# CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL CHENNAI

REGIONAL BENCH – COURT NO. III

## CUSTOMS APPEAL No.40876 of 2021

[Arising out of Order-in-Appeal Seaport C.Cus.II No.696/2021 dated 15.11.2021 passed by the Commissioner of Customs (Appeals-II), 60, Rajaji Salai, Custom House, Chennai 600 001]

**M/s.Sai Exports** **Appellant**
No.8/398-14, Selvalaksmi Nagar,
Opp. Indian Oil Petrol Bunk,
Angeripalayam Road,
Tirupur – 641 603.

Vs

**The Commissioner of Customs,** **Respondent**
Chennai II Commissionerate,
Custom House,
No.60, Rajaji Salai,
Chennai 600 001.

**APPEARANCE:**

Shri S. Murugappan, Advocate
For the Appellant

Ms. Anandalakshmi Ganesh Ram, Superintendent (AR)
For the Respondent

**CORAM:**

**Hon'ble Ms. Sulekha Beevi C.S., Member (Judicial)**

**Date of Hearing : 10.10.2022**
**Date of Pronouncement: 09.11.2022**

## FINAL ORDER No. 40356 / 2022

Brief facts of the case are that the appellant M/s.Sai Exports imported consignment of 100% Knitted Polyester Fabrics vide various Bills of Entry. They declared a price between USD 2.26 per kg and

USD 4.0 per kg. After examination, the department enhanced the price between USD 2.85 per kg and USD 4.94 per kg. The declared value was thus rejected by the department. The appellant paid the duty under protest and cleared the goods. The present dispute is with regard to 21 Bills of Entry.

2. Subsequently, the department passed two speaking orders covering 16 Bills of Entry justifying and confirming the enhancement of value. The Orders-in-Original Nos.21613/2013 & 21615/2013 both dated 22.08.2013 were issued by the Assistant Commissioner of Customs (Group-3) rejecting the declared values and enhancing the same on the basis of NIDB data. Aggrieved by the above orders, the appellant filed two appeals before the commissioner (Appeals) who in terms of Orders-in-Appeal Nos.528 & 529/2014 dated 21.03.2014 rejected the appeals filed by the appellant and affirmed the orders passed by the authority enhancing the value of the goods.

3. Similarly, the department passed a speaking order covering 5 Bills of Entry justifying and confirming the enhancement of value. An Order-in-Original No.23733/2014 in January 2014 was issued by the Assistant Commissioner of Customs (Group-3) rejecting the value declared and enhancing the same on the basis of NIDB data. Aggrieved by the order, the appellant filed an appeal before the Commissioner (Appeals), Chennai. The appeal was allowed by the Commissioner (Appeals) vide OIA No.745/2014 dated 01.05.2014 thereby setting aside the order of adjudicating authority enhancing the value of the goods.

4. The appellant then filed appeals before CESTAT, Chennai against the order passed by Commissioner (Appeals) dated 21.03.2014. These appeals were allowed in favour of the appellant in terms of Final Order Nos.40521-40522/2018 dated 01.03.2018 thereby setting aside the order passed by Commissioner (Appeals) who had confirmed the order of enhancement of value of imported goods. The department had also filed an appeal against the order passed by Commissioner (Appeals) dated 01.05.2014 before the CESTAT Chennai. This appeal was taken up by the Tribunal and in terms of Final Order No.40520/2018 dated 01.03.2018 the Tribunal dismissed the appeal filed by the department thereby upholding the order passed by Commissioner (Appeals) who had set aside the order of enhancement of value of the goods.

5. In essence, the enhancement of value of goods was ultimately set aside by the Tribunal in regard to Bills of Entry under dispute. Based on the final orders passed by the Tribunal, the appellant vide letter dated 06.04.2018 requested the department to carry out the final assessment. They also filed list of Bills of Entry which were subject matter of the dispute. They sent reminders on 04.06.2018 and 19.06.2018 in regard to the request for final assessment. Since there was no response from the department, the appellant filed Writ Petition No.22120 of 2018 before the Hon’ble jurisdictional High Court of Madras seeking a direction to carry out the final assessment of the Bills of Entry. The department had then taken a contention that they are

contemplating to file appeal against the order passed by the Tribunal. The Hon'ble High Court passed an order dated 14.11.2018 wherein it was stated as under :

> **"5. Therefore, without expressing any view on the merits of the claim made by both sides, this writ petition is disposed of, for the present, however, by granting liberty to the petitioner to work out their remedy afresh, after the statutory appeal time is over. No costs".**

As the appeal time in respect of the final order passed by the Tribunal was not over, no positive direction was issued by the Hon'ble High Court.

6. Subsequently, the appellant filed a refund claim before the respondent on 07.08.2019. After due process of law, the refund claim was rejected for the following reasons:

(i) CESTAT Final Order No.40521-40522/2018 based on which the subject refund claim was filed is dated 01.03.2018 and the refund claim under Section 27 of the Customs Act,1962 has been filed on 07.08.2019 which is beyond one year from the date of CESTAT order. Hence the refund claim is rejected as time-barred.

(ii) Further, it is stated that CESTAT Order No.40521-40522/2018 dated 01.03.2018 which has been accepted by the Committee of Commissioners on 12.10.2018 relates to the OIO issued by the Asst. Commissioner of Customs (Group-3) and has not attained finality and is premature for claiming refund.

(iii) The appellant had not produced documents required for processing the refund claim such as (a) original of the Duplicate Importer's copies of Bills of Entry and (b) Chartered Accountant certificate to rule out unjust enrichment.

7. Aggrieved by the above intimation of rejection dated 19.03.2020, the appellant filed appeal before the Commissioner (Appeals) who vide order impugned herein upheld the order passed by the original authority dismissing the refund claim as time-barred. Hence this appeal.

8. On behalf of the appellant Learned Counsel Shri S. Murugappan appeared and argued the matter. He submitted that the appeal relates to rejection of refund claim covering 21 Bills of Entry. In all these Bills of Entry, the duty was paid by the appellant under protest and they requested the Assistant Commissioner of Customs to issue a speaking order. However, the speaking orders were issued only on 22.08.2013 and in January 2014. The appeals filed against such orders travelled upto the Tribunal and vide Final Order No.40521-40522/2018 dated 01.03.2018 and Final Order No.40520/2018 dated 01.03.2018 the issue with respect to enhancement of value of the imported goods got settled in favour of the appellant.

9. Though the appellant requested for re-assessment / final assessment of the Bills of Entry pursuant to the order passed by the Tribunal setting aside the enhancement of value, the Department did not issue appropriate orders. The appellant approached the Hon'ble High Court of Madras requesting to issue a direction to the Department

for reassessment. A contention was raised by the Department that they are intending to file appeal against the order passed by the Tribunal. Since the appeal time was not over, the Hon'ble High Court disposed the writ petition granting liberty to the petitioner to work out their remedy afresh.

10. The appellant then filed an application for refund of excess duty paid by them under protest. The refund claim was filed on 07.08.2019. A Deficiency Memo dated 03.09.2019 was issued by the original authority to the appellant's old address. The new address was intimated in person by the appellant on 19.12.2019 and the deficiency memo was also collected in person. The appellants were informed that the Assessing Group has been asked to carry out the consequential reassessment as per the Tribunal's order and to quantify the amount of eligible refund. It is submitted by the Ld. Counsel that to the appellant's surprise an intimation dated 19.03.2020 was issued by the department wherein it was stated that the refund claim has been rejected on the ground of being premature, incomplete and time-barred.

11. Ld. Counsel submitted that the original authority while rejecting the refund claim has observed that the CESTAT Final order based on which the refund claim is filed is dated 01.03.2018 and the refund claim under Section 27 of the Customs Act, 1962 has been filed on 07.08.2019 which is beyond one year from the date of CESTAT order and therefore time-barred. Referring to the relevant section as it stands amended with effect from 08.04.2011, Ld. Counsel submitted

that the period of one year stated in sub-section (1B) of Section 27 will not apply to the present case as the duty has been paid under protest. The appellant having paid the duty under protest it is clear that the second proviso to sub-section (1) of Section 27 will apply and the limitation of one year is of no consequence. Section 27 as it stands amended after 08.04.2011 is reproduced as under :

**"SECTION 27 Claim for refund of duty**.-

[1][(1) Any person claiming refund of any duty or interest,-

(a) paid by him; or

(b) borne by him,

may make an application in such form and manner as may be prescribed for such refund to the Assistant Commissioner of Customs or Deputy Commissioner of Customs, before the expiry of one year, from the date of payment of such duty or interest:

**Provided** that where an application for refund has been made before the date on which the Finance Bill, 2011 receives the assent of the president, such application shall be deemed to have been made under sub-section (1), as it stood before the date on which the Finance Bill, 2011 receives the assent of the President and the same shall be dealt with in accordance with the provisions of sub-section (2):

**Provided further that the limitation of one year shall not apply where any duty or interest has been paid under protest.**

**Provided also that** where the amount of refund claimed is less than rupees one hundred, the same shall not be refunded.

**Explanation**.- For the purposes of this sub-section, "the date of payment of duty or interest" in relation to a person, other than the importer, shall be construed as "the date of purchase of goods" by such person.

(1A) The application under sub-section (1) shall be accompanied by such documentary or other evidence (including the documents referred to in section 28C) as the applicant may furnish to establish that the amount of duty or interest, in relation to which such refund is claimed was collected from, or paid by, him and the incidence of such duty or interest, has not been passed on by him to any other person.

**(1B) Save as otherwise provided in this section, the period of limitation of one year shall be computed in the following manner, namely:-**

(a) in the case of goods which are exempt from payment of duty by a special order issued under sub-section (2) of section 25, the limitation of one year shall be computed from the date of issue of such order;

(**b) where the duty becomes refundable as a consequence of any judgment, decree, order or direction of the appellate authority, Appellate Tribunal or any court, the limitation of one year shall be computed from the date of such judgment, decree, order or direction;"**

Prior to the amendment, Section 27 read as under :

"(1) Any person claiming refund of any duty and interest, if any, paid on such duty –

(i) paid by him in pursuance of an order of assessment; or

(ii) borne by him,

may make an application for refund of such duty and interest, if any, paid on such duty to the Assistant Commissioner of Customs or Deputy Commissioner of Customs-

(a) in the case of any import made by any individual for this personal use or by Government or by any educational, research or charitable institution or hospital, before the expiry of one year;

(b) in any other case, before the expiry of six months,

from the date of payment of duty and interest, if any, paid on such duty, in such form and manner as may be specified in the regulations made in this behalf and the application shall be accompanied by such documentary or other evidence (including the documents referred to in section 28C) as the applicant may furnish to establish that the amount of duty and interest, if any, paid on such duty in relation to which such refund is claimed was collected from, or paid by, him and the incidence of such duty and interest, if any, paid on such duty had not been passed on by him to any other person:

**Provided** that where an application for refund has been made before the commencement of the Central Excises and Customs Laws (Amendment) Act, 1991, such application shall be deemed to have been made under this sub-section and the same shall be dealt with in accordance with the provisions of sub-section (2):

**Provided further that the limitation of one year or six months, as the case may be, shall not apply where any duty and interest, if any, paid on such duty has been paid under protest.**

**Provided also** that in the case of goods which are exempt from payment of duty by a special order issued under sub-section (2) of section 25, the limitation of one year or six months, as the case may be, shall be computed from the date of issue of such order.

**Provided also that where the duty becomes refundable as a consequence of judgment, decree, order or direction of the appellate authority, Appellate Tribunal or any court, the limitation of one year or six months, as the case may be, shall be computed from the date of such judgment, decree, order or direction.**

**Explanation I. –** For the purposes of this sub-section, "the date of payment of duty and interest, if any, paid on such duty", in relation to a person, other than the importer, shall be construed as "the date of purchase of goods" by such person.

**Explanation II. –** Where any duty is paid provisionally under section 18, the limitation of one year or six months, as the case may be, shall be computed from the date of adjustment of duty after the final assessment thereof."

12. The learned Counsel argued that the main ground on which the refund has been rejected is that it is time-barred. The department has relied upon sub-section (1B) of Section 27. The Ld. Counsel pointed that the said sub-section (1B) starts with the phrase 'Save as otherwise provided in this section'. This means whatever has been provided is saved. The second proviso to sub-section (1) of Section 27 provides that the limitation of one year shall not apply when duty or interest has been paid under protest. This proviso provided in Section 27 is saved as per sub-section (1B). Ld. Counsel submitted that the limitation of one year cannot be applied when duty or interest is paid under protest. The contention of the department that the order of the

Tribunal has been passed on 01.03.2018 and the period of one year has to be computed from the said date and therefore the refund claim is time-barred is misconceived.

13. Ld. Counsel referred to the provision of law under Section 27 prior to the amendment 08.04.2011. Ld. Counsel stressed that prior to the amendment the period of limitation envisaged under Section 27 of the Customs Act was provided in the proviso to the section. The fourth proviso to sub-section (1) of Section 27 stated that limitation of one year or 6 months, as the case may be, shall be computed from the date of judgement, decree, order or direction of the appellate authority. Ld. Counsel argued that prior to the amendment, when the refund was in consequence of any judgement, decree, order or direction of a court, the method to compute limitation was stated in the nature of a proviso. However, after amendment, an Explanation was added to sub-section (1) of Section 27 by which (1A) and (1B) were introduced. Sub-section (1B) which speaks about the method of computing the period of limitation when duty becomes refundable as a consequence of any judgment, decree or order of court, starts with the phrase 'Save as otherwise provided in the section'. It has to be then construed that whatever has been provided in the section is saved. The second proviso to sub-section (1) of Section 27 which states that the limitation of one year shall not apply when duty or interest is paid under protest, is therefore saved.

14. Ld. Counsel contended that sub-section (1B) has been introduced as an Explanation and the object of Explanation is to

understand the act in the light of the Explanation. It does not ordinarily enlarge the scope of the original section which it explains, but only makes the meaning clear beyond dispute. In this regard, judgment of the Hon'ble Apex Court in the case of *S.Sundaram Pillai and Ors Vs V.R. Pattibiram and Ors.*- AIR 1985 SC 582 was relied by the Ld. Counsel and the relevant para of which reads as under :

> "46. We have now to consider as to what is the impact of the Explanation on the provisio which deals with the question of wilful default. Before, however, we embark on an enquiry into this difficult and delicate question, we must appreciate the intent, purpose and legal effect of an Explanation. It is now well settled that an Explanation added to a statutory provision is not a substantive provision in any sense of the term but as the plain meaning of the word itself shows it is merely meant to explain or clarify certain ambiguities which may have crept in the statutory provision. Sarathi in 'Interpretation of Statutes' while dwelling on the various aspects of an Explanation observes as follows:
>
> (a) The object of an explanation is to understand the Act in the light of the explanation.
>
> (b) It does not ordinarily enlarge the scope of the original section which it explains, but only makes the meaning clear beyond dispute."

15. It is also argued by the Ld. Counsel that a proviso carves out an exception to the main enactment and exclude something which otherwise would have been within the section. He relied upon the decision of the Hon'ble Apex Court in the case of *The Commissioner of Income Tax, Mysore, Travancore-Cochin and Coorg, Bangalore Vs The Indo Mercantile Bank Limited* – AIR 1959 SC 713.

16. Reliance was placed by the Counsel on the decision of Hon'ble Apex Court in the case of *Shah Bhojraj Kuverji Oil Mills and Ors. Vs*

*Subbash Chandra Yograj Sinha – AIR 1961 SC 1596*, the relevant paragraphs of the said decision are reproduced below :

> **"11.** He also relies upon the following observation of Lush, J., in Mullins V. Treasurer of Surrey (1880) 5. Q.B.D.170:
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> > "when one finds a proviso to a section, the natural presumption is that, but for the proviso, the enacting part of the section would have included the subject-matter of the proviso."
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> **12.** The law with regard to provisos is well-settled and well-understood. As a general rule, a proviso is added to an enactment to qualify or create an exception to what is in the enactment, and ordinarily, a proviso is not interpreted a stating a general rule. But, provisos are often added not as exceptions or qualifications to the main enactment but as savings clauses, in which cases they will not be construed as controlled by the section. The proviso which has been added to s.50 of the Act deals with the effect of repeal. The substantive part of the section repealed two Acts which were in force in the State of Bombay. If nothing more had been said, s.7 of the Bombay General Clauses Act would have applied, and all pending suits and proceedings would have continued under the old law, as if the repealing Act had not been passed. The effect of the proviso was to take the matter out of s.7 of the Bombay General Clauses Act and to provide for a special saving. It cannot be used to decide whether s.12 of the Act is retrospective. It was observed by Wood, V.C., in Fitzgerald v. Champneys (1861) 2 J.& H.31: 70 E.R. 958 that saving clauses are seldom used to construe Acts. These clauses are introduced into Acts which repeal others, to safeguard rights which, but for the savings, would be lost. The proviso here saves pending suits and proceedings, and further enacts that suits and proceedings then pending are to be transferred to the courts designated in the Act and are to continue under the Act and any or all the provisions of the Act are to apply to them. The learned Solicitor-General contends that the savings clause enacted by the proviso, even if treated as substantive law, must be taken to apply only to suits and proceedings pending at the time of the repeal which, but for the proviso, would be governed by the Act repealed. According to the learned Attorney-General, the effect of the savings is much wider, and it applies to such cases as come within the words of the proviso, whenever the Act if extended to new areas."

17. The decision in the case of M/s.*Agfa Healthcare Pvt. Ltd. Vs CC Chennai* – 2021 (4) TMI 429 – CESTAT Chennai was relied upon to argue that when appellant has approached a higher forum aggrieved by the rejection of benefit, it is sufficiently implied that the duty has been paid under protest. The relevant para of the Tribunal's decision is reproduced as under :

> "4. On perusal of the documents, it is seen that there is no dispute that the appellant has paid excess duty of Rs.29,57,931/- after reassessment of the bills of entry by extending the benefit of Notification No. 12/2012-CE. The refund has been rejected on the ground that it is barred by limitation. When the appellant has approached the higher forum aggrieved by the rejection of the notification benefit, it is sufficiently implied that the duty has been paid under protest. The Tribunal in the case of Bayshore Glass Trading Pvt. Ltd. (supra) has held that when appeal is filed against the assessment of the bill of entry, the same has to be considered as a protest in paying the duty."

18. The decision of the co-ordinate Bench of the Tribunal in *Commissioner of C.Ex & Cus., Nasik Vs Crompton Greaves Ltd.*- 2011 (22) STR 380 (Tri.-Mumbai) was relied upon to argue that when amount becomes refundable as a consequence of a favourable order, the question of limitation does not arise when the amount is paid under protest. The relevant para of the Tribunal's decision reads as under :

> **"5.** We have examined the position. We are not inclined to accept the Revenue's contention that the refund claim is time barred. The Hon'ble Supreme Court in the case of *Mafatlal Industries Ltd.* v. *U.O.I.* reported in 1997 (89) E.L.T. 247 (S.C.) in para 146 has held that -
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> > "it may be stated that duty paid in cases, which finally ended in orders or decrees or judgments of courts, must be deemed to have been paid under protest and the procedure and limitation etc. stated in Section 11B(2) read with Section 11B93) will not apply to such cases."

> Therefore, the amounts paid by the respondents are deemed to have been deposited under protest and the time-bar will not apply. The Tribunal in the case of *Omega Alloys Castings* v. *CCE* [2000 (121) E.L.T. 336 (T)] and *CCE* v. *Konark Cements and Asbestos* [2000 (37) RLT 415 (T) = 2000 (120) E.L.T. 634 (Tribunal)] have held that when the amount becomes refundable as a consequence of a favourable order, the question of limitation to such refund does not arise. Hence, we hold that the refund claim is not time-barred."

19. It is submitted that another ground on which the original authority has rejected the refund claim is that the claim is premature. This view has been taken based on the Public Notice No.88/2019 dated 18.10.2019. The said public notice has been issued pursuant to a judgement of the Hon'ble Supreme Court in the case of ITC Ltd. calling for the officers and giving direction to them to the effect that no refund shall be allowed unless the order of assessment including self-assessment is duly modified by way of an appeal. He submitted that in the present case, the appellant had requested for re-assessment after getting favourable orders from the Tribunal. It is the duty of the department to pass the reassessment orders. Refund claim filed by the appellant cannot be rejected for the inaction on the part of the department.

20. In regard to the view taken by the original authority that the refund claim is not complete as it is not supported by necessary document, it is submitted by the Ld.Counsel that the originals of the Bills of Entry had already been produced by the appellant while filing claim for Special Additional Duty refund. Duplicate copies of the Bills of Entry had been filed mentioning the same. The Chartered Accountant certificate was produced by the appellant before the

Commissioner (Appeals). Therefore, the contention that the appellant has not filed necessary documents is factually incorrect.

21. Ld. Counsel submitted that as the appellant had paid duty under protest which is evident from the Bills of Entry, the rejection of the refund claim as time-barred is not legally sustainable. He prayed that the appeal may be allowed.

22. Ld. A.R Ms. Anandalakshmi Ganesh Ram appeared and argued for the Department. She submitted that department had rejected the declared value of the imported goods and the value was enhanced on the basis of NIDB data. The appellant had paid duty under protest. Subsequently, the Assistant Commissioner of Customs (Group-3) has issued speaking order vide Orders-In-Original Nos. 21613/2013 & 21615/2013 both dated 22.08.2013 which vacates the protest. The details of which are as under :

| Speaking Order | OIA | | CESTAT Final Order | |
|---|---|---|---|---|
| No. | No | Decision | No. | Decision |
| 21613/2013 | 528/2014 | Upheld OIO | 40521/2018 | OIO set aside |
| 21615/2013 | 529/2014 | Upheld OIO | 40522/2018 | OIO set aside |
| 23733/2014 | 745/2014 | OIO set aside | 40520/2018 | OIO set aside |

The appellant had appealed against such orders before the Commissioner (Appeals) and these were upheld vide order dated 21.03.2014. However, the Commissioner (Appeals) vide OIA No.745/2014 dt. 01.05.2014 had set aside the order of enhancement

of value. The importer had filed an appeal against the order of Commissioner (Appeals) upholding the enhancement of value and the Department also filed appeal against the order of Commissioner (Appeals) setting aside the enhancement of value. The Tribunal vide Final Order No.40520-40521/2018 dated 01.03.2018 set aside the enhancement of value.

23. On the strength of the above mentioned final order of the Tribunal, the appellant had requested for reassessment of Bills of Entry vide letters dated 06.04.2018, 04.06.2018 and 19.06.2018. The appellant also filed a Writ Petition No.22120 of 2018 before the Hon'ble High Court of Madras seeking directions to carry out final assessment and the Hon'ble High Court of Madras held that the court is not in a position to issue a positive direction as the department is contemplating to file appeal against the order passed by the Tribunal and that the appeal time has not expired. The appellant then filed refund claim on 07.08.2019. This was rejected vide intimation dated 19.03.2020 by the refund section on the ground that the refund application is time-barred and it is filed after one year from the date of order of Tribunal). It was also held that the refund application is premature as the Bills of Entry were not re-assessed and the matter has not attained finality as the department was contemplating to file appeal against the order passed by the Tribunal. However, the department has accepted the final order passed by the Tribunal on monetary limitation.

24. The appellants were given an opportunity of hearing and the appellant's averment that the principles of natural justice was not followed is incorrect. Prior to issuance of order of rejection of refund, a deficiency memo was issued to the appellant to their old address. It is the responsibility of the appellant to have a mechanism to redirect letters to the new address. The personal hearing letter was sent to the appellant on 03.09.2019 and the date of intimation of change of address was given by the appellant only on 19.12.2019. Therefore, the lower adjudicating authority has correctly followed the principles of natural justice though the appellant did not appear for the personal hearing.

25. The appellant's averment that there is no time limit for filing refund claim when the duty is paid under protest is erroneous. Though appellant has paid the duty under protest, when the original authority issued speaking order for enhancement of the value, the protest gets vacated. The speaking order was issued at the request of the appellant-importer vide letter dated 31.07.2013.

26. Ld. A.R relied on the Tribunal's decision in the case of *Reddington India Ltd. Vs Commissioner of Customs, Chennai* - 2011-TIOL-863-CESTAT-MAD). She argued that Tribunal in the said case held that period of limitation has to be computed from the date of judgment even though duty is paid under protest. In the present case as the department having accepted the valuation, the dispute has attained finality by the order passed by the Tribunal. The refund claim ought to

have been filed within one year from the date of CESTAT order ie. 01.03.2018.

27. Though it is stated that the appellant has requested for re-assessment they have not submitted any documents along with refund claim to show that they have requested for re-assessment consequent to the order passed by the Tribunal. Hence the refund claim is premature.

28. Ld. A.R stressed that appellant has not furnished documents to show that refund claim is not hit by unjust enrichment. Since the refund is filed after expiry of one year from the date of Tribunal's order, the claim is rightly rejected as time barred by the adjudicating authority. She prayed that the appeal may be dismissed.

29. Heard both sides.

30. The issue to be decided is whether the rejection of refund claim on the grounds of (1) time-bar (2) premature and (c) being incomplete is legal and proper.

31. Section 27 of the Customs Act, 1962 has already been reproduced above. The second proviso to sub-section (1) of Section 27 states that limitation of one year shall not apply when the duty is paid under protest. In the present case, there is no dispute that the appellant had paid the duty under protest. Ld. A.R has argued that when a speaking order has been issued by the original authority, the

protest recorded by the appellant automatically gets vacated. Such an argument is untenable. The intention of making a protest is to inform the disagreement to the demand of duty. When a protest is recorded, it becomes the duty of the Department to pass a speaking order giving reasons for enhancement of the value of the goods. In this case, such a speaking order was passed only when a request was made by the appellant. Be that as it may, the appellant preferred an appeal before the Commissioner (Appeals) and thereafter the matter travelled upto the Tribunal. The argument of the Ld. AR that when a speaking order is issued (appealable order), the protest automatically gets vacated is unacceptable when the dispute with regard to demand of duty is carried to the higher forum.

32. The second proviso of sub-section (1) of Section 27 states that the limitation of one year will not apply when duty is paid under protest. The question is whether sub-section (1B) of Section 27 which says that the limitation of one year has to be computed from the date of judgment, decree or order of court would come into application even if the duty is paid under protest. Sub-section (1B) starts with the phrase '*Save as otherwise provided in this section*'. [emphasis supplied]. It means "except to the extent specific provision is made". In Section 27 a specific provision is made with regard to limitation when the duty is paid under protest. This provision is contained in the proviso. The meaning of the expression '*Save as otherwise provided in this section*' [emphasis supplied] was discussed by the Hon'ble

Andhra Pradesh High Court in the case of *Cherukuri Kutumbayya Vs The Municipal Council* reported in AIR 1959 AP 1. The relevant paragraphs of the said decision are reproduced as under :

> "5. The point for determination is whether the appropriate provision of law is Section 81(2) or 81(4). The answer to this must depend upon the construction we put on Section 81(2) and (4). Section 81(2) enacts:
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> "Save as otherwise provided in this Act, these taxes shall be levied at such percentages of the annual value of lands or buildings or both as may be fixed by the Municipal Council, subject to the provisions of Section 78."
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> Section 81(4) is in these words:
>
> "The Municipal Council may, in the case of lands used exclusively for agricultural purposes, levy these taxes at such proportions as it may fix of the annual value of such lands as calculated in accordance with the provisions of Section 79 of the Madras Local Boards Act, 1920."
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> 6. The expression "save as otherwise provided" in Sub-section (2) means 'except to the extent specific provision is made'. In other words, Sub-section (2) will come into play only in cases which are not governed by any other specific provisions of law. Therefore, it is only where there is no other special provision in respect to any other type of land this sub-section is attracted. Since the Legislature has enacted a specific provision in regard to agricultural lands, it is reasonable to infer that that category of lands contemplated by that sub-section should be governed by it.
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> 7. There is also another cardinal rule of interpretation of statutes, viz., when there is a general provision and a specific provision in regard to a subject, the general provision should yield to the specific provision and it is the latter that prevails. Undoubtedly Sub-section (2) contains a rule for the computation of taxes in regard to lands or buildings or both, that is to say, lands which are of a general character. It is operation will be excluded when there is a specific provision for a specific type of land. In this case the lands assessed are agricultural lands and the mode of taxation is provided for in Sub-section 4. Following this rule of construction, we must hold that it is Sub-section (4) that applies."
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> (emphasis supplied)

33. It is clear from the above, only in cases except as provided in Section 27, the newly added sub-section (1B) would apply. In other words, except for which has been provided in the section, the limitation of one year has to be computed from the date on which the judgment, decree or order of court has been passed. Thus, the operation of sub-section (1B) will not come into application when the duty is paid under protest.

34. The position of law was slightly different prior to 08.04.2011. On perusal of Section 27 as it stood prior to the amendment, it can be seen that the second proviso states that one year / 6 months, as the case may be, do not apply when duty is paid under protest. The fourth proviso to sub-section (1) states that when duty becomes refundable as a consequence of judgment, decree, order or direction of the court, the limitation of one year or 6 months, as the case may be, shall be computed from the date of such judgement, decree or order. Both being proviso, it does give rise to some confusion. However, after the amendment to Section 27 by adding sub-section (1B) separately and using the phrase '*Save as otherwise provided in this section*', the intention of the legislature to put the situation when duty has been paid under protest under a different category where no limitation applies is very much clear. The Ld. A.R has relied on the decision of the Tribunal in the case of *M/s.Reddington India Ltd*. (supra). It is true that in this decision the Tribunal has held that even if duty is paid under protest, when the refund is in consequence of a judgment,

decree or order of court, the limitation of one year / 6 months as the case may be would apply. On perusal of facts it is noted that the said decision pertains to the period prior to 08.04.2011 (prior to amendment of Section 27). This decision is therefore distinguishable on facts. In the case on hand, although refund claim is made out of a consequence of judgement, decree or order, the appellant having paid duty under protest, the limitation of one year envisaged in Section 27 will not apply. The issue of time bar is answered in favour of the appellant. However, I cannot agree with the argument of the Ld. Counsel for appellant that sub-section (1B) has been introduced as an explanation.

35. The second ground on which the refund claim is rejected is that the claim is premature. It is the case of the Department that the claim is made without re-assessment / final assessment of the Bills of Entry. The view taken by the department that the refund claim is time-barred as well as premature appears to be self-contradictory. Further, it is the duty of the department to conduct reassessment in consequence to the orders passed by the Tribunal which has set aside the enhancement of the value of imported goods. Undisputedly, the department has accepted the order passed by the Tribunal and there is no appeal filed against the said order. It also requires to be mentioned that though the department has contended before the Hon'ble High Court that they are contemplating to file an appeal, they have not done so. The appellant was thus denied relief before a higher

forum by contending that Department intends to file an appeal. Even after accepting the final order of Tribunal, they have not passed an order of final reassessment. The inaction on the side of the department cannot be a ground to reject the refund claim as premature.

36. The other reason for rejection of the refund is that refund claim is incomplete and not supported by necessary documents. Ld. Counsel for appellant has submitted that they have furnished the Chartered Accountant certificate before the Commissioner (Appeals). It is also stated that they have furnished original Bills of Entry while applying for refund of SAD. The matter having reached upto the Tribunal and also the Hon'ble High Court, it can be safely inferred that the department will not find it difficult to verify the copies of Bills of Entry produced by the appellant. The appellant having produced the Chartered Accountant certificate only before the Commissioner (Appeals), the original authority has not been able to verify the issue of unjust enrichment. For this reason, I hold that the matter requires to be remanded to the original authority.

37. From the discussions made above, I hold that rejection of refund claim on the ground of time-bar and premature is set aside. The department is directed to complete the re-assessment and then process the refund claim. The appellant shall be given an opportunity to furnish documents to prove that refund is not hit by unjust enrichment. Being the second round of litigation, the department is

directed to process the refund within a period of four months from the date of this order.

38. Thus the appeal is partly allowed and partly remanded in above terms.

(Pronounced in court on 09.11.2022)

Sd/-
(**SULEKHA BEEVI C.S.**)
**MEMBER (JUDICIAL)**

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