Appellant Rep by: Shri Shubendu Patnaik, Consultant
Respondent Rep by: Shri Dharmendra Singh, Supdt., AR

CORAM: Suvendu Kumar Pati, Member (J)

Cus - M/s. Ideal Tridon Clamp and M/s. Shree Namolar International (P) Ltd are in appeal against rejection of refund claim of SAD of customs by the refund sanctioning authority and confirmation of the O-I-O by the Commissioner (A) - The assessee submitted in M/s. Ideal Tridon Clamp's case that provisional assessment was finalised on 27-12-2017 and in view of Section 27 of the Customs Act, assessee was entitled for refund within one year of the date of final assessment for which invocation of notfn 93/2008 should have been dealt by Commissioner to mean the date of final assessment as date of payment, which was not done by him and giving over riding effect to such executive notification over the Statutory law, he considered the date of payment of SAD for the purpose of calculation contrary to the findings of High Court in the case of Pioneer India Electronics (P) Ltd. - 2013-TIOL-731-HC-DEL-CUS - In respect of the refund claim of Shree Namolar International P Ltd., assessee submitted that Bills of Entry dated 6, 20 & 21 January 2016 were taken as the date of payment of SAD to refuse refund claim filed on 30th January 2017 despite the fact that assessee was to become eligible for such refund of SAD only after payment of VAT and the same contradicted the decision of Delhi High Court in Sony India Pvt. Ltd. - 2014-TIOL-532-HC-DEL-CUS - Perused the copy of confirmation of assessment vide letter of Asst. Commissioner of Customs in Annexure (6) of the additional submissions - Further going by the OIO and OIA, it can be said that there is nothing available in these two orders or in the case records to substantiate that such ground was taken before the authorities below while claiming refund to bring the claim into the purview of Section 27 of the Customs Act - However, a cursory look is taken at the genesis of introduction of SAD in India by invoking Section 35 of Customs Act, which has been dealt elaborately in the judgment of M/s Bitumen Corporation (I) Ltd - The assessees are entitled to refund of SAD on production of proof of VAT/CST payment within a year of their filing application before refund sanctioning authority who is directed to complete the refund process within a period of two months from the date of receipt of this order with due regard to Section 11/BB of Central Excise Act dealing with interest on delayed refunds: CESTAT

Appeals allowed

Case laws cited:

Pioneer India Electronics (P) Ltd. v. Union of India - 2013-TIOL-731-HC-DEL-CUS... Para 3

Sony India Pvt. Ltd - 2014-TIOL-532-HC-DEL-CUS... Para 3

FINAL ORDER NOS. A/87034-87035/2019

Per: Suvendu Kumar Pati:

Rejection of refund claim of Special Additional Duty (SAD) of customs to both the appellants by the refund sanctioning authority and confirmation of the orders-in-original by the Commissioner of Customs (Appeals), JNCH, Nhava Sheva, Mumbai-II in appeal nos. 110/2017 and 480/2017 is assailed by the appellants in this appeal.

2. Factual back drop of the case is that appellant M/s. Ideal Tridon Clamp filed appeal against rejection of its application for refund of special additional duty of customs in respect of 8 Bills of Entry amounting to Rs.5,20,410/- in terms of notification no. 08/2007 COS dated 14-09-2007 read with 93/2008 notification no. Similarly in respect of 4 Bills of Entry amounting to Rs.10,14,283/- of appellant M/s. Shree Namolar International (P) Ltd, rejection of refund of Special Additional Duty (SAD) was also challenged before the Commissioner (Appeals) who passed a common order rejecting both the refunds which has been assailed in this appeal.

3. During the course of hearing of the appeal, Learned Counsel for appellant submitted in appellant M/s. Ideal Tridon Clamp's case that provisional assessment was finalised on 27-12-2017 and in view of Section 27 of the Customs Act, appellant was entitled for refund within one year of the date of final assessment for which invocation of notification no. 93/2008 dated 1st August 2008 should have been dealt by the Commissioner to mean the date of final assessment as date of payment, which was not done by him and giving over riding effect to such executive notification over the Statutory law, he considered the date of payment of SAD for the purpose of calculation contrary to the findings of the Hon'ble High Court (Delhi) in the case of Pioneer India Electronics (P) Ltd. v. Union of India reported in 2014 (301) E.L.T. 59 (Del.) = 2013-TIOL-731-HC-DEL-CUS. In respect of the refund claim of other appellant Shree Namolar International P Ltd., Learned Counsel for it submitted that Bills of Entry dated 6, 20 & 21 January 2016 were taken as the date of payment of SAD to refuse refund claim filed on 30th January 2017 despite the fact that appellant was to become eligible for such refund of SAD only after payment of VAT and the same contradicted the decision of Hon'ble Delhi High Court passed in Sony India Pvt. Ltd. reported in 2014 (304) ELT 660 = 2014-TIOL-532-HC-DEL-CUS as well as decision of this Tribunal held in the case of Bitumen Corporation I. Ltd. in appeal no. C/86932/2018 for which he prays to set aside the order passed by the Commissioner (appeals) and to allow refund of SAD to the appellants.

4. In response to such submissions, Learned Authorised Representative for the respondent Department supported the reasoning and rationality of the order passed by the Commissioner (Appeals) and argued, with reference to the Hon'ble Bombay High Court i.e. the jurisdictional High Court's finding given in CMS Info System Ltd that period of one year for refund of SAD is a mandatory requirement which was to be computed from the date of payment of SAD and since it had taken in to consideration the order passed by Hon'ble Delhi High Court in Sony India case which is also followed by this Tribunal vide its decision dated 03-06-2019 upholding such rejection order passed by the Commissioner (Appeals) in Associated Chemical Corporation case (Appeal no. C/86673/2018), he sought no interference in the order passed by the Commissioner (Appeals).

5. Heard from both the sides and perused the case record as well as the additional submissions which also contains documentary evidence to the effect that provisional assessment was completed on 27-12-2017. Perused the copy of the confirmation of assessment vide letter of the Asst. Commissioner of Customs in Annexure (6) of the additional submissions. Further going by the OIO and OIA, it can be said that there is nothing available in these two orders or in the case records to substantiate that such ground was taken before the authorities below while claiming refund to bring the claim into the purview of Section 27 of the Customs Act. However, a cursory look at the genesis of the introduction of SAD in India by invoking Section 35 of the Customs Act, which has been dealt elaborately in the judgment of M/s Bitumen Corporation (I) Ltd would reveal as hereunder:

(i) As available in the Economics Time of 10.06.2008, SAD on Customs @ 4% has been levied on all imports by the Budget 2006-07. As no Central Sales Tax or VAT is levied on imports, the levy of SAD was intended to create a level playing field for domestic goods vis-a-vis imports. A manufacture of excisable goods is permitted to utilise the SAD paid on imported goods as a credit against its excise duty liability for which SAD is not a cost for a manufacturer and as such does not operate as a countervailing tax. However, such credit was not available to a service provider or to the traders. An importer – traders who imports and sells goods in India upon payment of CST/VAT had to first pay SAD, and then CST/VAT on sale of the imported goods.

(ii) It was felt that for a trader, rather than being countervailing, levy of SAD results in double taxation. To be WTO-compliant and upon demand from the industry, the Government of India issued a notification exempting all goods imported into India for sale from levy of SAD, if such goods were resold in India upon payment of appropriate CST/VAT but such exemption has been granted by way of a refund and the procedure prescribing such refund has been issued by way of Circular/Notification No. 102/2007-Cus. dated 14.09.2007. The conditions are enumerated in para 2 of the said notification in which under sub para (c) the importer will have to file a claim of refund to the jurisdictional Customs Officer along with copies of documents including documents evidencing payment of CST/VAS on sale of such imported goods, for which SAD was paid. Sub-para (c) was amended by way of Notification No. 93/2008-Cus. dated 01.08.2008 where such refund claim before the jurisdictional Customs Officer was stipulated to be filed before the expiry of one year from the date of payment of the said additional duty of Customs.

Dispute concerning such fixation of one year time period to claim refund had reached the Hon'ble Delhi High Court through petition of M/s Sony India Ltd. and in the above referred judgment, it was observed by the Hon'ble High Court that the reason behind fixing of such time frame was that some field formation authorities invoked Section 27 of the Customs Act, where normal time limit of six months was prescribed to claim refund and considering the fact that goods imported will have to be dispatched for sale even to different parts of the country which the importers may find difficult to dispose of soon and complete the requisite documentation within the normal period of six months, above exemption up to a period of one year from the date of payment of duty had been necessitated, apparently in the public interest. Ultimately, Hon'ble Delhi High Court rejected that time frame inclusion notification on the ground that subordinate legislation on goods cannot prevail over statutory substantive rights. On the contrary, Hon'ble Bombay High Court in the case of CMC Info Systems Ltd. (supra), hold a finding that when the exemption is conditional all the conditions therein have to be complied with and the appellant cannot say one of those conditions as excessive, arbitrary, unjust or unreasonable, which did not suit it. As a matter of judicial discipline and in conformity to the rule of precedent, the finding of the jurisdictional High Court is normally considered as binding on this Bench of the Tribunal, since Article - 227 of the Constitution of India confers power of Superintendence on the Hon'ble High Court over the Tribunals throughout its territories. However, considering the peculiar composition of CESTAT which is a Tribunal having jurisdiction over the whole territory of India, Bombay Zonal Bench being a bench for the purpose of sitting of CESTAT, it would be inappropriate to delve into the intricacies of the issue in view of the fact that when Article – 227 was drafted, conception of National Tribunals and Article – 323 A & B were not in existence for which Tribunals, in Article – 227 would mean to read State Tribunals, to be subjected to the superintendence and control of jurisdictional High Court. Further five Members Bench of this Tribunal, in the case of

Atma Steel Pvt. Ltd. & Others Vs. Collector of Central Excise, Chandigarh and others reported in [RLT (LB-CEGAT)-87] had held as follows.

"70. We also feel that as a Tribunal, working on all-India basis, we have the freedom to consider judgments holding conflicting views given by different High Courts, and then see for ourselves as to which authority, applied more fully and aptly to the facts of a given case, before us. For, in view of the scheme of the Act, under which we are functioning, as brought into focus in paras 59 and 61 above, we are constrained to repel the argument, that we are circumscribed by the view of a particular High Court where the assessee or a particular Collectorate is, because that would inevitably land the Tribunal in a mess, propounding conflicting and contradictory views, vitiating its very existence, and cutting down the wholesome principles, desirability whereof has been highlighted in para 60 above. We, therefore, feel duty-bound to determine ourselves, this issue; namely, continuation of proceedings pending at the time of the respective amendments, and adopting the view of Madhya Pradesh High Court as enunciated in Gwalior Rayon case (supra), we hold that these proceedings can continue, which view a Bench of this Tribunal already expressed, without much controversy having been raised in the case of Carew & Co. Ltd. v. Collector of Central Excise, Allahabad (1983 E.L.T. 1186) (CEGAT). Another Bench of this Tribunal (NRB) also held similarly in case : Sri Ram Pistons and Rings Ltd. v. C.C.A., Meerut (1980 E.L.T. 927)."

In view of the above proposition of law laid by the Larger Bench of the Tribunal on judicial precedent to be followed, the freedom to consider judgments holding conflicting views given by different High Court is available with the Tribunal to see for itself as to which authority would apply fully and aptly to the facts of a given case, to be decided by the Tribunal.

A cursory reading of the Notification No. 102/2007-Cus. and Notification No. 93/2008-Cus. would clearly reveal that in the public interest, such notifications were made by the Government of India and as discussed earlier, SAD was made applicable to counter balance CST/VAT and create a level playing field for domestic goods so that price difference between the locally manufactured goods and imported goods would not put the local manufacturer in a disadvantageous position. Admittedly CST, VAT are collected for distribution among the States, for which it is difficult to understand why SAD is introduced as a counter balance. It appears that only to maintain the price equilibrium, SAD has been introduced as a precautionary measure to provide coverage to indigenous goods. Therefore, it is collected with the avode purpose of providing a security to such indigenous goods and collected as a security from the importer so that the movement they sale it up in the domestic market, they will pay CST/VAT accordingly and get back the SAD already paid, by way of refund. This analysis is fortified by the fact that such refund is designed as an exemption clause and not as a rebate or refund of excess payment.

As found from the para 35 of the judgment of Hon'ble Bombay High Court in CMC Info System Ltd. case, exemption flows from the power to exempt and refund flows from the power to grant such refund and makes it admissible. The word ‘exemption' in its common parlance indicates "the act of being free from an obligation or liability imposed". Therefore, purpose of this exemption notification is not to refund the tax but to exempt from payment of tax or duty which was not due to be paid but was collected to meet certain contingency. The right to avail such exemption from payment of duty would accrue upon sale of the imported goods may be in the market, consequent upon payment of CST/VAT. The cause of action can only arise upon sale of the imported goods which is a market dependent

condition and sometimes sale may not occur even within the period of one year. In such a situation, if benefit of exemption notification is not extended to the appellant then the same would amount to double taxation, which no law of the land would approve of, even in the international arena. Therefore, such a duty imposed to counter balance the Sales Tax or the Value Added Tax, Local Tax etc. will have to be refunded and upon payment of those taxes alone, the cause of action would accrue and such counter balancing payment already made was to be refunded. This being the purpose of introduction of SAD, I am of the considered view that amended sub-para (c) of para 2 which stipulated the time period to file claim of refund as one year from the date of payment of said additional duty of Customs should be read as effective payment of additional duty of Customs by way of CST/VAT as the purpose of payment of SAD at the time of import was in the nature of counter balancing the CST/VAT etc., which could be treated at par with security. I am constrained to borrow this analogy as in the CMC Info System Ltd. (supra) judgment, Hon'ble Bombay High Court had expressed its apprehension that it was not possible to guess as to whether refund application would be held to be not maintainable purely on the ground that condition like sale of the said goods on payment of appropriate of Sales Tax or Value Added Tax was not made. Going by the Board Circular No. 16/2008 which stipulates three months time period for processing of such refund, sale of goods and payment of CST/VAT etc. being condition precedent to file refund claim, no incomplete refund application could have ever been entertained by the respondent-department as the same is unusual to its prevailing practices. Any such application could be considered as not-maintainable being premature when such stipulation/condition is not met. Therefore, with respectful regards to the findings of the Hon'ble Delhi High Court and Hon'ble Bombay High Court on the issue regarding legality of the prescribed time period to file refund which was challenged and answered, and having regard to the definition of relevant time given in Explanation (3) of Sub-Section (5) of Section 11B of the Central Excise Act, 1944 wherein time frame is stated to have run from the date on which refund is held to be payable, I am of the firm opinion that the same period of one year is to be computed from the date of payment of CST, VAT etc. upon sale of goods. It is a settled principle that Tribunal being creature of statute, cann't go beyond the provisions of law but there is no impediment on the part of the Tribunal to read into the law to provide meaning and clarity to the provisions of law for the purpose of making it virtually implementable. Interpretation of the provision under sub para (C) of para 2 has not been done by the Hon'ble High Court of Bombay or Delhi who have primarily dealt with the legality of having a time limit to deal with cases of SAD refund. "

7. In view of above proposition of law the following order is passed.

ORDER

8. Both the appeals are allowed and the order passed by the Commissioner Customs in order no. No. 445-446(CRC-SAD-I/V) /2018(JNCH) Appeal-II dated 27th April 2018 is hereby set aside. The appellants are entitled to refund of SAD on production of proof of VAT/CST payment within a year of their filing application before refund sanctioning authority who is directed to complete the refund process within a period of two months from the date of receipt of this order with due regard to Section 11/BB of the Central Excise Act dealing with interest on delayed refunds.