IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 04.04.2019

CORAM

THE HONOURABLE MR.JUSTICE T.S.SIVAGNANAM
and
THE HONOURABLE MRS.JUSTICE V.BHAVANI SUBBAROYAN

Civil Miscellaneous Appeal Nos.1991 and 1992 of 2017
and
Civil Miscellaneous Petition Nos.10715, 10716 & 10717of 2017

Kamadhenu Polymers Pvt Ltd.,
No.37/12-1, Archana Complex,
4th Cross, Lalbagh Road,
Bangalore-560 027. .. Appellant/Appellant in both Appeals

-vs-

Commissioner of Customs (Seaport),
Chennai IV Commissionerate,
Customs House,
No.60, Rajaji Salai, Chennai-600 001. .. Respondent/Respondent in both Appeals

APPEALS under Section 130 of the Customs Act, 1962, to set aside the order dated 07.10.2016 made in Final Order Nos.41839 and 41840/2016 on the file of the Customs, Excise and Service Tax Appellate Tribunal, South Zonal Bench, Chennai arising out of order in Appeal C.Cus.II No.192 & 193/2016 dt.23.02.2016 passed by the Commissioner of Customs (Appeals-II), Chennai.

For Appellant : Mr.Joseph Prabakar
(In both Appeals)

For Respondent : Mr.S.Rajasekar,
(In both Appeals)

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COMMON JUDGMENT

(Delivered by T.S.Sivagnanam, J.)

These appeals, by the appellant/importer, are directed against the common order passed by the Customs, Excise and Service Tax Appellate Tribunal, South Zonal Bench, Chennai (for brevity, "the Tribunal"), dated 07.10.2016 in Final Order Nos.41839 and 41840/2016.

2.The above appeals have been filed raising the following substantial questions of law:-

> "(i) On facts and in the circumstances, was the learned Single Member of the Tribunal justified in assuming jurisdiction for hearing of Appeal No.C/40787/2016, in a manner contrary to Section 129C(4)(b) of the Customs Act, 1962, in as much as the Commissioner of Customs (Appeals) has decided the issue based entirely on classification of goods?
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> (ii) On facts, and in the circumstances, was the Tribunal correct in dismissing ex parte the Appeal No.C/40787/2016?
>
> (iii) On facts and in the circumstances, was the Tribunal correct in holding that the Revenue had filed appeal before the first appellate authority within the period of limitation prescribed under Section 129D of the Customs Act, 1962?
>
> (iv) Whether the Tribunal failed to note that the Commissioner of Customs (Appeals) cannot go into the aspect of correlation of 'goods imported' versus 'goods sold in India' to arrive at a contrary conclusion, when the very same exercise has been completed by the Statutory Auditor in terms of the stipulation contained in Paragraph No.5 of CBEC Circular No.6/2008 dated April 28, 2008 who had certified that the Appellant had complied with Condition No.2 (e) (iii) of Notification No.102/2007 dated 14.09.2007?"

3.Heard Mr.Joseph Prabakar, learned counsel for the appellant/importer; and Mr.S.Rajasekar, learned counsel for the respondent/Revenue.

4.The short issue which falls for consideration is whether the Tribunal was justified in dismissing the appeals filed by the appellant/importer.

5.The appellant filed an application claiming refund of 4% Special Additional Duty (SAD) being the amount paid by them for import of HDPE F0460, LDPLF2119 S, HDPE EGDA 6888, LLDPE 118W, HDPE FB1460, HDPEF 10750, LLDPE, HDPE F1, LLDPE vide 17 bills of entry. The appellant claimed refund in terms of Notification No.102/2007-Cus dated 14.09.2007 as amended by Notification No.93/2008 dated 01.08.2008 read with Board's Circular Nos.6/2008-Customs dated 28.04.2008; 16/2008-Customs dated 13.10.2008; and 18/2010-Customs dated 08.07.2010. The application filed by the appellant/importer was scrutinised by the adjudicating authority and the claim made by them was examined on the conditions stipulated in the notifications, more particularly, as contained in Notification No.6/2008-Cus dated 28.04.2008.

6.The original authority sanctioned two refund claims, one for Rs.7,21,828/- and the second for Rs.4,86,347/- in full, after recording that the Chartered Accountant had certified the correlation between the "goods imported" by the appellant and the "goods sold" by the appellant in India. The Department preferred appeals before the first appellate authority, who dismissed the appeals on account of delay in filing the appeal under Section 129 D(3) of the Act. On appeals before the Tribunal, the Tribunal vide common order dated 06.10.2015 allowed the appeals filed by the Department and directed the first appellate authority to pass fresh orders on merits. Upon remand, the Commissioner (Appeals) vide common order dated 23.02.2016 held that the appeals were filed in time and, held that there was mismatch between the description of goods in the bill of entry and the description shown the local sale invoice. The appellant filed appeals before the Tribunal and the Tribunal vide Final Order Nos.41839 and 41840 of 2016, dated 07.10.2016, held that there was mismatch in the description between the 'goods imported', namely LLDPE/LDPE Polymers and 'goods sold' locally in India, namely, "Plastic Granules".

7.Be that as it may, we are to test as to whether the Tribunal was justified in holding that the discrepancy in the goods was not in the nature of curable effect.

8.Mr.S.Rajasekar, learned counsel is right in his submission that a notification which grants refund was an exemption notification, should be construed strictly and the conditions contained should be scrupulously adhered to. In this regard, the leaned counsel has drawn our attention to Notification No.102/2007-Cus dated 14.09.2007.

9.We find that there are three documents which the importer has to produce for being entitled for refund of SAD, they being, (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. The adjudicating authority appears to have done a thorough scrutiny of the documents and granted refund in full.

10.The findings of the first appellate authority and the Tribunal, in our considered view, are not sustainable, considering the facts and circumstances of the case, as the adjudicating authority himself was satisfied that amount of claim for refund in full was sustainable.

11.Thus, for the above reasons, the appeals, filed by the appellant are allowed, the orders passed by the Tribunal and the Commissioner (Appeals) are set aside and the substantial questions of law are answered in favour of the appellant. No costs. Consequently, connected miscellaneous petitions are closed.

Sd/-
Assistant Registrar(Insp.Cell)

//True Copy//
Sub Assistant Registrar

abr

To

1.The Customs,
Excise and Service Tax Appellate Tribunal,
No.26, Sashtri Bhavan Annexe Building,
Haddows Road,
Chennai-600 006.

2.The Commissioner of Customs,
Chennai Seaport Commissionerate-IV,
Customs House,
No.60, Rajaji Salai, Chennai-600 001.

3.The Commissioner (Appeals-II),
O/o The Commissioner of Customs (Appeals-II),
Custom House, No.60, Rajaji Salai,
Chennai-600 001.

+1cc to Mr.Joseph Prabakar, Advocate, S.R.No.33867

C.M.A.Nos.1991 and 1992 of 2017

PMS(CO)

RRS(09/07/2019)