IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
CHENNAI

REGIONAL BENCH – COURT NO. I

Customs Appeal No. 41450 of 2019

(Arising out of Order-in-Original No. 218/2019-AIR dated 30.03.2019/11.04.2019 passed by the Principal Commissioner of Customs (Chennai-VII), New Custom House, Meenambakkam, Chennai – 600 027)

Commissioner of Customs (Air) **: Appellant**
Chennai-VII Commissionerate,
New Custom House, Meenambakkam, Chennai – 600 027

VERSUS

M/s. Cadensworth (Redington) India P. Limited **: Respondent**
"Redington House", Centre Point,
Plot Nos. 8 & 11 (SP),
ThiruVika Industrial Estate,
Guindy, Chennai – 600 032

APPEARANCE:

Shri M. Ambe, Deputy Commissioner for the Appellant

Dr. C. Manickam, Advocate for the Respondent

CORAM:

HON'BLE MR. P. DINESHA, MEMBER (JUDICIAL)
HON'BLE MR. VASA SESHAGIRI RAO, MEMBER (TECHNICAL)

FINAL ORDER NO. 40539 / 2023

DATE OF HEARING: 07.06.2023

DATE OF DECISION: 07.07.2023

Order : [Per Hon'ble Mr. P. Dinesha]

Brief undisputed facts of the case, as could be gathered from the impugned order and upon hearing the rival contentions, are that the appellant appears to have imported and cleared storage hardwares such as EMC VMAX All Flash, Unity All Flash, EMC Xtremio All Flash array, Isilon All Flash, EMC VNM hybrid flash storage platform from the supplier namely, M/s. EMC Information Systems International, falling under CTH 8471 7090 and

also claimed exemption from payment of 4% Special Additional Duty (SAD) vide Notification No. 21/2012-Customs dated 17.03.2012. (Sl. No. 2).

1.2 The Revenue entertained a doubt that the above goods imported by the assessee-respondent, appearing to be a storage platform intended for mainframe computing and storage of data, common in large business storage systems for data storage and processing, like banks, insurance companies, large media houses, IT institutions, etc., did not appear to be meant for retail sale, and consequently, the matter was taken up for investigation by the Directorate of Revenue Intelligence (DRI), Mumbai.

1.3 It appeared to the DRI during investigation that there was a contract titled as "Channel Partner Distribution Contract (India)" between M/s. EMC Information Systems International (hereinafter referred to as 'EMC'), which is the manufacturer and supplier, and the appellant, in the capacity of a channel partner, for remarketing products and services of M/s. EMC, belonging to product families such as Symmetrix, Application Software, Backup and Recovery Solutions, VNX, VNXe, etc., in India, Bhutan, Bangladesh, Sri Lanka and Nepal. The respondent, as a channel partner, was authorized to appoint re-sellers after obtaining prior permission of M/s. EMC, but however, such re-sellers were not authorized to remarket the products, for which even the respondent-assessee did not have authorization.

1.4 It appears that the DRI recorded statements from various persons of the respondent-company and it appears that there was also a search in the business premises of the respondent, wherein apparently, laptops of key persons and e-mails were recovered.

1.5 As an offshoot of the above investigation, search and statements recorded, it further appeared to the Revenue that the goods imported by the respondent were not considered to be a "pre-packaged commodity" in terms of

the provisions of the Legal Metrology Act ('LMA' for short), 2009, the goods could not be considered to be meant for retail sale and hence, it was doubted by the Revenue that the respondent did not satisfy the essential conditions of Notification No. 21/2012-Cus. *ibid*.; the Bills-of-Entry were filed by claiming the above goods to be intended for retail sale, under self-assessment, though it was obligatory for them to declare all particulars.

1.6 It was further assumed by the Revenue that, by the above, the respondent had conveniently suppressed that the goods were not intended for retail sale, thereby misleading the proper officer at the time of clearance, for availing the benefit of 4% SAD.

1.7 It also appeared to the Revenue that the *modus operandi* of the respondent i.e., the imported goods were sold to their ultimate customer through e-auction or tender process wherein the ultimate consumer / end user and the re-sellers negotiated and re-negotiated the prices and ultimately, the product with their desired specifications would be purchased by them; if the MRP was known to the ultimate user at the time of floating the tender the same would have been mentioned, which would have been the benchmark for the re-sellers, was also improper. The MRP, if at all displayed on the boxes by the importer-respondent, appeared to the Revenue to be irrelevant and fictitious, to falsely portray the sale as a retail sale devised only to wrongly avail the benefit of the exemption Notification.

2. In view of the above, the DRI, Mumbai appears to have issued a Show Cause Notice dated 09.10.2018 whereby it was *inter alia* proposed that: -

(i) The benefit of the Notification, should not be held as having been wrongly claimed and should not be denied;

(ii) Customs duties of Rs.23,09,82,797/- should not be demanded under Section 28(4) along with interest under Section 28AA of the Customs Act, 1962.

(iii) The imported impugned goods with a total assessable value of Rs.513,39,63,465/- in respect of the Bills-of-Entry under dispute should not be held liable for confiscation under Section 111(m) *ibid*.

(iv) Liability to penalties under Section 112(a) or 114A; and 114AA *ibid*.

3. It appears from the documents placed on record that the respondent filed a very detailed reply vide reply dated 21.12.2018 wherein they appear to have contended as under: -

- As a channel partner, the respondent would sell the imported goods in the market, on retail sale basis as such, in the same pre-packaged condition, against the payment of applicable VAT / CST.
- The respondent is also registered under the LMA, 2009.
- Levy of 4% SAD under Section 3(5) of the Customs Tariff Act, 1975 was imposed to counterbalance various internal / State taxes like Sales Tax and Value Added Tax vide Notification No. 19/2005-Cus. dated 01.03.2005, as amended subsequently.
- The respondent had paid applicable VAT on the sale, which took place after importing the goods.
- At the time of import, the respondent had also submitted declarations in the prescribed forms, as prescribed under the Notification, thereby complying with the provisions of the LMA and the Rules made thereunder.
- They had complied with the conditions stipulated in the SAD exemption Notification *ibid*.
- They had demonstrated that the goods imported were pre-packaged goods.
- The pre-packaged goods imported were intended for retail sale and they declared on the package the Retail Sale Price (RSP), as required under the LMA,

2009 and the Rules made thereunder or any other law for the time being in force.

- In any case, the entire issue relating to the availment of SAD benefit is revenue neutral for the reason that the products were sold upon payment of applicable VAT in all the cases wherever they had availed SAD exemption. The details of VAT payments were also submitted for reference.
- Without prejudice to the above, the proposed demand was clearly time-barred and on a mere allegation of suppression and misleading the Department. They had truthfully declared the correct and complete material parameters of the imported goods and in many instances, such goods were physically examined by the proper officer of the Customs.
- In respect of the above imports, they had obtained permission from the Department for affixing MRP labels on the individual pre-packaged goods under the supervision of the proper officer of the Customs in the Customs notified area.
- In view of the above, there was no deliberate default on their part and hence, invocation of extended period of limitation is wrong.
- In this regard, they had placed reliance on the following decisions: -
    a. *Pushpam Pharmaceuticals Company v. Collector of Central Excise, Bombay [1995 (78) E.L.T. 401 (S.C.)]*
    b. *Uniworth Textiles Ltd. v. Commissioner of Central Excise, Raipur [2013 (288) E.L.T. 161 (S.C.)]*

Accordingly, they had prayed for dropping the proceedings for recovery of the demand proposed against them.

4. In adjudication, the Ld. Commissioner appears to have accepted the pleadings / explanation of the respondent vide impugned Order-in-Original No. 2018/2019-AIR, apparently signed on 11.04.2019.

5. It is against this order that the Revenue, feeling aggrieved, has preferred the present appeal before this forum.

6. Heard Shri M. Ambe, Ld. Deputy Commissioner for the appellant-Revenue and Dr. C. Manickam, Ld. Advocate for the respondent.

7.1 The contentions of the Ld. Deputy Commissioner could be summarized, as below: -

(i) The imported packaged goods were not intended for retail sale as the imported goods were customized goods as per the requirements of the buyers.

(ii) The goods were procured on the basis of the tendering process, wherein the lowest bidder was given the order. Thus, the lowest quote by the buyer had become the basis for the sale of the goods with the MRP becoming irrelevant.

(iii) The imported goods were pre-booked on the basis of the Purchase Order placed by the buyers and the goods were already destined for sale to a pre-decided customer.

(iv) Even though VAT is claimed to have been paid, mere payment of VAT will not decide the retail sale nor their eligibility for the exemption at the time of import.

(v) With regard to respondent's submission as to revenue neutrality, it is imperative to understand that mere payment of VAT on any subsequent sale of the imported goods does not signify that revenue has been taken care of.

(vi) In terms of Notification No. 102/2007-Cus. dated 14.09.2007, the respondent-importer would be eligible for refund of SAD on any subsequent sale

(retail or otherwise), only when the 4% SAD was paid at the time of import of the said goods.

(vii) The option of not paying the SAD at the time of import was applicable only to goods intended for retail sale under the Notification No. 21/2012-Cus. dated 17.03.2013 (Sl. No. 2).

(viii) When the goods are not meant for retail sale, they are not eligible for claiming the SAD exemption.

(ix) Since the respondent had not paid the SAD on the goods at the time of import, it was never eligible for claiming the refund and hence, there was no question about the revenue neutrality of the matter as presented by the respondent.

(x) By referring to the issue of revenue neutrality, the respondent admits that they were liable to pay the 4% SAD on the imported goods which were not intended for retail sale.

7.2 He would thus request for setting aside the impugned Order-in-Original.

8. *Per contra*, the contentions of the Ld. Advocate made during the course of hearing are summarized as below: -

(a) The goods were imported in pre-packaged condition as per Section 2(l) of the LMA, 2009 and the imported goods were intended for retail sale in the domestic market in India.

(b) The respondent had registered with the Legal Metrology Department vide Registration Certificate No.N3/32552/2013 dated 01.08.2013 (Cadensworth) and also by Certificate No.N3/11218/2015 dated 08.04.2015 (Redington).

(c) The Special Additional Duty was levied on imported goods to counterbalance local levies such as Sales Tax / VAT and the exemption in terms of Notification No. 21/2012-Cus. was intended to ensure that there was no double impact of taxation i.e., payment of SAD at the time of import and also payment of VAT on domestic sales.

(d) At the time of import, prior to clearance of the goods, in accordance with the provisions of the Legal Metrology (Packaged Commodities) Rules, 2011 and the DGFT Notification No. 44/2000 dated 24.11.2000, details of retail sale price were affixed on the pre-packaged commodities imported from overseas countries. In accordance with the Public Notice No. 116/2011, as amended by Public Notice No. 33/2012 issued by JNCH, Nhava Sheva, and followed at Chennai Customs, Chennai Air Cargo Complex, necessary permissions were taken for affixing the MRP stickers on the imported pre-packaged goods. As a token of proof, letters dated 23.03.2015, 18.03.2015 and 16.02.2016, all submitted by Customs Brokers on behalf of the respondent, were also submitted.

(e) On post importation basis, at the time of retail sale, necessary Value Added Tax was paid on the imported goods, which were in pre-packaged condition.

(f) The aspect of revenue neutrality was also explained with reference to various decisions including the decision in the case of *M/s. Punjab Tractors Ltd. v. Commissioner of Central Excise, Chandigarh [2005 (181) E.L.T. 380 (S.C.)]* and *M/s. Tenneco RC India Pvt. Ltd. v. Commissioner of Central Excise, Chennai [2009 (235) E.L.T. 105 (Tribunal – Chennai)].*

(g) The aspect of limitation was also explained and it was pleaded that the demand was time-barred.

9. We have heard the rival contentions, perused the impugned order and also the documents placed on record.

10. After hearing both sides, we find that the only issue to be decided by us is: whether the assessee's claim for refund of 4% SAD, as allowed in the impugned order, was in order?

11. The whole issue revolves around the interpretation of Notification No. 21/2012-Cus. dated 17.03.2012, the relevant portion of which reads as under: -

S. No.	**Chapter, heading, sub-heading or tariff item of the First Schedule**	**Description of goods**	**Standard rate**
(1)	(2)	(3)	(4)
1	..	…..	..
2	Any Chapter	All pre-packaged goods intended for retail sale in relation to which it is required, under the provisions of the Legal Metrology Act, 2009 (1 of 2010) or the rules made thereunder or under any other law for the time being in force, to declare on the package thereof the retail sale price of such article	Nil
. . .		….	

12. From the above, it appears to us that in order to avail the benefit of the above Notification, essentially the importer is required to satisfy the following conditions: -

(i) The goods sought to be imported must be pre-packaged goods.

The term "pre-packaged commodity" is defined under the LMA, 2009. Section 2(l) of the LMA defines pre-packaged commodity to mean a *"a commodity which without the purchaser being present is placed in a package of whatever nature, whether sealed or not, so that the product contained therein has a pre-determined quantity".*

(ii) The second condition is that such imported pre-packaged goods should be intended for retail sale. The definition of "retail sale" under the Legal Metrology (Packaged Commodities) Rules, 2011 reads as under: -

" *"retail sale", in relation to a commodity, means the sale, distribution or delivery of such commodity through retail sales shops, agencies or other instrumentalities for consumption by an individual or a group of individuals or any other consumer;"*

The key takeaway from the above is that the imported pre-packaged commodity is certainly not for the consumption of the importer, but for retail sales through any of the modes prescribed thereunder.

(iii) The third condition is the requirement of declaration on the package thereof the retail sale price of such article.

Rule 2(m) of the Legal Metrology (Packaged Commodities) Rules, 2011 defines retail sale price as under: -

" *"retail sale price" means the maximum price at which the commodity in packaged form may be sold to the consumer and the price shall be printed on the package in the manner given below:*

'Maximum or Max. retail price Rs.....inclusive of all taxes or in the form MRP Rs.....incl., of all taxes……..”

The requirement of the above is to clearly declare / indicate the retail sale price.

13. The case of the Revenue is on loose foundation. If we go by their grounds of appeal, they say that the imported goods were customized as per the buyer’s requirements and the same were pre-booked. They also allege that such pre-booked, tailormade goods were sold, on the basis of tender, to the lowest bidder. So, if the contention as to pre-booked and tailormade goods was to be accepted, then there is no need for tender and the lowest bidder buying the goods. That is to say, the Department is trying to blow hot and cold; the first contention is clearly contrary to the second contention.

14. Be that as it may, now, we shall analyse if the importer in the case on hand has satisfied the above three conditions of the Notification.

15. From the contentions of the Ld. Advocate as also the importer’s reply to the Show Cause Notice, the following facts emerge: -

a) Each of the packages imported contained only one unit quantity of the specified model of specific configuration and the quantity has been declared accordingly in the MRP label.

b) In respect of most Bills-of-Entry, the goods were in fact examined by the proper officer of Customs, who certified that the goods were in pre-packaged condition.

Accordingly, we find that the respondent has satisfied the first condition of the Notification.

c) The importer sold the goods locally as such in the pre-packaged condition to their channel partners / distributors / re-sellers.

d) All the retail sales were effected by them as well as by their channel partners by way of appropriate local sale invoices and on payment of applicable VAT/CST/ST.

Accordingly, the second condition of the Notification also stands satisfied by the respondent.

e) They did not claim any refund of 4% SAD in terms of Notification No. 107/2007 in the cases where the exemption was claimed under Notification No. 29/2012-Cus.

f) Wherever they imported goods and supplied the same locally on account of 'warranty replacement', they had discharged 4% SAD liability without claiming any exemption / refund since such goods were not "*intended for sale*".

g) The importer is registered with the authority under the LMA.

h) At the time of import clearance, the packages were complied with the statutory requirement of MRP labels.

i) All the pre-packaged commodities were either imported with affixation of MRP labels either at the origin point i.e., the vendor site itself or cleared from the Customs after ensuring affixation of the MRP labels at the point of importation before Customs clearance.

j) Wherever such packages did not have MRP stickers at the original point, MRP stickers were pasted on the pre-packaged goods after obtaining permission from the proper officer within the area and under the

supervision of the proper officer of Customs; even the permission has been granted in writing by the Assistant Commissioner / Deputy Commissioner.

Thus, the respondent has satisfied the third condition of the Notification.

k) There is also no dispute as to the compliance with the requirements of the above SAD Notification since they had declared the State of destination where the imported goods are meant for sale or distribution or stock transfer, and VAT registration number / Sales Tax registration number / Central Sales Tax registration number was also furnished.

l) There is also no dispute as to the availability of MRP labels on the pre-packaged goods.

m) Rule 3 of the Legal Metrology (Packaged Commodities) Rules, 2011 prescribes exclusion clauses, to exclude:

(i) packages of more than 25 kg. or 25 litres, excluding cement and fertilizer sold in bags up to 50 kg.; and
(ii) packaged commodities meant for industrial consumers or institutional consumers.

n) There is also no doubt that the pre-packaged goods in question are also not covered by the above exclusion clauses since the imported pre-packaged goods were sold in units and the same were bought from the importer only by their channel partners / resellers and not directly sold to industrial or institutional consumers.

o) There is also apparently no declaration that such packages were “not for retail sale”.

16. There are clearly buyers, identified or otherwise, for the pre-packaged goods; there is no dispute that such pre-packaged goods were sold by the importer to the buyers/resellers and that MRP/RSP labelling was witnessed by the proper officer at the Customs notified area.

16.1 We do not find any disputes to the above factual position taken out either in the grounds-of-appeal before us or even in the impugned Order-in-Original, except as per paragraph 13 of this order, and therefore, we have to hold that the importer has satisfied the conditions of Notification No. 21/2012-Cus. *ibid.*

17.1 We have noticed in the earlier paragraphs of this order that the levy of SAD is to counterbalance the State levies in the form of VAT / ST / CST. This means that the importer is normally liable to pay SAD at the time of import; when such goods imported are subsequently sold locally on payment of applicable VAT / ST / CST, the whole of the SAD that was levied on such imported goods could be claimed as refund by the importer. This is the scheme incorporated in Notification No. 102/2007-Cus. dated 14.09.2007, which was intended to provide a level playing field to importers/traders who clear goods against payment of SAD vis-à-vis manufacturers, who did not pay SAD while manufacturing the goods domestically and thereby to remove the burden of double taxation on such importers. The above Notification underwent subsequent amendments.

17.2 Hence, by virtue of the above counterbalancing act, there is no loss to the exchequer and therefore, the issue is clearly revenue neutral. This will definitely have a bearing on the allegations as to suppression of facts, etc., for invoking the extended period of limitation.

17.3.1 Hence, it is not only on the issue of revenue neutrality, but also on the point of invocation of extended period of limitation, apart from merits, that the Revenue has to fail.

17.3.2 Admittedly, the Show Cause Notice reveals clearly that the demand was proposed by invoking the extended period of limitation under Section 28(4) of the Customs Act, 1962. The only allegation for doing so is that the "importer has resorted to wilful mis-statement and suppression of facts…". The Bills-of-Entry apparently declared what was being imported and there is also no dispute that the pre-packaged goods have been inspected / physically examined by the proper officer of Customs; there is also no dispute that wherever MRP labels were required, the same were affixed after obtaining prior permission from the Department in the Customs notified area.

18. From the above, it is clear that the Department was aware as to what was being imported and the purpose and hence, there was nothing that was "suppressed", more so, to evade payment of duty.

19. In the light of our above discussion, we do not find any infirmity in the impugned order and therefore, the same does not call for any interference by us.

20. In view of the above, we do not find any merit in the grounds of the appeal of the Revenue and therefore, we dismiss the appeal.

(Order pronounced in the open court on **07.07.2023**)

Sd/-

(VASA SESHAGIRI RAO)
MEMBER (TECHNICAL)

Sd/-

(P. DINESHA)
MEMBER (JUDICIAL)

Sdd