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

REGIONAL BENCH - COURT NO. 3

CUSTOMS Appeal No. 10287 of 2021-DB

[Arising out of Order-in-Original/Appeal No KDL-CUSTM-000-APP-70-20-21 dated 17.03.2021 passed by Commissioner of CUSTOMS-KANDLA]

Variety Lumbers Pvt Limited .... **Appellant**

Plot No 402 Sector - 5 Gandhidham
Ghandhidham Kutch, Gujarat - 370201

VERSUS

Commissioner of Customs, Kandla .... **Respondent**

Custom House, Near Balaji Temple,
Kandla, Gujarat

APPEARANCE :

Shri Hardik Modh, Advocate for the Appellant
Shri R P Parekh, Superintendent (AR) for the Revenue.

CORAM: HON'BLE MR. RAMESH NAIR, MEMBER (JUDICIAL)
HON'BLE MR. RAJU, MEMBER (TECHNICAL)

DATE OF HEARING : 13.09.2022
DATE OF DECISION : 02.22.2022

FINAL ORDER NO. A/11336 / 2022

RAMESH NAIR :

This appeal is directed against the impugned order of the Commissioner (Appeals) whereby he has upheld the denial of refund of Special Additional Duty (SAD) of Rs. 1,51,90,219/- paid on importation of Timber Round Logs through 39 Bills of Entry during December 2018 to March 2011 on the ground of limitation.

2. Factual backdrop of the case is that appellant had paid 4% SAD on importation of Timber Round Logs. Later on appellant filed refund claim for 4% SAD amounting to Rs. 1,51,90,212/- on the basis of exemption allowed under Notification No. 102/2007-Cus dated 14.09.2007. The said notification stipulates that an importer shall file a claim of Refund of SAD with the jurisdictional customs officer before the expiry of one year from the date of payment of SAD. It was alleged that the refund claim was filed by the Appellant after the expiry of one year and hence the claim appeared to be hit by limitation. Show cause notice dated 06.08.2019 was issued to the

Appellant proposing rejection of the refund claim. In adjudication, the Assistant Commissioner vide Order-In-Original dated 31.10.2019 rejected the refund claim on the ground that the claim was filed beyond the period of limitation. Being aggrieved with the said original order, the Appellant filed appeal before the Commissioner (Appeals), Ahmedabad who vide impugned Order-In-Appeal dated 17.03.2021 upheld the order-in-original dated 31.10.2019. Being aggrieved by the impugned order-in-appeal, the Appellant filed the present Appeal.

3. Shri Hardik Modh, learned Counsel appearing on behalf of Appellant submit that Learned Commissioner (Appeals) erred in confirming the order passed by the Assistant Commissioner of Customs rejecting the refund claim filed by the Appellant on limitation. The Hon'ble Supreme Court vide order dated 24.04.2018 upheld the order passed by the Hon'ble Gujarat High Court on 07.07.2011 and held that mere conversion of imported logs in sawn timber without loss of identity of the original product would not have deprived the Appellant from benefit of exemption notification. The Appellant within a period of one year from the date of order of the Hon'ble Supreme Court filed the refund claim and therefore, the same should be considered as filed within the time limit. Vide Circular No. 15/2010–Cus dated 29.06.2010 Board has clarified that refund of 4% SAD would not be eligible in a case where there is distinct classification in the imported and final products that are sold in the market on which VAT was paid. It was clarified that round logs were classifiable under heading 4407 and therefore, refund was not permissible. Due to circular, the Appellant had no option but to wait the outcome of the final decision on the issue pending before the Hon'ble Supreme court. The Hon'ble Supreme Court upheld the stand of Appellant on 24.04.2018 and therefore, the Appellant rightly filed the refund on 17.01.2018 and therefore, the Appellant filed the refund on 17.01.2019 within a period of one year from the date of decision of the Hon'ble Supreme Court.

4. He submits that pursuant to the Board circular, the department stopped accepting the refund claims in a case where the importers paid SAD on round logs and claimed refund of VAT paid on subsequent sale of sawn timber. On one hand, the department did not accept the refund claim and on other hand, the issue on merit was pending before the appropriate forum

and therefore, the Appellant decided to file the refund claim after the issue attained finality.

5. He also submits that Ld. Commissioner (Appeals) ought to have appreciated that the whole object and purpose of the Notification No. 102/2007 is to ensure that the importer does not suffer both SAD and VAT. As is evident from Section 3(5), SAD was levied for those importers who were actually users of the goods and who do not have to pay SAD/Sales Tax which they would have, had they procured the goods from domestic market for self–consumption. Evidently in the present case, timber has not been consumed which mean destruction by utility. The Appellant paid VAT on sale of the timber after importation. Since VAT amount has been paid and the Appellant had not consumed the timber, the Ld. Commissioner (Appeals) ought to have granted refund of SAD.

6. He further submits that Section 27(1B) (b) of the Customs Act provides that the period of limitation of one year will be computed from the date of judgment /decree/ order or direction in a case where the duty become refundable as consequence of Judgment/ decree/ and order. In the present case, the Hon'ble Supreme Court decided the issue finally only on 24.04.2018 and the Appellant preferred refund claim on 17.01.2019, therefore, it is within the period of limitation i.e. one year as prescribed under Section 27 of the Customs Act.

7. He also relies upon the following judgments in support of his contention:

(i) Sony India Pvt. Limited vs. Commissioner of Customs- 2014(304) ELT 660 (Del)
(ii) Commissioner of Customs (Import) vs. Gulati Sales Corporation – 2018 (360) ELT 277 (Del.)
(iii) Utkal Lumbers Pvt. Ltd. vs. Union of India – 2017(345) ELT 101 (Guj.)
(iv) Singla Trading Co. vs. Commissioner of Customs, New Delhi – 2012(285) ELT 256 (Tri. Del.)

8. Shri R P Parekh, learned Superintendent, AR appearing on behalf of the revenue reiterates the findings of the impugned order-in-appeal. He placed reliance on the following judgments:-

(i) CC, Hyderabad Vs. Surya Telecom Pvt. Ltd.- 2019 (370) ELT 338
(ii) MS Metals Vs. CC (Prev.), Patna – 2017(345) ELT 113 (Tri. Kol)
(iii) Alco India P. Ltd. vs. CC, Kolkata – 2018(359)ELT 244 (Tri. Kol)
(iv) Final order No. A/30655-30656/2018 dated 02.07.2018 – CC, Hyderabad vs. Surya Telecom Pvt. Ltd.
(v) Final Order No. A/10144/2018 dated 10.01.2018 – Thaim Trading Co. vs. CC, Mundra

9. After hearing both the sides and on perusal of the records, we find that there is no dispute on the facts. The refund claim was admittedly not filed within the period of one year as prescribed in paragraph 2 of clause C of Notification No. 102/2007-Cus dated 14.09.2007 and the same stands filed within a period of one year from the date of order of Hon'ble Supreme court. Further it is on record that appellant regularly filed the refund and department had not granted the refund after the period of 2009 on the ground that one of the condition of the Notification that refund of SAD would be entitled only if the imported goods were sold as such, has not been complied with. Pursuant to the action of department for not granting the refund, the Appellant was issued show cause notice for denial of refund claim on the ground that since the identity of goods imported by the Appellant was changed on account of sawing the timber, appellant was not entitled for refund. Further, Board vide circular No. 15/2010-CUS dated 29.06.2010 also clarified that refund of SAD would not be eligible to the importer in the case there is distinct classification for the imported and the final products that are same in market on which VAT was paid. We noticed that since the entire issue was sub-judice, Appellant had not filed the refund claim for subsequent imports. However, in view of the order passed by the Hon'ble Supreme Court, the Appellant had filed the refund claim on 17.01.2019 for the goods imported during the period between 29.12.2008 to 03.03.2011. Clearly, in the present case, the eligibility of refund arise only after the issue attained finality. The Hon'ble Supreme Court upheld the stand of Appellant on 24.04.2018 and appellant rightly filed the refund claim on

17.01.2009 within the period of one year from the date of decision of the Hon'ble Supreme Court.

10. Further, from the provisions of Section 27(1B) (C), it is clear that refund claim can be filed in consequence of any judgment decree, or direction of the appellate authority within one year. In this case, it is on record that the issue related to refund of SAD was under litigation and attained finality after the decision of Hon'ble Supreme Court. Therefore, as per the provisions of Section 27 of the Customs Act, 1962, the limitation for filing the refund claim shall start from date of decision of Hon'ble Supreme Court. In these circumstances, we hold that the refund claim filed by the appellant is within time.

In the present case there is peculiar fact that the appellant was refrained from filing refund claim by a Board's circular No.15/2010-CUS dated 29.06.2010 which is extracted below:

Circular No. 15/2010-Cus., dated 29-6-2010
F.No. 401/73/2010-Cus. III

Government of India
Ministry of Finance (Department of Revenue)
Central Board of Excise & Customs, New Delhi

Subject : Fraudulent claim of 4% SAD by unscrupulous importers - Regarding.

Attention is invited to Notification No. 102/2007-Cus., dated 14-9-2007 which provides exemption in the form of refund of 4% SAD paid on goods imported and subsequently sold on payment of VAT/ST.

2. Instances have come to notice of the Board where some importers of 'timber logs' have undertaken certain processes and subsequently sold 'sawn' or 'cut logs' after payment of VAT. These importers are claiming the refund of 4% SAD paid at the time of importation of goods in terms of Notification No. 102/2007-Customs, dated 14-9-2007. As per the said Notification, refund of SAD is available only in case the imported goods are subsequently sold on payment of VAT, without carrying out any process. However, at the time of claiming refund of 4% SAD, these importers have manipulated the facts by showing that goods sold were imported timber logs only and not 'sawn' or 'cut logs'. In terms of the classification of the First Schedule to Customs Tariff Act, 1975, round logs/round squares are classified under the heading 4403 whereas the 'sawn' woods are classified separately under heading 4407. Thus, there is distinct classification for the imported and the final products that are sold in the market on which VAT is paid. Hence, since the goods imported and subsequently sold were different goods falling under different tariff headings, the benefit of Notification No. 102/2007-Customs dated 14-9-2007 by way of refund of 4% SAD is not available to importers.

3. In certain other cases, refund claims have been filed with the department wherein forged documents were submitted for availing the refund envisaged in the notification No. 102/2007-Customs, dated 14-9-2007. In such cases, it is reported that the importers were preparing duplicate set of invoices of the same serial number. Scrutiny of these two sets of invoices establishes that the invoice submitted to the department shows description of goods as 'Malaysian round logs' whereas the invoices obtained from the buyer shows the description of goods as 'imported timber'. The other difference is that in the invoice submitted

> to the department the quantity of goods in number/pieces are not mentioned whereas in the invoices of the buyer the quantity in number/pieces is clearly mentioned. This fact of preparing duplicate invoices is further substantiated by the other documents such as related transit passes and lorry receipt. These importers are thus defrauding the government revenue by resorting to this *modus operandi* of submitting the forged documents for claiming refund fraudulently.
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> 4. It is apprehended that above mentioned *modus-operandi* may have all India ramifications and may be prevalent in other field formations and are not limited only to a few cases. In view of the above, all field formations are directed to be alert and vigilant to ensure that unscrupulous importers do not avail fraudulent refunds of 4% SAD in terms of Notification No. 102/2007-Customs, dated 14-9-2007 by resorting to the above-mentioned *modus operandi*.

From the above circular, it is clear that the appellant was not allowed to file refund claim by the government till the issue on merit was settled by the Hon'ble Apex court in the appellant's own case reported at *2018 (360) ELT 790 (SC).* In the peculiar fact of this case the period upto the decision of the Hon'ble Supreme Court shall be reduced for the purpose of the relevant date as prescribed in Section 27 for computing the period of limitation of one year. Accordingly, in this case the relevant date shall be the date of the Apex court decision i.e. 24.04.2018. The appellant admittedly filed the refund claim within one year from the date of the Hon'ble Supreme Court judgment. Hence refund claim was filed well within the stipulated time period of one year from the relevant date in terms of Section 27 of the Customs Act, 1962.

11. As per our above discussion and finding, we are of the considered view that in the facts of the present case, the refund claim of the appellant is not hit by limitation. Accordingly, we set aside the impugned order and allow the appeal with consequential relief.

(Order pronounced in the open court on 02.22.2022*)*

(Ramesh Nair)
Member (Judicial)

(Raju)
Member (Technical)

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