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IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
CHENNAI

REGIONAL BENCH – COURT NO. III

CUSTOMS APPEAL No.40747 of 2013

(Arising out of Order-in-Appeal C. Cus.No.1542/2012 dated 27.12.2012 passed by Commissioner of Customs (Appeals), 60, Rajaji Salai, Custom House, Chennai 600 001)

The Commissioner of Customs (Air) **... Appellant**
New Custom House,
Meenambakkam,
Chennai 600 027.

Versus

M/s. Dimension Data India Limited,
Trade View, 2nd Floor, Kamala Mills Compound, **... Respondent**
Pandurang Budhkar Marg,
Lower Parel,
Mumbai 400 012.

APPEARANCE:

Ms. Anandalakshmi Ganeshram, Superintendent (A.R)
For the Appellant

None
For the Respondent

CORAM:

HON'BLE MS. SULEKHA BEEVI C.S., MEMBER (JUDICIAL)
HON'BLE MR. M. AJIT KUMAR, MEMBER (TECHNICAL)

DATE OF HEARING : 24.04.2023
DATE OF PRONOUNCEMENT : 28.04.2023

FINAL ORDER NO.40317/2023

Order : [Per Hon'ble Ms. Sulekha Beevi C.S.]

The above appeal is filed by the department against the order passed by Commissioner (Appeals) who allowed the appeal filed by the importer (respondent).

2. Brief facts of the case are that M/s.Dimension Data India Ltd., (importer-respondent) filed an application for refund of 4% Special Additional Duty (SAD) levied under Section 3 (5) of the Customs Tariff Act, 1975 for import of Information Technology Equipment covered under various Bills of Entries through Air Cargo Complex, Chennai. The refund claim was filed in terms of Notification No.102/2007 dated 14.09.2007. After due process of law, the original authority sanctioned an amount of Rs.37,98,594/- and rejected an amount of Rs.7,23,072/-.

3. The adjudicating authority had rejected part of the refund claim as above pertaining to Bills of Entry where 4% SAD was paid by the respondent on the RSP based assessed goods without claiming the benefit of exemption Notification No.29/2010 dated 27.02.2010. Thus, the original authority was of the view that the respondent being eligible to claim benefit of exemption Notification No.29/2010 for goods, ought to have sought for reassessment and filed refund claim under Section 27 of Customs Act, 1962 instead of filing claim under notification 102/2007. It was therefore held that as the respondent had not claimed the benefit of notification, the bills of entry in respect of such goods had to be reassessed as per the decision in *Priya Blue Industries Ltd. Vs CC (Preventive)* - 2014 (172) ELT 145 (SC). Secondly, the adjudicating

authority had also rejected some amount pertaining to Bill of Entry No.4240557 dated 01.08.2011 on the ground that the goods imported and sold against the sale invoices were not tallying. Thirdly, refund claim pertaining to Bill of Entry No.4331330 dated 08.11.2011 was denied on the ground that the goods were sold on the same date of import as per the sales invoices, while actually the goods were physically removed from Air Cargo Customs only on the next day.

4. Against such order of rejecting part of the claim, the respondent filed appeal before Commissioner (Appeals). After considering the appeal filed by the respondent, the Commissioner (Appeals) held that the rejection of refund claim of Rs.7,23,072/- on the ground that the Bills of Entries has to be reassessed cannot sustain and ordered for sanction of refund on this issue. With regard to the other two issues, the Commissioner (Appeals) held in favour of the Revenue.

5. Against the order passed by the Commissioner (Appeals) who ordered for sanction of refund observing that no reassessment is required as to the Bill of Entry filed in respect of goods which are also eligible for benefit of Exemption of CVD as per Notification No.29/2010, the department is now before the Tribunal.

6. Ld. A.R Ms Anandalakshmi Ganeshram appeared and argued for the Department. It is submitted by her that, as seen from para-6 of OIO the adjudicating authority had rejected an amount of Rs.7,23,072/- on the ground that the respondent had not challenged the assessment. The respondent is eligible for the benefit of Customs Notification No.29/2010 dt. 27.02.2010 which gives full exemption with regard to the

countervailing duty (CVD). Instead of availing the said exemption, the respondent has paid the CVD and thereafter filed refund claim in terms of Notification No.102/2007-Cus. for refund of 4% SAD. As the respondent was eligible for benefit of notification, the refund claim cannot be allowed as the assessment with regard to these goods has not been challenged. To support her argument, she relied upon the decision in *Priya Blue Industries* (supra) and also the decision of the Tribunal in the case of *M/s.NationaL Institute of Ocean Technology Vs CC Chennai* - 2023-TIOL-242-CESTAT-MAD. She prayed that the appeal may be allowed.

7. None appeared for the respondent. On 29.03.2023 when this appeal had come up for final hearing, as there was no representation for the respondent, the Bench directed to issue notice to the respondent through registered post. The notice has been returned as 'undelivered'. The appeal is therefore taken up for disposal after hearing the A.R and on perusal of the records.

8. From the facts narrated above, it is brought out that an amount of Rs.7,23,072/- was rejected by the original authority on the ground that Bill of Entry in regard to RSP based assessed goods has to be reassessed and refund claim has to be filed for the CVD paid by respondent under Section 27 of the Customs Act, 1962. Before the Commissioner (Appeals), the respondent had argued that when there are two separate notifications which give benefit of exemption, the importer has the option to avail benefit of any of these notifications. The department cannot insist that only a particular notification has to be availed by the importer. The said

argument was considered by the Commissioner (Appeals) as noted in paras 6 & 7 of the impugned order. It is held by the Commissioner (Appeals) that if the refund claims were in order the original authority should have processed and sanctioned the refund and should not have rejected holding that the bills of entry has to be reassessed.

9. As per Notification No.102/2007 the scheme of exemption is by way of refund. The importer has to pay the duty (CVD) and then file refund claim when the goods have been sold in domestic market by paying VAT / Sales Tax. The scheme of exemption under notification No.102/2007 being in the nature of refund after payment of duty, it cannot be insisted that reassessment is required while filing refund. It may be true that respondent is eligible for benefit of Notification No.29/2010 by which they do not have to pay the CVD at the time of import. But however, the respondent has chosen not to avail this benefit and paid the duty (CVD). The respondent has then filed refund claim of the duty paid by them (CVD/SAD) in terms of notification no.102/2007. The Department cannot insist that the importer should avail benefit of a particular notification when they are eligible for different notifications of the same duty of CVD / SAD.

10. The Ld. AR has adverted to the decision in the case of *Priya Blue Industries.* The said decision does not apply when the scheme of exemption is by refund only after paying the duty. There is no question of reassessment when the assessment is in order. Reliance placed by Ld. A.R on the decision passed by the Tribunal in the case of *National Institute of Ocean Technology* is also misplaced. In that case, the importer had

filed refund claim of CVD in terms of Notification No.51/96 dated 23.06.96. The notification under consideration was notification no.51/1996 which exempted both BCD and CVD. The EDI system failed to extend the CVD exemption benefit. The refund claim was filed for such CVD part of the duty paid. Thus the importer had paid the CVD and thereafter filed the refund claims for refund of excess duty paid by them. While rejecting the refund claim the original authority had held that as the reassessment was not done the refund claim is premature.

11. The case before us is a refund claim filed in terms of Notification No.102/2007 wherein the scheme is of refund only after payment of duty. In other words, one of the conditions that has to be fulfilled for claiming refund under Notification No.102/2007 is that the importer has to pay the CVD at the time of import of the goods. The assessment therefore is in order and does not require reassessment. There is no excess duty paid. For these reasons, we find that the reliance placed by Ld A.R on the decisions is not applicable to the facts of the case before us.

12. As already stated, though the respondent may be eligible for benefit of CVD in terms of Notification No.29/2010, it is their option to avail or not to avail the exemption. They have later claimed refund of the CVD paid by them. The original authority has rejected part of the refund claim in regard to some of the goods for which the benefit of notification 29/2010 would be applicable, and held that without reassessment refund claim cannot be sanctioned as they are eligible for benefit of notification No.29/2010. This view does not find favour with us.

13. From the discussions made above, we find that the view taken by the Commissioner (Appeals) is legal and proper. There are no grounds to interfere with the impugned order. Same is sustained. The appeal filed by the department is dismissed.

(Pronounced in open court on 28.04.2023)

Sd/-	Sd/-
(M. AJIT KUMAR)	**(SULEKHA BHEEVI C.S.)**
MEMBER (TECHNICAL)	MEMBER (JUDICIAL)

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