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C.M.A.No.1927 of 2007

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 29.08.2024

CORAM :

**THE HONOURABLE DR.JUSTICE ANITA SUMANTH
and
THE HONOURABLE MR.JUSTICE G. ARUL MURUGAN**

C.M.A.No. 1927 of 2007

Commissioner of Customs (Exports),
Custom House, Chennai – 600 001.

.. Appellant

VS

- 1.M/s. Sri Sai Sea Food,
G-4 Jayaprada Apartment,
Visakapatnam 530 002.
- 2.M/s. Sai Marine Exports Pvt Ltd.,
D.No.15-1-37/4G, Jayaprada Apartment,
Visakapatnam 530 002.
- 3.M/s.Sandhya Marine Ltd.,
No.32, Pandurangapuram
Visakapatnam.
- 4.M/s.Bharath Marine Exports,
D.No.19-16-11/2, Rest House Road,
Bheemavaram, Andhra Pradesh.
- 5.M/s.Supreme Exports
Elurupadu,
Kallamandal West Godavari District,
Andhra Pradesh



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6.M/s.Jayalakshmi Sea Foods Pvt Ltd.,
Flat No.6, D.No.8-3-21(5),
Dhansita Apartments,
Padwaltair, Visakhapatnam
Andhra Pradesh

7.Customs Excise & Service Tax Appellate Tribunal
South Zonal Bench,
Shastri Bhawan Annexe,
1st Floor, 26, Haddows Road,
Chennai – 600 006.

.. Respondents

Prayer : Appeal filed under Section 130 of the Customs Act, 1962 to consider the above substantial questions of law raised by the Revenue and allow this Appeal by setting aside the impugned Final Order No.1030 to 1035/06 dated 09.11.2006 received in this Custom House on 24.11.2006 passed by the Customs Excise and Services Tax Appellate Tribunal, Chennai.

For Appellant : Mr.K.S.Ramaswamy
Senior Standing Counsel

For Respondents : Mr.R.Asokan (for R1, R2 & R4)
No Appearance (for R3, R5 & R6)
R7 - Tribunal

JUDGMENT

(Judgment of the Court was made by Dr.ANITA SUMANTH..J)

This Civil Miscellaneous Appeal has been filed by the Commissioner of Customs assailing an order passed by the Customs Excise and Services Tax Appellate Tribunal, Chennai (Tribunal/CESTAT) dated 10.11.2006.

2.A preliminary question that would arise is as to whether this



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appeal is at all maintainable, seeing as a single Civil Miscellaneous Appeal has been filed challenging a common order passed by the Tribunal in the case of six assessees. Separate Civil Miscellaneous Appeals ought to have been passed in the case of each assessee/respondent as dealt with under the Tribunal's order. However, as Mr.R.Asokan, learned counsel for R1, R2 and R4 does not raise any issue on this aspect, we proceed to dispose the appeal on the merits of the matter.

3.The respondents are exporters of sea food, specifically prawns and shrimps. 'Fish' is classified as a marine product that attracts liability under that statute. There has been a long standing litigation qua the parties on the ground that the produce exported, being 'prawns' and 'shrimps', cannot be equated to 'fish' in respect of which cess is levied. Thus, the substratum of their argument is that prawns and fish are distinct and distinguishable from fish under the Agricultural Produce Cess Act, 1940.

4.Be that as it may, over the years, while the tussle continued, the respondents have been paying cess, though under protest. While this is so, several similarly placed exporters in different parts of the Country had approached the High Courts, including this Court and the Andhra Pradesh



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High Court assailing the liability of shrimp and prawn to cess under the Agricultural Produce Cess Act.

5.This Court, in the case of *Commissioner of Customs , Tuticorin v. Edhayam Frozen Foods* [2008 (230) E.L.T. 225 (Mad.)] decided the questions of whether there was a distinction in the definition of fish, on the one hand, and prawns and shrimps on the other, under the provisions of the Customs Tariff Act, 1975, the Agricultural Produce Cess Act, 1940 and the Marine Products Export Development Authority (MPEDA) Act, 1972.

6.The question was answered in favour of the assessees holding that the expression 'fish' contained in Schedule -VII to the Agricultural Produce Cess Act, 1940 would not include within itself prawns and shrimps. This decision was carried in appeal to the Supreme Court by the Commissioner of Customs and the appeals were dismissed by judgment in C.A.Nos.3047-3083 of 2012 dated 11.08.2022.

7.Assessees thereafter commenced the process of seeking refunds in respect of the cess that had been remitted over the years under protest. We may note at this juncture that it became necessary for the Cess to be remitted in order for the seamless and uninterrupted continuance of the export business, as the produce in question comprises edible goods that



are susceptible to deterioration and cannot be stored for long periods.

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8.The claims for refund of duty were made under Section 27 of the Customs Act, 1962 (in short 'Act') on different dates. We are concerned with those instances where the applications for refund were filed beyond the period of one year from the date of payment of the duty or interest, of which refund is sought.

9.The substantial questions that arise for our decision are as follows:

“(i) Whether the Tribunal is right to consider that the provisions of the Customs Act or the explanatory notes on the Harmonized systems of Nomenclature (HSN) cannot be relied upon to determine the scope of the various entries under the Schedule of the Agricultural Produce CESS Act, 1940.

(ii) Whether the Tribunal is right in not considering the issue that there cannot be any distinction with regard to definition and classification of fish and prawns/shrimps under the provisions of the Customs Tariff Act, 1975, the Agricultural Produce CESS Act, 1940 and the Marine Products Export Development Authority Act, 1972 ?

(iii) Whether the Tribunal is right to consider that filing of Refund claim beyond the scope of Section 27 of the Customs Act, 1962 non-production of original documents for claiming refund is acceptable?”

10.Questions 1 and 2 would have to be answered in favour of the assesseees and against the Department/appellant in light of the decision of



this Court in *Edhayam Frozen Foods* (supra) as confirmed by the Supreme Court on 11.08.2022 and we do so. In the interests of completion we extract below the relevant portion of the judgment in the case of *Edhayam Frozen Foods* as under:

'42.In that case before the Apex Court, an importer who imported consignment of wool materials, claimed that it is wool waste and hence not liable for customs duty as per a Notification. The department was of the opinion that what was imported was not wool waste, but wool sleeve and imposed duty. The experts gave a report that it was not possible to give an opinion by visual observations of the material and that there was no specification laid down for the same by the ISI or International Standard Organisation. In those circumstances of the case, the Tribunal noted that the question would have to be understood on the basis of the trade understanding. Thus, the question involved in that case was whether the goods imported is woollen waste or woollen sleeve, that is a question of fact. But in the present case, the question whether the expression 'fish' includes prawns/'shrimps' cannot be regarded as question of fact, but can only be regarded as an issue involving interpretation of an entry, which can be regarded as a question of law.

43.For the discussion above made, the appeals are dismissed. However, there is no order as to costs. The connected miscellaneous petitions are consequently dismissed.'

11.Thus, it is essentially the third question that arises for decision in the present matter. Straight away we may note that the Tribunal has not really adverted to the position that the refund claims were belated and has



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merely proceeded on the ground that the issue in the appeals was covered by the decision in *Edhayam Frozen Foods* (supra). To that extent, learned Standing Counsel for the Revenue is right in saying that the legal issue raised by the revenue has been missed by the Tribunal.

12.The provisions of Section 27 of the Act, as it stood then, required an assessee to make an application for refund before the expiry of six (6) months from date of payment of such duty or interest. It is the stand of the Revenue that the payments of duty had been made on various dates, but the application for refund had been made only long past the statutory limitation of one year.

13.This submission omits to consider that the litigation on this issue had commenced much earlier by way of WP.No.18249 of 2004. That writ petition had been closed by order dated 29.06.2004 where this Court had directed the assessee to file an appeal before the statutory Authority.

14.The appeal had been allowed by the Commissioner (Appeals) on 31.08.2004 relying upon the decision of the Madras High Court in re. *Edhayam Frozen Foods*, dated 04.07.2008 and it is only in the wake of that success that the assessee filed refund claims on 26.05.2005. Even if we were to reckon the starting point of limitation to be 31.08.2004, being



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the order of the Commissioner (Appeals), the refund claims had been filed beyond the statutory period of six months, with a delay of three months.

15.The petitioner has relied on the second proviso to Section 27 which states that the limitation of six (6) years shall not apply where the duty or interest has been paid under protest. However, we do not propose to press into service this proviso for the reason that we are unaware of whether the duty has been remitted under protest and that remains a question of fact.

16.We would rather delve on the point that the petitioner is seen to have been vigilant and proactive over the years in pursuing its claim. Though Section 27 of the Act does not provide for a condonation of delay, in seeking refund and is absolute in its application, this Bench, is certainly in a position to consider whether a delay of three months would be fatal to the assessee's cause. On a considered appreciation of the matter, we are of the view that having regard to the trajectory that this matter has taken over the years, and particularly, seeing as the assessee has been remitting the cess diligently, the delay of three months should not enure to its detriment.

17.Thus, we reverse the rejection of the refund and direct that the



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claim be looked into on its merits.

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18. Section 27(1-A) states that the refund application shall be accompanied by documentary or other evidence as may be required to establish that the amount of duty of which refund is claimed was, in fact, paid by the assessee and that the incidence of such duty has not been passed on to any other person.

19. Before the lower authorities, the stand of the assessee was that the original documents that were called for were unavailable. However, before us, the respondents would submit that it is in possession of sufficient documents that would support their claim for refund. Needless to say, it is well within the discretion of the authority to convince himself, after scrutinising the documents to be produced, that the claim is in order and that the amount representing the duty of which refund is sought has, in fact, been paid by it.

20. Learned counsel for the respondent has produced an order of the Deputy Commissioner (Refunds) in the case of the first respondent where the refund claim has, in fact, been accepted as early as on 07.03.2011. In that order, the authority has issued refund, being satisfied with the Chartered Accountant's certificate as well as an indemnity bond filed in lieu of the original shipping bills.



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21.We are of the view that the approach of the Deputy Commissioner of Customs (Refunds), as taken in order-in-original No.15030/2011 dated 07.03.2011, is in order.

22.With this, the third substantial question of law is also answered in favour of the assessee/respondents. This Civil Miscellaneous Appeal is dismissed. Let consequence be given to this order within a period of six (6) months from date of receipt of a copy of this order. No costs.

[A.S.M., J] [G.A.M., J]
29.08.2024

Index:Yes
Neutral Citation:Yes
vs

To

The Customs Excise & Service Tax Appellate Tribunal
South Zonal Bench,
Shastri Bhawan Annexe,
1st Floor, 26, Haddows Road,
Chennai – 600 006.



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