[2016] 66 taxmann.com 253 (Delhi)

HIGH COURT OF DELHI

Allen Diesels India (P.) Ltd.

Vs.

Union of India

DR. S. MURALIDHAR AND VIBHU BAKHRU, JJ.
W.P. (C) NOS. 4665 TO 4667 AND 4970 OF 2014
CM NOS. 9309, 9311, 9313 AND 9940 OF 2014
FEBRUARY 1, 2016

CASE REVIEW

Sandur Micro Circuits Ltd. v. *CCE* 2008 taxmann.com 878 (SC) (para 17); *Modi Rubber Ltd.* v. *Union of India* 1978 (2) ELT J127 (Delhi) (para 18) and *Pioneer India Electronics (P.) Ltd.* v. *Union of India* [2014] 46 taxmann.com 429/46 GST 373 (Delhi) (para 19) *relied on*.

CASES REFERRED TO

Sandur Micro Circuits Ltd. v. *CCE* 2008 taxmann.com 878 (SC) (para 17) and *Pioneer India Electronics (P.) Ltd.* v. *Union of India* [2014] 46 taxmann.com 429/46 GST 373 (Delhi) (para 19).

Puneet Agarwal, **Deepak Anand** and **Sahil Kahol**, Advs. *for the Petitioner.* **Jasmeet Singh**, CGSC, **Ms. Astha Sharma**, Adv., **Kamal Nijhawan**, Sr. Standing Counsel and **Sumit Gaur**, Adv. *for the Respondent.*

ORDER

Dr. S. Muralidhar, J. - A common question that arises in these writ petitions by Allen Diesels India Pvt. Ltd. is whether, in the garb of circular issued by the Central Board of Excise and Customs ('CBEC') New Delhi, the benefit granted under a notification issued in terms of Section 25(1) of the Customs Act, 1962 ('Act') can be modified or amended.

2. The factual matrix in which the question arises is that under the Notification No. 102/2007-Customs dated 14th September 2007 issued in exercise of the powers of the Central Government under Section 25 (1) of the Act, the additional duty of customs, known as Special Additional Duty ('SAD'), under Section 3(5) of the Customs Tariff Act, 1975 was exempted if the goods imported were meant for subsequent sale. If the SAD was already paid, the notification allowed exemption by way of refund. Para 2 of the notification specified the following conditions that were required to be fulfilled for

availing the exemption:—

"(*a*) the importer of the said goods shall pay all duties, including the said additional duty of customs leviable thereon, as applicable, at the time of importation of the goods;

(*b*) the importer, while issuing the invoice for sale of the said goods, shall specifically indicate in the invoice that in respect of the goods covered therein, no credit of the additional duty of customs levied under sub-section (5) of section 3 of the Customs Tariff Act, 1975 shall be admissible;

(*c*) the importer shall file a claim for refund of the said additional duty of customs paid on the imported goods with the jurisdictional customs officer before the expiry of one year from the date of payment of the said additional duty of customs.

(*d*) the importer shall pay on sale of the said goods, appropriate sales tax or value added tax, as the case may be;

(*e*) the importer shall, inter alia, provide copies of the following documents along with the refund claim;

(*i*) document evidencing payment of the said additional duty;

(*ii*) invoices of sale of the imported goods in respect of which refund of the said additional duty is claimed;

(*iii*) documents evidencing payment of appropriate sales tax or value added tax, as the case may be, by the importer, on sale of such imported goods."

3. The notification stated that the jurisdictional customs officer shall sanction the refund on satisfying himself that the conditions referred to in para 2 above are fulfilled.

4. The importers were paying duties of customs including the SAD by using the duty entitlement pass book ('DEPB') scrip. However, it appears that the Department was not processing the said applications for refund of SAD in terms of the above Notification No. 102/2007-Customs on the ground that the SAD had been paid, not in cash, but by utilising the DEPB scrip. The importers then made various representations. The Customs officials also sought clarification from CBEC on whether the refund could be granted where the initial payment of SAD had been made by utilising the DEPB scrips. As a result the CBEC issued Circular No. 6/2008-Customs on 28th April 2008, clarifying in paras 3 and 7.2 as under:

"3. Manner of refund and its receipt:

Your attention is invited to the instructions communicated vide F.No. 354/129/2007-TRU, dated 14-9-2007 at the time of issue of the Notification No. 102/2007-Customs, dated 14-9-2007. It is reiterated that the scheme of refund of 4% Additional Duty of Customs has been notified through an exemption notification, and hence, the conditions as prescribed only in the said notification will apply. All refund applications under the aforesaid notification shall be received by the concerned field formations in their Centralized Refund Section, and the applicants would be given proper acknowledgement. The status of these refund claims shall also be displayed in the online database of customs duty refunds maintained by the respective Commissionerates.

7.2 In respect of the doubt that whether the stamping or hand-writing of declaration in the invoice would be acceptable for the purpose of fulfilling the condition as mentioned in para 2(b) of the said notification, it is clarified that a stamp on the invoice (to state that no CENVAT Credit is admissible) should suffice for the purpose of para 2 (b) of the said notification."

5. It must be noticed straightway that there was no corresponding amendment made to the notification itself. In fact, what the circular stated was that refund of the SAD, which was liable to be made upon fulfilment of the conditions of Notification No. 102/2007-Customs, would not be in cash but re-credited to the relevant DEPB scrips which were used for making payment of the SAD. However, even this proposed system of re-crediting DEPB scrip was unable to be given effect to. The Director General of Foreign Trade ('DGFT') which issued the DEPB scrips apparently had no mechanism for re-crediting them through the electronic data interchange ('EDI') system.

6. This led to a further Circular No. 27/2010-Customs being issued on 13th August 2010, where, after noting the issuance of the earlier circulars, it was stated that "EDI, at present, does not have facility to register such re- credited scrips issued by DGFT in the system". The CBEC noted that considering the difficulties in allowing re-crediting of scrips and the view of DGFT that such re-crediting through EDI was not feasible and considering the large scale pendency of refund claims, it decided that registration of the re-credited duty scrips "on the basis of consolidated certificate furnished by Customs should be allowed on manual basis". It was further stated: "The facility of manual filing of Bills of Entry for utilizing the amount of re- credited CVD refund for payment of duty is also allowed. This facility has been extended up to 30-12-2010 as a one-time measure with a view to liquidate all such pendencies by that time".

7. Para 8 of Circular No. 27/2010-Customs issued on 13th August 2010 brought about a change inasmuch as it stated that the importers were to be advised to make initial payment of the countervailing duty (CVD) in cash. Para 8 of the said circular read as under:—

"8. It has also been decided that importers should be suitably advised that re-credit amount of CVD refund should be used for payment of BCD and CVD only and not for 4% CVD so as to avoid cascading of subsequent re-credit of 4% CVD in the relevant scrips. Further, the Board is of the view that in the interest of ensuring expeditious grant of refund of 4% CVD in cash, the importers may be advised to make the initial payment of 4% CVD in cash."

8. The time limit for utilizing the re-credited DEPB scrips was extended by issuing further circulars. On 29th March 2012, Circular No. 10/2012- Customs was issued stating that no re-crediting of DEPB scrips would be done if the payment of CVD was done by using the DEPB scrip. While reiterating para 8 of the earlier Circular No. 27/2010-Customs, it was stated that the importers should be advised to make initial payment of CVD in cash. It noted that the "DGFT has also informed that no re-crediting shall be done if such payment is made by means of scrips. In other words, it was mandated that in future exporters should pay SAD component in cash if they wanted a refund.

9. This was reiterated by a subsequent Circular No. 18/2013-Customs issued on 29th April 2013. It

extended the time limit for using the re-credited DEPB scrips in case of 4% SAD up to 30th September 2013.

10. As far as the Petitioner is concerned, it filed four refund applications on 8th October 2013, 22nd November 2013, 16th December 2013 and 21st December 2014. Each of the above refund applications was rejected by referring to both the Circulars No. 6/2008 and 18/2013 on the ground that payments were not made in cash, but by using the DEPB scrips, and therefore, the question of refund of SAD in cash did not arise.

11. This petition challenges the aforementioned circulars on the ground that they could not have amended Notification No. 102/2007-Customs, dated 14th September 2007 and that they are ultra vires the Act. The consequential relief is for quashing of the orders dated 16th May 2014 and 20th May 2014 rejecting the refund applications on the ground that the initial payment of SAD was made by the Petitioner utilising DEPB scrips. It is clarified by the Petitioner that to the extent the initial payment of SAD was made in cash, refund was allowed by the said orders.

12. In paras 4, 8 and 9 of the order dated 16th May 2014 rejecting the Petitioner's refund claims submitted on 22nd November 2013 it is noted that the Petitioner has satisfied all the conditions of Notification No. 102/2007- Customs. However, in the counter affidavit filed by the Respondent, it is stated in para 1 of the preliminary submissions that the order-in-original only refers to fulfilment of conditions (a), (b),(d) &(e) of Notification No. 102/2007-Customs. This submission overlooks para 8 of the order dated 16th May 2014 rejecting the applications for refund which specifically refers to the fulfilment by the Petitioner of condition 2(c) of the Notification No. 10/2007. Therefore, it is clear that even according to the Respondents, the Petitioner fulfilled all the conditions for grant of refund in terms of Notification No. 102/2007-Customs.

13. The stand of the Department is that since the importers and exporters were put on notice that in order to seek refund they would have to make payment of the SAD only in cash and not by way of DEPB scrips, the Petitioner's applications for refund of SAD, to the extent it was not paid in cash, was rightly rejected. Reliance is placed on the very circulars which have been challenged by the Petitioner as ultra vires of the Act. It is in the above context the question arises whether the above circulars could have been issued restricting the entitlement of the importers and exporters to refund in terms of Notification No. 102/2007-Customs, without the said notification itself being amended.

14. Mr. Kamal Nijhawan, learned counsel for the Respondent, refers to Section 151A of the Act with regard to the power of the CBEC to issue such a circular bringing out a change in the procedure for availing of the exemption granted under Notification No. 102/2007-Customs. He submitted that from time to time circulars have been issued extending the time limit within which such refund could be claimed. He further stated that the above circulars were issued to remove the ambiguities and to streamline the procedures.

15. At the outset, the Court notes that Section 151A of the Act is for a very limited purpose of issuing of instructions to officers of customs for the purpose of "uniformity in the classification of goods or

with respect to the levy of duty thereon" or for the implementation of any other provisions of this Act or of any other law for the time being in force, in so far as they relate to "any prohibition/restriction for import or export of goods." The above provision does not envisage any amendment being made to an exemption notification that may have been issued in exercise of powers under Section 25 (1) of the Act. An amendment through notification can possibly be brought about only by again exercising the powers under Section 25(1) of the Act. In this very context, it may be noticed that one instance of such amendment is the issuance of Notification No. 93/2008-Customs, dated 1st August 2008 under Section 25(1) of the Act to bring about an amendment to Notification No. 102/2007-Customs to introduce a time limit within which claims for refund of the SAD should be made by importers.

16. Although it is sought to be projected that the circulars which are subject matter of the challenge in the present petitions were issued to streamline the procedure and to remove ambiguities, in fact what the circulars seek to amend is Notification No. 102/2007-Customs itself by introducing an additional condition for being entitled to refund, which condition does not find place in Notification No. 102/2007-Customs. This condition is to the effect that if the payment of the SAD has in the first place not been made in cash, but by using a DEPB scrip, then the importers concerned would not be entitled to refund of SAD in cash. It is not in dispute that there is no such restriction in Notification No. 102/2007-Customs even as on date.

17. The question whether the device of circulars could be adopted for modifying a notification has come up for consideration before the Court earlier. In *Sandur Micro Circuits Ltd.* v. *CCE* 2008 taxmann.com 878 (SC) it was inter alia held that:—

> "A Circular cannot take away the effect of Notifications statutorily issued. In fact in certain cases it has been held that the Circular cannot whittle down the Exemption Notification and restrict the scope of the Exemption Notification or hit it down. In other words it was held that by issuing a circular a new condition thereby restricting the scope of the exemption or restricting or whittling it down cannot be imposed".

18. In *Modi Rubber Ltd.* v. *Union of India* 1978 (2) ELT (J127) (Delhi), a similar issue was examined and this Court held as under:—

> 'Further, it is quite open to the Government to grant an exemption subject to conditions. If the object of the Government in granting an exemption is to benefit the consumer by the reduction of the selling price of the goods, then the Government notification granting the exemption should itself say so. For instance, notification GSR 1089, dated 29th April, 1969 expressly stated that the benefit of the exemption was to be available only to those manufacturers who produce proof to the satisfaction of the Collector that such benefit has been passed on by them to whom they have sole the goods. Such a condition has to be a part of the exemption notification. For, the Notification is "law". But, after enacting the law, such a condition cannot be imposed by administrative directions, guidelines or press note. These administrative acts cannot go contrary to the statutory notification'.

19. Recently in *Pioneer India Electronics (P) Ltd.* v. *Union of India* [2014] 46 taxmann.com 429/46 GST 373 (Delhi) it was observed as under:—

> 'The word "exemption" as used in sub-section (1) to Section 25 can and should include extension or increase in time but cannot be stretched and expounded to include power of the Government to, by a circular, reduce the statutory time for a claim of refund stipulated under the principal enactment, i.e., the Customs Act, 1962. That would make the circular ultra vires the statute and beyond the scope of the Act, Rules etc. Circulars might depart from the strict tenure of the statutory provision and might mitigate rigours of law thereby granting administrative relief beyond terms of the relevant provisions of the statute, but the Central Government is not empowered to withdraw benefits or impose harsher or stricter conditions than those postulated by the statute. In later cases, circulars can supplant the law but not supplement the law.'

20. Therefore, the legal position as explained in the above decisions makes it clear that the Circular Nos. 6/2008, 10/2012 and 18/2013 issued by the CBEC could not have imposed an additional restriction for availing of the exemption in terms of the Notification No. 102/2007- Cus issued under Section 25(1) of the Act. An amendment to a notification issued in exercise of the powers under Section 25 (1) of the Act has to be brought about only by issuing another notification under that provision. Inasmuch as the circulars under challenge seek to impose an additional restriction for grant of refund of the SAD under Notification No. 102/2007-Customs, they are ultra vires of the Act and cannot be legally sustained. Consequently, it is declared that the Circular Nos. 6/2008, 10/2012 and 18/2013 issued by the CBEC, insofar as they seek to deny importers and exporters the refund of the SAD paid by using DEPB scrips, are invalid.

21. The rejection of the Petitioner's refund applications by the orders dated 16th May 2014 and 20th May 2014, on the above grounds, is held to be bad in law and the said orders are hereby set aside. Since the Petitioner has fulfilled the conditions set out in Notification No. 102/2007-Customs for availing of the refund, the Department is directed to issue orders granting refund to the Petitioner, as prayed for by it in its four refund applications dated 8th October 2013, 22nd November 2013, 16th December 2013 and 21st December 2014 not later than four weeks from today. The Petitioner's entitlement to interest on the amount of refund will also be considered and granted in accordance with law within the same period of four weeks from today.

22. The writ petitions are allowed, and the applications disposed of, in the above terms with no orders as to costs.

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