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IN THE HIGH COURT OF DELHI AT NEWDELHI

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W.P. (C) 2102/2017

YU TELEVENTURES PVT. LTD.

..... Petitioner

Through: Mr. Tarun Gulati, Mr. Shashi Mathews,
Mr. Ankit Sachdeva, Ms. Rachana
Yadav & Mr. Anupam Mishra,
Advocates.

versus

UNION OF INDIA & ORS.

..... Respondents

Through: Mr. Arpit Shukla, Advocate for R-1.
Mr. Amit Bansal & Mr. Akhil
Kulshrestha, Advocates for R-2, 3 & 4.

CORAM:

JUSTICE S.MURALIDHAR

JUSTICE PRATHIBA M. SINGH

ORDER

26.07.2017

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Dr. S. Muralidhar, J.:

1. The Petitioner, Yu Televentures Private Limited, is aggrieved by the rejection, by the impugned order dated 22nd January, 2017 passed by the Assistant Commissioner (Refund) at Air Cargo Import, Refund Section (Respondent No.4), of its claim for refund of the countervailing duty (CVD) in respect of the imports made by it between 27th March, 2015 and 31st March, 2015.

2. The Petitioner sells electronic products, including mobile phones. The Petitioner imported mobile handsets along with mobile phone parts, components, phone covers etc. between 27th March, 2015 and

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9th July, 2015 during which period it filed 46 Bills of Entry ('B/E'). The Petitioner states that on these B/Es it paid the CVD at a higher rate even though it was eligible to pay duty at a lower rate in terms of Notification No. 12/2012-CE dated 17th March, 2012 as amended by Notification No. 4/2014 and as further amended by Notification No. 12/2015-CE dated 1st March, 2015. The concessional rate of duty for mobile phones was available provided that no CENVAT credit on inputs or capital goods had been availed. Further, the Petitioner imported mobile back covers which were also eligible for a lower rate of duty at 2% in terms of Notification No. 1/2011-CE dated 1st March, 2011 as amended. This was also conditional upon the Petitioner not availing credit on inputs or input services.

3. It is not in dispute that in regard to the above imports the claim of the Petitioner for refund under Section 27 of the Customs Act, 1962 ('Act') is based on the decision of the Supreme Court in ***SRF Ltd. v. Commissioner of Customs, Chennai 2015 (318) ELT 607 (SC)***, which was delivered on 26th March, 2015. In that case, the Supreme Court interpreted a condition in Notification No. 6/2002 (which was similar to condition No. 16 of Notification No. 12/2012) regarding availment of concessional rate of CVD. The Supreme Court had observed that for quantification of CVD in the case of imported articles it has to be considered that the imported article had been manufactured in India. Thereafter, the amount of excise duty leviable thereon had to be ascertained.

4. It is the case of the Petitioner that for the 46 B/Es for imports made by it during the period from 27th March, 2015 to 9th July, 2015, it made an excess payment of CVD in the sum of Rs. 21,93,87,645. On the basis of

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the judgment of the Supreme Court in *SRF Ltd. v. Commissioner of Customs, Chennai* (*supra*), the Petitioner filed refund claims in Form-102 for the imports made during the aforementioned period and also submitted the following documents:

- a) Details of bills of entry and challans evidencing payment of customs duty;
- b) Working sheet detailing the amount of excess duty paid under Section 3(1) of the Customs Tariff Act, 1975;
- c) Details of Customs House Agents;
- d) CA Certificate certifying that the Petitioner has not passed the burden of excess duty paid in relation to which such refund is claimed to its customers;
- e) Copy of judgment delivered by the Hon'ble Supreme Court in the case of *SRF Ltd. v. Commissioner of Customs, Chennai* (*supra*);
- f) An affidavit stating that the claim for refund is not barred by limitation and the refund amount would not be used in subsequent refund applications.
- g) Letter submitted at the time of clearance that duty was paid under protest.

5. After examining the refund application, the Deputy Commissioner (Refund) issued a Memorandum dated 26th February, 2016 stating that the Supreme Court in *Priya Blue Industries Ltd. v. Commissioner of Customs (Preventive)* (2005) 10 SCC 436 held that once an assessment order is passed, duty would be payable in terms thereof unless that order was reviewed under Section 28 of the Act or modified in appeal.

Consequently, it was held that since the assessment of the B/Es against which refund was claimed had become final, it should be held that the duty had been correctly paid.

6. In its reply dated 15th March, 2016, the Petitioner pointed out that the aforementioned decision had no relevance. The Petitioner pointed out that the assessment done under the B/Es was neither required to be disputed nor were the B/Es required to be re-assessed for the purposes of claiming the CVD refund.

7. In the meanwhile on 4th April, 2016, this Court allowed W.P.(C) No. 2802/2016 (*Micromax Informatics Ltd. v. Union of India*) relying on an earlier decision in *Micromax Informatics Ltd. v. Union of India 2016 (335) ELT 446 (Del.)*. In the Special Leave Petition ('S.L.P.') filed by the Union of India against the said decision dated 4th April, 2016 in W.P.(C) No. 2802/2016, the Supreme Court declined to stay the said order but directed that the transfer of the amount to the Consumer Welfare Fund would not be given effect to.

8. On 15th July, 2016, the Supreme Court dismissed the review petition filed by the Department against the decision in *SRF Ltd. v. Commissioner of Customs, Chennai (supra)*.

9. On 3rd August, 2016, the Court in the Petitioner's own case in W.P.(C) No. 6750/2016 (*Yu Televentures Pvt. Ltd. v. Union of India*) passed an order on 3rd August, 2016 relying on the decision in *Micromax Informatics Ltd. v. Union of India (supra)* holding that the Department could not refuse the refund only because an appeal had not been filed

against the assessment order. The petition concerned the refund claim made by the Petitioner in respect of 10 B/Es filed in January and February, 2015. The Court directed the Department to pay the Petitioner the amount of refund together with interest within two weeks from that date.

10. In another similar instance this Court by the order dated 5th September, 2016 in W.P.(C) No. 7851/2016 (***Vishal Video & Appliances Pvt. Ltd. v. Union of India***) relied on the earlier decisions in ***Micromax Informatics Ltd. v. Union of India*** (*supra*) and ***Yu Televentures Pvt. Ltd. v. Union of India*** (*supra*) and allowed the refund claim. In the SLP filed against this judgment, the Supreme Court directed the notice to issue but did not stay of the order of this Court.

11. On 28th September, 2016 by yet another judgment in ***Micromax Informatics Ltd. v. Union of India*** [W.P.(C) No. 4712/2016], this Court accepted the case of the Petitioner and directed the Department to pass appropriate orders of refund. Significantly, the Court held that the refund could be made on the basis of the certificate of the Chartered Accountant ('CA'), among other documents.

12. In respect of the refund claims made in the present case by the Petitioner, a memorandum dated 27th October, 2016 was issued by the Principal Commissioner of Customs (Import), Refund Section noting that only a CA certificate had been submitted for the rebuttal of unjust enrichment. It was stated that the inference drawn by the Independent CA cannot be said to be a rebuttal of the statutory presumption of passing on of the duty incidence. It was noted that the certificate issued by the CA "is

not found conclusive.” Accordingly the Petitioner was asked to furnish further documents including self-certified copies of audited financial statements for financial year (‘FY’) 2015-16 and any other documents for rebuttal of unjust enrichment.

13. In the meanwhile, on 8th November, 2016, this Court allowed W.P. (C) No.10618/2016 [*Intex Technologies (India) Ltd. v. Union of India*]. There the refund claim was sought to be denied by not accepting the certificate issued by the CA. The Court issued a specific direction to the Respondent “to process the petitioner’s refund claim and pass appropriate orders having regard to the fact the petitioner had filed supporting certificates in the form of a Chartered Accountant’s clarification/certificate etc. claiming that the benefit sought was not passed on to the customers.” The Respondents were asked to pay the refund amount, along with interest, within three weeks from that date.

14. In the instant case, a detailed reply was furnished by the Petitioner to the Respondent on 2nd December, 2016 referring to the abovementioned decision along with which a certificate that the duty burden had not been passed on by the company and a price summary of sample mobile phones showing that the prices remained the same despite increase in the rate of customs duty were submitted. It was pointed out that the Petitioner had imported the mobile phones on payment of CVD at 12.5% during the period in question and therefore there was no question of passing it on to the customers. Self-certified copies of sales invoices and a self-certified copy of the ledger in which the amount of refund had been accounted for as ‘recoverable’ was annexed with the reply.

15. On 22nd December, 2016 another memorandum was issued by the Respondent, once again asking the Petitioner to submit documentary evidence in respect of its refund claim. By a letter, dated 27th December, 2016, the Petitioner pointed out that it had already replied to a similar memorandum earlier and also submitted all the relevant documents. Another letter to the same effect was furnished on 3rd January, 2017.

16. The Petitioner has also placed on record a copy of the certificate issued by the CA which states that the company had recorded certain refund claims as recoverable assets in its books in FY 2015-16 which was reflected under the head 'loans and advances' as 'balance with statutory/Government authorities' in Note 10 of the financial statement. The certificate also extracted portions of the said note which specifically adverted to the issue regarding CVD and the filing of the refund claims with respect to import of goods for the period from 1st April, 2015 to 16th July 2015.

17. Against the order passed by this Court in the Petitioner's own case on 3rd August, 2016 in W.P.(C) No. 6750/2016, the Respondents filed S.L.P.(C) CC No. 2028/2017 in which the following order was passed by the Supreme Court on 6th February, 2017:

“Delay condoned.

Since the question of law involved in this matter is being examined by this Court in another pending matter before this Court, we deem it appropriate to issue notice in the matter.

However, we do not see any reason to grant any interim relief in favour of the petitioner.

Apart from that, by the judgment under appeal, the High Court directed an action to be taken against the Officer of the Union of India for the said observations made in the proceedings before the Officer.

Learned Additional Solicitor General seeks stay of the operation of the directions. However, we are not inclined at this stage to stay the operation of the directions, however, we call upon learned Additional Solicitor General to place before this Court as to what action Union of India is proposed to take against the Officer in the context of the matter.

Tag with SLP(C) no. 26530 of 2016.

List after a week.”

18. By the impugned order, dated 22nd January, 2017, Respondent No. 4 rejected the refund claims in relation to the back covers on the ground that the back covers did not fall within the exemption granted by the Notification No.1/2011-CE dated 1st March, 2011. Further, the refund claims in relation to B/Es filed between 27th March, 2014 and 31st March, 2015 was sought to be transferred on the ground that it was hit by unjust enrichment and that the Petitioner had passed on the incidence of duty on to the buyers. However, with respect to the refund claims in the B/Es filed for the period from April, 2015 to July, 2015 Respondent No. 4 credited the amount to the Petitioner's bank account through RTGS. However, no interest thereon had been granted. It is in the above circumstances that the present writ petition was filed in which notice was issued on 11th April, 2017.

19. Pursuant thereto, a counter affidavit has been filed by the Department in which a preliminary objection as to the maintainability of the petition is

raised. It is contended that the matter involves pure questions of fact, capable of being properly resolved in the appellate remedies. On merits, it is contended that this Court had, in *Micromax Informatics Ltd. v. Union of India* (*supra*), directed the Respondents to process the refund and pass appropriate orders having regard to the CA certificate and that it had not directed to sanction the entire amount “based merely on the Chartered Accountant certificate.”

20. The decision in *Vishal Video & Appliances Pvt. Ltd. v. Union of India* (*supra*) is sought to be distinguished on the ground that in the said decision the relevant part of the CA’s certificate confirmed that the importer’s books of accounts had been verified and the CA had been satisfied that the incidence of duty had not been passed on to the customer. It is maintained that the CA’s certificate is not of such evidentiary value so as to lend credence to the claim that the duty incidence has not been passed on.

21. During the course of the hearing today, learned counsel for the Respondent referred to the impugned order and drew a distinction between refund claims for the B/Es for the months of April, 2015 to July, 2015 and those between the dates 27th March, 2015 and 31st March, 2015.

22. In the impugned order, Respondent No. 4 has observed as under:

“Said Notes are carefully examined and it is found that amount of Refund Claim filed by the claimant against differential CVD paid, had been indicated the refund amount as “Balances with statutory/Govt. Authorities” in any of said notes to audited Balance Sheet. Thus I find that assessee has not indicated the refund amount as “Amount Recoverable” for the year ended 31 March 2015 and shown the refund amount as “Amount Recoverable” for the year

201 5-16 under note 10 (Short term loans and advances) to the financial statements/balance sheet for the year ending on 31st March 2016. Whereas no amount has been shown recoverable from Govt. in the audited financial statements/ balance sheet for year ending on 31st March 2015.”

23. Thereafter, it was observed that the refund claim had to be adjudged on the principle of unjust enrichment distinctly in respect of B/Es mentioned at serial Nos. 1 to 3 (i.e., between 27th March, 2015 and 31st March, 2015) and the remaining at serial Nos. 4 to 46 (i.e., June, 2015 and July, 2015).

24. It has been explained by learned counsel for the Petitioner that no refund claim had yet been made in respect of the aforementioned B/Es during the financial year which ended on 31st March, 2015. Since the refund applications were submitted only during FY 2015-16, the outstanding refund in respect of these four B/Es could not have been shown in the balance sheet for FY 2014-15. Indeed, the mere fact that this amount was not shown as outstanding during the year 2014-15 would not mean that the Petitioner is not entitled to claim refund. The Petitioner cannot possibly be denied refund if it, in fact, did not pass on the burden of CVD to its customers.

25. What Respondent No. 4 had to examine was whether the claim of the Petitioner that it had not passed on the incidence of CVD in respect of the above B/Es for 27th March, 2015 to 31st March, 2015 to the customer was supported by proper documentation.

26. Here it is interesting to note that the Petitioner submitted the same CA certificate and documents (including sales invoices) for the

aforementioned period as well as for the period June and July, 2015. Respondent No.4 has accepted these very documents for the claim in respect of June and July, 2015. Pertinently, Respondent No. 4 observes in respect of those invoices as under:

“I find that the sales invoices of June 2015 and July 2015 produced by the importer do not reflect the CVD amount separately which, *prima facie*, indicate that the burden of SAD has not been passed on by the importer to their customers directly. Further, I have already taken note of the fact that the importer has submitted a Chartered Accountant's Certificate issued by M/s Nayyar Maniar & Associates LLP, M. No.502101, to the effect that certifying that the burden of CVD under this refund claim has not been passed on to the buyers and the refund being claimed is shown in their books of account/ Balance Sheet for the year ended 31 March 2016 as amount recoverable from the Customs. Accordingly, I hold that the provisions of unjust enrichment clause under Section 28D read with Section 27 of the Customs Act, 1962 are not applicable to the facts of this case and hence not invocable.”

27. By the same yardstick, there was no reason whatsoever for Respondent No. 4 not to accept the very same documents in respect of the imports between 27th March, 2015 and 31st March, 2015. The certificate of the CA is categorical that the incidence of CVD, even in respect of these imports, had not been passed on to the customers. Consequently, there was no valid justification for Respondent No. 4 to have denied the refund claim.

28. Given the history of the case where the Petitioner has to approach this Court again for relief, the stand taken by the Respondents regarding the maintainability of the present petition deserves to be rejected. Respondent No. 4 appears to be unwilling to accept the legal position explained by this Court repeatedly in several decisions and is persisting with rejection of the refund claims of the Petitioner on specious grounds.

29. For the aforementioned reasons, the writ petition is allowed. The Respondent is directed to allow the Petitioner's refund in respect of the claims made for the imports for the period 27th March, 2015 to 31st March, 2015, i.e. occurring at serial Nos.1 to 3 in the refund claim, and pay the refund amount together with interest to the Petitioner's account directly not later than the period of three weeks from today.

30. The writ petition is allowed in the above terms but in the circumstances with no orders as to costs.

S. MURALIDHAR, J.

PRATHIBA M. SINGH, J.

JULY 26, 2017

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