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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **CUSAA 48/2017**

Date of decision: 7th November, 2017.

COMMISSIONER OF CUSTOMS(IMPORT) Appellant

Through Mr. Sanjeev Narula, Sr. Standing
Counsel for customs (CBEC) with Mr.
Abhishek Ghai, Advocate.

versus

GULATI SALES CORPORATION. Respondent

Through Mr. Tarun Gulati, Advocate with
Mr. Abeer Kumar and Mr. Vasu Nigam,
Advocates.

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MS. JUSTICE PRATHIBA M. SINGH

SANJIV KHANNA, J. (ORAL):

Commissioner of Customs (Import) vide present appeal under Section 130 of the Customs Act, 1962 (Act, for Short) impugns the final order dated 2nd January, 2017 passed by the Custom, Excise and Service Tax Appellate Tribunal (CESTAT) in appeal No. C/268/2011.

2. The impugned order allows the appeal preferred by the respondent- M/s Gulati Sales Corporation and directs refund of

Special Additional Duty (SAD) of Rs.13,72,436/- under Notification No. 102/2007-CUS dated 14th September, 2007.

3. In our opinion, the issue is covered by the decision of the Delhi High Court in the case of *Sony India Private Limited versus Commissioner of Customs, 2014 (304) E.L.T. 660 (Delhi)* (hereafter '*Sony India*'), wherein it has been held in as under:-

“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-Cus dated 14.09.2007 there was no period of limitation; by Circular No.6/2008-Cus, 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-Cus 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 negatived 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.”

4. The said judgment was followed in *Pee Gee International versus Commissioner of Customs (ICD), Tughlakabad, New Delhi*, 2016 (343) ELT 72 (Delhi).

5. Counsel for the appellant, however, has drawn our attention to the decision in *Principal Commissioner of Customs versus Riso India Private Limited*, 2016 (333) ELT 33(Delhi) (hereafter ‘*Riso India*’), which according to him, takes a different view from the view expressed in *Sony India* (supra). It is accordingly submitted that limitation period specified under Section 27 of the Act would apply to claims for refund made under the notification of 2007, which had not prescribed a specified period of limitation.

6. We have considered the said contention, but would observe that the decision and ratio of *Riso India* (supra) is being read out of

context, by the Revenue. In the said case, the issue was whether Revenue was liable to pay interest on the refund of SAD. It is in that context, reference was made to Sections 27 and 27A of the Act to hold that on delayed refund, interest would be payable. The Division Bench in *Riso India* (supra) referring to the ratio in *Sony India* (supra) observed that the issue in the latter case was whether a subordinate piece of legislation, i.e., a circular or notification issued by the Central Board of Excise and Customs, could have imposed a period of limitation for the first time. Reference was first made to the circular dated 28th April, 2008, paragraph 4 of which with the heading "Procedure to be adopted for refund of 4% Additional Duty of Customs in pursuance of Notification No. 102/2007- Customs dated 14.9.2007", reads:-

“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 stock would not be eligible for refunds.

4.2 It is also clarified that only a single claim against a particular Bill of Entry should be permitted to be filed within the maximum time period of one year. Filing of refund claim for a part quantity in a bill of entry shall not be allowed except when this is necessary at the end of the one year period. Further, since the Sales Tax (ST)/Value Added Tax(VAT) is being paid on periodical or monthly basis, even in case of bills of entry where the entire quantity of goods are sold within a month, all such cases shall be consolidated in angle refund claim and filed with the Customs authorities on a monthly basis. In other words, there would be a single refund claim in respect of one importer in a month irrespective of the number of Bills of Entry (B/Es) processed by the respective Commissionerate.

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.”

7. Thereafter vide Notification No. 93/2008- Customs dated 1st August, 2008, sub-paragraph (c) to the notification dated 14th September, 2007, was substituted, stipulating that the importer shall

file a claim for refund of SAD before expiry of one year from the date of payment of the said duty. Validity of imposition of the said limitation has been examined in *Sony Media* (supra).

8. We, therefore, do not find any conflict between the view expressed in *Riso India* (supra) and *Sony India* (supra). In fact, the Division Bench in *Riso India* (Supra) could not have taken a different view without referring the matter to a Larger Bench in case they felt that the view expressed in the former decision required reconsideration. The Division Bench in *Riso India* (supra) observed that in *Sony India* (supra) "*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.*" The words "without statutory amendment" were highlighted to qualify and not to be misunderstood, as if limitation period under section 27 applies. These words would not indicate and show that limitation period specified in Section 27 of the Act applies to SAD refunds. Thereafter, the appeal of the Revenue in *Riso India* (supra) was dismissed.

9. In terms of Notification No. 102/2007 dated 14th September, 2007, an importer is entitled to refund of SAD, which is levied at the time of importation after he files documents to show that appropriate sales tax or value added tax has been paid. It may be noted that the purpose of imposing SAD is to protect and ensure collection of appropriate sales tax or value added tax, payable on the imported goods. This is paid upfront at the time of import. SAD is not credited and set off from the sales tax and value added tax, which are State

taxes. SAD is, therefore, refundable to the importer after evidence with regard to payment of appropriate sales tax or value added tax is produced. The documents and papers have to be produced before the custom authorities, checked and verified, before refund is issued. It goes without saying that the intent is that no double duty/tax - first, in the form of SAD and secondly, in form of sales tax or value added tax, is to be paid.

10. Circular dated 28th April, 2008 quoted above specifically states the view and understanding of the Revenue that Section 27 of the Act is not made applicable to the Notification No.102/2007 and the time limit prescribed under the said Section would not be applicable. The Revenue notwithstanding the said understanding and their Circular, now seeks to contend and urge to the contrary.

11. In view of the aforesaid, we find that the impugned order being in consonance with the ratio in the case of *Sony India* (supra), no case for interference is made out. No substantial question of law, therefore arises. The appeal is dismissed, without any order as to costs.

SANJIV KHANNA, J.

PRATHIBA M. SINGH, J.

NOVEMBER 07, 2017
MR/VKR