

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

RESERVED ON: 11.03.2014
PRONOUNCED ON: 16.04.2014

+ **CUSAA 3/2014 & C.M. No.829/2014**

SONY INDIA PVT. LTD.

.....APPELLANT

Through : Mr. Tarun Gulati, Mr. Rony. O.
John & Mr. Shashi Mathews, Advocates.

Versus

THE COMMISSIONER OF CUSTOMS, NEW DELHI

.....RESPONDENTS

Through : Mr. Satish Kumar, Standing
Counsel.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE R.V. EASWAR

MR. JUSTICE S.RAVINDRA BHAT

1. This is an appeal under Section 130 of the Customs Act, 1962, against the order dated 19.06.2013 of the Customs Excise and Service Tax Appellate Tribunal (“CESTAT”) dismissing the appellant company’s appeal challenging the denial of refund claim under Notification no. 102/2007-Cus read with Section 27 of Customs Act. The question of law that arises for determination in this appeal is

Can period of limitation for preferring refund claims, specified in the amending notification no.

93/2008-Cus be made applicable with retrospective effect, in absence of a limitation period in the original Notification No. 102/2007-Cus, in respect of goods imported prior to the issue of the amending notification.

2. The facts briefly are that the appellant is involved in the import, distribution and sale of electronic items and IT products. The appellant had been clearing the imported goods on payment of the applicable custom duties including basic customs duty, additional customs duty and special additional customs duty (“BDC”, “ADC” and “SADC” respectively). Notification No. 102/2007 dated 14.9.2007 (“original notification”) exempted goods in the First Schedule of the Customs Tariff Act, 1975 (“CTA”) from the whole of the SADC leviable under Section 3(5) of Customs Act when imported into India for subsequent sale on the fulfillment of certain conditions.

3. The appellant imported some items in between 1.12.2007 and 5.12.2007 under 9 Bills of Entry, paid the applicable customs duties by demand drafts dated. 4.12.2007 and 6.12.2007 and received stamped TR-6 challans on 14.12.2007, 18.12.2007 and 19.12.2007. Notification 93/2008-Cus dated 1.08.2008 (“amending notification”) was then issued amending Notification no. 102/2007 to prescribe a time period of 1 year from date of payment for the filing of refund claims by an importer under the Notification. On 11.12.2008, the appellant filed a refund claim amounting to Rs. 66,67,480/- before the Assistant Commissioner of Customs (“the respondent”) for the refund of SADC on the imports in December

2007 under the Notification no. 102/2007. After hearing the appellant, the respondent passed an order dated 12.10.2009 allowing the claim of Rs. 33,49,015/-, on the ground that the refund in respect of 4 Bills of Entry had been filed beyond the period of 1 year stipulated in the amending notification. The order, in relevant part, reads:

“... that the verification of the TR-6 Challans against the bill of entry dated 1.12.2007 and 5.12.2007 reflect that the refund claims against the above bills of entry are time barred as the date mentioned in the TR-6 Challan was wrongly taken as the date of payment of duty by the appellant. The claim filed by the appellant was not within one year from the date of payment of duty as per Circular 6/2008 and accordingly the refund amount claimed under the said bills of entry was held to be liable to be rejected.”

4. On appeal against this order before the Commissioner of Customs (Appeals) (“CC(A)”), the appellant sought to argue *first*, that there was no time limit in the original notification, *second*, the period of one year should be computed from the date in the TR-6 challan, and that the time limit of 1 year as applied by the respondent was bad in law, *third*, that the Board Circular no. 6/2008-Cus dated 28.04.2008 clarifies that the time period of 6 months as under Section 27 of the Customs Act does not automatically apply to the SADC refund applications under the original notification. The CC(A) rejected the appeal on the ground that the dates of payment of duty provided by the appellant in

respect of 4 bills of entry were incorrect. The CESTAT upheld the findings of the CC(A) in the appeal on the ground that the refund claims were time-barred having been filed beyond a period of 1 year from date of payment, mandated in the amending notification no. 93/2008-Cus.

5. The appellant submits *first*, that the respondent's order was passed on the basis of the amending notification, as the original notification neither stipulated a time period within which the refund was to be claimed, nor did it make Section 27 of the Customs Act applicable to such claims; *second*, since imports and payment of relevant customs duties were made when the original notification was in force, and the amending notification has no retrospective effect, the appellant is entitled to the refund of SAD. Learned counsel for the appellant relies on *New India Insurance v. Shanti Misra*, (1975) 2 SCC 840 and *Electrofronts v. Union of India*, 2003 (162) E.L.T. 1182 (Bom.) to argue that while the law of limitation in operation on the date of commencement of action is applicable to the cause, a new law of limitation can neither revive a dead remedy by providing for a longer limitation period, nor extinguish a right of action by providing a shorter limitation period. Counsel also relies on *CCE, Jaipur v. Raghuvar (India) Ltd.* (2000) 5 SCC 299, to argue that a law of limitation, because it creates and destroys rights must be specifically enacted and cannot be imported by implication by Courts when there is no express stipulated period.

6. The appellant also argues that the CESTAT erred in not complying with its own decision in *United Chemicals Industries v. Com. C. Ex Kanpur*, 2013 (289) ELT 333, *Om Household Appliances Pvt. Ltd. v. C.C (Import), Nhava Sheva*, [2012 (276) ELT 2591] and *Audioplus v. Com. Customs (Imports) Raigad*, [2011 (264) ELT 5161].

7. Finally, without prejudice to its previous submissions, the appellant submits that the Central Excise Law Manual in Chapter 3 Part V, clause 3.3 states that duty liability shall be deemed to have been discharged only when the amount payable is credited to the Government's account i.e. when the bank stamps the TR-6 *challan* to indicate receipt. The date of payment for calculation of limitation period must thus be considered as the date of receipt of stamp on the TR-6 *challan*, as that is the date on which the duty is deposited in the treasury. From this date, it is argued, the limitation period has not been exceeded.

8. To understand the nature of duty, it would be appropriate to extract Section 3(5) of the CTA:

“(5) If the Central Government is satisfied that it is necessary in the public interest to levy on any imported article [whether on such article duty is leviable under sub-section (1) or, as the case may be, sub-section (3) or not] such additional duty as would counter-balance the sales tax, value added tax, local tax or any other charges for the time being leviable on a like article on its sale, purchase or transportation in India, it may, by notification in the Official Gazette, direct that such imported article shall, in addition, be liable to an additional duty at a

rate not exceeding four per cent of the value of the imported article as specified in that notification.

Explanation.--In this sub-section, the expression "sales tax, value added tax, local tax or any other charges for the time being leviable on a like article on its sale, purchase or transportation in India" means the sales tax, value added tax, local tax or other charges for the time being in force, which would be leviable on a like article if sold, purchased or transported in India or, if a like article is not so sold, purchased or transported, which would be leviable on the class or description of articles to which the imported article belongs, and where such taxes, or, as the case may be, such charges are leviable at different rates, the highest such tax or, as the case may be, such charge." (emphasis supplied)

9. This provision indicates that this duty, while enacted into force in a legislation that sought to consolidate the "*law relating to customs duties*", is a duty in the nature of sales/VAT. The intent of such duties seeking to counter-balance the sales/VAT etc. leviable on like goods sold in India is to counter balance the duties borne by like goods produced indigenously in India, as its Statement of Objects and Reasons would indicate. The exemption provided in the original notification issued in exercise of the power under Section 25(1) of the Customs Act *is conditional upon subsequent sale*, as can be seen from the conditions required to be fulfilled in order for an importer to avail the benefit of this exemption:

"(a) the importer of the said goods shall pay all duties, including the said additional duty of customs leviable thereon, as applicable, at the time of importation of the goods;

(b) the importer, while issuing the invoice for sale of the said goods, shall specifically indicate in the invoice that in respect of the goods covered therein, no credit of the additional duty of customs levied under sub-section (5) of section 3 of the Customs Tariff Act, 1975 shall be admissible;

(c) 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;

(d) the importer shall pay on sale of the said goods appropriate sales tax or value added tax, as the case may be;

(e) the importer shall, inter alia, provide copies of the following documents along with the refund claim:

(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."

10. That the importer is required to produce invoices of sale, documents evidencing payment of sales tax/VAT etc. clearly indicates that the benefit of this notification can be availed only once sale of the imported goods is complete. The exemption is clear in its intent to allow a refund of the SADC paid under Section 3(5) of the CTA because the importer has suffered the incidence of SADC (meant to counter-balance sales tax/VAT leviable on a like article in India) on import, and then of actual sales/VAT on sale of these imported goods. In this light, it is necessary to examine the

applicability of any limitation period, whether under the amending notification or under Section 27 of the Customs Act.

11. Section 3(8) of the CTA states:

“(8) The provisions of the Customs Act, 1962(52 of 1962) and the rules and regulations made thereunder, including those relating to drawbacks, refunds and exemption from duties shall, so far as may be, apply to the duty chargeable under this section as they apply in relation to the duties leviable under that Act.”

12. The provisions of the Customs Act on the rules and mechanism for refund is incorporated by reference into the CTA only “*so far as may be*” applicable. Since SADC levied under Section 3(5) is refundable only on *subsequent sale* (i.e. the point at which sales tax/VAT liability arises), it is the opinion of this Court that no limitation period can possibly be imposed for advancing a refund claim. This is because the right to claim refund only accrues to the importer once sale, an entirely market driven event, is complete. Given the vagaries of the market, the importer has limited control over when the sale is complete. To uphold a limitation period starting from the date of payment of duty, as prescribed in the amending notification, would amount to allowing the commencement of a limitation period for refund claims before the right of refund has even accrued. To this extent, this Court is of the opinion that the refund provisions under the Customs Act are inapplicable to the duties levied under Section 3(5) of the CTA. Thus, neither Section 27 nor a notification under Section 25(1),

such as the amending notification no. 93/2008-Cus dated 1.08.2008 can be used to impose a limitation period on the right to claim refund of additional duty of customs paid under Section 3(5). If a limitation period is sought to be imposed in respect of refund claims in a case where the importer advances a refund of SADC paid owing to having incurred sales tax/VAT liability on subsequent sale of goods, it must be introduced by legislation, given the expropriatory consequences of such a limitation period.

13. Customs duties, properly so charged, are those which every importer knows to be leviable on the importation of goods, of course subject to any exemption which may be provided. The regime under which customs duty can be recovered concerns *known* events and details. Several contingencies with respect to rate of duty, removal of goods, their warehousing, etc are envisioned in the scheme of the Customs Act. However, in the case of SADC, which is a levy meant to offset any advantage, there is inherent a right to refund, once the importer shows that the goods have been sold or the other taxation incident, i.e. payment of VAT occurs. This duty was imposed as India's response to offset any advantage that importers might secure, by way of a non-discriminatory levy, by importation of goods at cost or prices lower than what could be obtained by domestic manufacturers. A discriminatory tax could not have been levied, given India's obligations as a participant in the WTO and having regard to its treaty obligations.

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 tax, local tax 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 Notification No.102/2007-Customs dated 14.09.2007 there was no period of limitation; by Circular No.6/2008-Customs, 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-Customs 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 negated 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 be 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 CBEC stated that:

“4. Time-Limit:

“4.1 In the Notification No. [102/2007](#)-Customs, 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

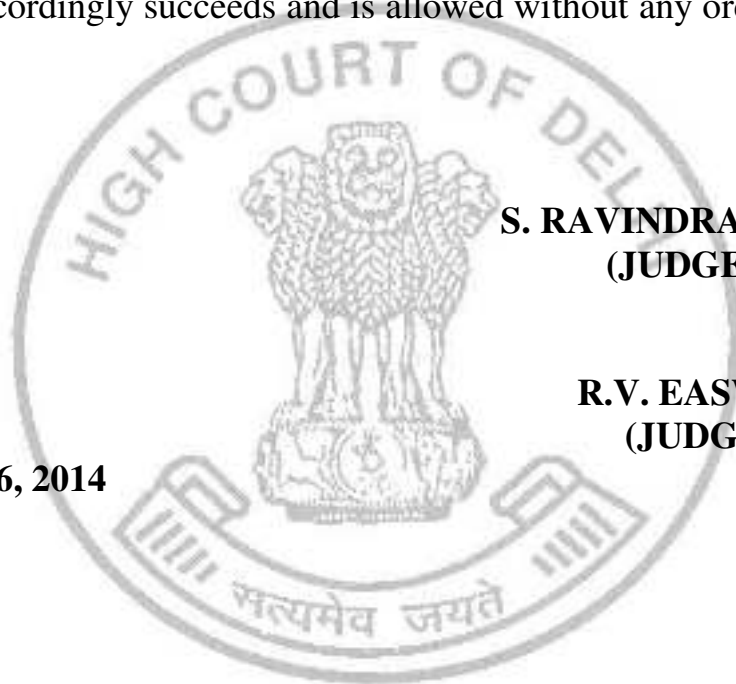
payment of duty, within which the refund could be filed by any person. It is also clarified that the importers would be entitled to refund of duties only in respect of quantities for which the prescribed documents are made available and the claims submitted within the maximum prescribed time of one year. Unsold stocks would not be eligible for refunds.”

Notification No [93/2008](#) dated 01.8.2008 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 01.08.2008 (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.



**S. RAVINDRA BHAT
(JUDGE)**

**R.V. EASWAR
(JUDGE)**

APRIL 16, 2014