

***IN THE HIGH COURT OF DELHI AT NEW DELHI**

% Judgment reserved on : 29th July, 2013
Judgment pronounced on: 13th September, 2013

+ **W.P.(C) 5120/2011**

PIONEER INDIA ELECTRONICS (P) LTD. Petitioner

Through Mr. Sukumar Pattjoshi,
Senior Advocate with
Mr.S.K.Dubey, Mr.Zeeshan
Khan and Ms.Anuradha
Salhotra, Advocates

versus

UNION OF INDIA & ANR. Respondents
Through Ms.Sonia Sharma, Adv for
Union of India.
Mr.Anshuman Chowdhury,
Advocate for R-2

CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA

HON'BLE MR. JUSTICE SANJEEV SACHDEVA

SANJEEV SACHDEVA, J.

1. The petitioner has filed the present petition impugning the Circular No.23/2010-Customs dated 29.7.2010 and the notification No. 93/2008-Customs dated 1.8.2008. The petitioner further prays for setting aside of the orders dated 21.3.2011 and 27.4.2011 passed by the Commissioner of Customs (Appeals) relying on the

impugned Circular No. 23/2010-Customs dated 29.7.2010 and further sought a writ of mandamus seeking refund of the provisional duty paid amounting to Rs. 94,43,216/-.

2. The petitioner M/s Pioneer India Electronics Private Limited was incorporated in the year 2008 and is subsidiary of Pioneer Corporation, Japan. The petitioner is engaged in the import and marketing of Pioneer branded products in India.
3. The petitioner imported several electrical goods falling under the first schedule of the Customs Tariff Act, 1975 (hereinafter referred to as, the Act). The goods were cleared after payment of provisional duty.
4. As it was a case of a related party transaction, Customs Authorities referred the case to the Special Valuation Branch of the Customs for the purposes of valuation and clearance. Pending valuation by the Special Valuation Branch, all bills of Entry were cleared by the Customs Authorities provisionally under Section 18 of the Act. After valuation by the Special Valuation Branch of the Customs, the liability was determined and the importer i.e. the petitioner then applied for finalisation of the Bill of Entry. On the finalisation of the Bill of Entry, the final duty was

assessed and the provisional duty paid was adjusted towards the final assessment. The said procedure is followed in related party transactions. In case, any additional duty is payable on final adjudication, the importer is liable to pay the same and where the provisional duty is more than the final duty assessed the importer is entitled to the refund of the same.

5. On 14.09.2007 notification No. 102/2007-Customs was issued by the Ministry of Finance, Government of India in exercise of powers conferred by Sub-section 1 of Section 25 of the Act. Vide the said notification, the Central Government exempted the goods falling within the first schedule to the Customs Tariff Act, 1975 when imported into India for subsequent sale from the whole of the additional duty of Customs leviable thereon under Sub-section 5 of Section 3 of the said Customs Tariff Act. The exemption contained in the notification was subject to the fulfilment of 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 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 alongwith 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.”

6. In this notification dated 14th September, 2007, no period of limitation was prescribed for making an application for refund of CVD. The notification postulated furnishing of documents evidencing

payment of additional duty, invoices of sale of imported goods for which refund of additional duty was claimed and evidence of payment of appropriate sales tax or value added tax. The absence of stipulation of any period of limitation leads to the clear implication that the refund would be processed under Section 27 of the Act. This aspect has been addressed below.

7. On 28.04.2008 the Central Board of Excise and Customs issued Circular No. 6 of 2008-Customs, on account of various representations being made by the importers, exporters, Trade and Industry Association and had reference from some of the Customs Fields Formations. One of the issues dealt with by the said circular related to the fixation of time limit for filing an application for refund. In respect of the same, the circular provided as under:

4. Time – Limit:

4.1 In the Notification No.102/2007-Customs dated 14.9.2007, no specific time limit has been prescribed for filing a refund application. Under the circumstances, a doubt has been expressed that whether the normal time-limit of six months prescribed in section 27 of the Customs Act, would apply. In the absence of specific provision of section 27 being made applicable in the

said notification, the time limit prescribed in this section would not be automatically applicable to refunds under the notification. Further, it was also represented that the goods imported may have to be despatched 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. Necessary change in the notification is being made so as to incorporate a specific provision prescribing maximum time limit of one year from the date of payment of duty, within which the refund could be filed by any person. It is also clarified that the importers would be entitled to refund of duties only in respect of quantities for which the prescribed documents are made available and the claims submitted within the maximum prescribed time of one year. Unsold stocks would not be eligible for refunds.

4.2 It is also clarified that only a single claim against a particular Bill of Entry should be permitted to be filed within the maximum time period of one year. Filing of refund claim for a part quantity in a bill of entry shall not be allowed except when this is necessary at the end of the one year period. Further, since the Sales Tax (ST)/Value Added Tax (VAT) is being

paid on periodical or monthly basis, even in case of bills of entry where the entire quantity of goods are sold within a month, all such cases shall be consolidated in a single refund claim and filed with the Customs authorities on a monthly basis. In other words, there would be a single refund claim in respect of one importer in a month irrespective of the number of Bills of Entry (B/Es) processed by the respective Commissionerate.

4.3 With the extension of time limit and the requirement to file claims on a monthly basis, Board feels that the number of refund claims should be manageable for disposal within the normal period of three months. Further, in the absence of specific provision for payment of interest being made applicable under the said notification, the payment of interest does not arise for these claims. However, Board directs that the field formations shall ensure disposal of all such refund claims under the said notification within the normal period not exceeding three months from the date of receipt.”

(underlining supplied)

8. Circular No. 6/2008 dated 16th April, 2008 noticed that no specific time limit was fixed in notification dated 14th September, 2007. Doubts had been expressed as to whether Section 27 of the Act would apply. The circular purports to clarify that in the absence of

specific stipulation in the notification, which made Section 27 of the Act applicable, the time limit prescribed in Section 27 of the Act would not be applicable automatically. This statement in the circular according to us is incorrect. Section 27 of the Act applies because of the statute i.e. the Act and does not require clutches of a notification for application. The aforesaid clarification in form of a circular can be also challenged and questioned to the extent that it withdraws or curtails beneficial provisions of Section 27 of the Act. The circular records that representations had been received from the importers, who had found it difficult to dispose of the exported goods and complete the requisite documentation within the normal period of six months. This period of six months is specified in Section 27 of the Act. The Board keeping in view the aforesaid factors had decided to permit importers to file claims for exemption upto a period of one year, i.e., the time limit specified in Section 27 of six months, was extended to one year, but with certain stipulations, namely;

- (i) Unsold stock would not be eligible for refund;

- (ii) For one bill of exchange a single applicable would be maintainable;
- (iii) The claim would be entertained on monthly basis, i.e., single refund claim irrespective of number of bills of entry processed in that month by the respective Commissionerate;
- (iv) The refund claims would be normally disposed of within three months;

9. Subsequent to the issuance of circular No. 6 of 2008 the Central Government issued a notification No. 93/2008 on 1.8.2008. The notification No. 93/2008 amended paragraph 2(c) is as under:

“Paragraph 2(c) prior to the amendment read as:

“the importer shall file a claim for refund of the said additional duty of customs paid on the imported goods with the jurisdictional custom officer.”

Paragraph 2(c) after the amendment read as:

“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.”

(Underlining supplied)

10. This is the new notification issued by the Central Government on 1st August, 2008, which made amendment to paragraph 2 (c) of the earlier notification dated 14th September, 2007. Instead of time limit being fixed by the circular, the time limit for making claim for refund of additional duty was specified in the notification itself. The time limit as prescribed for making the said claim was one year from the date of payment of the additional duty on customs.

11. Observing that divergent practices were being followed as regard sanction of the refund claims in cases where the assessments were provisional, the Central Government issued circular No.23 of 2010-Customs on 29.7.2010. The Circular inter alia provided as under:

“3. The matter has been examined in the Board. As per the Board Circular No.6/2008-Customs dated 28.4.2008, the limitation of time under Section 27 of the Customs Act, 1962 is not applicable in cases relating to refund claims of 4% CVD. The refund of 4% CVD is admissible in

terms of Notification No.102/2007-Customs dated 14.9.2007 read with Notification No.93/2008-Customs dated 1.8.2008 issued under Section 25(1) of the Customs Act, 1962 subject to fulfilment of certain conditions as envisaged in the said notifications. The time limit prescribed for the purpose of 4% CVD refund claim is one year from the date of payment of duty as per the said Notifications. Hence, in cases where the assessment is provisional, for the purpose of sanction of refund of 4% CVD, the date of payment of duty would be, the date of payment of CVD at the time of import of goods and not the date of finalization of provisional assessment. The Importer, therefore, would be eligible to get the refund, if the claims is filed within one year of the date of actual payment of 4% CVD i.e. the date of payment of duty at the time of clearance of imported goods.”

(Underlining supplied)

12. Circular dated 29th July, 2010 seeks to explain notification No. 93 of 2008 dated 1st August, 2008 and states as under:

(i) Limitation of time specified for refunds under Section 27 of the Act is not applicable.

(ii) Claims of refunds of 4% CVD under Circular dated 28th April, 2008 should be

filed within one year of payment of duty, whether the assessment was provisional or final was immaterial.

The reason given is that the notification has been issued under Section 25(1) of the Act and is subject to fulfilment of certain conditions; one of them being that the claim for refund should be made within one year from the date of payment of duty. Thus, in cases where assessment was provisional, date of payment of duty for CVD would be the actual date of payment and not the date of finalization of provisional assessment. In other words, the order finalizing the assessment will not determine the limitation of one year for refund of duty. The date of finalization of assessment is, therefore, rendered inconsequential. The importer is entitled to refund only if the claim is made within one year from the date of payment of actual duty, whether it was paid as provisional assessment or on the basis of final assessment.

13. This notification No. 93 of 2008 and the Circular No. 23/2010–Custom have been impugned in the present petition.
14. In the present case the petitioner imported various goods from its related party, i.e., M/s Pioneer

Corporation, Japan. In the present case three claims of the petitioner are in issue. The first claim pertains to an import vide seven bills of exchanges ranging between 22.12.2008 to 06.03.2009. In respect of imports made vide these bills of exchanges, the petitioner provisionally assessed the duty and paid the same between 31.12.2008 to 13.03.2009. The assessment of duty, i.e., finalisation of the bill of exchange was done by the customs authorities on 09.07.2010. The claim with respect to the first set of bill of exchange was lodged on 30.07.2010.

15. The second set of bill of exchanges range between 27.03.2009 to 12.08.2009 and the provisional duty was paid between 04.04.2009 to 12.08.2009. These set of bills of exchange were finalised on 09.07.2010 and the claim for the second set of bill of exchange was lodged on 22.12.2010.
16. The third set of bill of exchange range between 08.09.2009 to 09.10.2009 and provisional duty was paid between 15.09.2009 to 14.10.2009. The third set of bill of exchange was finalized on 09.07.2010 and the claim with respect to the same was lodged on 27.10.2010.

17. The first claim pertaining to the first set of bill of exchange was rejected by the Assistant Commissioner (Refund) vide order dated 31.10.2010 on the ground that the refund claim had been filed beyond the stipulated period of one year of the date of the payments of the duty at the time of clearance of the imported goods. The petitioner filed an appeal before the Commissioner of Customs (Appeals) against the order dated 30.10.2010 which appeal was further rejected by the Commissioner of Customs (Appeals) vide its order dated 21.3.2011 and the said order is impugned in the present petition also. Similarly, the second claim of the petitioner for the second set of bill of exchanges was also rejected by the Assistant Commissioner (Refund) vide order dated 23.12.2010. The petitioner filed an appeal against the order dated 23.12.2010 before the Commissioner of Customs(Appeal) which appeal has also been dismissed vide order dated 27.4.2011 and the said order dated 27.4.2011 is also impugned in the present petition. The third claim filed by the petitioner with respect to the third set of bill of exchange was also rejected on the same ground by the Assistant Commissioner (Refund) vide order dated 28.2.2011 and the petitioner has filed an appeal on 11.4.2011

against the said order before the Commissioner of Customs (Appeals).

18. The case of the petitioner is that by the impugned notification and circular, the Central Government has created a situation whereby a person would need to file an application for refund even before the assessment is finalized as the time limit for making an application has been prescribed to commence from the date of payment of the provisional duty for release of the goods and not the final assessment of duty.
19. Learned counsel for the petitioner further contended that Section 27 which relates to claim for refund of duty, period for limitation prescribed is one year or six months as the case may be from the final assessment of duty and the impugned notification seeks to change the period prescribed under the Statute which was impermissible and contrary to law.
20. In contra learned counsel for the respondent submitted that the circular and notification had been issued in exercise of the powers conferred under Section 25 of the Act and under Section 25 the Government had the power to grant exemption subject to the certain conditions and the conditions so prescribed also stipulated a time limit for seeking refund and as such

the application for refund had to be made within the time limit prescribed by notification and circular issued under Section 25 and that Section 27 had no application to the claim of refund under the circular issued under Section 25.

21. The main issue which arises for consideration in the present petition is whether the Central Government while imposing conditions for grant of exemption under Section 25(1) of the Act could lay down conditions in derogation to the specific statutory provisions and stipulations contained in Section 27 of the Act.
22. Section 18 provides for provisional assessment of duty and lays down as under:

“18. Provisional assessment of duty.— (1) Notwithstanding anything contained in this Act but without prejudice to the provisions contained in section 4—

(a) where the proper officer is satisfied that an importer or exporter is unable to produce any document or furnish any information necessary for the assessment of duty on the imported goods or the export goods, as the case may be; or

(b) where the proper officer deems it necessary to subject any imported goods or export goods to any chemical or other test

for the purpose of assessment of duty thereon; or

(c) where the importer or the exporter has produced all the necessary documents and furnished full information for the assessment of duty but the proper officer deems it necessary to make further enquiry for assessing the duty,

the proper officer may direct that the duty leviable on such goods may, pending the production of such documents or furnishing of such information or completion of such test or enquiry, be assessed provisionally if the importer or the exporter, as the case may be, furnishes such security as the proper officer deems fit for the payment of the deficiency, if any, between the duty finally assessed and the duty provisionally assessed.

(2) When the duty leviable on such goods is assessed finally in accordance with the provisions of this Act, then—

(a) in the case of goods cleared for home consumption or exportation, the amount paid shall be adjusted against the duty finally assessed and if the amount so paid falls short of, or is in excess of, [the duty finally assessed], the importer or the exporter of the goods shall pay the deficiency or be entitled to a refund, as the case may be;

(b) in the case of warehoused goods, the proper officer may, where the duty finally assessed is in excess of the duty provisionally assessed, require the importer to execute a bond, binding himself in a sum equal to twice the amount of the excess duty.

(3) The importer or exporter shall be liable to pay interest, on any amount payable to the Central Government, consequent to the final assessment order under sub-section (2), at the rate fixed by the Central Government under section 28AB from the first day of the month in which the duty is provisionally assessed till the date of payment thereof.

(4) Subject to sub-section (5), if any refundable amount referred to in clause (a) of sub-section (2) is not refunded under that sub-section within three months from the date of assessment, of duty finally, there shall be paid an interest on such unrefunded amount at such rate fixed by the Central Government under section 27A till the date of refund of such amount.

(5) The amount of duty refundable under sub-section (2) and the interest under sub-section (4), if any, shall, instead of being credited to the Fund, be paid to the importer or the exporter, as the case may be, if such amount is relatable to –

- (a) the duty and interest, if any, paid on such duty paid by the importer, or the exporter, as the case may be, if he had not passed on the incidence of such duty and interest, if any, paid on such duty to any other person;
- (b) the duty and interest, if any, paid on such duty on imports made by an individual for his personal use;
- (c) the duty and interest, if any, paid on such duty borne by the buyer, if he had not passed on the incidence of such duty and interest, if any, paid on such duty to any other person;
- (d) the export duty as specified in section 26;
- (e) drawback of duty payable under sections 74 and 75.”

23. Section 25 of the Act lays down as under:-

“25. Power to grant exemption from duty.— (1) If the Central Government is satisfied that it is necessary in the public interest so to do, it may, by notification in the Official Gazette, exempt generally either absolutely or subject to such conditions (to be fulfilled before or after clearance) as may be specified in the notification goods of any specified

description from the whole or any part of duty of customs leviable thereon.

(2) If the Central Government is satisfied that it is necessary in the public interest so to do, it may, by special order in each case, exempt from the payment of duty, under circumstances of an exceptional nature to be stated in such order, any goods on which duty is leviable.

(2A) The Central Government may, if it considers it necessary or expedient so to do for the purpose of clarifying the scope or applicability of any notification issued under sub-section (1) or order issued under sub-section (2) insert any explanation in such notification or order, as the case may be, by notification in the Official Gazette at any time within one year of issue of the notification under sub-section (1) or order under sub-section (2), and every such explanation shall have effect as if it had always been the part of the first such notification or order, as the case may be.

(3) An exemption under sub- section (i) or sub- section (1) in respect of any goods from any part of the duty of customs leviable thereon (the duty of customs leviable thereon being hereinafter referred to as the statutory, duty) may be granted by providing for the levy of a duty On such goods at a rate expressed in a form or

method different from the form or method in which the statutory duty is leviable and any exemption granted in relation to any goods in the manner Provided in this sub- section shall have effect subject to the condition that the duty of customs chargeable on such goods shall in no case exceed the statutory duty.

Explanation.-" Form or method", in relation to a rate of duty of customs, means the basis, namely, valuation, weight, number, length, area, volume or other measure with reference to which the duty .

(4) Every notification issued under sub-section (1) or sub-section 92A) shall,--

(a) Unless otherwise provided, come into force on the date of its issue by the Central Government for publication in the Official Gazette;

(b) also be published and offered for sale on the date of its issue by the Directorate of Publicity and Public Relations of the Board, New Delhi.

(5) Notwithstanding anything contained in sub-section (4), where a notification comes into force on a date later than the date of its issue, the same shall be published and offered for sale by the said Directorate of Publicity and Public Relations on a date on

or before the date on which the said notification comes into force.

(6) Notwithstanding anything contained in this Act, no duty shall be collected if the amount of duty leviable is equal to, or less than, one hundred rupees.”

24. Section 27 of the Customs Act lays down as Under:

“27 **Claim for refund of duty.—** (1) Any person claiming refund of any duty –

(i) paid by him in pursuance of an order of assessment; or

(ii) borne by him,

may make an application for refund of such [duty and interest, if any, paid on such duty] to the [Assistant Commissioner of Customs or Deputy Commissioner of Customs]—

(a) in the case of any import made by any individual for his personal use or by Government or by any educational, research or charitable institution or hospital, before the expiry of one year;

(b) in any other case, before the expiry of six months,

from the date of payment of [duty and interest, if any, paid on such duty] [in such form and manner] as may be specified in the regulations made in this behalf and the

application shall accompanied by such documentary or other evidence (including the documents referred to in section 28C) as the applicant may furnish to establish that the amount of [duty and interest, if any, paid on such duty] in relation to which such refund is claimed was collected from, or paid by, him and the incidence of such [duty and interest, if any, paid on such duty] had not been passed on by him to any other person:

Provided that where an application for refund has been made before the commencement of the Central Excises and Customs Laws (Amendment) Act, 1991, such application shall be deemed to have been made under this sub-section and the same shall be dealt with in accordance with the provisions of sub- section (2):

Provided further that the limitation of one year or six months, as the case may be, shall not apply where any [duty and interest, if any, paid on such duty] has been paid under protest:

[Provided also that in the case of goods which are exempt from payment of duty by a special order issued under sub-section (2) of section 25, the limitation of one year or six months, as the case may be, shall be computed from the date of issue of such order]:

[Provided also that where the duty becomes refundable as a consequence of judgment, decree, order or direction of the

appellate authority, Appellate Tribunal or any court, the limitation of one year or six months, as the case may be, shall be computed from the date of such judgment, decree, order or direction.]

Explanation [I]. – For the purposes of this sub-section," the date of payment of [duty and interest, if any, paid on such duty] in relation to a person, other than the importer, shall be construed as" the date of purchase of goods" by such person.

[Explanation II.— Where any duty is paid provisionally under section 18, the limitation of one year or six months, as the case may be, shall be computed from the date of adjustment of duty after the final assessment thereof.]

25. Before we elucidate upon Section 18, we would like to examine the provisions of Section 25 of the Act. The said Section empowers the Central Government to issue a notification in the Gazette and exempt generally either absolutely or subject to such conditions, which may have to be fulfilled before or after clearance of the goods, from the customs from whole or any part of customs duty leviable thereon. It is important to note that the notification can only grant exemption absolutely or subject to certain conditions. Thus, notification under Section 25(1) has to be liberal, indulgent or benevolent and reduce/delimit the rigours

of the statute. Imposition of increased or higher tax by a notification under Section 25 is impermissible and prohibited. Only exemption can be granted but harsher or higher duty or more rigorous or harsher terms than those mentioned and stipulated under the Act cannot be imposed and stipulated.

26. Sub-section (3) of section 25 clarifies and affirms that notification issued under sub-section (1) shall be subject to the condition that the duty on customs chargeable on such goods shall not exceed the statutory duties. Sub-section (3) further states that the notification under Section 25(1) can relate to rate of duty expressed in a form or method different from the form or method in which the statutory duty is leviable, but subject to the condition that the rate of duty shall not exceed the statutory duty. The words “form or method” as per the explanation mean, basis of the duty, i.e., valuation, weight, number, length, area, volume or any other measure but explanation does not refer to the time limit and the right of the Government, by issue of a notification, to reduce the statutory time limit for claim of refund in Section 27 of the Act.

27. 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.

28. Section 27 of the Act is a general provision relating to refund of any duty. Dictionary meaning of the word 'any' can indicate 'all' or 'every' as well as 'some' or 'one'. Usage depends upon the context of subject matter. In the context of Section 27 of the Act, the word 'any duty' should and would encompass 'all' and 'every' type of refund payable under the Act and in terms of the notification issued under Section 25.

29. Third proviso to Section 27 clears any possible ambiguity and this proviso refers to special order under Section 25(2), which is like a notification and states that the period of limitation of one year or six months as the case may be, shall be computed from the date of issue of such order. Contention of the respondent that notification under Section 25 must specifically invoke Section 27 is misconceived. Notification under Section 25 of the Act is issued under the statute i.e. the principal enactment itself and refund of duty under Section 27 means and includes any type of refund whether payable in view of appellate orders, adjudication order or pursuant to a notification or exemption etc. Bare perusal of Section 27(1), indicates the wide amplitude and the broad parameters under which the said provision operates. The provision is not applicable or restricted to refund pursuant to a decree, judgment, order or direction of the appellate authority, tribunal etc. The very fact that the first notification dated 14th September, 2007 issued under Section 25 of the Act did not refer or prescribe any period of limitation, is sufficient to reject the contention that Section 27 of the Act is not applicable to notifications. The question under which provision and time limit refund under the notification dated 14th

September, 2007 was payable, cannot be and is not answered by the respondents. Subsequent circular dated 28th April, 2008 was issued nearly after seven months of the notification.

30. Notification dated 1st August, 2008 refers to the expression the 'date of payment' of said additional duty of customs and the limitation period fixed is one year from the said date. The expression used in Section 27(1) is "from the date of payment of duty and interest, if any, paid on such duty". The connotation of the words 'date of payment' is identical in the notification dated 1st August, 2008 and in sub-clause (1) to Section 27 of the Act. Explanation I to Section 27 clarifies the position and states that for any duty paid provisionally under Section 18, the limitation period as applicable shall be computed from the date of adjustment of duty after final assessment. Thus, the expression 'date of payment of duty' used in sub-clause (1) to Section 27 has to be read with Explanation II i.e. the date of adjustment of duty after final assessment and not the date on which duty was paid provisionally under Section 18.

31. Section 18 of the Act, postulates payment of duty which is ad-hoc or interim duty which is paid but

subject to final assessment. Ultimately, the duty payable is determined and decided by final assessment and the said determination is mandatory, when provisional assessment is made. Difference between the final duty payable and provisional duty paid will either result in a demand or a refund. Until final assessment is done, the duty paid is merely provisional and not fully ascertained or quantified. It can fluctuate.

32. The reason why explanation II to Section 27 refers to final assessment and not provisional assessment is apparent and logical. Till final adjudication order is passed and duty is ascertained, quantum of the duty paid or payable is uncertain. The amount of refund will be determinable upon final assessment and not earlier. Even when there is an exemption and duty is refundable post import, the refund cannot be ascertained and will be fluctuating till final assessment order is passed. The quantum of refund would depend upon the final adjudication and not upon provisional assessment. No person can lodge a claim for refund without knowing or quantifying the amount which is to be refunded. As per the final adjudication, refund may not be payable, or quantum thereof may increase or decrease.

33. Explanation II to Section 27 should not create any difficulty as one should expect that the final adjudication order would be passed within a reasonable time or shortly after provisional assessment.
34. In the present case, for the three claim of the petitioner, the relevant dates are as under:

<i>Provisional payment date</i>		<i>Final Assessment date</i>	<i>Claim lodging date</i>
31.12.2008 13.03.2009	to	09.07.2010	30.07.2010
04.04.2009 12.08.2009	to	09.07.2010	22.12.2010
15.09.2009 14.10.2009	to	09.07.2010	27.10.2010

35. The impugned circular No. 23 of 2010 was issued on 29.07.2010 stipulating a limitation of one year from the date of payment of the duty at the time of clearance of the imported goods. If the period in the circular was to be followed then some of the refund claims of the petitioner would become time barred and in others hardly any time would be left for the petitioner to make a claim.

36. The problem in the present case has arisen largely due to failure of the respondents to pass final adjudication orders which were belatedly made. Bills of exchange between the period 20th December, 2008 to 6th March, 2009; bills of exchange between 27th March, 2009 to 12th August, 2009; and bills of exchange between 8th September, 2009 to 9th October, 2009 were finally adjudicated on 9th July, 2010. There is no explanation for this delay and the cause thereof.
37. Circular No. 23 of 2010/custom issued on 7th September, 2010 stipulates that the date of payment of provisional duty and not the date of final adjudication is determinative for computing the limitation period of refund under notification No. 93 of 2008 issued on 1st August, 2008, can be faulted for many reasons. These are as under:
- i. As per Section 25(1), Central Government is empowered to issue a notification granting exemption i.e. grant exemption generally or absolutely or subject to conditions from whole or any part of custom duty leviable on goods. A notification cannot restrict the benefit or impose more rigorous or severe terms than the one prescribed under the Act. Notification can

liberalise and grant exemption. Indulgence and benevolence can be an objective of a notification and restricted or shorter period of refund is not postulated. Notification cannot impose more deleterious terms and reduce the period of limitation for refund of claim. (Sub – section 2A to Section 25 is not applicable)

- ii. Section 27 of the Act prescribes period of limitation. The period of limitation under the said Section cannot be curtailed by way of a notification but a notification can extend and increase the period of limitation. Similarly, a circular cannot reduce the period of limitation for seeking refund stipulated in Section 27 of the Act.
- iii. Section 27 applies to all refunds whether due and payable pursuant to appellate orders or court orders or otherwise in terms of exemption notification under Section 25(1) or special orders under Section 25(2) of the Act.
- iv. The expression ‘date of payment’ used in notification No. 93 of 2008 dated 1st August, 2008 can mean the date of final assessment. The said interpretation would be in accordance and as per explanation II to Section 27. Similar

expression has been used in Section 27(1). Circular issued on 29th July, 2010 accepts that in some cases refunds under the notification dated 1st August, 2008 had been issued on a claim being made within one year from date of final assessment and beyond one year from the date of provisional assessment. The circular however, stipulates that the claim for refund would be entertained under the notification dated 1st August, 2008, if it is made within one year from payment of duty and not final assessment. This, may result in reducing the period. Assuming that the issue of date of payment was debatable, the Board did not deem it appropriate to fix a period or time limit during which claims of refund should be entertained in cases where the Assessee bonafidely believed and were acting on the presumption that period of one year was to be computed from the date of final assessment. The said belief was not ill founded but based on sound logic and reasoning. The Board while issuing the circular would have been fair and just and fixed a time limit during which past claim of refund could be entertained with a reference to the date of final assessment.

38. In view of the above discussion, we feel that it will be proper to harmoniously construe and interpret notification dated 1st August, 2008 and Section 27 read with Circular dated 29th July, 2010 by holding that an Assessee can make a claim for refund under notification No. 93 of 2008 dated 1st August, 2008 either by filing an application for refund within the limitation period specified under Section 27 of the Customs Act, 1962 or within the extended limitation period of one year from the actual date of payment even, if the said payment made was pursuant to provisional assessment. The longer of the two periods i.e. the period specified under Section 27 or the notification dated 1st August, 2008 read with Circular No. 23/2010–Custom dated 29th July, 2010 would be applicable.

39. To sum up:

- a. where the imported goods are released on payment of CVD on regular assessment, the application seeking refund can be made within one year of the payment of the CVD in terms of the notification dated 1st August, 2008 read with Circular No. 23/2010–Custom dated 29th July, 2010.

b. where the goods are released on provisional assessment followed by the final assessment, the application seeking refund can be made within the period of one year or six months, as the case may be, of the final assessment as stipulated by Explanation II to section 27 of the Act or within the enlarged period of one year from the date of provisional release as stipulated by the notification dated 1st August, 2008 read with Circular No. 23/2010–Custom dated 29th July, 2010.

40. The Circular No. 23/2010-Custom in so far as it stipulates that the provisions of section 27 of the Act do not apply to the Notification cannot be sustained to the extent indicated above.

41. In view of the construction given by us to the circular hereinabove, the Judgment relied upon by the counsel for the Petitioner of the High Court of Madras in the case of ***KSJ Metal Impex Private v. Under Secretary, Customs and Others in Writ Petition No. 959/2013 decided on 21.01.2013*** need not be referred to. Even otherwise the said judgement is not applicable in the facts of the present case as the same was dealing with the issue of interest on delayed refunds.

42. Since the petitioner has filed the claims within the period stipulated by section 27 of the Act, in view of the construction given by us, the same could not have been rejected on the ground of limitation.
43. In view of the above, the impugned Circular No. 23/2010-Custom to the extent it holds that section 27 of the Act has no application is held ultra-vires the statute and quashed. The impugned orders dated 21.3.2011 and 27.4.2011 passed by respondent No.2 relying on Circular No. 23/2010-Custom dated 29.07.2010 are hereby set aside and the matter is remanded to respondent No.2 to assess the claim of the petitioner for refund on imports and to process the same in accordance with the provisions of Section 27 of the Act.
44. The writ petition is, accordingly, disposed of with no order as to costs.

SANJEEV SACHDEVA, J.

13th SEPTEMBER, 2013
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SANJIV KHANNA, J.