

In the High Court of Judicature at Madras

Dated : 10.3.2021

Coram :

The Honourable Mr.Justice T.S.SIVAGNANAM

and

The Honourable Ms.Justice R.N.MANJULA

Writ Appeal No.718 of 2021

M/s.Deccan Organics, rep.by
its Authorized Signatory
Shri V.Harinarayanan ...Appellant/Appellant

Vs

The Assistant Commissioner of
Customs (Refunds-Sea), Custom
House, No.60, Rajaji Salai,
Chennai-1.Respondent/Respondent

APPEAL under Clause 15 of the Letters Patent against the
order dated 23.11.2020 made in W.P.No.1714 of 2017.

Prayer in W.P No.1714 of 2017:

Writ Petition filed under Article 226 of the Constitution of
India praying to issue a Writ of Certiorari calling for the
records of the respondent leading to issuance of Order-in-
Original No. 45453/216 dated 8.3.2016 issued in F. No.
S24/SAD/4003/15-Refunds-S25/SAD/1059/16 and quash the same for
being contrary to the statutory provisions more particularly
Section 3 (5) of the Customs Tariff Act 1975.

For Appellant : Mr.Hari Radhakrishnan

For Respondent : Mr.A.P.Srinivas, SSC

Judgment was delivered by T.S.SIVAGNANAM, J

We have elaborately heard Mr.Hari Radhakrishnan, learned
counsel for the appellant and Mr.A.P.Srinivas, learned Senior
Standing Counsel accepting notice for the respondent.

2. The writ appeal, filed by the assessee, is directed
against the order dated 23.11.2020 made in W.P.No.1714 of 2017.

3. The said writ petition was filed by the appellant challenging an Order-in-Original dated 08.3.2016 passed by the respondent rejecting the application filed by the appellant for the refund of Special Additional Duty (SAD) on two grounds namely (i) that the refund claim was filed beyond the time limit of one year from the date of payment of duty and (ii) that the sales invoice submitted by the appellant along with refund claim did not indicate charging of sales tax, instead there was an endorsement in the sales invoices that 'sale of poultry feed supplement under Commodity Code - 705 of IV Schedule exempted from sales tax'.

4. As against the said Order-in-Original dated 08.3.2016, the appellant has been provided an appeal remedy before the Commissioner of Customs (Appeals), Chennai. The appellant did not exhaust such a remedy, but chose to file the said writ petition on the ground that the said appeal remedy was not an efficacious remedy as the order passed the respondent was contrary to the statutory provisions.

5. The appellant has also pressed into service several notifications in support of their claim. It is argued by the learned counsel for the appellant that though the appellant sought for an opportunity of personal hearing before the respondent by indicating in the relevant column in the application, no such opportunity was granted. The said writ petition was pending from 2017. In the meantime, an additional affidavit was filed by the appellant raising additional grounds stating that in an identical matter, the Hon'ble Division Bench of this Court in the case of Commissioner of Customs (Sea), Chennai-II Vs. HLG Trading [reported in (2020) 371 ELT 173] upheld the order passed by the Tribunal allowing the refund claim.

6. The counter affidavit filed by the respondent in the said writ petition sought to sustain the rejection of refund claim.

7. However, the issue as to whether the appellant would be entitled to the refund of SAD has now been settled pursuant to the decision of the Principal Bench of the Delhi Tribunal in the case of Gazal Overseas Vs. Commissioner of Customs, New Delhi [reported in (2016) 332 ELT 767], the relevant portions of which read thus :

"It is evident from the above clarification of CBE and C that even if VAT/sales tax was less than 4%, the appellant was entitled to refund of SAD which was 4% so long as VAT/ sales tax was paid. In other words, so long as appropriate

VAT/sales tax was paid, SAD refund was admissible even if the appropriate sales tax/VAT was less than SAD; if the sales tax/VAT was NIL, so be it. In other words, what is required in terms of the said Notification is payment of appropriate sales tax/VAT regardless of the rate thereof. It logically follows that if the appropriate rate of sales tax/VAT was NIL, then the appropriate sales tax/VAT paid will also be NIL."

8. The above decision had been accepted by the Department and based on the same, various learned Single Judges of this Court have been allowing writ petitions and two such orders have been placed before us namely in the cases of (i) M/s.Goyal Impex and Industries Ltd. Vs. Assistant Commissioner of Customs (Refunds-Sea) [W.P.No.3700 of 2017 etc. cases dated 23.9.2019]; and (ii) M/s.G.T.Jayanti Agrochem (India) Pvt. Ltd. Vs. Commissioner of Customs (Appeal) [W.P.No.20995 of 2016 etc. cases dated 13.7.2020].

9. In the instant case, the learned Single Judge dismissed the said writ petition by relying upon the decision of the Hon'ble Supreme Court in the case of Assistant Commissioner (CT), LTU, Kakinada Vs. M/s.Glaxo Smith Kline Consumer Health Care Limited [reported in 2020 (36) GSTL 305] and held that the said writ petition was not maintainable.

10. Rather, we had an occasion to consider a similar issue in the case of Mahindra & Mahindra Ltd. Vs. Joint Commissioner (CT) (Appeals) [W.A.No.493 of 2021 dated 18.2.2021] and noted the circumstances, under which, a writ petition would be maintainable despite availability of an alternate remedy. The facts before us would show that the availability of alternate remedy is not an absolute bar especially when the legality of entitlement of the refund claim was accepted by the Department pursuant to the decision of the Delhi Tribunal in the case of Gazal Overseas and there have been instances where Writ Courts have been entertaining writ petitions and granting the relief of refund. Therefore, we would be well justified in entertaining this appeal and consequentially, the said writ petition.

11. Mr.A.P.Srinivas, learned Senior Standing Counsel appearing for the respondent submits that the refund claim was also rejected on the ground that it was beyond the period of limitation.

12. Per contra, the learned counsel for the appellant would submit that the said finding is incorrect because the out of

charge order was granted only on 10.12.2014, after which, the goods were cleared and that if the said date is reckoned, then the application for refund was well within the period of limitation.

13. The learned counsel for the appellant would place reliance on the decision of the Hon'ble Division Bench of this Court in the case of HLG Trading wherein it was held that the date, on which, the remaining goods were released should be taken as the date of commencement for the claim of refund and not on the date, on which, the duty was paid. He also places reliance on the decision of the Delhi High Court in the case of Sony India Pvt. Ltd. Vs. Commissioner of Customs [reported in (2014) 304 ELT 660] wherein the Court considered the prescription of limitation under Section 27(1) of the Customs Act, 1962 and also took note of the various Notifications and in particular, Notification No.102/2007-Cus dated 14.9.2007 and held that that the date of payment of duty has to be reckoned for the purpose of computing limitation for sustaining a refund claim.

14. The relevant portions in the decision of the Delhi High Court in the case of Sony India Pvt. Ltd., read thus :

"12. The provisions of the Customs Act on the rules and mechanism for refund is incorporated by reference into the CTA only "so far as may be" applicable Since SADC levied under Section 3(5) is refundable only on subsequent sale (i.e. the point at which sales tax/VAT liability arises), it is the opinion of this Court that no limitation period can possibly be imposed for advancing a refund claim. This is because the right to claim refund only accrues to the importer once sale, an entirely market driven event, is complete. Given the vagaries of the market, the importer has limited control over when the sale is complete. To uphold a limitation period starting from the date of payment of duty, as prescribed in the amending notification, would amount to allowing the commencement of a limitation period for refund claims before the right of refund has even accrued. To this extent, this Court is of the opinion that the refund provisions under the Customs Act are inapplicable to the duties levied under Section 3(5) of the CTA. Thus, neither Section 27 nor a notification under Section 25(1), CUSAA 3/2014 Page 8

such as the amending notification no. 93/2008-Cus dated 1.08.2008 can be used to impose a limitation period on the right to claim refund of additional duty of customs paid under Section 3(5). If a limitation period is sought to be imposed in respect of refund claims in a case where the importer advances a refund of SADC paid owing to having incurred sales tax/VAT liability on subsequent sale of goods, it must be introduced by legislation, given the expropriatory consequences of such a limitation period.

14. The expression "so far as may be" in this context, under Section 27 is significant as well as instructive. The levy under CUSAA 3/2014 Page 9 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-Customs dated 14.09.2007 there was no period of limitation; by Circular No.6/2008-Customs, 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-Customs 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 CUSAA 3/2014 Page 10 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 negated 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 CUSAA 3/2014 Page 11 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 CUSAA 3/2014 Page 12 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 CUSAA 3/2014 Page 13 imposition of a period of limitation for the first time, without statutory amendment, through a notification, therefore could not prevail."

15. The special leave petition filed by the Department against the decision of the Delhi High Court in the case of *Sony India Pvt. Ltd.*, was dismissed on the ground of limitation. However, the question of law has been kept open as reported in the decision of the Hon'ble Supreme Court in (2016) 337 ELT A102.

16. Mr.A.P.Srinivas, learned Senior Standing Counsel appearing for the Revenue would point out that in the decision of the Bombay High Court in the case of *CMS Info Systems Ltd. Vs. Union of India* [reported in (2017) 349 ELT 236], it has been held that to maintain a claim for refund under Section 27(1) of the Customs Act, 1962, it should be made before the expiry of one year from the date of payment of such duty or interest. It is also submitted that as against this decision made against the assessee, S.L.P.No.11646 of 2017 has been filed by the assessee before the Hon'ble Supreme Court and leave has been granted on 23.10.2017 and the matter is pending as reported in (2018) 360 ELT A190.

17. The issue relating to limitation is a question of law to be considered and we find that the assessee did not have an opportunity to place their submissions before the respondent before ever the order impugned in the said petition was passed.

Not providing an opportunity of personal hearing would result in violation of the principles of natural justice, which would be one of the grounds to entertain a writ petition. Therefore, we are inclined to remit the matter back to the respondent to reconsider the claim of refund only with regard to the aspect of limitation, as the legal position with regard to entitlement of refund has already been settled by the decision of the Delhi Tribunal in the case of Gazal Overseas, which decision has been accepted by the Department.

18. For all the above reasons, the writ appeal is allowed, the impugned order is set aside and the writ petition is allowed. The order passed by the respondent dated 08.3.2016 is set aside and the matter is remanded to the respondent for a fresh consideration on the issue relating to limitation alone for filing an application for refund in terms of Notification No.102/2007 dated 14.9.2007 after affording an opportunity of personal hearing to the appellant. This exercise shall be completed by the respondent within a period of 12 weeks from the date of receipt of a copy of this judgment. No costs.

Sd/-
Assistant Registrar(CS VII)

//True Copy//

Sub Assistant Registrar

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To

The Assistant Commissioner of Customs (Refunds-Sea), Custom House, No.60, Rajaji Salai, Chennai-1.

+1cc to M/s.A.P.Srinivas, Advocate Sr.15274

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