BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Date of Reserving the Judgment	Date of Pronouncing the Judgment
21.04.2021	29.04.2021

CORAM:

THE HONOURABLE MR.JUSTICE T.S.SIVAGNANAM
and
THE HONOURABLE MRS.JUSTICE S.ANANTHI

W.A.(MD) Nos.792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811 & 812 of 2021
and

C.M.P.(MD) No.3590, 3593, 3594, 3596, 3598, 3600, 3605, 3607, 3609, 3610, 3611, 3612, 3613, 3614, 3615, 3616, 3617, 3618, 3619, 3620, 3621 of 2021
and
C.M.A.(MD) No.687 of 2019
and
C.M.P.(MD) No.8431 of 2019

The Assistant Commissioner of Customs
St.John Inland Container Depot No.1663/2b,
Harbour Express Bye Pass Road
Tuticorin ... Appellant in W.A.(MD) Nos.792, 793, 794, 795, 797, 798, 803, 804, 805, 806, 807, 808, 809, 810, 811 & 812 of 2021

The Assistant Commissioner of Customs
Customs House, Tuticorin District ... Appellant in W.A.(MD) Nos.796, 799, 800, 801 & 802 of 2021

-vs-

M/s.Kurian Abraham (P) Ltd.,
rep.by its Director Shri.Philip C.Jacob
13/1-423, M.S.Road
Parvathipuram, Nagercoil ... Respondent in W.A.(MD) Nos.792, 793, 794, 795, 796, 797, 798, 799, 800, 801 & 802 of 2021

M/s.Kanam Latex Industries (P) Ltd.,
rep. by its Director Shri.Abraham C.Jacob
3/13f, West Peruvilai
Pallavilai, Vettrunimadam Post
Nagercoil ... Respondent in W.A.(MD) No.803, 804, 805, 806, 807, 808, 809, 810, 811 & 812 of 2021

Writ Appeals filed under Clause 15 of Letters Patent to set aside the order, dated 09.07.2019, passed in W.P.(MD) No.10110, 10111, 10112, 10113, 10114, 10115, 10116, 10117, 10118, 10119, 10120, 10121, 10122, 10123, 10124, 10125, 10126, 10127, 10128, 10129 & 10130 of 2019, on the file of this Court.

For Appellant (in all W.As.) : Mr.B.Vijay Karthikeyan

For Respondent (in all W.As.) : Mr.Hari Radhakrishnan

C.M.A.(MD) No.687 of 2019:

The Commissioner of Customs
Custom House
New Harbour Estate
Turicorin-628 004 ... Appellant

-vs-

M/s.Kanam Latex Industries (P) Ltd.
Ananthanadarkudy
Asaripallam P.O.
Nagercoil-629 201 ... Respondent

Civil Miscellaneous Appeal filed under Section 130 of the Customs Act, 1962, to set aside the common final order No.40860-40861/2018, dated 16.03.2018, passed by the Customs, Excise and Service Tax Appellate Tribunal, South Zonal Bench, Chennai.

For Appellant : Mr.B.Vijay Karthikeyan

For Respondent : Mr.Hari Radhakrishnan

COMMON JUDGMENT

T.S.SIVAGNANAM, J.

Since the issue involved in the writ appeals and the civil miscellaneous appeal are identical, they were heard together and are disposed of by this common Judgment and Order.

2. C.M.A.(MD) No.687 of 2019 has been filed by the Commissioner of Customs, Tuticorin, under Section 130 of the Customs Act, 1962 (in short, "the Act"), challenging the common final order No.40860-40861/2018, dated 16.03.2018, passed by the Customs, Excise and Service Tax Appellate Tribunal, South Zonal Bench, Chennai (in short, "the Tribunal").

3. The civil miscellaneous appeal was admitted on the following substantial questions of law:

> *"(i) Whether the CESTAT is correct in holding that processes viz., sterilization, re-packing, re-labelling etc., defined as manufacture in the Chapter Note under Chapter Heading 4015 of Central Excise*

Tariff w.e.f. 11.07.2014, cannot be invoked to interpret a Notification under Customs Tariff Act?

(ii) *Whether the CESTAT is correct in allowing refund of SAD under Notification No.102/2007-Cus dated 14.09.2007 when the importer has not fulfilled the conditions 2(d) and 2(3)(ii) stipulated in the said Notification?*

(iii) *Whether CESTAT is correct in allowing the refund on the ground that there is no such condition viz., imported goods to be sold as such in the Notification No.102/2007-Cus. Dated 14.09.2007, in spite of the clarification under CBEC Circular No.34/2010-Customs, dated 15.09.2010?"*

4. The writ appeals have been filed by Assistant Commissioner of Customs, Tuticorin, questioning the correctness of the order, dated 09.07.2019, in W.P.(MD) Nos.10110 to 10130 of 2019.

5. In this Judgment and Order, the parties shall be referred to as the "Revenue" and "Assessees".

6. The writ petitions were filed by the assessees praying for issuance of a writ of certiorarified mandamus to quash the order in original dated 29.12.2016 and to direct the Revenue to sanction refund as claimed by the assessees.

7. The order impugned in C.M.A.(MD) No.687 of 2019 is in an appeal, passed by the Tribunal, which accepted the stand taken by the assessees and held that the assessees are entitled to refund of Special Additional Duty of Customs (in short, SAD) and set aside the order passed by the original Authority, namely, Commissioner of Customs, Tuticorin, dated 29.02.2016.

8. We take up the facts, which are subject matter of C.M.A.(MD) No.687 of 2019 and the case of the assesses therein, as the lead case.

9. The assessees imported Latex Gloves in bulk and filed bills of entry for clearance of those goods, which after clearance were packed in

pouches, after undergoing a process of sterlization and were sold in the retail markt with the brand name. The assessee filed applications for refund of SAD paid by them by relying on a Notification No.102/2007-Cus, dated 14.09.2007. The original Authority had sanctioned refund in respect of 77 bills of entry and in respect of the remaining 69 bills of entry, they were not sanctioned. The contention of the Revenue was that in terms of Section 2(f)(iii) of the Central Excise Act, 1944, packing, re-packing, labelling, re-labelling, printing of MRP on packages or any treatment of goods to render them marketable would amount to manufacture. Therefore, the Department proposed that the assessee had not fulfilled the conditions specified in Paragraph No.2 of the Notification No.102/2007-Cus, wherein there is a specific condition that the imported goods shall be sold as such and without being subjected to any further process amounts to manufacture. With this view, a show-cause notice was issued to the assessee, dated 01.10.2015, calling upon them to explain as to why the amount pertaining to 77 refund claims already sanctioned should not be recovered under Section 28(4) of the Customs Act, 1972 and why the remaining refund claims should not be rejected for the reasons set out in the show-cause notice and why the penalty

should not be imposed on the assessees under Section 117 of the Act. The assessees submitted their reply dated 02.11.2015 contending that they had not used the imported goods for any manufacturing activities as alleged in the show cause notice and the gloves are either sold as non-sterile gloves, after repacking or relabelling and sterile gloves, surgical gloves are sold after repacking and sterilization.

10. It was further submitted that the process of sterlization would not amount to manufacture as the use and character of the imported gloves remain the same even after packing and no new product has been created on account of the said process of sterilization and repacking. Further, in terms of the notification, if the importer can establish that the goods sold were the same as imported, the benefit of exemption would apply and there is no specification in the notification that the goods are required to be sold as such.

11. Further, it was submitted that the correct test to be applied is whether the process undertaken by the assessees has resulted in emergence of a different product or a new commodity with distinct character and name

and if this test is applied, it is evidently clear that no new product has emerged on account of the process of repacking and sterilization.

12. Further, it was submitted that the notification as amended uses the words "subsequent sale", which means the product imported must be resold and it does not state that the goods imported cannot undergo any packing, relabelling etc., before it is subsequently sold. The goods imported are medical examination gloves or surgical gloves and they sell the same as medical examination gloves or surgical gloves, even though they may be packed and sterilized and if the pouch is opened, it will become non-sterile reverting back to the condition at the time of import and hence, the sterilization process of the gloves, which is undertaken, does not result in a different product, what was imported by the assessees is not raw material, but it is a finished product, which they pack and sell or pack, sterile and sell and resell, which meets the requirements as per Notification No.102/2007 as amended.

13. The assessees placed reliance on the decision in the case of ***Commissioner of Customs vs. Variety Lumbers Pvt. Ltd., [2014 (302) ELT 519 (Guj.)***; the decision of the ***Delhi Tribunal in Commissioner of Customs, Amritsar vs. Hero Exports 2013 (298) ELT 410 (Tri-Del.)***, ***Agarwalla Timbers Pvt. Ltd. vs. CC, Kandla [2014 (299) ELT 455 (Tri.Ahmed)*** and ***M/s.Posco India Delhi Steel Processing Ltd. vs. CC.Kandla [2012 (285) ELT 410 (TC)***.

14. It was further submitted that in the Notification No.102/2007, the word "as such" has been omitted and the word "subsequently sale" has been incorporated and both have different meaning and the word "subsequent sale" is not ambiguous and it means only that the goods have to be sold and it does not say that it has to be sold as such without processing.

15. Further, by relying upon the decision of the Honourable Supreme Court in the case of ***M/s.Servo Med Industries Pvt. Ltd. vs. CCE, Mumbai [2015 (309) ELT 578 (SC)***, it was submitted that the process of sterilization does not amount to manufacture.

16. The assessees also relied upon the decision of the Honourable Supreme Court in the case of ***Tejo Engineering Services Pvt. Ltd. [2015 (322) ELT 418 (SC); decision of Chennai Tribunal in TI Diamond Chain Ltd. vs. CCE, Chennai-II [2000 (126) ELT 790 (T)***.

17. It was further contended that the importer intentionally suppressed the facts is incorrect and whatever allegations made in the show cause notice is only based on the documents produced by the importer in respect of the refund application and no additional evidence has been brought on record by the Revenue and therefore, there is no justification for proposing to impose penalty under Section 117 of the Customs Act.

18. The Adjudicating Authority, namely, the Commissioner of Customs, Tuticorin, framed the following three questions for consideration:

> *"1. Whether the process to which the imported goods have been subjected to render such products to be different from what were imported.*

2. *Whether the notification 102/2007-customs dated 14.9.2007 necessarily requires the imported goods to be sold in subsequent sale without their being subjected to any process at all.*
3. *Does it become necessary that the process undertaken should constitute what is generally referred to in the Central Excise law as 'manufacture' which would alone disentitle the goods for the benefit of exemption under Notfn. 102/2007-customs dated 14.9.2007."*

19. The Adjudicating Authority, after referring to the deeming provision in terms of Section 2(f)(iii) of the Central Excise Act, 1944, held that the imported goods, which are repacked, relabelled and sterilized and sold subsequently by the assessees with effect from 11.07.2014, have to be treated as goods, which are deemed to be different from what was imported. With regard to the goods imported and sold prior to 11.07.2014, relief was granted to the assessees. Accordingly, partial relief was granted to the assessees in respect of the imports effected prior to 11.07.2014 and the imports subsequent thereto were denied relief. The proposal to impose penalty under Section 117 of the Customs Act was held to be not justified.

20. The assessees challenged the order passed by the Commissioner of Customs by filing appeal before the Tribunal. The Tribunal first took up the issue regarding whether the process undertaken by the assessees amounts to manufacture or not in the ordinary sense. It took note of the decision in the case of ***M/s.Servo Med Industries Pvt. Ltd.*** (supra), wherein it was held that process of sterilization does not amount to manufacture. Further, it was held that the process does not convert the gloves to any other product than the gloves except that they are sterilized, which is not a lasting character and when the gloves are opened from the packing, they tend to become desterlized.

21. The Tribunal relied on the decisions in the case of ***Variety Lumbers Pvt. Ltd.,*** (supra) and ***M/s.Posco India Delhi Steel Processing Ltd.*** (supra) and ***Hero Exports*** (supra) and observed that these decisions were followed by the Adjudicating Authority for the period prior to 11.07.2014 and refund has been held to be admissible.

22. The Tribunal next examined as to whether the imports post 11.07.2014, for which the refund claims were rejected by the Adjudicating Authority is proper. After taking note of the Notification No.56/1998, which was in vogue prior to Notification No.102/2007, wherein the words "as such" stood replaced, the Tribunal took note of the decision in ***M/s.Vijirom Chem. Pvt. Ltd. vs. Commissioner of Customs, Bangalore [2006 (199) ELT 751 (Tri-Bang.)***, wherein it was held that the legal fiction of manufacture incorporated in the Chapter note of the Excise Tariff cannot be invoked to interpret a notification under the Customs Tariff Act. Therefore, it held that the Adjudicating Authority, though referred to the decision in ***Vijirom***'s case (supra), did not follow the same. Further, it was observed that no extraneous conditions can be introduced in the notification, which has to be interpreted on its own wording and Notification No.102/2007 uses the expression "subsequently sold", which has been done by the assessees and that on account of the activities like repacking and sterilization, the imported gloves have not undergone any change and therefore, there is no justification for the denial of SAD. The Revenue is aggrieved by the order passed by the Tribunal.

23. Mr.B.Vijay Karthikeyan, learned Senior Standing Counsel appearing for the Revenue, submitted that Notification No.102/2007 exempts the goods from the whole of the additional duty of customs leviable thereon under sub-section (5) of Section 3 of Customs Tariff Act, when imported into India for subsequent sale if the conditions stipulated in Paragraph No.2 of the Notification is fulfilled. It is further submitted that as per Paragraph Nos.2(d), 2(e)(ii) and 2(e)(iii) of the Notification No.102/2007, as amended, the words "said goods" and "such imported goods" have been emphasized only to imply that the said goods referred therein are only imported goods and that the imported goods were required to be sold without being subjected to any further process before being put for retail sale.

24. It is further submitted that exemption is given only if the importer fulfills the conditions specified in the Notification and one such condition being the imported goods sold as "imported goods" without being subjected to any further process, which amounts to manufacture. Repacking, relabelling etc., shall amount to manufacture and the imported goods no more

remain the imported goods as required under the Clauses 2(d), 2(e)(ii) of the Notification No.102/2007 and therefore, the order of the Tribunal is incorrect.

25. Further, it is submitted that the assessees have not fulfilled the condition 2(d) of the Notification, inasmuch as the goods have been subjected to the process, which amounted to manufacture. In terms of Section 2(f)(iii) of the Central Excise Act, 1944, packing, repacking, labelling, relabelling, MRP declaration / alteration or treatment of goods rendering them marketable ones shall amount to manufacture. In such situation, as per the condition specified in Notification No.102/2007, the words "such goods" in clause 2(d) and "imported goods" in clause 2(e)(ii) implies that the imported goods should be sold as such, without being subjected to any further process before being sold by the imported.

26. It is further submitted that by virtue of the deeming provision as provided under Section 2(f)(iii) of the Central Excise Act, 1944, the imported goods could be treated to be subjected to a process of manufacture within the larger meaning of the term "manufacture" to be considered before arriving at the benefit of the said Notification.

27. It is further submitted that the subject goods fall under the Customs Tariff Item 4015 and has been brought within the ambit of Schedule-III of the Central Excise Act with effect from 11.07.2014, whereby the process of packing, repacking, labelling, relabelling or treatment of goods rendering them marketable has been deemed to be amounting to manufacture. As a consequence, the assessees are liable to pay central excise duty after the imported goods are subjected to the process of packing, repacking, labelling or sterilization to market such products. This liability to pay excise duty remains under the provisions of 2(f)(iii) of the Central Excise Act, despite the fact that the process of sterilization and packing carried out by them per se do not lead to emergence of new and distinct product with different use as has been held to be relevant for levy of excise duty. Therefore, the goods in question are deemed to be treated to be different from what was imported.

28. Further, it is submitted that the goods, after being subjected toi the process of sterilization, are being sold in the retail market under the brand name “Surgi-Care” and “Kaltex” with effect from 11.07.2014 and therefore, not entitled to the benefit of the notification.

29. It is further submitted that the Tribunal committed an error in observing that the legal fiction of manufacture incorporated in the chapter notes of the excise tariff cannot be invoked to interpret the Notification under the Customs Tariff Act as the importer, a central excise registration holder, a manufacturer, after importing the subject goods, subjects the imported goods to certain activities, which amounts to manufacture, as chapter notes of the Central Excise Tariff, as such the imported goods now becomes the input materials for the importers for further processes in the central excise premises and the imported goods no more remain the same goods as imported. Hence, manufacturing activities carried out by the assessees, on the imported goods, render the goods to be sold different from that which was imported subsequently, consequently, the conditions stipulated in Notification No. 102/2007 are not fulfilled.

30. Further, it is submitted that in CBEC Circular No.34/2010-Cus, dated 15.09.2010 emphasis has been laid for the sale of goods as such to be eligible for the benefit of exemption from SAD provided under the Notification No.102/2007.

31. It is further submitted that Notification No.102/2007 is independent and it is not an amending notification to the earlier notification and the observations of the Tribunal that the words "as such" have been omitted is not correct as it gives a different meaning. It is further submitted that merely because the words "as such" are not found place, it does not mean that the assessees can claim refund as Special CVD on sale of goods, other than the imported goods or any other goods manufactured out of the imported goods which is not the interntion of the legislature. In this regard, the learned counsel has invited out attention to Circular No.34/2010-Customs, dated 15.09.2010. Thus, it is submitted that as per the clarification issued by the Board in the above Circular, it is evident that there is no intention to omit / delete the words "as such" from the Notification, which continue to remain as a condition through implied and therefore, the observations of the Tribunal in this regard are not sustainable.

32. Mr.Hari Radhakrishnan, learned counsel appearing for the assessees, sought to sustain the order passed by the Tribunal and after reiterating the contentions, which were placed before the Tribunal and which

were accepted by the Tribunal, it is submitted that the decision in the case of ***Variety Lumbers Pvt. Ltd.,*** (supra) relied on by the Tribunal has been affirmed by the Honourable Supreme Court in the case of ***Commissioner of Customs vs. Variety Lumbers Pvt. Ltd., [2018 (360) ELT 790 (SC)*** and prayed that the order passed by the Tribunal may be affirmed and the questions of law framed for consideration be answered in favour of the assessees.

33. The learned counsel appearing for the assessees, who also appeared for the writ petitioners, submitted that the assessees, who are the writ petitioners, were constrained to file the writ petitions challenging the order in original rejecting the refund claim as they were awaiting the decision of the Tribunal in the case of the assessees, subject matter in C.M.A.(MD) No. 687 of 2019 and after the decision, the assessees / writ petitioners submitted representations for reconsideration of the order in original and in spite of the reminder being submitted to the Revenue, since the order in original was not reconsidered, the assessees, left with no other option, filed the writ petitions.

34. It is submitted that the learned Writ Court was convinced with the explanation offered by the assessees and held that there is no total negligence on the part of the assessees in seeking redressal and therefore, permitted the assessees to challenge the orders in original in the writ petitions. Further, the Court took note of the relevant portion of the Notification No.102/2007 and held that Paragraph No.2(d) states that the importer shall pay on the sale of the said goods appropriate sales tax or VAT and this has been admittedly done by the assessees and stand of the Revenue that sterilization and repacking effects changes to the goods was rejected as the goods continue to remain as same commodity and consequently, the definition of "deemed manufacture" with effect from 11.07.2014 is not applicable and allowed the writ petitions. The learned counsel appearing for the assessees / writ petitioners submitted that the reasons assigned by the learned Writ Court are valid and prayed for sustaining the said order.

35. Mr.B.Vijay Karthikeyan, learned counsel appearing for the Revenue, submitted that the writ petitions ought to have been dismissed as not maintainable, since the assessees had an avenue of appeal before the

Commissioner (Appeals), Trichy, which is to be filed within 60 days from the date of communication of the order and if aggrieved, further appeal to the Tribunal and the writ petitions were filed nearly three years after the order in original was passed and the same is not maintainable. In support of such contention, the learned counsel placed reliance on the decision in the case of ***Raj Kumar Shiv Hare vs. Directorate of Enforcement [(2010) 4 SCC 772]***.

36. Further, it is submitted that though it was brought to the notice of the Writ Court about the pendency of the civil miscellaneous appeal, the Court ought to have awaited the decision in the appeal and not allowed the writ petitions.

37. The arguments, which were putforth by the learned Senior Standing Counsel in the civil miscellaneous appeal were reiterated in the writ appeals, which have been filed by the Revenue challenging the order passed in the writ petitions.

38. We have elaborately heard the learned counsel for the parties and carefully perused the materials available on record.

39. First we take up the writ appeals filed by the Revenue as we are inclined to examine whether the writ petitions are maintainable and whether the reasons assigned by the learned Writ Court to entertain the writ petitions were proper. Admittedly, as against the order in original passed by the Assistant Commissioner of Customs, Tuticorin, the assessees had an effective alternate remedy of appeal before the Commissioner (Appeals), Trichy. This has been clearly set out in the preamble of the order in original, dated 30.12.2016. Further, appeal has to be preferred within 60 days from the date of communication of the order. Admittedly, the assessees did not file appeal before the Commissioner (Appeals) within the time permitted, had challenged the order in original after a period of three years by filing writ petitions in the year 2019-2020.

40. The explanation offered by the assessees as noted by the learned Single Bench in Paragraph No.8 is that they have submitted representations to the Assistant Commissioner of Customs to reconsider his order in original in the light of the order passed by the Tribunal, dated 16.03.2018, which is impugned in the civil miscellaneous appeal. The learned Writ Court has also observed that a further request was made by way of a reminder to the Assistant Commissioner to reconsider his earlier order. This explanation by the assessees was found to be reasonable and accordingly, the learned Writ Court held that the writ petitions can be entertained as against the order in original. To be noted that the Assistant Commissioner of Customs, who is the Adjudicating Authority, does not have power to review his own orders. If the Customs Act does not confer the power of review on an Authority, such Authority cannot assume such power nor state that the power of review is inherent in him. Unless and until the statute confers a power of review, no Authority is entitled to exercise such power. This legal position can never be disputed by the assessees and therefore, the explanation offered by them that they submitted representations to the Assistant Commissioner of Customs to reconsider his earlier order based on the order passed by the

Tribunal is an argument, which needs to be outrightly rejected. If that is so, the resultant consequence would be to hold that the writ petitions are not maintainable.

41. Furthermore, as held by the Honourable Supreme Court in the case of ***Raj Kumar Shiv Hare*** (supra), a writ petition will not be entertained ignoring when statutory forum created by law for redressal of grievance, particularly, in a fiscal statute is available and statutory provisioins get defeated if writ petition allowed to be filed despite existence of efficacious remedy of appeal under the statute. Furthermore, the writ petitions were filed three years after the order in original was passed. Therefore, the learned Writ Court ought not to have entertained the writ petitions and adjudicated the correctness of the order in original. Therefore, we have to necessarily allow the writ appeals filed by the Revenue and set aside the orders passed in the writ petitions, consequently, the writ petitions have to be dismissed.

42. On doing so, the assessees will be left with no other remedy, since appeals, if filed by the assessees before the Commissioner (Appeals), will be rejected as time barred. Thus, the issue would be whether the assessees should be left remediless. We shall consider the same after we take a decision on the correctness of the order passed by the Tribunal, which is impugned in C.M.A.(MD) No.687 of 2019.

43. The Tribunal was guided to allow the appeal filed by the assessees primarily on four grounds. Firstly, the process of sterilization would not amount to manufacture placing reliance on the decision of ***M/s.Servo Med Industries Pvt. Ltd.*** (supra). Secondly, by relying ***Variety Lumbers Pvt. Ltd.,*** (supra), wherein it was held that cutting of round logs into small pieces will not result in a different item. Thirdly, though the Adjudicating Authority, namely, Commissioner of Customs referred to the decision in the case of ***Vijirom***'s case (supra) did not apply the same and lastly, the words “as such” do not find place in the Notification No.102/2007 and it uses expression “subsequently sold”.

44. The fundamental legal principle, which we need to note is that an exemption notifiction has to be interpreted *stricto sensu*. No external aids can be brought in to interpret an exemption notification. If the assessees, who claim benefit of exemption notification, fail to fulfil any one of the conditions contained therein, the benefit cannot be extended. Courts have to read the exemption notification as such without substituting the words or phrases. Bearing in mind this legal principle, if we examine the order passed by the Tribunal, we find that the Tribunal was of the view that the Notification No. 102/2007 was in supersession of the earlier notification and that the words "as such" has been omitted.

45. On a reading of Notification No.102/2007, we find that nowhere there is indication that it is a supersession of an earlier Notification. Therefore, the question would be whether the Tribunal could have come to the conclusion that Notification No.102/2007 was in supersession of the earlier notification, which uses only the expression "subsequently sold" will stand fulfilled in the case of the assessees. The position has been clarified by the

Board in Circular No.34/2010-Customs, dated 15.09.2010, which reads as follows:

> *"Special CVD is one of the duties specified under sub-rule (1) of rule 3 of the CENVAT Credit Rules, 2004. Credit of this duty, when paid on inputs (imported) used in or in or in relation to the manufacture of excisable goods, is available. This credit can be used for payment of duty on the final product. Hence, a textile manufacturer who opts to pay excise duty on his final produce can avail of CENVAT credit of 4% Special CVD paid on his inputs. But, this benefit obviously cannot be extended to a manufacturer who opts to avail of full exemption (and hence not pay excise duty) on his final product. Further, if the imported inputs on which 4% Special CVD has been paid are used by such a manufacturer for the manufacture of final products, the benefit of exemption (by way of refund) under Notification No.102/2007-Customs, dated 14th September, 2007 would also not be available. This is because the condition regarding payment of State VAT on imported inputs cannot be fulfilled in this situation where inputs are consumed and not sold as such."*

46. The effect of Circular No.34/2010 has not been considered by the Tribunal. The learned Senior Standing Counsel for the Revenue lays emphasis on the Circular, which clarifies the position that there is no intention to omit / delete the words "as such" from the Notification, which continues to remain as condition though implied. The Circular is not under challenge in any of the proceedings, nor its applicability has been questioned by the assessee.

47. The next aspect of the matter is that whether the general principle that the process of sterilization would not amount to manufacture can be incorporated and applied to the case on hand, which involves consideration with regard to the applicability of an exemption notification.

48. The Adjudicating Authority, namely, Commissioner of Customs has taken note of Circular No.34/2010. However, the Tribunal has not considered the correctness of the order passed by the Adjudicating Authority *qua* the applicability of the Circular, which explains the intention of

the Notification. The Tribunal found fault with the Adjudicating Authority in not granting relief in respect of the imports after 11.07.2014 and while granting the relief to the assessees proceeded on the basis that the earlier Notification No.56/1998 required the imported goods to be sold "as such" and it had a more stringent condition and there is no such requirement in the Notification No.102/2007. In our considered view, this finding *prima facie* appears to be not sustainable as the issue whether the Notification No. 102/2007 was in supersession of Notification No.56/1998 was required to be considered and decided.

49. From the reply given by the assessees to the show cause notice, dated 01.10.2015, it appears that the assessees did not raise the plea that the Notification No.102/2007 was in supersession of the earlier Notification nor there was any argument made by the assessees with regard to the effect of the Circular No.34/2010-Customs, dated 15.09.2010. Thus, in our considered view, the matters requires to be re-examined, for which purpose, we are inclined to remand the matter back to the Commissioner of Customs to reconsider the entire issue afresh.

50. In the preceding paragraphs, we have held that the writ petitions filed by the assessees challenging the orders of the Assistant Commissioner of Customs rejecting the refund claim was not maintainable. Those orders passed by the Assistant Commissioner of Customs were based upon the order in original No.1/2016, dated 19.04.2016, which is to be set aside and the matter to be remanded back to the file of the Commissioner of Customs for fresh decision. In such circumstances, we are of the considered view that the writ petitioners should not be left without any remedy and since we are remanding the matter back to the file of the Commissioner of Customs for reconsideration, after setting aside the order passed by the Tribunal, we deem it appropriate that the orders passed by the Assistant Commissioner of Customers rejecting the refund applications are required to be set aside and the refund applications should stand restored to the file of the Assistant Commissioner of Customs to be taken up for fresh consideration after the Commissioner of Customs completes *de novo* adjudication based on the order of remand in this appeal.

51. In the result,

(i) C.M.A.(MD) No.687 of 2019 is allowed and for the reasons assigned by us, the order passed by the Tribunal and the order in original No.1/2016, dated 19.04.2016, is set aside and the matter is remanded to the Commissioner of Customs, Tuticorin, to consider the issue afresh, after affording opportunity to the assessees. The substantial questions of law framed for consideration are left open.

(ii) The writ petitions filed by the assessees are held to be not maintainable and accordingly, they are required to be dismissed. However, in the light of the orders passed in C.M.A.(MD) No.687 of 2019, we are inclined to set aside the orders passed by the Assistant Commissioner of Customs, rejecting the refund applications and accordingly, they are set aside and the refund applications are restored to the file of the Assistant Commissioner of Customs, who shall await

the decision by the Commissioner of Customs, who is to decide the matter afresh pursuant to the order of remand passed in C.M.A.(MD) No.687 of 2019 and thereafter take up the applications for refund and decide the same in terms of the orders passed by the Commissioner of Customs on *de novo* adjudication.

(iii) No costs. Consequently, connected miscellaneous petitions are closed.

[T.S.S., J.] **[S.A.I., J.]**

29.04.2021

Index : Yes / No
Internet : Yes / No

Note :
In view of the present lock down owing to COVID-19 pandemic, a web copy of the Judgment may be utilized for official purposes, but, ensuring that the copy of the Judgment that is presented is the correct copy, shall be the responsibility of the advocate / litigant concerned.

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T.S.SIVAGNANAM, J.
and
S.ANANTHI, J.

krk

COMMON JUDGMENT
IN
W.A.(MD) Nos.792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811 & 812 of 2021
and
C.M.A.(MD) No.687 of 2019

29.04.2021