IN THE HIGH COURT OF MADRAS

Civil Miscellaneous Appeal No.2030 of 2017 and
Civil Miscellaneous Petition No.10896 of 2017

PP PRODUCTS LTD
NO.37-12/1, ARCHANA COMPLEX
4TH CROSS, LALBAGH ROAD
BANGALORE-560 027

Vs

COMMISSIONER OF CUSTOMS
CHENNAI SEAPORT COMMISSIONERATE-IV
CUSTOMS HOUSE, NO.60, RAJAJI SALAI, CHENNAI-600001

T S Sivagnanam & V Bhavani Subbaroyan, JJ

Dated: April 04, 2019

Appellant Rep by: Mr Joseph Prabakar
Respondent Rep by: Mr.S Rajasekar

Cus - The assessee-company filed application seeking refund of 4% SAD which had been paid by it for importing HDPE F0460, LDP LF2119 S, HDPE EGDA 6888, LLDPE 118W, HDPE FB1460, HDPEF 10750, LLDPE, vide 13 Bills of Entry - On adjudication, the refund claim was sanctioned in part, while another part was rejected on grounds that the products sold by the assessee did not match with those which were imported - On appeal, the Commr.(A) allowed relief to the assessee upon finding that the description of the imported goods in the bill of entry and in the invoices was the same, except that the assessee had used generic expressions - On Revenue's appeal, the Tribunal held that the identity of the goods could not be established by the refund sanctioning authority unless there is an acceptable match between the description of the imported goods as per the bill of entry and the corresponding sale invoices - Hence it was held that discrepancy in description of goods was not a curable defect - Hence the present appeal by the assessee.

Held: There are three documents which an importer must submit so as to be eligible for refund of SAD, namely - (i) document evidencing payment of the said additional duty; (ii) invoices of sale of the imported goods in respect of which refund of the said additional duty is claimed; (iii) documents evidencing payment of appropriate sales tax or value added tax, as the case may be, by the importer, on sale of such imported goods - The adjudicating authority rejected the claims on grounds that the assessee did not adopt the same code while describing the product in sales invoices - The adjudicating authority did not conclude that the product sold was entirely different - There is nothing on record to disprove the CA certificate stating that both products are one and the same - If such certificate is to be disproved, this must be based upon some material - Thus the findings of the

Tribunal are unsustainable since the adjudicating authority was satisfied that substantial duty was refundable - Hence the Tribunal's order is quashed: HC (Para 5,6,10)

Assessee's appeal allowed

JUDGEMENT

Per: T S Sivagnanam:

This appeal by the appellant/importer is directed against the order passed by the Customs, Excise and Service Tax Appellate Tribunal, South Zonal Bench, Chennai (hereinafter referred to as "the Tribunal"), dated 18.11.2016, in Final Order No.42290/2016.

2. The above appeal has been filed raising the following substantial questions of law:-

"(i) Whether the Single Member of the Tribunal was justified in hearing the matter relating to the claim of exemption from the Special Additional Duty of Customs under Notification No.102/2007-Cus?
(ii) Whether the Tribunal, in the face of documentary evidence produced by the appellant, was correct in setting aside the order of the Appellate Authority, holding that there was no correction between the imports and subsequent sales?

(iii) Whether the Tribunal failed to note that the Commissioner of Customs (Appeals) cannot go into the aspect of correction of 'goods imported' versus 'goods sold in India' to arrive at a contrary conclusion, when the very same exercise has been completed by the Statutory Auditor in terms of the stipulation contained in Paragraph No.5 of CBEC Circular No.6/2008 dated April 28, 2008, who had certified that the Appellant had complied with Condition No.2 (e) (iii) of Notification No.102/2007 dated 14.09.2007?"
3. Heard Mr.Joseph Prabakar, learned counsel for the appellant/importer; and Mr.S.Rajasekar, learned counsel for the respondent/Revenue.

4. The short issue which falls for consideration is whether the Tribunal was justified in reversing the order passed by the Commissioner (Appeals-II) dated 16.03.2015, which reversed the order passed by the original authority dated 24.11.2014.

5. The appellant filed an application claiming refund of 4% Special Additional Duty (SAD) being the amount paid by them for import of HDPE F0460, LDP LF2119 S, HDPE EGDA 6888, LLDPE 118W, HDPE FB1460, HDPEF 10750, LLDPE, vide 13 bills of entry. The appellant claimed refund in terms of Notification No.102/2007-Cus dated 14.09.2007 as amended by Notification No.93/2008 dated 01.08.2008 read with Board's Circular Nos.6/2008-Customs dated 28.04.2008; 16/2008-Customsdated 13.10.2008; and 18/2010-Customs dated 08.07.2010. The application filed by the appellant/importer was scrutinised by the adjudicating authority and

the claim made by them was examined on the conditions stipulated in the notifications, more particularly, as contained in Notification No.6/2008-Cus dated 28.04.2008. The adjudicating authority accepted the claim for refund partially, and by Order-in-Original dated 24.11.2014, sanctioned a sum of Rs.10,78,622/- as refund and rejected the claim for refund to the tune of Rs.5,72,251/- on the ground that the product sold by the appellant did not match with the product imported by the appellant.

6. The appellant filed appeal before the Commissioner of Customs (Appeals-II), who by order dated 16.03.2015 allowed the appeal having found that the description of the imported goods in the bill of entry and in the invoices are the same, except that the appellant has used the generic expression. The respondent-Revenue filed appeal to the Tribunal and the Tribunal after noting the conditions in the notification, held that the goods being various grades of HDPE/LDPE/LLDPE granules, unless there is an acceptable match between description of the imported goods as given in the bill of entry and corresponding sales invoices, the identity of the goods will not be able to be established by the refund sanctioning authority. Thus, it was held that the discrepancy in the description of goods was not in the nature of curable defects, hence no merit emerges on the appeal.

7.Having held so, it appears that the Tribunal committed a small error by stating that the Revenue's appeal is dismissed. In fact, the discussion which leads to the conclusion should read as 'the Revenue's appeal is allowed'.

8. Be that as it may, we are to test as to whether the Tribunal was justified in holding that the discrepancy in the description of goods was not in the nature of curable effect.

9. Mr.S.Rajasekar, learned counsel is right in his submission that a notification which grants refund was an exemption notification, should be construed strictly and the conditions contained should be scrupulously adhered to. In this regard, the leaned counsel has drawn our attention to Notification No.102/2007-Cus dated 14.09.2007.

10. We find that there are three documents which the importer has to produce for being entitled for refund of SAD, they being, (i) document evidencing payment of the said additional duty; (ii) invoices of sale of the imported goods in respect of which refund of the said additional duty is claimed; (iii) documents evidencing payment of appropriate sales tax or value added tax, as the case may be, by the importer, on sale of such imported goods. The adjudicating authority appears to have done a thorough scrutiny of the documents and granted refund for substantial portion of the claim. In respect of the remaining portion, the only reason for rejection is that the appellant has not adopted the same code while describing the product in their sale invoices. The explanation offered by the appellant/importer is that the numbers which followed the letters HDPE/LDPE/LLDPE are relevant only for person who is importing goods from the foreign country on orders being placed by the appellant and is of

no consequence on the sale while selling the product in the local market. In our considered view, the adjudicating authority has not come to a conclusion that the product sold was entirely different. In fact, there was nothing on record to disbelieve the Chartered Accountant's certificate which certified that both products are one and the same. If the adjudicating authority had to disbelieve such certification, then there should have been material to do so. However, the larger question would be whether at all such jurisdiction is vested with the adjudicating authority, when there is no allegation of any fraud or misrepresentation against the appellant.

11. In our considered view, the Commissioner (Appeals-II), the first appellate authority was right in its observations/findings which are quoted hereinbelow:-

"...It is seen from the tabular column of discrepancy given in the Order-in-Original by the lower authority, only the grades of the granules are missing but the description 'HDPE' and 'LDPE' is found in both the documents. It is seen that the appellants have used the generic description of the imported goods in the sales invoices and non-mentioning of grade will not change the imported goods different. Hence, the goods imported and the goods sold are one and the same and are co-relatable. The lower authority has not issued any DM or PH to the appellants for making the deficiencies good or to make any submissions. The department has not proved that the goods sold are different from the goods imported. The lower authority has not disputed the fulfillment of the other substantive conditions of the notification by the appellants. Rejection of partial amount of refund on this flimsy ground is not sustainable."

12. The finding of the Tribunal, in our considered view, is not sustainable, considering the facts and circumstances of the case, as the adjudicating authority himself was satisfied that substantial amount of claim for refund was sustainable.

13. Thus, for the above reasons, this appeal, filed by the appellant is allowed, the order passed by the Tribunal is set aside and the order passed by the Commissioner (Appeals-II) is restored and the substantial questions of law are answered in favour of the appellant.

(No costs. Consequently, connected miscellaneous petition is closed)