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

% *Date of Decision: 25.01. 2023*

+ **CUSAA 33/2021, CM Nos.30448/2021 & 35279/2022**

PRINCIPAL COMMISSIONER OF CUSTOMS
(IMPORT & GENERAL)

..... Appellant

Through: Mr. Satish Kumar, Adv.

Versus

CISCO SYSTEMS INDIA PVT LTD

..... Respondent

Through: Mr. Karan Sachdev, Mr. Yogendra
Aldak, Mr. Agrim Arora, Mr. Sumit
Khadaria & Ms. Masooma Rizvi,
Advs.

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

HON'BLE MR. JUSTICE AMIT MAHAJAN

VIBHU BAKHRU, J.

1. The Revenue has filed the present appeal under Section 130 of the Customs Act, 1962 (hereafter the '**Customs Act**') impugning an order dated 14.10.2020 – Final Order No.C/A/51573/2020-CU(DB), hereafter the '**impugned order**' – passed by the Customs Excise & Service Tax Appellate Tribunal (hereafter the '**Tribunal**') in Customs Appeal No.52739/2019.

2. The principal controversy involved in the present appeal is that, whether the respondent's claim for refund of tax was beyond the period of limitation as prescribed under Section 27 of the Customs Act. Although the customs duty was reassessed by the Adjudicating

Authority pursuant to the respondent prevailing before the Commissioner of Customs (Appeal); the benefit of reduction of duty was denied to the respondent on the ground that its application for refund was beyond the period of limitation. It is the Revenue's case that since the duty was initially paid on the enhanced value without protest, the respondent's claim for refund, which was made beyond the period of one year from the date of payment of duty, is barred by provisions of Section 27(1) of the Customs Act.

3. The respondent claims that it had paid the customs duty under protest and the same was evident from the fact that it had preferred an appeal challenging the enhancement of the value of the goods and consequentially the demand of additional custom duty. Thus, it is entitled to the benefit of second proviso to Section 27(1) of the Customs Act, which expressly provides that the limitation of one year, as prescribed under Section 27(1) of the Customs Act, would not apply when any duty or interest has been paid under protest.

4. The learned Tribunal following the decision of the Constitution Bench of the Supreme Court in the case of ***Mafatlal Industries Ltd. v. Union of India: 1997 (89) ELT 247 (SC)*** had accepted the respondent's case that since it had filed an appeal challenging the levy of duty, the demand of duty was required to be considered as paid under protest.

5. The only question which falls for consideration for this Court is whether the learned Tribunal was correct in its finding that the duty paid by the respondent was required to be construed as duty paid under protest as the respondent had appealed against the enhancement of the

value of the goods and the consequential enhancement in the custom duty payable thereon?

6. Briefly stated the relevant facts necessary to address the controversy in the present appeal are as under:

6.1 The respondent had imported certain goods from its parent company located overseas during the period April, 2004 to June, 2008. Since the import was from a related party, the Revenue initiated an investigation as to whether the declared value of the goods imported was at an arm's length price. The Special Valuation Branch conducted the relevant enquiries as to the arm's length price of the goods imported by the respondent. Thereafter, the Adjudicating Authority passed an Order-in-Original dated 25/26.08.2004 enhancing the declared value of the goods by 65.75% in case of spare parts; 45% for imports made for STP Units; and, 26% for import of goods for demonstration purposes and for internal use by the respondent.

6.2 Aggrieved by the Order-in-Original dated 25/26.08.2004, the respondent filed an appeal before the Commissioner of Customs (Appeals), which was allowed. The Commissioner of Customs (Appeals) set aside the Order-in-Original dated 25/26.08.2004 and remanded the matter to the Adjudicating Authority to assess the arm's length of the imported goods after examining the relevant data submitted by the respondent.

6.3 Thereafter, the Adjudicating Authority assessed the value of the goods and by an order dated 23.04.2009 enhanced the declared value

by 46% of the Global Price List for the relevant years 2004-07.

6.4 In view of the said order, the respondent filed an application on 12.04.2010 seeking refund of the excess duty paid for the period April, 2004 to June, 2009. The respondent claimed that a sum of ₹46,53,86,615/- was required to be refunded to it. The said application was rejected by an order dated 31.08.2010 on the ground that the respondent's claim was barred by limitation.

6.5 The respondent appealed against the order dated 31.08.2010 rejecting its claim for refund before the Commissioner of Customs (Appeals). However, the respondent was unsuccessful and the said appeal was rejected by an order dated 07.02.2011.

6.6 Aggrieved by the aforesaid order, the respondent preferred an appeal before the learned Tribunal, which was allowed by an order dated 13.04.2016 [Final Order No.C/A/51232/2016-CU(DB)]. In terms of the aforesaid order, the learned Tribunal set aside the order dated 31.08.2010 passed by the Adjudicating Authority as well as the order dated 07.02.2011 passed by the Commissioner of Customs (Appeals) and remanded the matter to the original Adjudicating Authority.

6.7 In compliance with the orders passed by the learned Tribunal, the Adjudicating Authority once again considered the respondent's claim for refund and rejected the same by an order dated 02.08.2017. The respondent appealed against the said decision by filing an appeal before the Commissioner of Customs (Appeals), however, the same was rejected by an order dated 22.08.2019.

6.8 Aggrieved by the said order dated 22.08.2019, the respondent filed an appeal before the learned Tribunal which was allowed in terms of the impugned order.

Reasons & Conclusions

7. The respondent filed its claim for refund on 14.04.2010, which was after one year from the date of payment of duty. It was also beyond the period of six months from the date of order dated 23.04.2009, passed by the Adjudicating Authority, reducing the enhancement to the declared value to the declared price to 46% of the Global Price List. At the material time, Section 27(1) of the Customs Act reads as under:

“Section 27- Claim for refund of duty - (1) Any person claiming refund of any duty-

- (i) paid by him in pursuance of an order of assessment; or
- (ii) borne by him,

may make an application for refund of such duty and interest, if any, paid on such duty to the Assistant Commissioner of Customs or Deputy Commissioner of Customs-

- (a) in the case of any import made by any individual for his personal use or by Government or by any educational, research or charitable institution or hospital, before the expiry of one year;
- (b) in any other case, before the expiry of six months, from the date of payment of duty and interest, if any, paid on such duty in such form and manner as may be specified in the regulations made in this behalf and the application 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 and interest, if any, paid on such duty in relation to which such refund is claimed was collected from, or paid by, him and the incidence of such duty and interest, if any, paid on such duty had not been passed on by him to any other person:

Provided that where an application for refund has been made before the commencement of the Central Excises and Customs Laws (Amendment) Act, 1991, such application shall be deemed to have been made under this sub-section and the same shall be dealt with in accordance with the provisions of sub-section.

Provided further that the limitation of one year or six months, as the case may be, shall not apply where any duty and interest, if any, paid on such duty has been paid under protest:

Provided also that 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 or six months, as the case may be, shall be computed from the date of issue of such order:

Provided also that where the duty becomes refundable as a consequence of judgment, decree, order or direction of the appellate authority, Appellate Tribunal or any court, the limitation of one year or six months, as the case may be, shall be computed from the date of such judgment, decree, order or direction.

Explanation—For the purposes of this sub-section, “the date of payment of [duty and interest, if any, paid on such duty], in relation to a person, other than the importer, shall be construed as “the date of purchase of goods” by such person.

Explanation II—Where any duty is paid provisionally under section 18, the limitation of one year or six months, as the case may be, shall be computed from the date of adjustment of duty after the final assessment thereof.”

8. According to the appellant, the fourth proviso to Section 27(1) of the Customs Act – which stipulates that in case refund is due as a consequence of a judgement, decree, order or direction of the appellate authority, the period of limitation is required to be computed from the date of the judgement, decree or order as the case may be – is applicable. Thus, the application for refund was required to be made within six months from the date of the order dated 23.04.2019 passed by the

Adjudicating Authority. It is contended that the said order was passed pursuant to the order in appeal dated 20.08.2007 passed by the Commissioner of Customs (Appeals) and therefore, the refund was due as a consequence of an order of an appellate authority.

9. Concededly, this contention was rejected by the learned Tribunal by an order dated 13.04.2016. The said order has not been placed on record. However, the learned counsels appearing for the parties state that the learned Tribunal had finally concluded that the fourth proviso to Section 27(1) of the Customs Act was not applicable. The learned Tribunal had held that the order dated 23.04.2009 was not passed by an Appellate Authority, Appellate Tribunal or any Court but had been passed by the Adjudicating Authority *albeit* on the matter being remanded by the Commissioner of Customs (Appeals), therefore, the fourth proviso to Section 27(1) of the Customs Act was not applicable. The only question to be examined was that whether the respondent is entitled to the benefit of the second proviso to Section 27(1) of the Customs Act, which would be available if the duty is paid under protest.

10. The Revenue accepted the said order and therefore, it is not open for the Revenue to now contend to the contrary. It is also relevant to note that Section 27(1) of the Customs Act was amended by the Finance Act, 2011 and the fourth proviso stands deleted. Section 27(1) of the Customs Act as currently in force reads as under:

“27. Claim for refund of duty

- (1) Any person claiming refund of any duty or interest,-
(a) paid by him; or

(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.

PROVIDED ALSO that where the amount of refund claimed is less than rupees one hundred, the same shall not be refunded.

Explanation: For the purposes of this sub-section, "the date of payment of duty or interest" in relation to a person, other than the importer, shall be construed as "the date of purchase of goods" by such person."

11. In the aforesaid context, the only issue to be addressed is whether filing of an appeal against the Order-in-Original dated 25/26.08.2004 while at the same time paying the duty on the enhanced value, would amount to paying the same under protest.

12. The respondent claims that it was obvious that the additional duty was paid under protest as the respondent had appealed the Order-in-Original dated 25/26.08.2004 enhancing the declared value of the goods resulting in the increase in custom duty. The Revenue contends that since no formal protest had been lodged while paying the duty, the benefit of second proviso to Section 27(1) of the Customs Act is not available to the respondent.

13. It is difficult for this Court to accept that the payment of custom duty imposed pursuant to an order while appealing the same can be construed as payment of duty without protest. The very act of filing an appeal against an order imposing customs duty is a protest against the duty as assessed. The entire purpose of such an appeal is to seek reduction of the levy. It is, thus, obvious that the assessee does not accept the said levy and, payment of the same would necessarily have to be construed as payment under protest.

14. The learned Tribunal had relied on the Constitution Bench decision of the Supreme Court in the case of *Mafatlal Industries Ltd. v. Union of India* (*supra*) and referred to the following passage from the said decision:

“83. It is then pointed out by the learned Counsel for the petitioners-appellants that if the above interpretation is placed upon amended Section 118, a curious consequence will follow. It is submitted that a claim for refund has to be filed within six months from the relevant date according to Section 11B and the expression “relevant date” has been defined in Clause (B) of the Explanation appended to subsection (1) of Section 11B to mean the date of payment of duty in cases other than those falling under Clauses (a), (b), (c), (d) and (e) of the said Explanation. It is submitted that Clauses (a) to (e) deal with certain specific situations whereas the one applicable in most cases is the date of payment. It is submitted that the appellate/revision proceedings, or for that matter proceedings in High Court/Supreme Court, take a number of years and by the time the claimant succeeds and asks for refund, his claim will be barred; it will be thrown out on the ground that it has not been filed within six months from the date of payment of duty. We think that the entire edifice of this argument is erected upon an incomplete reading of Section 11B. The second proviso to Section 11B (as amended in 1991) expressly provides that “the limitation of six months shall not apply where any duty has been paid under protest”. **Now, where**

a person proposes to contest his liability by way of appeal, revision or in the higher courts, he would naturally pay the duty, whenever he does, under protest. It is difficult to imagine that a manufacturer would pay the duty without protest even when he contests the levy of duty, its rate, classification or any other aspect. If one reads the second proviso to subsection (1) of Section 118 along with the definition of “relevant date”, there is no room for any apprehension of the kind expressed by the learned Counsel.”

(emphasis supplied)

15. In view of the authoritative decision of the Supreme Court in *Mafatlal Industries Ltd. v. Union of India* (*supra*), the question whether payment of duty while appealing its imposition, is required to be construed as payment under protest, is no longer *res integra*. Although the said decision was rendered in the context of Section 11B of the Central Excise Act, 1944, the second proviso to Section 11B of the Central Excise Act, 1944 is *pari materia* to second proviso of Section 27(1) of the Customs Act.

16. We concur with the decision of the learned Tribunal that the duty paid by the respondent on the enhanced value of the goods is required to be accepted as duty paid under protest.

17. Thus, the question framed in paragraph 5 of this order is answered in the affirmative. Consequently, the appeal is dismissed.

VIBHU BAKHRU, J

AMIT MAHAJAN, J

JANUARY 25, 2023

‘gsr’