CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH
Court No. IV

CUSTOMS APPEAL NO. 50189 OF 2021

[Arising out of Order-in-Appeal No. CC(A)/Customs/D-II/Export/ICD/TKD/322/2020-21 dated 10.07.2020 passed by the Commissioner of Customs, (Appeal), New Customs House, Near IGI Airport, New Delhi.]

ELAN ELECTRONICS INDIA
186, Harsh Vihar
Pitampura
New Delhi 110034. **APPELLANT**

Vs.

COMMISSIONER OF CUSTOMS
(**Appeal**), New Customs House,
New Delhi. **RESPONDENT**

Appearance:

Shri Uday Pathak, Advocate for the Appellant
Shri Gopi Raman, Authorised Representative for the Respondent

CORAM:

HON'BLE DR. RACHNA GUPTA, MEMBER(JUDICIAL)

Date of Hearing : December 02, 2022
Date of Decision : 04-01-2023

FINAL ORDER No. 50004 /2023

PER DR. RACHNA GUPTA

Present appeal has been filed to assail the Order-in-appeal No. 322/2020-21 dated 10.07.2020 vide which the order of rejection of refund claim has been upheld by Commissioner (Appeals) being barred by time. The facts in brief giving rise to present appeal are as follows:-

That the appellants had imported 54 sets of battery operated rickshaw in CKD condition without battery and charger at ICD TKD vide Bill of Entry No.4233121 dated 31.12.2013. The declared assessable value of the goods is Rs.16,82,163/-. On the said value Customs duty amounting to Rs.7,76,205/- was also deposited at the time of presentation of Bill of Entry seeking clearance of goods under import for home consumption. However, during the scrutiny of said Bill of Entry, it was observed that the vehicle imported by the appellant required valid certificate of compliance in terms of Rule 126 of Central Motor Vehicle Rules (CMVR), 1989. Since the certificate was not with the appellant-importer, that he vide its letter dated 29.9.2014. requested for re-export of goods, however, to third country in UAE (Dubai).

Pursuant to the said request that the aforementioned Bill of Entry was allowed to be amended from 'home' to 'warehouse' under section 59 of Customs Act, 1962 read with section 69 of the Act and the goods under the said Bill of Entry were allowed to be re-exported. However, penalty of Rs.50,000/- under section 112(a) of Customs Act, 1962 was imposed upon the appellant vide order dated 14.10.2014. Pursuant to the said order the 'let export' order was passed on 12.11.2014. The goods were accordingly re-exported and the appellant filed a refund claim on 28.5.2015 in respect of the amount of Rs.7,76,205/- as was deposited on 03.01.2014 towards the customs duty for the import of impugned goods.

The claim was rejected vide order No. 1962/gs/ 17 dated 4.10.2017 on the ground of time limitation being in contravention of section 27 (1) of Customs Act, 1962 and for being filed in contravention of Explanation A of section 26A (2) of Customs Act. In an appeal against the said order, the Commissioner (Appeals) though has accepted that section 26A(2) of Customs Act was not applicable to the said given circumstances, however still rejected

the appeal while upholding the findings about refund claim to be time barred. Being aggrieved, the appellant is before this Tribunal.

2. I have heard Shri Uday Pathak, learned counsel for the appellant and Shri Gopi Raman, authorised representative for the respondent.

3. Learned Counsel for the appellant has mentioned that the period of one year under section 27(1) of Customs Act has wrongly been invoked from the date of demand of customs duty. It is mentioned that section 26A(1) of the Act has wrongly been invoked whereas the appellant's case is covered under section 27(1B)(b) and the period of limitation should have been calculated from the date of order of re-export. It is further submitted that since the goods have been re-exported and never cleared for home consumption, the intention of evading the duty which was paid at the time when Bill of Entry for home consumption has been filed, is illegal and without any authority of law. Learned Counsel has relied upon the following case laws:

1. **Elin Electronics Ltd. Vs. Commissioner of Customs, Noida, [2018 (363) ELT 933 (Tri.-All.)];**

2. **Siemens Limited Vs. Collector of Customs, [1999 (113) ELT 776 (SC)];**

3. **MV Marketing & Supplies Vs. Commr. of Cus. (Import), Chennai, [2004 (178) ELT 1034 (Tri.-Chennai)];**

4. **CIT Vs. McDowell and Co. Ltd., [(2009) 10 SCC 755]; and**

5. **Em Pee Syndichem Pvt. Ltd. Vs. Union of India, [2012 (279) E.L.T. 340 (Del.)].**

4. While rebutting the submissions, learned Departmental Representative has laid emphasis upon the findings of Commissioner (Appeals), where he has accepted the request of the appellant as far as non-applicability of section 26A of Customs Act, 1962 is concerned. With respect to time bar issue, paragraph 5.3 of the order has been relied upon. Impressing

upon no infirmity in those findings, learned Departmental Representative prays for dismissal of appeal.

5. Having heard the rival contentions, I observe that the sole issue to be decided is:

> "as to whether the time bar under section 27(1) of Customs Act, 1962 is invokable with respect to impugned refund claim."

For the purpose, it is observed that the opening line for section 27 is "claim of refund of duty". Reverting to the facts of this case admittedly, the amount in question Rs 7,76,205/- was paid at the time of presentation of Bill of Entry on 03.01.2014 as duty on the goods / vehicles imported by the appellant. It is also admitted fact on record that those goods since were not allowed to be imported without any requisite certificate. Since the Certificate was not available with the appellant that the appellant made a request for the goods to be re-exported. Admittedly the request was made at the time when the goods were still in the Customs area. The Bill of Entry as was filed for home consumption was allowed to be amended for warehouse and those were allowed to be re-exported vide order dated 14.10.2014. The 'let export order' was passed with respect to the goods which were still lying in the customs area on 22.11.2014.

6. These admitted facts are sufficient admission to the fact that the goods were never cleared for home consumption. There was no occasion for the appellant to actually pay the customs duty. Hence the amount in question cannot be called as the amount of duty to which section 27 applies. As per Article 265 of Constitution of India, no tax shall be levied from or collected except by the authority of law. In terms of section 49 of the Customs Act, 1962, the Revenue was competent to collect customs duty only if the goods would have been cleared for home consumption. Apparently and admittedly that stage could not arrived in the present case and the goods were allowed to be re-

exported. It becomes abundantly clear that the stage of collection of duty was never arrived, there was no need for the Customs Department to ask for any amount as duty. The duty of Rs.7,76,205/- which stand deposited since at the stage prior to scrutiny of the impugned Bill of Entry, hence remained as deposit made by the appellant for which the department has no authority to retain. Resultantly, same cannot be called as amount of duty.

7. I draw my support from the decision of Hon'ble Supreme Court in the case of **Jindal Stainless Ltd. vs. State of Haryana** reported as **[(2017) 12 SCC 1]**. The decision relied upon by the appellant settles the proposal of law that once the goods have been allowed to be re-exported, the importer was entitled to refund of duty. Though redemption fine and penalty can still be imposed, there is otherwise no challenge from the appellant about imposition of penalty and redemption fine but simultaneously, I observe that there had never been challenge by the department to the order dated 14.10.2014 allowing the re-export of the impugned goods. The refund application was filed for the amount as was deposited in the name of duty but was not the liability of the appellant since the goods have been re-exported and were never cleared for home consumption. As already observed above, such an amount was out of scope of being called duty, hence section 27 would not be applicable to such refunds. Resultantly appellant is entitled for the sanction on such refund.

8. I also draw my support from the decision of Hon'ble Supreme Court in the case of **Garden Silk Mills Ltd. vs Union of India** reported as **[1999 (113) ELT 358 (SC)]** wherein the Apex court has held that the taxable event will reach at the time when the goods reach the customs barrier and the Bill of entry for home consumption is filed. It was upheld in this case that the import is complete only after the goods become part of the mass

of goods of the country, i.e. only after order for home consumption. The Hon'ble Supreme Court noticed that no duty was payable prior that order. This decision was relied upon by Hon'ble Delhi High Court in the case of **Em Pee Syndichem Pvt Ltd. vs Union of India** reported as **[2012 (279) ELT 340 (Del)]** wherein it was held that it was only after the order of let-export was made and the goods are re-exported, when the goods had entered the territorial waters, the petitioner could have asked for refund of the amount, if any, deposited in the name of customs duty. It was clarified in this case that in such a case, the said refund shall not be read in isolation and has to be read along with the facts and conduct of the parties, and held that such refund could be sanctioned even prior the goods were not actually re-exported. Thus, the refund is available immediately after the order of re-export.

9. In view of above discussion, I hold that Commissioner (Appeals)_ has wrongly invoked section 27(1) of the Customs Act, 1962 while rejecting the refund claim as barred by time. Section 26A(1) is otherwise not applicable to the facts of the present case. The order is accordingly set aside. Appellant is held entitled for the said refund along with interest at the rate of 6% from the date of payment till the sanction arrived.

10. The appeal stands allowed.

(pronounced in the open court on 04-01-2023)

(DR. RACHNA GUPTA)
MEMBER (JUDICIAL)

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