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

REGIONAL BENCH – COURT NO. 01

## CUSTOM Appeal No. 10733 of 2023

[Arising Out Of OIA- AHD-CUSTOM-000-COM-158-23-24 Dated- 15/09/2023 Passed By Commissioner of CUSTOMS-AHMEDABAD]

**IAPL Group Private Limited** **.....Appellant**
Iapl House, 2/8, West Patel Nagar,
Nr. Patel Nagar Metro Station
New Delhi-110008

*VERSUS*

**Commissioner of Customs-Ahmedabad** **.....Respondent**
Office Of The Pr. Commissioner Of Customs
1 St Floor, Customs House,
Opps. Old High Court, Navrangpura,
Ahmedabad-Gujarat-380009

**APPEARANCE**:
Ms. Dimple Gohil, Advocate for the Appellant
Shri. Himanshu P Shrimali, Superintendent (AR) for the Respondent

**CORAM: HON'BLE MEMBER (JUDICIAL), MR. SOMESH ARORA**
**HON'BLE MEMBER (TECHNICAL), MR. C.L. MAHAR**

**FINAL ORDER NO. 10652 / 2024**

DATE OF HEARING:14.03.2024
DATE OF DECISION: 21.03.2024

**SOMESH ARORA**

The Appellant is, inter alia, engaged in the business of importing Mitsubishi Air Conditioners-Cooling Ductable and clearing the same for home consumption. The Appellant imported the said goods as per following details of dates of events:

| Sl. | DATES | EVENTS |
|---|---|---|
| 1. | 19.03.2016 | Bill of Entry No. 4644128 filed at ICD Sanand on payment of BCD and 4% SAD (Rs.3,79,272.40) under Section 3(5) of the Customs Tariff Act, 1975. |
| 2. | 28.9.2016 (24.8.2016) | Claim for Refund for Rs.3,79,272.40 i.e., 4% SAD terms of Notification No. 102/2007-Cus. Dated 14.09.2007 as per procedure by Circular No. 6/2008- Customs dated 14.09.2007 read with Circular No. 16/2008- Customs dated 13.10.2008 was filed. |
| 3. | Order in Original no. 35/AC/ REFUND/ICD-SND/2016-17 dated 29.11.2016 passed by Asstt. Commissioner Customs ICD, Sanad. | Sanctioned Refund Rs 3,79,272.40 in terms of Notification No.102/2007-Cus. dated 14.09.2007 noting that Appellant had paid all the duties and submitted documents evidencing payment of SAD and therefore, refund of SAD paid was admissible in cash. |
| 4. | Inter-departmental 'Audit' letter dated 07.02.2017 as mentioned in Order in Original no. Dated 03.1.2022 at pp. 73 para 14 stated to be not communicated to the Appellant. | There was non-fulfilment of condition in Para 2(b) of the said Notification was conveyed by the CHA involved in the process of clearance of the goods to the Appellant. |
| 5. | Demand Draft bearing no. 059382 dated 20.05.2017 | Appellant deposited Rs 4,06,393/- [Refund sanctioned alongwith interest Rs. 27,121] |
| 6. | Reminder letter dated 11.10.2021 to Deputy Commissioner of Customs, I.C.D. Sanand, Ahmedabad. | Appellant after waiting for communication and review order, addressed a reminder letter, enclosing relevant documents after rectifying procedural lapse, with a request that amount deposited by the Appellant be remitted back. Same treated as refund application by the department. |
| 7. | Show Cause Notice F. No. VIII/20-08/REF/1APL/ICD-SND/2021-22 dated 11.11.2021 | SCN was issued to the Appellant, alleging intra alia that reminder letter dated 11.10.2021 was a Refund claim, which was filed after expiry of permissible period of one year from date of payment. |
| 8. | Detailed Reply dated 15.12.2021 | 1. Rs.4,06,393/-retained by the Department was in violation of Article 265 of the Constitution of |

| | | |
|---|---|---|
| | | India as collected by the Department without any appropriate order being passed, resulting in collection without authority of law.<br>2. payment of Rs.4,06,393/- was deemed to be made "under protest" and does not partake character of the duties. Customs Act, 1962 does not empower collection of any amount other than the levies specified therein.<br>3. Reminder Letter dated 11.10.2021 was not hit by limitation as the original Refund Claim had been filed well within time ie., on 28.09.2016, which was within the stipulated period of one year from the date of payment of duties. |
| 9. | Order in Original No. 41/DC/ REFUND/ICD-SND/2021-22 Dated 03.01.2022 [passed by Deputy Commissioner Customs ICD Sanand. | Appellant's submissions were rejected and intra alia held that:<br>a. that the Refund sanctioned vide Refund Order did not fulfil Condition 2(b) of the said Notification, which lapse was flagged by Headquarters Audit, Customs, Ahmedabad vide its letter dated F.No. VIII/20-490/Cus-Ref/IAD/2016-17 dated 07.02.2017<br><br>b. that the Appellant had maintained silence for more than 4 years and then filed for refund on which the duty had been paid on 22.03.2016.<br>c. that the refund claim was not admissible as it was time barred and hence it was rejected. |
| 10. | Appeal dated 21.02.2022 filed before the Commissioner (Appeals) | Aggrieved by the Order-in=-Original, Appellant filed appeal before the Commissioner of Customs (Appeals) Ahmedabad |
| 11. | Written Submission via email dated 28.08.2023 | Appellant filed written submission pursuant to personal hearing. |
| 12. | Order-in-Appeal No. AHD-CUSTM-000-APP-158-23-24 dated 05.09.2018 passed by the Commissioner of customs (Appeals) Ahmedabad | Vide which the first Appellate Authority rejected the Appellant's Appeal against Order-in-Original dated 03.01.2022 wherein the Appellant's refund claim of the Commissioner of Customs (Appeals), Ahmedabad SAD on imports of Air Conditioners sanctioned in 2016 and then deposited back, was rejected on the ground that it was barred by limitation. |
| 13. | | Aggrieved by the Order-in-Appeal the appellant has filed the present appeal. |

**Following grounds inter alia, were taken by the appellant:-**

2. The Appellate Authority ought to have appreciated that the amount paid by the Appellant was a deposit in lieu of an inquiry. Being a regular importer, the Appellant paid the amount as a deposit to prove my bonafide. Further, no proceedings commenced in relation to the deposit and hence the Appellant requested for return of the deposit vide reminder letter 11.10.2021. The appellant submits that the bar of limitation did not apply to the payment made as a deposit. Further, as the Department had not brought any order of rectification or revision in order to appropriate the amount paid by the Appellant and therefore the amount paid could not be retained by the Department.

2.1 The Appellant submits that without there being any assessment or adjudication appropriating the amount paid, the same retains the character of a 'deposit and does not take the character of a 'duty'. It is only in case where the deposit is appropriated towards a duty that the period of limitation under Section 27 of the Customs Act, 1962 is initiated. In the absence of there being any appropriation, the period of limitation under Section 27 does not apply to deposits.

3. The aforesaid refund sanctioning Order dated 29.11.2016 passed by the Assistant Commissioner had not been challenged in appeal, the same had attained finality and therefore, the refund, granted by the said Order could not be disturbed and the Appellant could not be directed to return the same, along with interest. The conduct of the Department in calling upon the Appellant to return the refunded amount was contrary to law and

impermissible. Hence, in the present case, the amount deposited having been collected without any authority deserves to be refunded forthwith.

4. The Appellant submits that the deposit of SAD refund claim retained by the Department, which is not authorized by law is hit by Article 265 and is bound to be returned to the Appellant. The Appellate Authority ought to have appreciated that the deposit was not made on the Appellants' own ascertainment but on the directions of the Department vide the letter dated 07.02.2017, as conveyed by their CHA, which letter was not provided to them.

4.1 In Commissioner of Sales Tax, U.P. v. Auraiya Chamber of Commerce, Allahabad; 1986(25) E.L.T. 867(S.C.) the Hon'ble Supreme Court held that "no tax shall be levied or collected except by authority of law."

5. Learned AR reiterates the findings of the lower authorities and that inital SAD duty was refunded to the department on its own volition and later refund filed was barred by limitation and has been correctly rejected.

6. Considered. In this regard, we find that Learned Commissioner (Appeals) has in detail dealt with this submission vide para 5.6 onwards of its order.

> *"5.6 It is an undisputed fact that the refund claim, which was initially filed by the appellant was sanctioned. Thereafter, in the course of post clearance audit of the refund claim, it was observed that the appellant had not complied with the condition prescribed under Para 2(b) of the Notification No. 102/2007-Cus, dated 14.09.2007, which was communicated to the appellant through the Customs House Agent Consequently, agreeing to the observation, the appellant paid the refund amount along with interest in the Government Exchequer. Thereafter, the appellant have filed fresh refund claim vide letter dated 11.10.2021, along with, the relevant documents*

*after rectifying the mistake in the previous documents. In other words, the refund application complete in all aspects was submitted on 11.10.2021. Hence, the same is hit by the limitation prescribed in the Notification. Therefore, I do not find any infirmity in the impugned order rejecting the same as time barred in terms of Para 2(c) of the Notification No. 102/2007-Cus dated 14.09.2007, as amended.*

*5.7 The appellant have further contended that the appellant had returned the amount in anticipation of further communication from the Respondent. However, the department has neither appropriated the amount towards any liability nor the Order - In - Original dated 29.11.2016 has been modified, amended, revised, annulled or challenged by the Ld. Respondent. Therefore, the refund sanctioned vide Order - In - Original dated 29.11.2016 has attained finality. Hence, the payment made by way of Demand Draft was required to be deemed as payment under protest and should be considered as 'Deposit'. Thus, it needs to be examined whether the department was required to issue Show Cause Notice, when the appellant suo-moto refunded the amount erroneously granted as refund.*

*5.7.1 It is relevant to refer to Section 28 of the Customs Act, 1962, which is reproduced below:*

> *"SECTION 28. Recovery of [duties not levied or not paid or short- levied or short-paid or erroneously refunded. -( 1 Where any (duty has not been levied or not paid or has been short-levied or short-paid] or erroneously refunded, or any interest payable has not been paid, part-paid or erroneously refunded, for any reason other than the reasons of collusion or any wilful mis-statement or suppression of facts,-*
>
> *(a) the proper officer shall, within [two years) from the relevant date, serve notice on the person chargeable with the duty or interest which has not been so levied [or paid] or which has been short-levied or short-paid or to whom the refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice:*
>
> *[Provided that before issuing notice, the proper officer shall hold pre-notice consultation with the person chargeable with duty or interest in such manner as may be prescribed;]*
>
> *(b) the person chargeable with the duty or interest, may pay before service of notice under clause (a) on the basis of.-*
>
> *(i) his own ascertainment of such duty; or*
>
> *((ii)the duty ascertained by the proper officer,*

*the amount of duty along with the interest payable thereon under section 28AA or the amount of interest which has not been so paid or part-paid.*

*[Provided that the proper officer shall not serve such show cause notice, where the amount involved is less than rupees one hundred.]*

*(2) The person who has paid the duty along with interest or amount of interest under clause (b) of sub-section (1) shall inform the proper officer of such payment in writing, who, on receipt of such information, shall not serve any notice under clause (a) of that sub-section in respect of the duty or interest so paid or any penalty leviable under the provisions of this Act or the rules made thereunder in respect of such duty or interest:"*

*5.7.2 On conjoint reading of Sub-Section (1) and (2) of Section 28 of the Customs Act, 1962, the proper officer shall not serve any notice, in case the person chargeable with erroneously refund has refunded duty before service of notice on the basis of his own ascertainment of such duty or the duty ascertained by the proper officer, and intimate such payment in writing to the proper officer. It is relevant to refer to the Judgment of Hon'ble CESTAT, Mumbai in case of ITC Ltd. (2016 (344) E.L.T 485 (Tri.- Mumbai)], wherein, it is held that:*

*"From the above provision of sub-section (28) is plear that when there is no suppression of fact on the part of the assessee and the duty along with interest is admittedly paid without contest, the show cause notice should not have been issued. The only exception, is provided that if the duty is not paid by reason of suppression of fact, misdeclaration, fraud, collusion, etc., with intent to evade payment of duty, immunity provided under sub- section (28) is not available to the assessee. In the present case, though the non-payment was pointed out by the department but no suppression of fact, misdeclaration, collusion, fraud, etc., exist in the case for the reason that M/s. MRBBIPL have issued valid invoice for removal of capital goods. Therefore, neither show cause should have been issued nor any charges of the show cause notice should have been confirmed. As per above discussion and the clear legal provision under sub-section (2B) of Section 11A, the confiscation of the goods is not legal and correct. Therefore, the impugned order is set aside and appeal is allowed with consequential relief if any in accordance with law."*

*5.7.3 Hon'ble CESTAT, Chennai Bench, had taken same views in case of Sri Velmurugan Sago Factory [2017 (347) E.L.T. 185 (Tri.-Chennai):*

> *6. This being the case, it would have been most appropriate if the SCNs had not been issued in these cases. Instead, these appellants perforce have been required to come before this forum for relief. In the circumstances, while there is no two opinion that the differential duty has been discharged by the appellant on being pointed out, along with interest amounts thereon, issue of SCNs for imposition of penalties under Section 11AC is an overkill. Penalty has also been imposed under Rule 27 of the Central Excise Rules, 2002 for not taking registration. When in the first place there was no requirement of issue of SCN itself, penalties will not survive particularly as there was some confusion on the duty rates and the continued eligibility of SSI concessions for these appellants.*

*5.7.4 Even though these cases pertain to interpretation of Section 11 of the Central Excise Act, 1944, the language of the Section is pari materia to the language of Section 28 of the Customs Act, 1962. Hence, the ratio of the above judgments is applicable to the facts and circumstances of the present case.*

*5.8 It is an undisputed fact that in light of the observations of the Audit regarding non fulfilment of the conditions of the Notification, the appellant had paid the erroneously refunded amount along with applicable interest before service of the Show Cause Notice by the proper officer. Hence, in terms of the Section 28 of the Customs Act, 1962, the proper officer was not required to issue any Show Cause Notice to appellant. Therefore, the contention of the appellant on the ground that they return the amount in anticipation of further communication from the respondent is legally not sustainable.*

*5.9 It is further observed that the adjudicating authority in the impugned order has recorded that the appellant had a copy of Judgment of Hon'ble CESTAT, Mumbai in case of M/s. Samsung India Electronic Pvt. Ltd., Gurgoan and submitted that in the said case the appeal was allowed in favour of M / s Samsung India in spite of invoices remain unprinted with declaration as required under clause 2(b) of the Notification No. 102/2007-Cus Dated 14.09.2007, and that their case being similar one, hence they again submitted the claim. These finds of the adjudicating authority have not been disputed by the appellant in the appeal memorandum or during course of hearing. Hence, I am of the considered view that the appellant, agreeing to the query raised by the Hdars. Audit had paid the erroneously refunded amount to the Government Exchequer. Therefore, in light of the Judgment of Hon'ble CESTAT, Mumbai in case of M / s . Samsung India Electronic Pvt. Ltd., Gurgoan, they had resubmitted the refund claim approximately after a period of 4 1/2 years. It is relevant to refer the*

*observations of 9 Member Bench the Hon'ble Supreme Court in case of Mafatial Industries Ltd .-[1197 89) E.L.T. 247 (S.C.)]:*

> *(iv) It is not open to any person to make a refund claim on the basis of a decision of a Court or Tribunal rendered in the case of another person. He cannot also claim that the decision of the Court/Tribunal in another person's case has led him to discover the mistake of law under which he has paid the tax nor can he claim that he is entitled to prefer a writ petition or to institute a suit within three years of such alleged discovery of mistake of law. A person, whether a manufacturer or importer, must fight his own battle and must succeed or fail in such proceedings. Once the assessment of levy has become final in his case, he cannot seek to reopen it nor can he claim refund without re-opening such assessment/order on the ground of a decision in another person's case. Any proposition to the contrary not only results in substantial prejudice to public interest but is offensive to several well established principles of law. It also leads to grave public mischief. Section 72 of the Contract Act, or for that matter Section 17(1)(c) of the Limitation Act, 1963, has no application to such a claim for refund."*

*5.10 Hence, contentions of the appellant that the amount should be considered as deposit or limitation is not applicable in the present case or limitation is required to be counted with reference to the original date of filing of refund claim i.e. 28.09.2016, are not legally sustainable and are accordingly rejected.*

*5.11 At the time of personal hearing the appellant had submitted a copy of Judgment dated 06.03.2023 of Hon'ble Tribunal CESTAT, New Delhi in case of M/s. S.K. Rasayan Udyog Pvt. Ltd., wherein, the Hon'ble Tribunal had allowed the appeal relying upon Judgment of, Hon'ble High Court of Delhi in case of M/s. Sony India Pvt. Ltd. It is further observed that the judgment of Hon'ble Delhi High Court has been dissented by the Hon'ble High Court of Bombay in case of CMS Info Systems Ltd. [2017 (349) E.LT, 225 (Bom.)], wherein, the (appeal), High Court held that*

> *"34. Mr. Patil would submit that the importUP goods appropriate sales tax or value added tax, as the case may be, is equally a condition and further requirement is providing of copies of documents along with refund claim. Else, no refund is admissible. We are of the opinion that it is not possible to guess as to whether the refund application would be held to be non-maintainable purely on the grounds or for the reasons suggested. If it is made within a period of one year from the date of payment of the additional duty of customs, then, because there is no subsequent sale and the documents evidencing that, as also proof of payment of the sales tax or local taxes are required to be produced, that their production is also mandated in a particular period and within a particular time limit is not something which we are required to call upon and decide. We have before us a case of rejection of a refund application simply because it was not filed within one year from the date of payment of*

*the additional duty of customs. In such circumstances and when that stipulation is challenged, all that we can hold is that we are unable to agree, with greatest respect, with the view taken by the Hon'ble High Court of Delhi. With greatest respect, if the exemption can only be claimed within the statutory provisions and not beyond the same, such conditional exemption including the stipulation as above has not been challenged. Only one condition therein cannot be declared ultra vires because the petitioners desire to brush it aside. The petitioners have accepted the position that if this exemption notification had not been issued in exercise of the statutory power, no exemption could have been claimed at all. In these circumstances, merely because a condition is imposed to file a refund application and which is in the nature of a time-bar or limitation, that cannot be held to be onerous, excessive and therefore ultra vires Article 14 of the Constitution.*

*35. We are of the view that it is entirely for the Central Government to take a decision with regard to exemption, the conditions to be imposed therein and whether those conditions ought to be fulfilled within a time limit. These are matters best left to the Central Government. The Central Government having exercised the powers in terms of the statutory provisions, then, that must govern the whole field. Just as exemption flows from the power to exempt, equally the refund flows from the power to grant such refund and makes it admissible. Both powers flow from the statute, namely, the Customs Act, 1962. It is that statute and the other one which envisages levy, imposition and recovery of customs duties. It is that statute which grants an exemption therefrom but on conditions. Once the statutory scheme is understood in the proper perspective and as a whole, then, merely because the view taken by the Delhi High Court has not been interfered by the self will not enable us to follow it. ॐ siter GROUP PVT. LTD.*

*There, the discussion, with greatest respect, is short of all the above noticed provisions."*

*5.11.1 Further, the Hon'ble CESTAT, Chennai in case of Honda Siel Power Products Ltd. [2019 (369) E.L.T. 1773 (Tri. Chennai)), after considering both the aforementioned judgments passed by Hon'ble High Court of Delhi and Hon'ble High Court of Bombay, held that the judgment of Hon'ble High Court of Bombay in case of CMS Info Systems Ltd. (supra), syncs well with the ratio of the judgment of the Constitutional Bench of the Hon'ble Apex Court on 30th July, 2018 in the case of Dilip Kumar & Company. The relevant para is reproduced below:*

*"17. To sum up, we find that the Hon'ble High Court of Delhi has taken a liberal view on interpreting the exemption notification and held that since the purpose of availing the SAD is to provide level playing field between the imported goods and the domestic goods, when the imported goods are resold on payment of VAT to the State Government, the exemption notification provides for refund of SAD. It may or may not be always possible for the importer to resell the goods and file the refund claim within time depending on his market conditions. Taking a liberal view, the Hon'ble High Court held that refund is available without the limitation of one*

*year indicated in the exemption Notification 102/97 after amendment. On the other hand, the Hon'ble Bombay High Court has constructed the exemption notification strictly and held that all conditions including the time limit within which the refund claim has to be filed must be fulfilled. We also find that there is no order of the jurisdictional High Court of Madras. However, the question of strict versus liberal interpretations of the exemption notifications has now finally been settled by the judgment of the Constitutional Bench of the Hon'ble Apex Court on 30th July, 2018 in the case of Dilip Kumar & Company (supra), any exemption notification must be strictly interpreted and any benefit of doubt must go in favour of the Revenue and against the assessee. Contrary decisions such as those in the case of Sun Export Corporation v. Collector [1997 (93) E.L.T. 641 (S.C.)] have been pverruled by the aforesaid Five-Judge Constitutional Bench. Judicial discipline requires us to follow the judgment of the Apex Court and interpret the exemption notification strictly as it has been drafted including the time limit within which refund applications have to be filed. We find that the judgment of the Hon'ble High Court of Bombay in the case of CMS Info System (supra) is consistent and appropriate, syncs wellB with the ratio of Dilip Kumar's case (supra), which is required to be followed."*

*5.12 In view of the above respectfully following the judgment of Hon'ble High Court of Bombay in case of CMS Info System (supra), I reject the contention of the appellant.*

*5.13 On perusal of the other judgment of Hon'ble High Court of Karnataka in case of Schneider Electric IT Business, it is observed that the order deals with condition prescribed under Para 2 (b) of the Notification, which says that while issuing such invoices for sale of the goods, the importer was required to 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. Whereas, the adjudicating authority has rejected the refund claim of the appellant as time bared in terms of condition prescribed under Para 2 (c) of the Notification. Hence, the judgment relied is not of much help to the appellant.*

*6. In view of the above discussions, I do not find any justification to interfere with the findings of the adjudicating authority."*

From the above, it is clear that the letter dated 20.06.2017 by which refund amount along with interest dated 12/20.06.2017 had been paid by the appellant of amount of erroneous refund along with interest on same having been communicated to them was voluntarily act and which falls

within parameter of requirement of Section 28 1(b) and because of which the proper officer was not required to issue any further show cause notice, unless the erroneous refund was found to be short paid. The appropriation of amount of refund and interest once paid voluntarily by appellant is self-appropriation. The amount thus paid was clearly on account of erroneous refund which vide its payment was accepted by the party obviating any necessity of further show cause notice. If for any reason appellant wanted refund of such erroneous refund amount paid by them, then the same had to be within the prescribed limitation which as per the concurrent findings of the lower authorities was not done and therefore, the claim filed in the year 2021 was clearly barred by limitation.

7. Impugned order is therefore maintained and appeal is rejected.

(Pronounced in the open Court on 21.03.2024)

**(SOMESH ARORA)**
**MEMBER (JUDICIAL)**

**(C.L.MAHAR)**
**MEMBER (TECHNICAL)**

Prachi