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

\+ **W.P.(C) 9178/2017**

Date of decision: 16th January, 2018

MICROMAX INFORMATICS LIMITED ..... Petitioner
Through Mr. Tarun Gulati, Mr. Shashi Mathews, Mr. Ankit Sachdeva, ms. Rachana Yadav and Mr. Vasu Nigam, Advocates.

versus

UNION OF INDIA & ORS. ..... Respondent
Through Mr. P.S. Singh and Ms. Annu Singh, Advocates for R-1.
Mr. Harpreet Singh, Sr. Standing Counsel with Ms. Bhavya Dubey, Advocate for R-2, 3 and 4.

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE CHANDER SHEKHAR

SANJIV KHANNA, J. (ORAL)

Micromax Informatics Limited has filed the present writ petition praying for issue of writ in the nature of writ of Certiorari declaring paragraph 4.3 of the Circular No.06/2008-Cus. dated 28th April, 2008 as *ultra vires* and contrary to provisions of Section 27A of the Customs Act, 1962. The petitioner has also prayed for quashing of the order No. VIII (20)/ICD/TKD/Refund/651/16 dated 3rd August, 2017, to the extent it does not grant interest on delayed refund as being contrary to the judgment of the Delhi High Court in ***Principal Commissioner of Customs Vs. Riso India Pvt. Ltd.***, 2016 (333) ELT 33. Other prayers are also made.

2. The petitioner is a company incorporated under the laws of India and is a manufacturer, importer and seller of products like mobile phones etc.

3. The petitioner had imported goods vide 38 Bills of Entry and at the time of clearance for home consumption during the period 12th July, 2013 to 19th March, 2014, paid Special Additional Duty (SAD) of Rs. 3,96,39,212/- under sub-section (5) of Section 3 of the Customs Tariff Act, 1975 in addition to basic and additional customs duty leviable under Section 3(1) of the Customs Act.

4. SAD is in nature of counter-balancing duty, to account for sales tax, value added tax, etc.

5. Notification No.102/2007-Cus dated 14th September, 2007 issued under Section 25 (1) of the Customs Act grants exemption from payment of SAD on all goods imported for subsequent sale falling in the First Schedule of the Customs Tariff Act, 1975, when Value Added Tax/Sales Tax is paid by the importer. This notification has been quoted below.

6. It is undisputed that the petitioner is entitled to the benefit of the said exemption notification in respect of 38 Bills of Entry cleared for home consumption on which SAD amounting to Rs.3,96,39,212/- was paid, in view of the order in original dated 14th November, 2014 granting refund of Rs. 2,50,99,545/- and order-in-appeal dated 22nd January, 2016, granting refund of balance SAD of Rs.1,45,39,667/-. The respondents had preferred an appeal, but did not succeed vide order of the Tribunal dated 11th November, 2016.

7. The question, which arises for consideration relates to payment of interest on late refund of SAD in terms of Section 27A of the Customs Act. The contention of the respondents is that Section 27A is not applicable to refunds of SAD as Notification No.102/2007-Cus. dated 14th September, 2007, has been issued under sub-section (1) to Section 25 of the Customs Act and not under Section 27A of the Customs Act. The respondents in support rely on Circular No.6/2008-Cus. dated 28th April, 2008, which in paragraph 4.3 states that interest under Section 27A would not be payable on refund of SAD. The petitioner has accordingly challenged paragraph 4.3 of the said circular.

8. Sections 25, 27 and 27A of the Customs Act, reads :-

> "**25. Power to grant exemption from duty**.— (1) If the Central Government is satisfied that it is necessary in the public interest so to do it may, by notification in the Official Gazette, exempt generally either absolutely or subject to such conditions (to be fulfilled before or after clearance), as may be specified in the notification goods of any specified description from the whole or any part of duty of customs leviable thereon.
>
> [(2) If the Central Government is satisfied that it is necessary in the public interest so to do, it may, by special order in each case, exempt from the payment of duty, circumstances of an exceptional nature to be stated in such order, any goods on which duty is leviable.]
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> [(2-A) The Central Government may, if it considers it necessary or expedient so to do for the purpose of clarifying the scope or applicability of any notification issued under sub-section (1) or order issued under sub-section (2), insert an explanation in such notification or order, as the case may be, by notification in the Official

Gazette, at any time within one year of issue of the notification under sub-section (1) or order under sub-section (2), and every such explanation shall have effect as if it had always been the part of the first such notification or order, as the case may be.]

[(3) An exemption under sub-section (1) or sub-section (2) in respect of any goods from any part of the duty of customs leviable thereon (the duty of customs leviable thereon being hereinafter referred to as the statutory duty) may be granted by providing for the levy of a duty on such goods at a rate expressed in a form or method different from the form or method in which the statutory duty is leviable and any exemption granted in relation to any goods in the manner provided in this sub-section shall have effect subject to the condition that the duty of customs chargeable on such goods shall in no case exceed the statutory duty.

Explanation.— "Form or method", in relation to a rate of duty of customs, means the basis, namely, valuation, weight, number, length, area, volume or other measure with reference to which the duty is leviable.]

[(4) Every notification issued under sub-section (1) or sub-section (2-A) shall, unless otherwise provided, come into force on the date of its issue by the Central Government for publication in the Official Gazette.]

(5) [* * *]

[(6) Notwithstanding anything contained in this Act, no duty shall be collected if the amount of duty leviable is equal to, or less than, one hundred rupees.]

[(7) The mineral oils (including petroleum and natural gas) extracted or produced in the continental shelf of India or exclusive economic zone of India as referred to in Section 6 and Section 7, respectively, of the Territorial Waters, Continental Shelf, Exclusive Economic Zone and Other Maritime Zones Act, 1976 (80 of 1976), and imported prior to the 7th day of

February, 2002 shall be deemed to be and shall always be deemed to have been exempted from the whole of the duties of customs leviable on such mineral oils and accordingly, notwithstanding anything contained in any judgment, decree or order of any court, tribunal or other authority, no suit or other proceedings in respect of such mineral oils shall be maintained or continued in any court, tribunal or other authority.

(8) Notwithstanding the exemption provided under sub-section (7), no refund of duties of customs paid in respect of the mineral oils specified therein shall be made.]

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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.

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SECTION 27A. Interest on delayed refunds.

- If any duty ordered to be refunded under sub-section (2) of section 27 to an applicant is not refunded within 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 five percent and not exceeding thirty percent 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:

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.

Explanation**.** - Where any order of refund is made by the Commissioner (Appeals), Appellate Tribunal, National Tax Tribunal or any court against an order of the Assistant Commissioner of Customs or Deputy Commissioner of Customs under sub-section (2) of section 27, the order passed by the Commissioner (Appeals), Appellate Tribunal, National Tax Tribunal or, as the case may be, by the court shall be deemed to be an order passed under that sub-section for the purposes of this section."

9. We would also like to reproduce Notification No.102/2007-Cus. dated 14th September, 2007 and the relevant portion of Circular No.6/2008-Cus. dated 28th April,2008, which read as under:-

"**Notification No. 102/2007-Customs**

New Delhi, the 14th September, 2007

G.S.R. (E).- In exercise of the powers conferred by sub-section (1) of section 25 of the Customs Act, 1962 (52 of 1962), the Central Government, on being satisfied that it is necessary in the public interest so to do, hereby exempts the goods falling within the First Schedule to the Customs Tariff Act, 1975 (51 of 1975), when imported into India for subsequent sale, from the whole of the additional duty of customs leviable thereon under sub-section (5) of section 3 of the said Customs Tariff Act (hereinafter referred to as the said additional duty).

2. The exemption contained in this notification shall be given effect if the following conditions are fulfilled:

(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 alongwith 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.

3. The jurisdictional customs officer shall sanction the refund on satisfying himself that the conditions referred to in para 2 above, are fulfilled."

Relevant Portion of Circular No.6/2008

"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 despatched 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.

4.2. ****

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."

10. Section 25 of the Customs Act empowers the central government, who may by notification in the official gazette, grant exemption generally, either absolutely or subject to conditions which may be specified from whole or any part of duty of customs leviable thereon. The conditions to be fulfilled can be before or after clearance of goods. Sub section 3 widens the manner and scope in which exemption can be granted to include form or method different from the form or method in which the statutory duty is leviable. The explanation defines the term 'form or method' in relation to a rate of duty of customs.

11. Notification No.102/2007-Cus. has been issued in exercise of power conferred by Section 25 of the Customs Act. As noticed above, it exempts goods falling within the First Schedule of the Customs Tariff Act, 1975, from the whole of SAD leviable under sub-section (5) of Section 3 of the Customs Act, when imported into India for subsequent sale, subject to the conditions in paragraph 2 of notification being fulfilled. Paragraph 3 of the said notification states that jurisdictional customs officer shall sanction refund on being satisfied that conditions referred to in paragraph 2 are fulfilled. It is not disputed that conditions mentioned in paragraph 2 of the notification in respect of 38 Bills of Entry are fulfilled. The orders passed by the jurisdictional customs officer, appellate authority and the Tribunal have attained finality. As a sequitor, it follows that SAD refundable was a duty paid by the petitioner under the Customs Act in respect of which exemption vide Notification 107/2007-Cus dated 14th September,2007 has been granted by the Central Government.

12. Section 27 relates to refund of duty or interest paid or borne by the assessee and the manner in which application is to be made for refund of duty and interest paid. Logically, Section 27 applies when an assessee applies and seeks refund of duty including SAD.

13. Section 27A states that duty directed to be refunded under sub section 2 to Section 27, if not paid within three months from date of receipt of application under sub section 1 to section 27, interest would be paid by the authorities as per the rate specified. In other words, if the refund is paid within three months of date of receipt of application under sub section 1 to Section 27, no interest is payable. Interest is payable on delayed refunds

after three months post the application for refund till the date of refund. Section 27A therefore ensures prompt decision and payment of refunds, when due and payable under sub section 2 of Section 27 of the Act.

14. We need not refer to the other portions of Sections 25, 27 and 27A of the Customs Act for the purposes of this decision.

15. The expression 'duty' used in clauses (a) to (h) of subsection 2 to Section 27 of the Customs Act was interpreted in **Riso India Pvt. Ltd**. (supra), and in our opinion rightly, as wide enough to cover all kinds of customs duties as per the definition clause Section 2(15) of the Customs Act. Duty would include SAD. This decision also refers to Section 3(8) of the Customs Tariff Act, which stipulates that provisions of the Customs Act, including those related to drawback, refunds and exemptions shall apply to SAD as far as may be. Thus, SAD levied under the Customs Tariff Act is a duty within the meaning of Section 27, and refunds under sub section 2 to Section 27 A of the Customs Act when delayed beyond 3 months from date of application, interest would be payable in terms of and as per Section 27 of the Customs Act.

16. Referring to notification no. 102/2007-Cus, the Division Bench in **Riso India Pvt. Ltd.** (supra) observed that the clauses had the effect of extending the period of limitation for refund, to the extent that the said period is not stipulated in Section 27 of the Customs Act. In ***Riso India Pvt. Ltd.*** (supra) it was held -

> "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."

17. . Referring to Circular No.6/2008-Cus., dated 28th April, 2008, the Division Bench in ***Riso India Pvt. Ltd***. (supra) observed that it seeks to clarify applicable time limit for making an application for refund in terms of Notification No. 102/2007. Thus, Notification No.102/2007 had effect of extending period of limitation for refund, to the extent, the said period is not stipulated in Section 27 of the Customs Act. Refund under Notification No.102/2007 is payable on satisfaction of conditions mentioned in paragraph 2 which include documents evidencing payment of appropriate sales tax or value added tax on sale of imported goods. Sale would be post the import and thus the time limit fixed under Section 27 was impracticable and unrealistic. It required an extension of time to apply for refund for the exemption to be effective. Thus, period of time was extended.

18. In aforesaid decision, notwithstanding paragraph 4.3 of Circular No. 6/2008 dated 28th April, 2008, direction was given to pay interest in terms of Section 27A of the Customs Act. The reason was and the Division Bench

has held that paragraph 4.3 of the Circular No.06/2008 dated 28th April, 2008 was not in consonance with and in accord with statutory mandate of Section 27A, which was applicable to refund payable under Notification No. 102/2007.

19. A similar issue had arisen before the Madras High Court in ***KSJ Metal Impex (P) Ltd. Vs. Under Secretary (CUS.), M.F. (D.R.)***, 2013 (294) ELT 211 (Mad.). This decision also refers to the relevant provisions and, in particular, to Section 3 (5) of the Customs Tariff Act, which provides for levy of SAD to counterbalance sales tax, value added tax, local tax etc. and exemption Notification No.102/2007-Customs dated 14th September, 2007, by which exemption from payment of SAD on imported goods was granted on specified terms and conditions. Reference is also made to Section 3 (8) of the Customs Tariff Act, which states that the provisions of the Customs Act, in relation to refund are applicable to SAD. Thereafter, it has been held as under:-

> "10. The petitioner, therefore, is justified in filing refund application in terms of Section 27 of the Customs Act, 1962 and that is not in dispute. However, no order has been passed so far and the Court has already directed the respondents to process the refund application. In such a situation, the present circular has been challenged. On going through paragraph 4.3 of the circular, it is evident that the Board is of the view that there is no specific provision for payment of interest in the Notification No.102/2007-Customs, dated 14.9.2007. That reason is not correct as the grant of exemption under Section 25(1) of the Customs Act, 1962 is one facet. The claim for refund is contingent on

complying with the requirement as specified in the notification. The exemption from payment of special additional duty as payable under Section 3(5) of the Customs Tariff Act, 1975 is exempted under Section 25(1) of the Customs Act, 1962. Therefore, the refund of duty paid will have to be read in terms of Section 3(8) of the Customs Tariff Act, 1975 and not otherwise. Therefore, the provision that is applicable for refund is Section 27 of the Customs Act, 1962. If the refund is not made as specified, then the consequences will follow with regard to interest.

11. Furthermore, the grant of exemption under Section 25(1) of the Customs Act, 1962 is an independent exercise of power by the Central Government and certain conditions have been imposed in the said notification for seeking refund, but the procedure for refund, as has already been highlighted, will fall under Section 27 of the Customs Act, 1962 as made applicable under Section 3(8) of the Customs Tariff Act, 1975. A conjoint reading of these two provisions makes it clear that the refund application should be filed and entertained only under Section 27 of the Customs Act, 1962 and there is no method or manner prescribed under Section 25 of the Customs Act, 1962 to file an application for refund of duty or interest. To state that no interest on delayed payment is contemplated in the notification issued under Section 25 of the Customs Act, 1962 is a misconception of the provisions of the Customs Act, 1962.

12. When Section 27 of the Customs Act, 1962 provides for refund of duty and Section 27A of the Customs Act, 1962 provides for interest on delayed refunds, the authority cannot override the said provisions by a circular and deny the right which is

> granted by the provisions of the Customs Act, 1962 and Customs Tariff Act, 1975. Therefore, paragraph 4.3 of the Circular No.6/2008-Customs, dated 28.4.2008 is contrary to the statute and becomes totally inappropriate. When the circular is contrary to the provisions of the Customs Act, 1962 and Customs Tariff Act, 1975, it has to be struck down as bad.
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> 13. For the foregoing reasons, the writ petition is allowed and paragraph 4.3 of the Circular No.6/2008-Customs, dated 28.4.2008 insofar as it seeks to restrict or obliterate the claim of interest on belated refunds granted in terms of Notification No.102/2007-Customs, dated 14.9.2007 is quashed and the pending refund application of the petitioner shall be considered by the respondents in the light of Sections 27 and 27A of the Customs Act, 1962. No costs. Consequently, M.P.No.1 of 2013 is closed."

20. We respectfully agree with the reasoning given in ***KSJ Metal Impex (P) Ltd.*** (supra), which is in consonance with the reasoning given by this Court in ***Riso India Pvt. Ltd.*** (supra).

21. The result would be that paragraph 4.3 of the Circular No.06/2008-Cus. dated 28th April, 2008 has to be struck down. The said circular does not correctly interpret provisions of Section 27A of the Customs Act to deny claim for payment of interest. Accordingly, it is held that interest would be payable in terms of Section 27A of the Customs Act on refund of SAD payable in terms of Notification No. 102/2007.

22. We may also deal with the objection raised by the respondents that the impugned order is appealable. Contention of the petitioner in this regard is

two-fold. Firstly, the issue is covered by the decision in ***Riso India Pvt. Ltd.*** (supra) and, therefore, filing of appeal is not required and is a formality. Secondly, it is submitted that the authorities in spite of the decision of Delhi High Court in ***Riso India Pvt. Ltd.*** and of Madras High Court in ***KSJ Metal Impex (P) Ltd***. have followed the circular. In these circumstances, the petitioner has challenged the validity of this circular itself as being contrary to the legislative intent and Section 27A of the Customs Act. This challenge cannot be made before the Customs' authorities. We find merit in the contentions raised by the petitioner to meet the challenge predicated on the plea of alternative remedy, in view of the factual matrix of the present case and challenge to the circular.

23. Resultantly, the writ petition is allowed and the impugned order dated 29th September, 2017 is quashed and set aside. The respondents would pay interest in terms of Section 27A of the Customs Act within a period of 8 weeks from the date copy of this order is received. There would be no order as to costs.

SANJIV KHANNA, J.

CHANDER SHEKHAR, J.

JANUARY 16, 2018
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