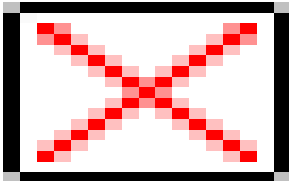


A SAD refund can have a happy ending

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SAD

(countervailing duty levied as special additional duty of customs) is an abbreviation which is not to be construed in a literal sense as this duty paid is usually refunded back to the importer on the subsequent domestic sale made by them on payment of VAT. However, as is the case with most of the refund claims, receiving a refund of SAD is also fraught with various legal challenges.

One of the contentious questions has been the issue of limitation period for claim of SAD.

The conflict can be attributed to a specific amendment which was carried out through Notification 93/2008-Cus.

Notification [102/2007-Cus](#) granted exemption to goods in the First Schedule of the Customs Tariff Act, 1975 ("CTA") from the whole of the SAD leviable under Section 3(5) of Customs Act when imported into India for subsequent sale on the fulfilment of certain conditions. The original notification laid out the following conditions-

- (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;***
- (d) the importer shall pay on sale of the said goods, appropriate sales tax or value added tax***
- (e) the importer shall, inter alia, provide copies of the specified documents***

Subsequently, vide notification [93/2008-Cus](#) dated 01st August 2008, the third condition in the notification was substituted to ***inter alia*** state that the refund claim is to be filed before the expiry of ***"one year from the date of payment of the said additional duty of customs;"***.

After the amendment, the Department took the position that limitation period for all refund claims filed for SAD should be calculated from the date of payment of such duty in light of provisions of Section 3(8) of the Customs Tariff Act read with Section 27 of the Customs Act.

The issue was taken up by the Hon'ble High Delhi High Court in the case of **M/s Sony India Pvt Limited 1**

. In this case, the importer had imported the goods prior to the amendment to 102/2007 in 2008 and an application for refund was filed on 11-12-2008 (after the amendment to the Notification). The question of law before the Hon'ble High Court was whether the period of limitation for preferring refund claims, specified in the amending Notification No. 93/2008-Cus., be made applicable with retrospective effect, in absence of a limitation period in the original Notification No. 102/2007-Cus., in respect of goods imported prior to the issue of the amending notification.

The Court after analysing Section 3(8) held as under

- ***Since SAD levied under Section 3(5) is refundable only on subsequent sale (i.e. the point at which sales tax/VAT liability arises), no limitation period can possibly be imposed for advancing a refund claim.***
- ***The right to claim refund only accrues to the importer once sale, an entirely market driven event, is complete. Given the vagaries of the market, the importer has limited control over when the sale is complete.***
- ***To uphold a limitation period starting from the date of payment of duty, as prescribed in the amending notification, would amount to allowing the commencement of a limitation period for refund claims before the right of refund has even accrued.***

With these reasons, the Court held that the refund provisions under the Customs Act are inapplicable to the duties levied under Section 3(5) of the CTA. The Court further held that neither Section 27 and nor the exemption notification can be used to impose a limitation period on the right to claim refund of additional duty of customs paid under Section 3(5). If the limitation period is sought to be imposed in respect of refund claims in a case where the importer advances a refund of SAD paid owing to having incurred sales tax/VAT liability on subsequent sale of goods, it must be introduced by legislation, given the expropriatory consequences of such a limitation period. The Court concluded that the imposition of a period of limitation for the first time, without statutory amendment, through a notification, therefore, could not prevail. The SLP against this order was dismissed by the SC on grounds of limitation keeping the questions of law open.

It is also pertinent to note that Section 3(8) *ibid* prescribed that the provisions relating inter-alia to refunds under the Customs Act would equally apply to the matters pertaining to SAD. Section 27 covering refunds under the Customs Act, 1962 prescribed a period of six months from the date of payment of duty for staking a claim for refund of customs duty. Nevertheless, as a measure of trade facilitation, Government introduced this one-year time limit. The CBEC Circular No [6/2008-Cus](#) elaborated as under:

Further, it was also represented that the goods imported may have to be dispatched for sale to different parts of the country and that the importer may find it difficult to dispose of the imported goods and complete the requisite documentation within the normal period of six months. Taking into account various factors, it has been decided to permit importers to file claims under the above exemption upto a period of one year from the date of payment of duty.

But as discussed supra, the Hon'ble Delhi High Court was not impressed.

This issue subsequently came up for consideration before the Hon'ble Bombay High Court in the case of CMS Info Systems Ltd - [2017-TIOL-79-HC-MUM-CUS](#)

by way of a writ petition. The petitioners herein sought the quash the condition of limitation which was introduced by way of Notification 93/2008. After hearing the matter at length, the Court dismissed the writ petition filed by the petitioners on the following grounds -

- Merely because a condition is imposed to file refund application and which is in nature of a time-bar or limitation, that cannot be held to be onerous, excessive and, therefore, ultra vires Article 14 of Constitution of India
- Even though there was no stipulation with regard to period for refund in notification, the power to consider the refund claim was traceable to Section 27 of Customs Act, 1962. Therefore, it was impossible to ignore statutory bar and contained in Section 27(1) at any time. Section 27 was always present in the Statute book.
- Compliance with this period does not call upon importer to do or perform something which is impossible.

- The refund which was granted was only conditional. In such cases, it was not open to pick and choose convenient conditions of the exemption notification and leave out those which appear to be onerous and excessive.
- There was no vested or absolute right of refund vested with the assessee and hence the conditions could not be termed as unfair, unjust and unreasonable.

The Bombay High Court ² with these observations respectfully did not agree with the views expressed by the Delhi High Court.

Subsequent to these decisions, there have been a series of cases by the Tribunal which have either followed the Delhi High Court and granted relief to the assessee ³ or have followed the Bombay High Court and decided the issue against the assessee ⁴.

While on this, another facet of the "**limitation**"

controversy may also be highlighted. The Notification No. 102/2007-Cus (as amended) apart from prescribing the time period of 1 year to claim refund of the SAD, also prescribed the manner of computing the 1 year. It said, one year from the date of payment of SAD. The assessee-importer had been contending that this one year should be computed from the date of payment of VAT / Sales Tax paid after importation, and sale of the imported goods and not from the date of payment of SAD. There have been, as expected, decisions, in favour and against the assessee. Noting the conflicting decisions, the Hon'ble Tribunal (Western Bench) ⁵ had referred the matter to the Larger Bench of the Tribunal with the following questions of law -

(a) Whether, the application for SAD refund is required to be filed within one year from the date of payment of such duty; or within one year from the date of actual sell of imported goods in India, upon payment of Sales Tax/VAT thereon?

(b) Whether, the Notification No. 93/2008-Cus., dated 01.08.2008 has to be interpreted to mean that the period of limitation of one year should commence from the date of payment of SAD amount at the time of clearance of goods from the port of import or; the date of actual sale of imported goods on payment of Sales Tax/VAT (the date when the refund claim become due to the importer-dealer)?

(c) In the light of the above facts, which of the orders (supra), passed by the Tribunal following (a) the ratio of judgment of Hon'ble Delhi High Court in the case of Sony India Pvt. Ltd. (supra) or; (b) the Hon'ble Bombay High Court in CMS Info Systems Ltd. (supra) is to be followed for determining the issue of time limit for claim of refund of the SAD amount?

Recently, the Hon'ble Tribunal in the case of M/s Fibre Bond Industries - [2022-TIOL-293-CESTAT-Del](#) held that one year must be computed **from the date of sale only**

. While passing the order, the Hon'ble Tribunal has followed the decision of the Hon'ble Delhi High Court, though the decision in Smartlink Network Systems (supra) was not noticed.

Conclusion

It is important to note that while prescribing the one-year time limit in 2008, Government did not want to impose the six months prescription under Section 27 ibid but wanted to take a liberal view to enable the trade to claim the refund after selling the goods. However, the prescription to reckon the limitation from the date of payment of duty, actually runs counter to this liberal position and, in fact, unwittingly laid down another unstated condition that the goods imported should be sold within a period of one year from the date of payment of duty. This condition is indeed onerous and cannot uniformly apply to all types of goods.

The maxim "**Lex non Cogit Ad impossibilia**"

(the law does not compel a man to do anything vain or impossible or to do something which he cannot possibly perform) squarely applies to the case in hand.

The authors view that the logical position taken by the Hon'ble Delhi High Court should be taken as a guide and a quietus should be given to this contentious issue, by the Board. Moreso, since SAD is no longer in existence.

[The views expressed are strictly personal.]

¹- [2014-TIOL-532-HC-DEL-CUS](#)

² Appeal to SC has been admitted in this matter

³Shandong Heavy Indus. India P. Ltd. - [2019-TIOL-3164-CESTAT-MUM](#)
; International Refrigeration Corporation 2016 (332) E.L.T. 824 (Tri. - Del.)

⁴Honda Siel Power Products Ltd. - 2019 (369) E.L.T. 1773 (TRI. - Chennai); Surya Telecom Pvt. Ltd. - [2018-TIOL-3283-CESTAT-HYD](#);

⁵M/s Smartlink Network Systems v. CCE, Goa - [2019-TIOL-3984-CESTAT-MUM](#)

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