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* IN THE HIGH COURT OF DELHI AT NEW DELHI

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Date of Decision: 18.08.2022

+ CUSAA 106/2022

COMMISSIONER OF CUSTOMS ICD – TKD Appellant
Through: Mr Vaibhav Joshi, Adv.

versus

THERMOKING Respondent
Through: Mr R V Prabhat with Mr Vinay
Yadav, Mr Rishav Dubey and Mr
Pragyesh Pratap Singh, Advs.

CORAM:
HON'BLE MR. JUSTICE RAJIV SHAKDHER
HON'BLE MS. JUSTICE TARA VITASTA GANJU

[Physical Court hearing/ Hybrid hearing (as per request)]

RAJIV SHAKDHER, J. (ORAL):

1. Issue notice.
 - 1.1. Mr R. V. Prabhat accepts notice on behalf of the respondent.
2. In view of the fact that the issue obtaining in the present appeal is similar to the issue raised in CUSAA no.54/2021, titled: ***Premier Timber and Trading Pvt. Ltd. vs. Pr. Commissioner Customs Import***, which has been disposed of *via* judgment dated 14.07.2022, with the consent of the counsel for the parties, this appeal is be taken up for disposal at this stage itself.
3. This appeal is directed against the order dated 24.11.2021 passed by the Customs, Excise & Service Tax Appellate Tribunal [in short,



‘Tribunal’].

4. As is evident, in the aforementioned judgment i.e. CUSAA 54/2021, the assessee was in appeal whereas in the instant case, the revenue has preferred the appeal.

4.1. The issue which arises in the instant appeal, as in the **Premier Timber** case, concerns the application of limitation *vis-à-vis* refund sought *qua* Special Additional Duty of customs, levied under section 3 (5) of the Customs Tariff Act, 1975.

4.2. In the **Premier Timber** case, we had examined the judgements rendered by coordinate benches of this Court in **Sony India Pvt. Ltd. v. Commissioner of Customs, New Delhi**, 2014 (304) ELT 660 (Del) and judgement dated 21.09.2016 rendered in CUSAA No.25/2016, titled **Commissioner of Customs (Import) v. Wilhem Textiles India Pvt. Ltd.**

4.3. After examining the said judgements, we had agreed with the reasoning and conclusions arrived at in **Sony India Pvt. Ltd.** case.

4.4. This aspect was also noticed by another coordinate bench in a judgement dated 19.04.2022, passed in CUSAA 36/2021, titled **Commissioner of Customs v S.R. Traders**, which included one of us i.e., Rajiv Shakdher J. In **S.R. Traders**, it had been noted that the Bombay High Court in **CMS Info systems Ltd. vs Union of India** 2017 (349) ELT 236 had taken a different view.

4.5. It is after noticing these aspects, that we had ruled in favour of the assessee in the **Premier Timber** case. The relevant portions of the said judgement are extracted below:

4. The relevant portion of the judgment passed in S.R. Traders reads as follows:



“2. Mr S Sunil, who appears on behalf of the respondent, says that the issue is covered in favour of the respondent/assessee, by virtue of the judgment rendered by a co-ordinate bench of this Court in **Sony India Private Limited vs. Commissioner of Customs, New Delhi** 2014 (304) ELT 660 (Del), as also the judgment dated 21.09.2016 rendered by another co-ordinate bench in CUSAA 25/2016, titled **Commissioner of Customs (Import) vs. Wilhelm Textiles India Private Limited**.

3. We are told that, insofar as **Sony India** is concerned, a Special Leave Petition (SLP) had been filed, which was dismissed by the Supreme Court vide order dated 26.02.2016 on the ground of delay, keeping the questions of law open.

3.1. It is also the submission of the counsel for the parties that a SLP was preferred in **Wilhelm Textiles India Pvt. Ltd.** case as well. We are told that the said SLP, which is, numbered as SLP(C) No.1507/2017 has been admitted by the Supreme Court, via order dated 15.04.2019.

3.2. Furthermore, we are informed by the counsel for the parties that no stay has been granted by the Supreme Court in the aforesaid SLP.

4. Mr Sunil, however, informs us that a division bench of the Bombay High Court in the judgement rendered in **CMS Info systems Ltd. Vs. Union of India, Ministry of Finance and Ors.** 2017 (349) ELT 236 has taken a contra view, qua the issue in hand.”

5. We may also add that the authorities below have sought to distinguish the judgment rendered by this Court in **Sony India Pvt. Ltd.** by furnishing the following reasons, in the Order-in-Appeal dated 11.05.2020:

“5.4 Regarding the case laws cited by the Appellant, I find that **Pee Gee International case** [2016 (343)



ELT 72(Del.)] and Siya Paper Mart Pvt. Ltd. cases refer to the Sony India decision. I find that the period involved in the Sony India case was from 01.12.2007 to 05.12.2007. In the instant case, the period involved is of 2016. It is to be noted that the Notification No. 102/2007Cus dated 14.09.2007 was amended by Notification No. 93/2008-Cus dated 01.08.2008 by which the condition of filing refund claim within one year was inserted In the principal Notification 102/2007. This has been amplified in para 5.3.1 above. Thus the judgment of Sony India and subsequent judgment based on it are not applicable to present case.

5.4.1. In fact, this aspect has been specifically dealt in the decision of the Hon'ble Bombay High Court in the case of CMS Info Systems Ltd. [2017 (349) ELT 236 (Bom)] and the decision of Hon'ble Tribunal in case of Honda Siel Power Products Ltd. [2019 (369) ELT 1773 (Tri. Chennai)]. Appellants contention that the order of jurisdictional High Court is binding on the Department and the order of another High Court cannot be relied upon is not relevant as the facts and circumstances under which the order of Sony India or Pee Gee International were delivered were entirely different. The case of Sony India is for the period prior to amendment of notification 102/2007-Cus. Thus this judgment cannot be applied to present case."

6. In our view, the reasoning furnished by the Commissioner of Customs (Appeals) via order dated 11.05.2020 is flawed, as limitation cannot be prescribed by a notification.

*6.1 This aspect of the matter was dealt by this Court in **Sony India Pvt. Ltd.** case. The observations made in that behalf are extracted hereafter:*

"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 [Sic: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 [Sic: 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 [Sic: Page 13] imposition of a period of limitation for the first time, without statutory amendment, through a notification, therefore could not prevail.”

7. We respectfully agree with the view taken in ***Sony India Pvt. Ltd.*** and therefore, allow the instant appeal.

8. Consequently, the impugned order dated 18.08.2021 passed by Customs, Excise and Service Tax Appellate Tribunal is set aside as also the Order-in-Appeal dated 11.05.2020 and the Order-in-Original dated 11.02.2019.

9. The respondent will now process the application for refund preferred by the petitioner, as per law, having regard to the decision taken in the present appeal.

10. Needless to add, if the respondent/revenue were to prefer an appeal and have it tagged with the ***Wilhelm Textiles*** case (supra), the final view in the matter will abide by the decision rendered by the Supreme Court in the said appeal.

11. The appeal is disposed of in the aforesaid terms.

5. Thus, in line with the judgment rendered in ***Premier Timber***, the appeal preferred by the revenue is dismissed.

5.1. The order dated 24.11.2021 passed by the Tribunal is sustained.

6. The appellant/revenue will now process the application for refund preferred by the respondent/assessee, as per law, in line with the decision



rendered in the *Premier Timber* case.

7. It goes without saying that if the appellant/revenue were to prefer an appeal and have it tagged with *Wilhelm Textiles* case, the final decision rendered in the matter by the Supreme Court will bind the parties.

RAJIV SHAKDHER, J

TARA VITASTA GANJU, J

AUGUST 18, 2022/pmc

[Click here to check corrigendum, if any](#)