

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL  
MUMBAI**

**Customs Appeal No. 86324 Of 2019  
Customs Appeal No. 86325 Of 2019**

(Arising out of Order-in-Appeal No. 1560 and 1561 (CRC-SAD-IV)2018(JNCH)Appeal-II dated 10.10.2018 passed by the Commissioner of Customs(Appeals), Mumbai-II).

**Virgo Suitings Pvt Ltd**

1, Jhanwar Plastic Ind Compound Pur Road,  
Bhilwara (raj)- 311001.

.....Appellant

*VERSUS*

**Commissioner of Customs, Mumbai-II**

Jawaharlal Nehru Custom House, Nhava Sheva,  
Taluka – Uran, Dist. Raigad, Maharashtra- 400 707

.....Respondent

**APPEARANCE:**

Shri Anjali Hirawat Advocate for the Appellant  
Shri Ram Kumar Authorised Representative for the Respondent

CORAM:

**HON'BLE MR. AJAY SHARMA, MEMBER (JUDICIAL)**

**FINAL ORDER NO. A/86139-86140/2022**

Date of Hearing: 16.11.2022

Date of Decision: 02.12.2022

**PER: AJAY SHARMA**

These appeals have been filed by the appellant assailing the order dated 10.10.2018 passed by Commissioner of Customs, Mumbai by which Learned Commissioner rejected the appeals filed by the appellant.

2. The issue involved herein is whether the appellant is entitled for refund of additional duty of Customs (SAD) paid through DEPB scrip/license?

3. The facts give rise to the filing of the instant appeal are stated as follows. The appellant filed refund claims on 04/02/2016 and 04/04/2016 for Rs.6,75,155/- and Rs.13,78,961/-

respectively of SAD paid u/s. 3(5) of Customs Tariff Act, 1975 in terms of Notification no. 102/2007-CUS dated 14/09/2007 as amended by Notification No. 93/2008-CUS dated 01/08/2008. So far as SAD refund of Rs.6,75,155/- is concerned, out of this amount Rs.4,48,989/- was paid in cash whereas, the remaining amount of Rs.2,26,166/- was Debited from the relevant DEPB License. In second refund, claim out of the amount of Rs. 13,38,961/- an amount of Rs.8,94,587/- was paid in cash and the remaining amount of Rs.4,44,374/- was debited from the relevant DEPB License.

4. The Adjudicating Authority vide two separate Orders-in-Original dated 01/03/2017 and 11/04/2017 respectively sanctioned the refund of duty which was paid in cash and rejected the refund claims in respect of the duty which was debited from the DEPB License. On appeal filed by the appellant, the Commissioner (Appeals) vide impugned order dated 10/10/2018 upheld the Adjudicating orders and rejected the appeals filed by the appellant.

5. Learned Counsel for the appellant submitted that the SAD refund claims have been rejected by the Authorities below only on the ground that the duty was paid through debit from the relevant DEPB License. He further submitted that the appellant has satisfied all the conditions mentioned in the Notification No. 102/2007-CUS dated 14/09/2007 as amended by Notification No. 93/2008-CUS dated 01/08/2008 wherein exemption has been provided from payment of SAD amount on the imported goods when those are subsequently sold in India and that the exemption benefit provided under these Notifications is subject to fulfillment of the condition mentioned therein, which the appellant do. The said conditions nowhere prohibit the refund when the duty amount was paid through DEPB scrips. Per contra Learned Authorised Representative appearing on behalf of Revenue drew my attention to public notice dated 18/04/2013 issued by DGFT which provided that if SAD was paid by the utilizing duty credit scrip after 30/09/2013 such payment cannot be considered as proper

payment of Custom Duty as time limit fixed for utilizing the credit of 4% SAD was only till 30/09/2013 and therefore the Authorities below have rightly rejected the refund claim. According to Learned Authorised Representative the public notice issued by DGFT is not just an executive instructions but Delegated Legislation which has the force of law.

6. I have heard rival submissions and gone through the case records including the submissions and case laws cited by respective sides. The Notification dated 14/09/2007 as amended by Notification dated 01/08/2008 nowhere denied the refund when the same was paid by debiting DEPB scrips. The said notification laid down certain conditions and the exemption under Notifications has to be upon fulfilment of those conditions only and nothing else. It is not disputed that the appellant have fulfilled the conditions therein and that is why the refund has been sanctioned of that part of the duty which has been paid in cash. Had those the condition were not fulfilled then there was no question of Adjudicating Authority's sanctioning the refund. In a series of decisions it is held that debit of any amount under the DEPB scheme, is a mode of payment of duty of exported goods and it cannot be treated as exempted goods. An identical issue came up for consideration before the Hon'ble High Court of Delhi of *Allen Diesels India Pvt. Ltd. v/s Union of India 2016 (334) E.L.T. 624 (DEL)* wherein the importers were paying duty of Custom including SAD by using DEPB scrips but the department was not refunding the SAD on the ground that SAD had not been paid in cash but by utilizing DEPB scrips and the Hon'ble High Court vide order dated 01/02/2016 allowed the petitions filed by the importers and held that since the petitioner therein have fulfilled the conditions set out in Notification No. 10/2007-CUS for availing the refund, the department is directed to issue orders granting refund to the petitioner therein. The relevant paragraphs of aforesaid decisions is reproduced hereunder:-

"13. The stand of the Department is that since the importers and exporters were put on notice that in order

to seek refund they would have to make payment of the SAD only in cash and not by way of DEPB scrips, the petitioner's applications for refund of SAD, to the extent it was not paid in cash, was rightly rejected. Reliance is placed on the very circulars which have been challenged by the petitioner as *ultra vires* of the Act. It is in the above context the question arises whether the above circulars could have been issued restricting the entitlement of the importers and exporters to refund in terms of Notification No. 102/2007-Customs, without the said notification itself being amended.

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15. At the outset, the Court notes that Section 151A of the Act is for a very limited purpose of issuing of instructions to officers of customs for the purpose of "uniformity in the classification of goods or with respect to the levy of duty thereon" or for the implementation of any other provisions of this Act or of any other law for the time being in force, insofar as they relate to "any prohibition/restriction for import or export of goods." The above provision does not envisage any amendment being made to an exemption notification that may have been issued in exercise of powers under Section 25(1) of the Act. An amendment through notification can possibly be brought about only by again exercising the powers under Section 25(1) of the Act. In this very context, it may be noticed that one instance of such amendment is the issuance of Notification No. 93/2008-Customs, dated 1st August, 2008 under Section 25(1) of the Act to bring about an amendment to Notification No. 102/2007-Customs to introduce a time limit within which claims for refund of the SAD should be made by importers.

16. Although it is sought to be projected that the circulars which are subject matter of the challenge in the present petitions were issued to streamline the procedure and to remove ambiguities, in fact what the circulars seek to amend is Notification No. 102/2007-Customs itself by introducing an additional condition for being entitled to

refund, which condition does not find place in Notification No. 102/2007-Customs. This condition is to the effect that if the payment of the SAD has in the first place not been made in cash, but by using a DEPB scrip, then the importers concerned would not be entitled to refund of SAD in cash. It is not in dispute that there is no such restriction in Notification No. 102/2007-Customs even as on date.

17. The question whether the device of circulars could be adopted for modifying a notification has come up for consideration before the Court earlier. In *Sandur Micro Circuits Ltd. v. Commissioner of Central Excise*, 2008 (8) TMI 3-SC = 2008 (229) E.L.T. 641 (S.C.), it was *inter alia* held that :

“A Circular cannot take away the effect of notifications statutorily issued. In fact in certain cases it has been held that the Circular cannot whittle down the exemption notification and restrict the scope of the exemption notification or hit it down. In other words it was held that by issuing a circular a new condition thereby restricting the scope of the exemption or restricting or whittling it down cannot be imposed”.

18. In *Modi Rubber Ltd. v. Union of India*, 1978 (2) E.L.T. (J127) (Del.), a similar issue was examined and this Court held as under :

“Further, it is quite open to the Government to grant an exemption subject to conditions. If the object of the Government in granting an exemption is to benefit the consumer by the reduction of the selling price of the goods, then the Government notification granting the exemption should itself say so. For instance, notification GSR 1089, dated 29th April, 1969 expressly stated that the benefit of the exemption was to be available only to those manufacturers who produce proof to the satisfaction of the Collector that such benefit has

been passed on by them to whom they have sold the goods. Such a condition has to be a part of the exemption notification. For, the notification is "law". But, after enacting the law, such a condition cannot be imposed by administrative directions, guidelines or press note. These administrative acts cannot go contrary to the statutory notification".

19. Recently in *Pioneer India Electronics (P) Ltd. v. Union of India*, 2014 (301) E.L.T. 59 (Del.) it was observed as under :

"The word "exemption" as used in sub-section (1) to Section 25 can and should include extension or increase in time but cannot be stretched and expounded to include power of the Government to, by a circular, reduce the statutory time for a claim of refund stipulated under the principal enactment, i.e., the Customs Act, 1962. That would make the circular *ultra vires* the statute and beyond the scope of the Act, Rules, etc. Circulars might depart from the strict tenure of the statutory provision and might mitigate rigours of law thereby granting administrative relief beyond terms of the relevant provisions of the statute, but the Central Government is not empowered to withdraw benefits or impose harsher or stricter conditions than those postulated by the statute. In later cases, circulars can supplant the law but not supplement the law."

20. Therefore, the legal position as explained in the above decisions makes it clear that the Circular Nos. 6/2008, 10/2012 and 18/2013 issued by the C.B.E. & C. could not have imposed an additional restriction for availing of the exemption in terms of the Notification No. 102/2007-Cus. issued under Section 25(1) of the Act. An amendment to a notification issued in exercise of the powers under Section 25(1) of the Act has to be brought about only by issuing

another notification under that provision. Inasmuch as the circulars under challenge seek to impose an additional restriction for grant of refund of the SAD under Notification No. 102/2007-Customs, they are *ultra vires* of the Act and cannot be legally sustained. Consequently, it is declared that the Circular Nos. 6/2008, 10/2012 and 18/2013 issued by the C.B.E. & C., insofar as they seek to deny importers and exporters the refund of the SAD paid by using DEPB scrips, are invalid.

21. The rejection of the petitioner's refund applications by the orders dated 16th May, 2014 and 20th May, 2014, on the above grounds, is held to be bad in law and the said orders are hereby set aside. Since the petitioner has fulfilled the conditions set out in Notification No. 102/2007-Customs for availing of the refund, the Department is directed to issue orders granting refund to the petitioner, as prayed for by it in its four refund applications dated 8th October, 2013, 22nd November, 2013, 16th December, 2013 and 21st December, 2014 not later than four weeks from today. The petitioner's entitlement to interest on the amount of refund will also be considered and granted in accordance with law within the same period of four weeks from today."

While relying upon aforesaid decision of Hon'ble High Court, this Tribunal in the matter of *M/s. Armstrong World Industries (India) Private Limited V/S. Commissioner of Customs Nhava Sheva-III; 2021 (11) TMI 912- CESTAT Mumbai*, allowed the appeal of the importer and held that the order that has rejected the refund benefit to the appellants therein arising out of the Notification dated 14/09/2007 as amended, has no merits. Similarly Ahmedabad bench of the Tribunal in the matter of *M/s. Surya Roshni Ltd v/s Commissioner of Customs, Ahmedabad; 2022 (5) TMI 1108-Cestat Ahmedabad*, while relying upon aforesaid decision of the Hon'ble High Court in the matter of *M/s Allen Diesels (supra)* allowed the appeal of the appellant therein. Undisputedly, the Revenue has failed to establish through any kind of documents or case laws that debit of any amount under

the DEPB scheme is not a mode of payment of duty, therefore the benefit cannot be denied to the appellant.

7. In view of the discussions made hereinabove, I do not find any justification for rejecting the refund claim in respect of the duty which was paid through DEPB scrip and therefore the impugned order cannot sustain. Accordingly, the appeals filed by the appellant are allowed with consequential relief, if any, in accordance with law.

(Pronounced in open Court on 02.12.2022)

**(Ajay Sharma)**  
**Member (Judicial)**

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