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

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Date of decision: 09.11.2022

+ **CUSAA 151/2022**

COMMISSIONER OF CUSTOMS

..... Appellant

Through: Ms Anushree Narain, Adv.

versus

FIBRE BOND INDUSTRIES

..... Respondent

Through: None.

CORAM:

HON'BLE MR JUSTICE RAJIV SHAKDHER

HON'BLE MS JUSTICE TARA VITASTA GANJU

[Physical Hearing/Hybrid Hearing (as per request)]

RAJIV SHAKDHER, J.: (ORAL)

CM Appl. 42983/2022

1. Allowed, subject to just exceptions.

CUSAA 151/2022 & CM Appl. 42984/2022 *[Application filed on behalf of appellant seeking interim relief]*

2. Ms Anushree Narain, who appears on behalf of the appellant, informs us that the issue which arises in the present matter also obtained *inter alia*, in CUSAA No. 54/2021, titled ***Premier Timber Trading Pvt. Ltd. v. Principal Commissioner of Customs Import***

2.1 To recapitulate, the only issue which arises for consideration in this appeal concerns the application of limitation *vis-à-vis* refund sought *qua* Special Additional Duty (SAD).

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3. In ***Premier Timber Trading*** case, we had set aside the impugned order passed by the Customs, Excise and Service Tax Appellate Tribunal [in short “Tribunal”] as also the order-in-appeal and order-in-original, based on the view taken by a coordinate bench of this court in ***Sony India Pvt. Ltd. v. Commissioner of Customs, New Delhi***, 2014 (304) ELT 660 (Del.).

3.1 Besides this, we had observed that the very same issue is also covered by another coordinate bench judgment of this court dated 21.09.2016, rendered in CUSS 25/2016, titled ***Commissioner of Customs (Import) v. Wilhelm Textiles India Pvt. Ltd.***

3.2. It appears that judgment in ***Wilhelm Textiles India Pvt. Ltd.*** case was carried an appeal by the appellant/revenue to the Supreme Court. We are told by Ms Narain that the appeal is pending adjudication, at this juncture.

4. Ms Narain has also relied upon the judgment of Madras High Court dated 08.06.2022, rendered in ***Commissioner of Customs v. CMS Info Systems Ltd.***, wherein a view different from the one which has been taken by this court in ***Sony India Ltd.*** case has been reached.

5. We may note, a perusal of the said judgment shows that the Madras High Court, in reaching its conclusion in the aforementioned matter has relied upon Bombay High Court judgment in ***CMS Info Systems Ltd. Vs. Union of India*** 2017 (349) E.L.T. 236(Bom.).

6. To be noted, in the instant matter, the appellant/revenue has assailed the order dated 17.03.2022 passed by the Tribunal.

7. We may also note that in ***Premier Timber Trading*** case, we have made the following observations:

“5. We may also add that the authorities below have
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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 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.”

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

8. We respectfully concur with the view taken by the coordinate bench in ***Sony India Pvt. Ltd.*** case. Therefore, are not inclined to entertain the appeal. The appeal is, accordingly, dismissed.

9. The appellant/revenue will, accordingly, process the application for refund preferred by the respondent, as per law, having regard to the decision taken in the instant appeal.

10. Needless to add, if the appellant/revenue were to prefer an appeal and have it tagged with the appeal preferred in ***Wilhelm Textiles India Pvt. Ltd.*** case, the final view in the matter will abide by the decision rendered by the Supreme Court in the said appeal.

(RAJIV SHAKDHER)
JUDGE

(TARA VITASTA GANJU)
JUDGE

NOVEMBER 9, 2022 /r
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