAD paid by the seller, and the seller gets the refund of the SAD. It was noted that in the case of a trader, who is not registered with the department and thus is not authorised to issue a taxable invoice, and who does not indicate in the commercial invoice, the details of SAD paid, the question of taking any

credit would not arise in as much as commercial invoice issued by a non registered trader is not a document, on the strength of which Cenvat credit can be availed. Further, in the absence of duty particulars in the invoice, the question of taking any Cenvat credit would not arise.

6. Whereas, contrary view was taken by another Division Bench of this Tribunal in the case of **Astrageneca Pharma India Ltd** wherein it was held that the benefit of notification cannot be availed in absence of non-compliance of condition 2(b).

7. The Larger Bench took notice of the ruling of the Apex court in the case of **Mangalore Chemicals & Fertilizers Ltd. Vs. Deputy Commissioner 991 55 ELT 437** and also **Bombay Chemicals Pvt Ltd. Vs. CCE 1995 77 ELT 3**, wherein it have been held that the exemption cannot be denied when there is infraction of a procedural condition of a technical nature. A distinction has to be drawn between a procedural condition and the substantive condition. Once this distinction is drawn, the benefit of exemption should not be denied merely on account of infraction of a procedural condition.

8. The Larger Bench held- a trader -importer, who paid SAD on the imported goods and who discharged. VAT/sales tax 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 No. 102/2007-CUs, notwithstanding the fact that he made no endorsement that 'credit of duty is not admissible' on the commercial invoice, subject to the satisfaction of the other condition stipulated therein.

9. Accordingly, learned Counsel prays for allowing the appeal with consequential benefits.

10. Learned AR for revenue relies on the impugned order.

11. Having considered the rival contentions, I find that the issue herein is squarely covered by the interpretation of the Larger Bench of this Tribunal in the case of **Chowgule & Company Pvt Ltd (Supra)** in favour of the appellant-assessee. Accordingly, I allow this appeal and set aside the impugned order, the Adjudicating Authority is directed to grant the refund within a period of 60 days from the date of receipt of the copy of this order, alongwith interest as per rules. Appeal allowed.

(Order pronounced in the open court)

(Anil Choudhary)
Member (Judicial)