IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, KOLKATA

REGIONAL BENCH – COURT NO.2

Customs Appeal No. 76287 of 2024

(Arising out of Order-in-Appeal No. KOL/CUS/AIRPORT & ACC/KS/404/2024 dated 26.06.2024 passed by Commissioner of Customs (Appeals), Kolkata.)

M/s Steel Authority of India Limited,
(Branch Transport & Shipping office SAIL House,
6th Floor, Kolkata-700007)

...Appellant

VERSUS

Commissioner of Customs (Port), Kolkata,
(Customs House, 15/1, Strand Road, Kolkata-700001)

.. ...**Respondent**

APPERANCE :

Mr. Rishi Raju, Advocate for the Appellant
Mr. A. K. Choudhary, Authorized Representative for the Respondent

CORAM:
HON'BLE MR. R. MURALIDHAR MEMBER (JUDICIAL)

FINAL ORDER No...75906./2026

DATE OF HEARING : 10.07.2026

DATE OF PROUNCEMENT: 20.07.2026

PER R. Muralidhar :

The appellant is a public sector undertaking and is one of the largest manufacturers of steel and pig iron in India. During the financial year 2020-21, the appellant proposed to import radio remote control devices from Frankfurt, Germany. The said radio remote control devices were intended for use in the plant area for operating and controlling three vital equipment, namely, the manipulator, drill machines and clay pushing barrels, which are deployed in the cast houses of the blast furnaces for drilling, covering and plugging the tap holes. Their use renders plant operations smoother, more accurate and safer.

2. For the import of the said goods, the appellant filed Bill of Entry No. 8673857 dated 30.08.2020. The Bill of Entry was thereafter assessed and duty amounting to Rs. 5,65,417/- was paid vide Customs Challan No. 2031951661 dated 02.09.2020. Upon import, it was observed that the radio remote control devices, being of a specified frequency, were required to be accompanied by an Equipment-Type Approval / licence from the Wireless Planning and Coordination (WPC) Wing of the Ministry of Communications. The said observation was recorded by the Appraising Officer, Air Cargo Complex, vide letter dated 16.09.2020. Consequently, the goods were not allowed clearance for home consumption and were, instead, warehoused at the customs station. In terms of DGFT Notification No. 07/2015-20 dated 09.05.2016, the import of radio remote control devices of a specified frequency requires a licence from the WPC Wing. In order to apply for such a licence, the importer is required to file a test report of the product from an accredited laboratory, which the shipper was to provide. Despite repeated requests, the shipper failed to furnish the requisite test report, and the appellant was, therefore, unable to make the application for the licence. For this reason, the goods were not allowed clearance for home consumption and remained warehoused under the control of the Customs authorities. On 03.03.2021, the appellant decided to return the goods to the foreign supplier, the licence not having been obtained. Vide letter dated 03.05.2021, the appellant communicated the said position to the Deputy Commissioner of

Customs and requested permission to return the goods. For the return of the goods, the appellant engaged a custom house agent, namely, Balmer Lawrie & Co. On its advice, the appellant paid the penalty of Rs. 10,000/- imposed by the Customs authorities and the storage rent of Rs. 6,01,800/- payable to the Airport Authority of India towards storage of the goods from September 2020; internal approval for the said payments was sought vide communication dated 26.07.2021. As the goods had not been cleared for home consumption and had never crossed the customs frontier, no separate shipping bill was required to be filed for their return. Accordingly, an airway bill dated 01.09.2021 was filed for the return / re-export of the radio remote control devices to the foreign supplier.

3. Within a month of the return of the goods, the appellant, vide letter dated 21.10.2021, informed the Deputy Commissioner that the goods had been returned and that no duty was payable, the goods not having been cleared for home consumption, and prayed for refund of the amount paid. On 24.12.2021, the appellant filed a refund application in respect of the amount of Rs. 5,65,417/-. A deficiency memo was issued on 10.01.2022, in response to which the appellant furnished documents vide letters dated 24.01.2022 and 28.01.2022.Vide letter dated 24.03.2022, the appellant requested cancellation of the Bill of Entry, the goods not having been imported into or brought within the mass of goods of the country. The appellant states that the revenue vide their deficiency memo had stated that prima

facie, the appeal was time barred under Section 27 of the Customs Act. As a result, the appellant vide letter dated 20.09.2022, sought to amend its refund application under Section 26A of the Customs Act, 1962 (hereinafter, the "Act"); and vide letter dated 07.11.2022, the appellant clarified the facts and circumstances of the case. A further personal hearing was held on 15.09.2023.

4. Vide the Order-in-Original dated 30.11.2023, the refund claim was rejected. The rejection was rested principally upon the second proviso to Section 26A(1) of the Act, it being held that refund could not be granted as an offence appeared to have been committed, in as much as the goods had been imported without the requisite WPC authorisation and the appellant had been subjected to fine and penalty before being permitted to re-export the goods. The appellant vide their memorandum of appeal before the Ld. Commissioner (Appeals) stated that the refund falls within the ambit of Section 27, and not Section 26A of the Customs Act. It was stated that the period of limitation under Section 27 of the Customs Act, would not time-bar the application for the reason that the limitation was not applicable in the present case. The duty paid was without jurisdiction, and hence, it could not be retained unjustly by the government, in direct contravention to Article 265 of the Constitution. The appeal preferred by the appellant was, in turn, rejected by the impugned Order-in-Appeal dated 26.06.2024. The appellate authority, rejected the appeal and upheld the decision of the adjudicating authority. Hence, the appellant is before the Tribunal.

5. The Learned Counsel, appearing for the appellant, makes the following submissions:

5.1 The appellant submits that no import duty was payable on the goods covered by the said Bill of Entry, for the reason that the import was never completed. The taxable event that alone attracts the levy of import duty never occurred. Consequently, the amount paid vide challan dated 02.09.2020 is not duty at all, but a sum held by the Government in trust for the appellant, which the Government is bound to refund.

5.2 Under the scheme of the Act, import duty is levied upon the import of goods. In terms of Section 2(23), "import", with its grammatical variations, means bringing into India from a place outside India, and Section 12 levies duty upon the import of goods into India. It is settled that the taxable event in the case of import is not the mere landing of goods or their entry into territorial waters, but the crossing of the customs barrier, i.e. the point at which the goods are cleared for home consumption and become part of the mass of goods in the country. In the case of warehoused goods, the customs barrier is crossed only when the goods are sought to be taken out of customs control and brought into the mass of goods of the country.

5.3 This principle is squarely settled by the Hon'ble Supreme Court in **Kiran Spinning Mills v. Collector of Customs, 1999 (113) E.L.T. 753 (S.C.)**, wherein it was held as follows:

> *"…in the case of duty of customs the taxable event is the import of goods within the customs barriers. In other words, the taxable event occurs when the customs barrier is crossed. In the case of goods which are in the warehouse the customs barriers would be crossed when they are sought to be taken out of the customs and brought to the mass of goods in the country… The import would be completed only when the goods are to cross the customs barriers and that is the time when the import duty has to be paid… The taxable event, therefore, being the day of crossing of customs barrier, and not on the date when the goods had landed in India or had entered the territorial waters."*

5.4 Since the amount paid does not bear the character of duty, the period of limitation prescribed under Section 27 of the Act is not attracted. The very same question, on facts identical to the present case, arose before the jurisdictional Tribunal in **Commissioner of Customs v. Banmore Electricals, 2006 (205) E.L.T. 689 (Tri.-Kolkata)**. There, goods imported on payment of duty were found defective, were warehoused and denied clearance, and were thereafter re-exported; the assessee's refund claim, initially rejected on the ground of limitation, was allowed by the Commissioner (Appeals) and the said view was affirmed by the Tribunal.

5.5 The reasoning applies a fortiori to the present facts. The appellant's goods, though physically brought to the customs station, were never cleared for home consumption and were re-exported while remaining under the control of the Customs authorities; they never crossed the customs barrier so as to be brought into the mass of goods of the country. As in Star Textile (supra), the amount paid does not bear the character of duty but is, at the highest, a deposit, and Section 27(1) has no application to its refund.

5.6 At the time of filing the Bill of Entry, the assessment was made provisionally, in anticipation that the goods would be cleared for home consumption. However, since the goods were never cleared for home consumption, the provisional assessment became infructuous. To date, no final assessment has been made by the Customs authority. In these circumstances, no duty liability crystallised, and the amount paid can, at the highest, be regarded as a deposit or an amount paid under protest, refundable to the appellant.

5.7 In the present case, no final assessment exists on record, and no duty was in fact leviable, the taxable event never having occurred. The amount provisionally paid, as reflected in the Bill of Entry, therefore does not qualify as duty and is in the nature of a deposit, refundable to the appellant. The requirement, canvassed by the Revenue, of first challenging the assessment before seeking refund has no application where there is no final assessment and where the sum paid is not duty at all.

5.8 Without prejudice to the foregoing, since no import duty was leviable on the goods, the sum paid into the exchequer is merely money paid into the Government account under a mistake. The Government could not have claimed or appropriated any part of it as duty or interest. Such a sum is money paid by mistake by one person to another, which the recipient is bound in law to repay.

5.9 The impugned order rejects the refund by invoking the second proviso to Section 26A(1) of the Act, holding that refund is barred as an offence appears to have been committed. The said reasoning is misconceived. Section 26A of the Act has no application to the facts of the present case, and, its very foundation being absent, the second proviso thereto cannot be pressed into service to deny the refund.

5.10 A plain reading of sub-section (1) of Section 26A makes clear that the section applies only where, on the importation of goods capable of being easily identified, duty has been paid on clearance of such goods for home consumption. The opening words of the sub-section — "any duty has been paid on clearance of such goods for home consumption"

— are the sine qua non for the applicability of the section. In the present case, the goods were never cleared for home consumption; they remained warehoused under the control of the Customs authorities and were re-exported. Section 26A is, therefore, wholly inapplicable.

5.11 Since Section 26A (1) itself does not apply, its second proviso — which merely carves out an exception from the substantive right of refund conferred by the sub-section — equally cannot apply. A proviso cannot have an existence independent of, or wider than, the main provision to which it is attached. The impugned order, by invoking the second proviso to a section that does not govern the claim at all, has proceeded on a fundamental error of law and is liable to be set aside.

5.12 Assuming, without admitting, that the claim is to be tested under the Act, it would fall to be considered under Section 27, and even then it would not be barred by limitation. The duty was paid only provisionally and the goods have never been finally assessed. In terms of Explanation 1(B)(c) to Section 27(1) of the Act, in the case of goods that are provisionally assessed, the relevant date for computing the period of limitation is the date of final assessment.

6. In view of the above submissions, it is prayed that the appeal may be allowed.

7. The Learned AR reiterates the findings of the lower authorities. He submits that it was the appellant who has changed his stand from

Section 27 refund to Section 26A refund. Accordingly, both the authorities have gone through the statutory provision of Section 26A and the factual details and have correctly rejected the refund claim. Therefore, he prays that the appeal may be dismissed.

8. After going through the above submissions, it is observed that the appellant had initially filed the refund claim under Section 27 of the Customs Act 1962. After sometime before the Adjudication, admittedly, they have changed their stand that the refund claim should be treated in terms of Section 26A of the Customs Act 1962. Therefore, the Adjudicating vide the OIO has addressed the issue of Section 26A for rejecting the refund claim, as correctly pointed out by the Ld AR. If the appellant's refund was solely based on the applicable provisions of Section 26A refund claim and has been dealt so by the lower authority, the appellant cannot request the Tribunal to decide the issue holding that the refund should be considered as filed under Section 27. This was not the pleading before the lower authorities as could be observed from the OIO and the OIA.

9. The appellants claim that at the time of their appeal before the Commissioner (Appeals), they have taken the stand that the refund is to be granted in terms of Section 27 and in terms of Section 26A. However, as per the appellant, the Commissioner (Appeals) has upheld the rejection of the refund claim in terms of Section 26A. On a specific query from the Bench as to whether the appellant had specifically and

clearly pleaded before the Commissioner (Appeals) to consider their refund claim under Section 27, the Ld Counsel has confirmed that they have done so. But as per him, the Commissioner (Appeals) has neither recorded this, nor addressed this, in the impugned OIA. The appellant was asked to submit copy of the CA 1 and Grounds of Appeal / Written submissions before the Commissioner (Appeals) to show that this plea was indeed taken up before the Commissioner (Appeals). Till the time of pronouncing this order, this task has not been completed by the appellant.

10. So long as the refund was treated as being filed in terms of Section 26A by the Adjudicating authority in the OIO, the Commissioner (Appeals) would also have dealt the matter only in respect of Section 26A and he would be correct to do so. The burden is on the appellant to prove that he has taken the plea before the Commissioner (Appeals) that the refund claim should be addressed as if it was filed under Section 27. In the absence of any evidence to this effect, Tribunal is not required to go into the applicability of Section 27 as is being prayed by the appellant. It is also seen that they have also made some pleadings under Section 26A. This shows that the appellant himself is not clear as to under which Section they are claiming the refund. They have been emphatically confirming that the request to consider the refund under Section 27 was very much before the Commissioner (Appeals).

11. In the interest of justice, I feel the appellant may be given one more opportunity to prove the same, for which the matter is being remanded to the Commissioner (Appeals).

12. In order to verify and find the correct nature of the pleadings before the Commissioner (Appeals) in respect of the impugned OIA, I remand the matter before him with the following directions:

(a) To verify the Ground of Appeal and the Written submissions made at the time of PH before the Commissioner (Appeals), wherein the appellant has raised this issue to consider the refund as being filed under Section 27 and not under Section 26A as was earlier canvassed before the Adjudicating authority.

(b) If documentary evidence is brought in by the appellant to this effect, then the Commissioner (Appeals), should consider the original refund claim to have been filed under Section 27 and pass the necessary order on the merits of the refund claim under the provisions of this Section and pass the OIA.

(c) If the appellant is unable to provide any evidence towards this claim towards their pleading on Section 27, then the Commissioner (Appeals) need not considering any other point on the applicability or otherwise of Section 27. He should pass the OIA in terms for Section 26A only.

13. The appeal stands disposed off on the above terms by way of remand to the Commissioner (Appeals).

(Pronounced in the open court on…20.07.2026.)

Sd/-

(R. Muralidhar)
Member (Judicial)

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