**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

**Civil Writ Petition No. 5013 of 2017
Date of Decision: 30.01.2018**

M/s Malwa Industries Ltd. .....Petitioner

versus

Union of India and another .....Respondents

**CORAM: HON'BLE MR. JUSTICE S.J.VAZIFDAR, CHIEF JUSTICE
HON'BLE MR. JUSTICE AVNEESH JHINGAN, JUDGE**

Present: Mr. Jagmohan Bansal, Advocate, for the petitioner.

Mr. Tajinder K.Joshi, Senior Standing Counsel for respondent No.2.

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S.J.VAZIFDAR, CHIEF JUSTICE

The petitioner seeks a writ of certiorari quashing an order dated 13.02.2017 rejecting its claim for refund of duty with interest on the ground that it is barred by limitation.

2. The petition raises a question of law. The facts are admitted. It is necessary, therefore, to refer to the facts only briefly. In the year 2007, the petitioner imported consignments of indigo. On 10.08.2007 and 07.09.2007 the petitioner filed bills of entry for the clearance of the goods. On 07.09.2007, the petitioner informed the respondents that it had paid the CVD under protest at the time of clearance of the goods.

3. The petitioner filed an appeal before the Commissioner (Appeals) against eight assessed bills of entry. The appeals were allowed in respect of five bills of entry. The Department's appeal to the Customs

Excise and Service Tax Appellate Tribunal (CESTAT) was dismissed on 30.04.2008. The petitioner's application for refund was sanctioned by an order dated 15.10.2008 in respect of five bills of entry. The Department's appeal against the order of the CESTAT was dismissed by the order of the Supreme Court on 12.02.2009. This petition, therefore, is not concerned with these five bills of entry.

4. By an order dated 06.05.2008 the Commissioner (Appeals), however, took a contrary view and dismissed the petitioner's appeal in respect of the remaining three bills of entry. The Tribunal, however, by an order dated 09.05.2013 allowed the appeal.

5. The petitioner made an application for refund under section 27 of the Customs Act, 1962 only on 06.05.2015 i.e. beyond the period one year from the date of the order of CESTAT namely 09.05.2013. We have held that the period of one year prescribed in section 27(1) does not apply to this case in view of the second proviso thereto. Section 27, in so far as it is relevant, reads as under:-

> "**SECTION 27. Claim for refund of duty.** -(*1*) Any person claiming refund of any duty or interest,-
> (*a*) paid by him; or
> (*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, <u>before the expiry of one year, from the date of payment of such duty or interest:</u>
>
> <u>Provided further that the limitation of one year shall not apply where any duty or interest has been paid under protest</u>.
>
> …. ….. ……. ……..… …..…… ..….. ……... ……… ..….. ……
>
> (1B) Save as otherwise provided in this section, the period of limitation of one year shall be computed in the following manner, namely:-

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> (*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."
>
> *(Emphasis supplied)*

6. The Deputy Commissioner of Customs rejected the claim for refund in respect of the said three bills of entry on the ground that it was barred by limitation. The petitioner challenged this order by filing Civil Writ Petition No.13859 of 2016 which was disposed of by an order and judgment of this Court dated 27.01.2017 to which one of us (S.J.Vazifdar, C.J.) was a party. The order noted that the notice for fixing the hearing was received by the petitioner only after the dates on which the hearing was fixed. The order was, therefore, quashed and set aside and the Deputy Commissioner was directed to pass a fresh order after affording the petitioner an opportunity of being heard.

The Deputy Commissioner (Customs) accordingly passed the impugned order dated 14.02.2017. Respondent No.2 did not reject the claim on the ground that the payment was not made under protest but on the ground that it was made more than one year after the date of the order of refund dated 09.05.2013. He held that once the dispute is settled by the authority, the fact of the duty having been paid under protest no longer remains relevant and the relevant date to be reckoned is the date of the order of the Appellate Authority. It was observed that a view to the contrary would entitle a party to make an application for refund at any time for an indefinite period. Reliance was placed in this regard on the judgment of the Supreme Court in *Dena Snuff (P) Ltd. v. Commissioner of Central Excise, Chandigarh 2003(157) ELT 500 (SC).*

The respondents contend that the application for refund having been filed more than one year from the date of the order of the refund is barred by limitation in view of the provisions of section 27 of the Customs Act, 1962.

7. Sub section (1) of Section 27 of the Act provides that any person claiming refund of any duty or interest may make an application "before the expiry of one year from the date of payment of such duty or interest". The second proviso, however, stipulates that the limitation of one year shall not apply where the duty or interest has been paid under protest. In the present case the petitioner paid the duty under protest. In view of the second proviso to Section 27(1) the period of limitation would, therefore, not apply to the petitioner's case for refund and interest.

8. The respondents, however, contend that the second proviso to Section 27(1) will not operate after the orders of the Authority, Tribunal or Court in view of sub-section (1-B). The submission is not well founded.

9. Clause-(b) of section (1-B) indeed applies to the present case. It provides that where the duty becomes refundable as a consequence of any judgment, decree, order or direction of the Appellate Authority, the Appellate Tribunal or any Court, the limitation of one year shall be computed from the date of such judgment, decree, order or direction.

Undoubtedly, therefore, the period of limitation would, absent anything else, commence in the petitioner's case from 09.05.2013. However, sub section (1-B) opens with the words "Save as otherwise provided in this section…………". It is, therefore, subject to anything to the contrary in the section. The second proviso to sub section (1) expressly states that "the limitation of one year shall not apply where any duty or interest has been paid under protest". Clause (b) of sub-section (1-B) does not alter this position. The second proviso to sub-section (1) and sub-section (1B) cannot stand together. It follows, therefore, that the second proviso falls within the ambit of the words "Save as otherwise provided in this section ….." in sub-section (1B).

10. Sub-section (1-B) only stipulates the *terminus a quo*. It does not affect the second proviso to sub-section (1). Sub section (1-B) is not a stand alone section. Sub section (1-B) by itself has no meaning or existence. It must be read together with sub section (1). The words "period of limitation of one year" in sub-section (1-B) refer to the period of one year mentioned in sub section (1). Thus in the present case, for instance, the words "before the expiry of one year" in sub section (1) must be read with the provisions of clause (b) of sub section (1-B). It is axiomatic, therefore, that the second proviso would apply to the main part of sub section (1) read with sub section (1-B) as well. A view to the contrary would render the second proviso to sub-section (1) otiose.

11. The respondents contend that this interpretation would render sub-section (1-B) otiose. The error in this contention is evident from the fact that even if duty is not paid under protest, the assessee would be entitled to the period of one year as computed in accordance with sub

section (1-B). Thus, sub section (1-B) is applicable to cases where the second proviso does not apply.

12. The Tribunal relied upon the following observations of the Supreme Court in *Dena Snuff (P) Ltd. (supra)*:-

> "5. As far as the first submission is concerned, we are of the view that the Tribunal's appreciation of the relevant paragraph in Mafatlal Industries was correct. The "cause of action" of the appellant would arise only after the final dispute regarding the classification list had been settled by this Court. That was done as recently as on 28-8-2003. The application for refund by the appellant was, therefore, premature. We have noted the proviso to **sub-section (1) of section 11-b** which says that the period of limitation of one year prescribed under sub-section (1) will not apply in case duties are paid under protest. The question then is from which date will the period of limitation start to run? It appears on the basis of the paragraph of Mafatlal Industries decision which has been relied upon by the Tribunal it would have to be from the final decision in the assessee's own case. (emphasis supplied)"

The judgment does not apply to the case before us as in that case the provisions of section 11-B of the Central Excise Act, 1944 fell for consideration. Section 11-B of the Central Excise Act is different from Section 27 of the Customs Act, 1962. Section 11-B of the Central Excise Act, 1944 reads as under:-

> **"Section 11B. Claim for refund of duty and interest, if any, paid on such duty -**
>
> (1) Any person claiming refund of any duty of excise and interest, if any, paid on such duty may make an application for refund of such duty and interest, if any, paid on such duty to the Assistant Commissioner of Central Excise or Deputy Commissioner of Central

Excise before the expiry of one year from the relevant date in such form and manner as may be prescribed and the application shall be accompanied by such documentary or other evidence (including the documents referred to in section 12A) as the applicant may furnish to establish that the amount of duty of excise and interest, if any, paid on such duty in relation to which such refund is claimed was collected from, or paid by, him and the incidence of such duty and interest, if any, paid on such duty had not been passed on by him to any other person :

Provided further that the limitation of one year shall not apply where any duty and interest, if any, paid on such duty has been paid under protest.

…. ….. ……. ……... …....…. ..….. …..…. …..…. ..….. ……. …..

Explanation. - For the purposes of this section, -

…. ….. ……. ……... …....…. ..….. …..…. …..…. ..….. ……. …..

(B) "relevant date" means, -

(a) in the case of goods exported out of India where a refund of excise duty paid is available in respect of the goods themselves or, as the case may be, the excisable materials used in the manufacture of such goods, -

(i) if the goods are exported by sea or air, the date on which the ship or the aircraft in which such goods are loaded, leaves India, or

(ii) if the goods are exported by land, the date on which such goods pass the frontier, or

(iii) if the goods are exported by post, the date of dispatch of goods by the Post Office concerned to a place outside India;

(b) in the case of goods returned for being remade, refined, reconditioned, or subjected to any other similar process, in any factory, the date of entry into the factory for the purposes aforesaid;

(c) in the case of goods to which banderols are required to be affixed if removed for home consumption but not so required when exported outside India, if returned to a factory after having been removed from such factory for export out of India, the date of entry into the factory;

(d) in a case where a manufacturer is required to pay a sum, for a certain period, on the basis of the rate fixed by the Central Government by notification in the Official Gazette in full discharge of his liability for the duty leviable on his production of certain goods, if after the manufacturer has made the payment on the

> basis of such rate for any period but before the expiry of that period such rate is reduced, the date of such reduction;
>
> (e) in the case of a person, other than the manufacturer, the date of purchase of the goods by such person;
>
> (ea) in the case of goods which are exempt from payment of duty by a special order issued under sub-section (2) of section 5A, the date of issue of such order;
>
> (eb) in case where duty of excise is paid provisionally under this Act or the rules made there under, the date of adjustment of duty after the final assessment thereof;
>
> (ec) in case where the duty becomes refundable as a consequence of judgment, decree, order or direction of appellate authority, Appellate Tribunal or any court, the date of such judgment, decree, order or direction;
>
> (f) in any other case, the date of payment of duty."

Under section 11B, the application for refund of duty of excise must be made "before the expiry of one year from the relevant date." "Relevant date" is defined in Explanation (B)(ec). Thus, the application for refund must be made before the expiry of one year from the date of the judgment, decree, order or direction of the authority, Tribunal or Court. What is important and what is different in section 11B of the Central Excise Act from section 27 of the Customs Act is that section 11B does not contain a provision similar to section (1-B) of section 27 of the Customs Act, 1962 which opens with the words "Save as otherwise provided in this section". Thus, Explanation (B) including clause (ec) thereof is not subject to the Proviso. Under section 27 of the Customs Act, sub-section (1-B) is subject to the second Proviso to sub-section (1).

13. The respondents' apprehension that if the petitioner's submission is accepted, there would be no period of limitation is not well founded. An application for refund must be made within a reasonable period of time. What is reasonable a period of time would depend on the facts of each case. This apprehension in any event cannot be the basis of denying a just claim on the ground of limitation.

14. In the circumstances, the impugned order is set aside. The petitioner's claim for refund is allowed. The same shall be computed and paid to the petitioner by 30.04.2018.

(S.J. VAZIFDAR)
CHIEF JUSTICE

(AVNEESH JHINGAN)
JUDGE

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Whether speaking/reasoned √ Yes/No
Whether Reportable: √Yes/No