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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
21.
\+ **CUSAA 20/2015**

PRINCIPAL COMMISSIONER OF CUSTOM ..... Appellant
Through: Mr Satish Kumar, Senior Standing Counsel.

versus

RISO INDIA PVT. LTD. ..... Respondent

CORAM:
DR. JUSTICE S. MURALIDHAR
MR. JUSTICE VIBHU BAKHRU

<u>O R D E R</u>

% **07.10.2015**

<u>Dr. S. Muralidhar, J</u>

<u>CM No.22556/2015 (Delay)</u>

1. For the reasons stated in the application, the delay of 10 days in filing the appeal is condoned.

2. The application stands disposed of.

<u>CM No.22555/2015 (Exemption)</u>

3. Allowed, subject to all just exceptions.

4. The application stands disposed of.

<u>CUSAA 20/2015 & CM No.22554/2015 (Stay)</u>

5. The appeal under Section 130 of the Customs Act 1962 ('Act') is directed against the final order dated 21st January, 2015 passed by the Customs, Excise & Service Tax Appellate Tribunal (CESTAT) in Appeal No.

C/4014/2012.

6. The substantial question of law that is sought be urged by the Principal Commissioner of Customs in this appeal is whether an importer is entitled to interest beyond the period of three months under Section 27A of the Act on refund of Special Additional Duty (SAD) under Notification No. 102/2007 issued under section 25 of the Act in the absence of a specific provision for payment of interest in the said Notification as subsequently clarified in Para 4.3 of the Circular No. 6/2008-Cus dated 28th April, 2008 issued by the Central Board of Excise and Customs (CBEC).

7. The brief facts are that the Respondent filed a claim on 2nd March, 2010 in terms of Notification No. 102/2007 for refund of SAD paid by it. The refund application was rejected on 18th June, 2010 on the ground that the period of limitation had expired. The appeal filed by the Respondent against the said order was allowed by the Commissioner of Customs (Appeals) on 4th January, 2011. The refund application was remanded to the Assistant Commissioner for a fresh consideration. Thereafter, the refund was granted. However, the claim of the Respondent for interest on the refunded SAD was rejected by the Assistant Commissioner by an order dated 30th March, 2012.

8. The appeal against the said order was dismissed by the Commissioner of Customs (Appeals) by an order dated 16th October, 2012. It was observed that the Respondent had not specifically claimed interest and sought only refund. Further, it was held that the refund under Notification No. 102/2007 was not governed by Section 27 of the Act and, therefore, Section 27 A of the Act would also not apply.

9. The CESTAT has, in the impugned order, while allowing the Respondent's further appeal, followed the decision of the Madras High Court in ***KSJ Metal Impex (P) Ltd. v. Under Secretary (Customs), 2013 (294) E.L.T. 211 (Mad)*** which quashed paragraph 4.3 of Circular No. 6/2008-Customs in so far as it sought to restrict or obliterate the claim of interest on belated refunds granted in terms of Notification No. 102/2007-Customs and held that that Section 27 and 27A of the Act would apply to claims for refund under the said Notification. Accordingly, the CESTAT directed the Assistant Commissioner to pay interest to the Respondent on the refunded amount for a period after three months from the date of the application for refund till the date of refund.

10. It is submitted by Mr Satish Kumar, learned Senior Standing Counsel for the Appellant, that the CESTAT erred in placing reliance on a judgment of the Madras High Court which has since been appealed before a Division Bench of the Madras High Court and in which an order has been passed staying the order of the learned Single Judge. He also referred to the decision of this Court in ***Sony India Pvt. Ltd. v. The Commissioner of Customs 2014 (304) E.L.T. 660 (Del)*** where, the words "so far as may be" occurring in Section 3(8) of the Customs Tariff Act 1975 (CTA) were interpreted to mean "to the extent possible" in the context of considering whether Section 27 of the Customs Act, 1962 read with certain amending notifications concerning the limitation period within which a refund application had to be made under Notification No. 102/2007.

11. It requires to be noticed that the word 'duty' has been defined under

Section 2 (15) of the Act as "a duty of customs leviable under this Act". The levy of additional duty is provided under Section 3 of the CTA. Further Section 3 (8) which incorporates by reference the provisions of the Act, reads thus:

> "(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. As a result, the provisions of the Act in so far as they relate refund of duty and interest payable on the refunded amount of duty in the event of delay in refund, as provided by Sections 27 and 27 A of the Act would apply to refund of SAD levied under Section 3 of the CTA as well. The relevant portions of Sections 27 and 27A of the Act which are relevant for the purposes of the present case read as under:

> **"27. Claim for refund of duty**
> (1) Any person claiming refund of any duty or interest,-
> (a) paid by him
> (b) borne by him,-
>
> may make an application in such form and manner as may be prescribed for such refund to the Assistant Commissioner of Customs or Deputy Commissioner of Customs, before the expiry of one year, from the date of payment of such duty or interest.
>
> Provided that where an application for refund has been made before the date on which the Finance Bill, 2011 receives the assent of the President, such application shall be deemed to have been made under sub-section (1), as it stood before the date on which the Finance Bill, 2011 receives the assent of the

President and the same shall be dealt with in accordance with the provisions of sub-section(2).

Provided further that the limitation of one year shall not apply where any duty or interest has been paid under protest:

(1A) The application under sub-section (1) shall be accompanied by such documentary or other evidence (including the documents referred to in section 28C) as the applicant may furnish to establish that the amount of duty or interest, in relation to which such refund is claimed was collected from, or paid by, him and the incidence of such duty or interest, has not been passed on by him to any other person.

(1B) Save as otherwise provided in this section, the period of limitation of one year shall be computed in the following manner, namely:-

(a) In the case of goods which are exempt from payment of duty by a special order issued under sub-section (2) of section 25, the limitation of one year shall be computed from the date of issue of such order;

(b) Where the duty becomes refundable as a consequence of any judgment, decree, order or direction of the appellate authority, Appellate Tribunal or any court, the limitation of one year shall be computed from the date of such judgment, decree, order or direction;

(c) Where any duty is paid provisionally under section 18, the limitation of one year shall be computed from the date of adjustment of duty after the final assessment thereof or in case of re-assessment, from the date of such re-assessment.]

(2) If, on receipt of any such application, the [Assistant Commissioner of Customs or Deputy Commissioner of Customs] is satisfied that the whole or any part of the 3[duty

and interest, if any, paid on such duty] paid by the applicant is refundable, he may make an order accordingly and the amount so determined shall be credited to the Fund:

Provided that the amount of [duty and interest, if any, paid on such duty] as determined by the [Assistant Commissioner of Customs or Deputy Commissioner of Customs] under the foregoing provisions of this sub-section shall, instead of being credited to the Fund, be paid to the applicant, if such amount is relatable to-

(a) the [duty and interest, if any, paid on such duty], paid by the importer [or the exporter, as the case may be], if he had not passed on the incidence of such 1[duty and interest, if any, paid on such duty] to any other person;

(b) the [duty and interest, if any, paid on such duty], on imports made by an individual for his personal use;

(c) the [duty and interest, if any, paid on such duty] borne by the buyer, if he had not passed on the incidence of such [duty and interest, if any, paid on such duty], to any other person;

(d) the export duty as specified in section 26;

(e) drawback of duty payable under sections 74 and 75;

(f) the [duty and interest, if any, paid on such duty] borne by any other such class of applicants as the Central Government may, by notification in the Official Gazette, specify:

Provided further that no notification under clause (f) of the first proviso shall be issued unless in the opinion of the Central Government the incidence of [duty and interest, if any, paid on such duty] has not been passed on by the persons concerned to any other person.

....

> **27A. Interest on delayed refunds**
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> If any duty ordered to be refunded under sub-section (2) of section 27 to an applicant is not refunded with three months from the date of receipt of application under sub-section (1) of that section, there shall be paid to that applicant interest at such rate, not below ten per cent and not exceeding thirty per cent per annum as is for the time being fixed by the Board, on such duty from the date immediately after the expiry of three months from the date of receipt of such application till the date of refund of such duty
>
> Provided that where any duty, ordered to be refunded under sub-section (2) of section 27 in respect of an application under sub-section (1) of that section made before the date on which the Finance Bill, 1995 receives the assent of the President, is not refunded within three months from such date, there shall be paid to the applicant interest under this section from the date immediately after three months from such date, till the date of refund of such duty."

13. Thus under Section 27(2), the Assistant Commissioner of Customs can make an order, on an application for refund. The various kinds of duty that can be ordered to be refunded under Section 27 (1) have been provided in clauses (a) to (f) of sub-section 2 of Section 27. Under Section 27A if any duty is ordered to be refunded under Section 27 (2) and such refund is not made within three months from the date of receipt of the application under Section 27(1) "there shall be paid to that applicant interest at such rate, not below 5% and not exceeding 30% per annum as is for the time being fixed by the Central Government, by notification in the Official Gazette, on such duty from the date immediately after the expiry of three months from the date of receipt of such application till the date of refund of such duty".

14. Notification no.102/2007 under Section 25(1) of the Act exempts goods described in the First Schedule of the CTA from the whole of the additional duty of customs leviable under Section 3 (5) of the CTA. The conditions on which exemption would be granted is specified in the said notification. With the purported object of clearing the confusion regarding the time limit within which a refund can be made in terms of Notification No.102/2007, the CBEC issued Circular No.6/2008-Customs dated 28th April, 2008. This Circular noted that the normal time limit under Section 27 of the Act was six months. However, the question that arose was whether the said time limit would automatically apply to refunds made under Notification No.102/2007. The circular clarified in para 4.3 as under:

> "4.3. With the extension of time limit and the requirement to file claims on a monthly basis, Board feels that the number of refund claims should be manageable for disposal within the normal period of three months. Further, in the absence of specific provision for payment of interest being made applicable under the said notification, the payment of interest does not arise for these claims. However, Board directs that the field formations shall ensure disposal of all such refund claims under the said notification within the normal period not exceeding three months from the date of receipt."

15. The issue that arises as far as the present case is concerned is whether the Department was justified in denying interest on the amount directed to be refunded to the Respondent by resorting to para 4.3 of the above circular.

16. While, the CESTAT has relied on the decision of the Madras High Court in ***KSJ Metal Impex (P) Ltd.*** (*supra*), considering that the said decision of the learned Single Judge of that High Court is pending in appeal before a

Division Bench of that Court, it is proposed to examine the issue with reference to the provisions of the Act, the CTA, the Notification No. 102/2007 and the CBEC Circular No. 6/2008.

17. As already noticed, the word 'duty' as defined in Section 2 (15) of the Act is wide enough to cover all kinds of customs duty. Section 3(8) of the CTA makes it clear that the provisions of the Act including those relating to drawback, refunds and exemptions shall "so far as may be" apply to the SAD chargeable under the CTA. There can be no doubt, therefore, in relation to the SAD levied under Section 3 of the CTA, the provisions of Section 27 and 27A of the Act concerning refund of duty and interest for delayed refund would apply.

18. At this juncture, it must be noted that what was sought to be done by way of Circular No.6/2008 was to clarify the applicable time limits for making an application for refund in terms of Notification No.102/2007. It is in that context that this Court was called upon in ***Sony India Pvt. Ltd. v. The Commissioner of Customs*** (*supra*) to examine if the limitation period specified in the notification needed to be read down to the extent that it provided for a limitation period when Section 27 itself did not. After analysing the Notification in light of Section 27 of the Act, and Section 3 (8) of the CTA, this Court observed as under:-

> "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."

19. The issue dealt with by this Court, in the above decision in ***Sony India Pvt. Ltd. v. The Commissioner of Customs*** (*supra*) was whether a subordinate piece of legislation, like a circular issued by the CBEC, can prevail over the statutory provision concerning limitation. The Court was clear that the imposition of a period of limitation for the first time through a notification "without statutory amendment" was legally impermissible.

20. In the context of the present case, Sections 27 and 27A of the Act form a statutory scheme for grant of refunds. Section 27A unambiguously states that where there is a delay in making the refund, interest would be payable on the amount of refund, in the manner stipulated under Section 27A of the Act. A collective reading of Section 3(8) of the CTA and Sections 27 and

27A of the Act leads to the conclusion that the provisions in the Act concerning refunds and interest on delayed refunds, would equally apply to refund of SAD leviable under Section 3 of the CTA. Circular No.6/2008 to the extent that it seeks to deny a successful applicant for refund of SAD, in terms of Notification No. 102/2007, interest on such refund in terms of Section 27A of the Act, is inconsistent with and *ultra vires* Section 27A of the Act.

21. Consequently, in the present case, the Department was not justified in denying interest to the Respondent on the delayed refund of SAD by resorting the para 4.3 of the CBEC's Circular No.6/2008.

22. For the above reasons, the Court finds that no error has been committed by the CESTAT in allowing the appeal of the Respondent and ordering interest on the amount of SAD determined to be refunded, in terms of Section 27A of the Act.

23. No grounds have been made out for interference with the impugned order of the CESTAT.

24. The appeal is, accordingly, dismissed.

S. MURALIDHAR, J

VIBHU BAKHRU, J

OCTOBER 7, 2015/MK