CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH – COURT NO. 3

Customs Appeal No. 52190 of 2018

(Arising out of Order-in-Appeal No. CC(A)Cus/D-II/ICD/TKD/Export/732/2018 dated 27.03.2018 passed by the Commissioner of Customs (Appeals), New Delhi)

Commissioner of Customs (Import) **Appellant**
Inland Container Depot,
Tughlakabad, New Delhi

VERSUS

M/s Siya Paper Mart Pvt. Ltd. **Respondent**
35/13, Baldhari Colony,
Mata Wali Gali, Near Dr. Agarwal Clinic,
Bakhtawarpur, Alipur, Delhi-110036.

AND
Customs Appeal No. 52192 of 2018

(Arising out of Order-in-Appeal No. CC(A)Cus/D-II/ICD/TKD/Export/731/2018 dated 26.03.2018 passed by the Commissioner of Customs (Appeals), New Delhi)

Commissioner of Customs (Import) **Appellant**
Inland Container Depot,
Tughlakabad, New Delhi

VERSUS

M/s Siya Paper Mart Pvt. Ltd. **Respondent**
35/13, Baldhari Colony,
Mata Wali Gali, Near Dr. Agarwal Clinic,
Bakhtawarpur, Alipur, Delhi-110036.

Appearance

Shri Rakesh Kumar, Authorized Representative – for the Appellant

None – for the Respondent

CORAM:

HON'BLE MR. P.V. SUBBA RAO, MEMBER (TECHNICAL)
HON'BLE MS. BINU TAMTA, MEMBER (JUDICIAL)

DATE OF HEARING : 27/02/2023
DATE OF DECISION : 23/03/2023

Final Order Nos. 50385-50386/2023

P.V. Subba Rao:

Revenue filed these two appeals on the same issue in respect of the same respondent and hence they are being disposed of together. Goods which are imported into India are chargeable to basic customs duty, additional duty of customs and also Special Additional duty of Customs [1] levied under Section 3(5) of the Customs Tariff Act, 1975 on some goods. SAD is levied @ 4% ad valorem in order to provide a level playing field to domestic industry because goods manufactured in India have to pay Value Added Tax (VAT) but imported goods do not have to pay it because sale in the course of international trade is not exigible to VAT by the State Governments. After importing the goods, if the importer uses the goods, he has to suffer the 4% SAD so paid. However, if the importer sells the goods to someone else, then that transaction takes place within India and is chargeable to VAT at the hands of the State Government.

2. Notification No. 102/2007-Cus dated 14.9.2007 has been issued to provide for refund of the SAD if the importer sells the imported goods and pays the VAT on them. The benefit of this notification is available subject to some conditions including condition in paragraph 2(c) of the notification that '*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*

[1] SAD

before the expiry of one year from the date of the payment of the said additional duty of customs'.

3. In appeal no. C/52190/2018, the respondent filed a claim for refund of Rs. 2,10,632/- of which the Assistant Commissioner rejected refund of Rs. 1,53,507/- for the reason that the claims were filed beyond one year from the date of payment of duty and hence were time-barred as per condition 2 (c) of the notification.

4. In appeal no. C/52192/2018, the respondent filed a claim for refund of Rs. 22,631/- which the Assistant Commissioner rejected for the reason that the claim was filed beyond one year from the date of payment of duty and hence was time-barred as per condition 2 (c) of the notification.

5. The Commissioner (Appeals), by the impugned orders, allowed appeals of the respondent relying on the judgment of the jurisdictional Delhi High Court in **M/s. Sony India Pvt. Ltd. vs Commissioner of Customs, New Delhi**[2] in which the it was held that the notification must be read down insofar as it places the restriction of one year for filing the refund claim. The relevant paragraphs of this decision are as follows:

> **14.** The expression *"so far as may be"* in this context, under Section 27 is significant as well as instructive. The levy under Section 3(5) is conditional upon the Central Government's opinion that it is necessary to *"counter-balance the sales tax, value added lax, local lax or any other charges for the time being leviable on a like article."*; the rate of duty - where more than one levy exists, would be the highest of such rates and the terms of imposition of SADC would be spelt out in the notification. In this case, the regime existing before the notification of 2008 did not specify any period of limitation - and perhaps advisedly so. Some customs authorities apparently started applying Section 27, drawing inspiration from Section 3(8) which led to confusion. In

[2] **2014 (304) ELT 660 (Del.)**

Notification No. 102/2007-Cus., dated 14-9-2007 there was no period of limitation; by Circular No. 6/2008-Cus., an amending notification providing for one year period from the date of payment of the additional duty of customs was issued, through Notification No. 93/2008-Cus., dated, 1-8-2008, amending Para 2(c) of the 2007 Notification. The net effect of these was that a one year period was insisted upon for refund applications. That period was calculable from date of payment of duty (SAD) : *Dr. Partap Singh & Anr.* v. *Director of Enforcement, Foreign Exchange Regulation Act & Ors.*, 1985 (3) SCC 72 is an authority for the proposition that the use of the phrase *"so far as may be"* in a later statute, with reference to provisions in an earlier statute, means that the provisions of the referred (earlier) statute are to be followed *"to the extent possible".* The Supreme Court, in that case turned down the argument that the letter and content of Section 165 of the Code of Criminal Procedure was to be followed in Foreign Exchange Regulation Act proceedings, by virtue of Section 37(2) of that Act. It was held, crucially that:

"The submission that Section 165(1) has been incorporated by pen and ink in Section 37(2) has to be negatived in view of the positive language employed in the section that the provisions relating to searches shall so far as may be apply to searches under Section 37(1). If Section 165(1) was to be incorporated by pen and ink as sub-section (2) of Section 37, the legislative draftsmanship will leave no room for doubt by providing that the provisions of the CrPC relating to searches shall apply to the searches directed or ordered under Section 37(1) except that the power will be exercised by the Director of Enforcement or other officer exercising his power and he will be substituted in place of the Magistrate. The provisions of sub-section (2) of Section 37 has not been cast in any such language. It merely provides that the search may he carried out according to the method prescribed in Section 165(1)."

16. Section 27(1) of the Customs Act prescribes a time limit of expiry of *"one year, from the date of payment of such duty or interest..."*. Section 27(1B) lists out three contingencies when the one year limit applies with modified effect. That provision has the effect of shifting the date from which the refund claim is to be reckoned. All that can be inferred from the term "so far as may be" would be that specific provisions relating to the *mechanism* applicable for refund, in the Customs Act, applied; not the *period of limitation*. The Customs authorities had never understood Section 27(1) as to mean that a one year period of limitation was applicable. *Audioplus* (supra) and *United Chemicals Industries* (supra) are both testimony to this. It is the circulars/notifications of 2008 and No. 16/2009 which for the first time harped on the one year period of limitation. Circular No 6/2008, dated 28-4-2008 issued by the C.B.E. & C. stated that :

Time-Limit: "4.

In "4.1 the Notification No. 102/2007-Cus., dated 14-9-2007, no specific time-limit has been prescribed for filing a refund application. Under the circumstances, a doubt has been expressed that whether the normal time-limit of six months prescribed in Section 27 of the Customs Act, would apply. In the absence of specific provision of Section 27 being made applicable in the said notification, the time-limit prescribed in this section would not be automatically applicable to refunds under the notification. Further, it was also represented that the goods imported may have to be dispatched for sale to different parts of the country and that the importer may find it difficult to dispose of the imported goods and complete the requisite documentation within the normal period of six months. Taking into account various factors, it has been decided to permit importers to file claims under the above exemption upto a period of one year from the date of payment of duty. Necessary change in the notification is being made so as to incorporate a specific provision prescribing maximum time-limit of one year from the date of payment of duty, within which the refund could be filed by any person. It is also clarified that the importers would be entitled to refund of duties only in respect of quantities for which the prescribed documents are made available and the claims submitted within the maximum prescribed time of one year. Unsold stocks would not be eligible for refunds."

Notification No. 93/2008, dated 1-8-2008 was issued prescribing the period of limitation as one year from the date of payment of additional duty of Customs.

17. Plainly, therefore. Section 27 was understood as not applying to SAD cases, even though it was in the statute book for many years. Yet, with the introduction of the circular and then the notification (No. 93), the Customs authorities started insisting that such limitation period which was prescribed with effect from 1-8-2008 (by notification) became applicable. There is a body of law that essential legislative policy aspects (period of limitation being one such aspect) cannot be formulated or prescribed by subordinate legislation. *Khemka and Co. (Agencies) Private Ltd.* v. *State of Maharashtra*, (1975) 35 STC 571 and other decisions are authority on the question that in matters which deal with substantive rights, such as imposition of penalties and other provisions that adversely affect statutory rights, the parent enactment must clearly impose such obligations; subordinate legislation or rules cannot prevail or be made, in such cases. The imposition of a period of limitation for the first time, without statutory amendment, through a notification, therefore could not prevail.

18.For these reasons, this Court holds that the amending notification must be read down to the extent that it imposes a limitation period. The question of law framed is therefore, answered in favour of the assessee and against the Revenue. The appeal accordingly succeeds and is allowed without any order as to costs.

6. Revenue's SLP against the above judgment was dismissed by the Supreme Court in view of the limitation leaving the question of law open[3]. On the same question of law, Bombay High Court held that the limitation of one year applies for refunds in **CMS INFOSYSTEMS LTD. Versus UNION OF INDIA[4].** Appeal against **CMS Infosystems[5]** is admitted and is pending before Supreme Court. Thus, the binding legal precedent as far as Delhi jurisdiction is concerned is **Sony India** which still holds the field.

7. Revenue filed these appeals on the ground that in another case of **Wilhem Textiles India Pvt. Ltd.,** involving the same issue, Revenue's appeal to Delhi High Court on the same issue was dismissed and Revenue's SLP against the dismissal by the Delhi High Court has been admitted by the Supreme Court. Therefore, according the Revenue, Commissioner (Appeals) has erred in observing the judicial discipline and following the ratio of the judgment of the jurisdictional High Court and should have defied Delhi High Court while passing the impugned order. The relevant portion of the appeal signed by the Committee of the two Commissioners on page 18 of the appeal reads as follows:

> *" 22. Since, the issue remains that the question of law has not been decided till date and is open, the learned Commissioner (Appeals) has erred in ignoring the legal position as laid down vide notification no. 93/2008 and deciding the matter against the revenue. Hence, this appeal."*

8. We are surprised as to how the Committee of two Commissioners has not only concluded that the Commissioner (Appeals) does not have to follow judicial discipline but have gone

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[3] Commissioner v. Sony India Pvt. Ltd. - 2016 (337) E.L.T. A102 (S.C.)]
[4] 2017 (349) E.L.T. 236 (Bom.)
[5] CMS Info Systems Ltd. v. Union of India - 2018 (360) E.L.T. A190 (S.C.)]

further to say that the Commissioner (Appeals) has erred in following the binding precedent of the jurisdictional High Court. The prayer before us is to hold that the Commissioner (Appeals) erred in following judicial discipline and that he should have not followed the binding precedent of the jurisdictional High Court because in some other case, on the same issue in which also the High Court dismissed the Revenue's appeal, an SLP has been admitted by the Supreme Court. The submissions of Revenue in this appeal that the Commissioner (Appeals) should have not followed the binding ruling of the jurisdictional High Court can only result in considerable harassment to the assessee-public through needless litigation without any benefit to the Revenue. The law relating to the judicial discipline was explained in clearest terms by the Supreme Court in **UNION OF INDIA vs. KAMLAKSHI FINANCE CORPORATION LTD**[6]

> "5. The learned Additional Solicitor General, however, submits that the learned Judges have erred in passing severe strictures against the two Assistant Collectors who had dealt with the matter. He submitted that these officers had given reasons for classifying the goods under Heading 39.19 and not 85.46 and could do no more. He submitted that they acted *bona fide* in the interests of Revenue in not accepting a claim which, they felt, was not tenable.
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> 6. Sri Reddy is perhaps right in saying that the officers were not actuated by any *mala fides* in passing the impugned orders. They perhaps genuinely felt that the claim of the assessee was not tenable and that, if it was accepted, the Revenue would suffer. But what Sri Reddy overlooks is that we are not concerned here with the correctness or otherwise of their conclusion or of any factual *mala fides* but with the fact that the officers, in reaching their conclusion, by-passed two appellate orders in regard to the same issue which were placed before them, one of the Collector (Appeals) and the other of the Tribunal. The High Court has, in our view, rightly criticised this conduct of the Assistant Collectors and the harassment to the assessee caused by the failure of these officers to give effect to the orders of authorities higher to them in the appellate

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[6] 1991 (55) E.L.T. 433 (S.C.)

hierarchy. It cannot be too vehemently emphasised that it is of utmost importance that, in disposing of the quasi-judicial issues before them, revenue officers are bound by the decisions of the appellate authorities. **The order of the Appellate Collector is binding on the Assistant Collectors working within his jurisdiction and the order of the Tribunal is binding upon the Assistant Collectors and the Appellate Collectors who function under the jurisdiction of the Tribunal. The principles of judicial discipline require that the orders of the higher appellate authorities should be followed unreservedly by the subordinate authorities. The mere fact that the order of the appellate authority is not "acceptable" to the department - in itself an objectionable phrase - and is the subject-matter of an appeal can furnish no ground for not following it unless its operation has been suspended by a competent Court. If this healthy rule is not followed, the result will only be undue harassment to assessees and chaos in administration of tax laws.**

7. The impression or anxiety of the Assistant Collector that, if he accepted the assessee's contention, the department would lose revenue and would also have no remedy to have the matter rectified is also incorrect. Section 35E confers adequate powers on the department in this regard. Under sub-section (1), where the Central Board of Excise and Customs [Direct Taxes] comes across any order passed by the Collector of Central Excise with the legality or propriety of which it is not satisfied, it can direct the Collector to apply to the Appellate Tribunal for the determination of such points arising out of the decision or order as may be specified by the Board in its order. Under sub-section (2) the Collector of Central Excise, when he comes across any order passed by an authority subordinate to him, if not satisfied with its legality or propriety, may direct such authority to apply to the Collector (Appeals) for the determination of such points arising out of the decision or order as may be specified by the Collector of Central Excise in his order and there is a further right of appeal to the department. The position now, therefore, is that, if any order passed by an Assistant Collector or Collector is adverse to the interests of the Revenue, the immediately higher administrative authority has the power to have the matter satisfactorily resolved by taking up the issue to the Appellate Collector or the Appellate Tribunal as the case may be. In the light of these amended provisions, there can be no justification for any Assistant Collector or Collector refusing to follow the order of the Appellate Collector or the Appellate Tribunal, as the case may be, even where he may have some reservations on its correctness. He has to follow the order of the higher appellate authority. This may instantly cause some prejudice to the Revenue but the remedy is also in the hands of the same officer. He has only to bring the matter to the notice of the Board or the Collector so as to enable appropriate proceedings being taken under S. 35E(1) or (2) to keep the interests of the department alive. If the officer's view is the correct one, it will no doubt be finally upheld and the Revenue will get the duty, though after some delay which such procedure would entail.

8. We have dealt with this aspect at some length, because it has been suggested by the learned Additional Solicitor General that the observations made by the High Court, have been harsh on the officers. **It is clear that the observations of the High Court, seemingly vehement, and apparently unpalatable to the Revenue, are only intended to curb a tendency in revenue matters which, if allowed to become widespread, could result in considerable harassment to the assessee-public without any benefit to the Revenue. We would like to say that the department should take these observations in the proper spirit. The observations of the High Court should be kept in mind in future and utmost regard should be paid by the adjudicating authorities and the appellate authorities to the requirements of judicial discipline and the need for giving effect to the orders of the higher appellate authorities which are binding on them.**

9. With the above observations, this Special Leave Petition is dismissed.

9. In view of the above, we dismiss both these appeals filed by the Revenue and uphold the impugned orders.

(Pronounced in open Court on 23/03/2023)

(P. V. SUBBA RAO)
MEMBER(TECHNICAL)

(BINU TAMTA)
MEMBER(JUDICIAL)

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